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Decision

Matter of: Pasha Hawaii Holdings LLC

File: B-419020; B-419020.2; B-419020.3

Date: November 25, 2020

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DIGEST

1. Protest challenging the agency's price realism evaluation is sustained where the record provides insufficient evidence that the agency considered the possible risk to contract performance of the awardee's lowest-priced proposal; to the extent that the agency considered the awardee's technical approach to comply with the solicitation's requirements, the analysis was based on incorrect facts.
 2. Protest that the competition was flawed because the solicitation contained a latent ambiguity about the crew requirements for vessels is sustained.
 3. Protest challenging the agency's past performance evaluation is sustained where the evaluation was inconsistent with the terms of the solicitation.
 4. Protest challenging the agency's evaluation of technical proposals is sustained where the evaluation was inconsistent with the terms of the solicitation.
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DECISION

Pasha Hawaii Holdings LLC, of San Rafael, California, protests the award of a contract to Crowley Government Services, Inc., of Jacksonville, Florida, under request for proposals (RFP) No. 693JF719R000034, issued by the Department of Transportation, Maritime Administration (MARAD), to acquire, operate, and maintain replacement

vessels for the Ready Reserve Force (RRF). The protester asserts that the agency failed to conduct a proper price realism analysis of Crowley's proposed price, and failed to recognize that the significant difference in proposed prices was due to a latent ambiguity in the solicitation regarding the required crew to operate and maintain the vessels. Pasha also challenges the evaluation of technical proposals and past performance.

We sustain the protest.

BACKGROUND

MARAD requires replacement vessels for the RRF, and, to procure those vessels, it issued this solicitation seeking the services of a vessel acquisition manager (VAM). The agency sought a VAM with experience procuring, reflagging, re-classifying, modifying, and maintaining and operating vessels. Agency Report (AR), Tab 9, RFP amend. 0002 at 13. The solicitation sought proposals for the issuance of a single cost reimbursable and fixed-price indefinite-delivery, indefinite-quantity contract with a 4-year base period, a 2-year option period, and a 6-month extension. *Id.* at 21. The agency advised offerors that proposals would "be compared on the basis of their ratings, strengths, weaknesses, risks, and total evaluated price." *Id.* at 141.

Award would be made to the offeror whose proposal represented the best value to the agency, considering the following five evaluation factors: technical approach, management approach, operations and maintenance approach, past performance, and price. *Id.* The technical approach factor was the most important factor. The management approach factor and operations and maintenance approach factor were of equal importance; each was less important than the technical approach factor and more important than the past performance factor. All non-price factors, when combined, were significantly more important than price. *Id.* at 149.

Under the technical approach, management approach, and operations and maintenance approach factors, the agency would assign proposals a combined technical/risk rating of outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 141-142. The RFP advised offerors that the agency would evaluate recent past performance for relevancy and quality of performance. *Id.* at 146. MARAD would then assign proposals a past performance confidence rating. *Id.* at 147.

The procurement included nine contract line item numbers (CLINs). The first six CLINs required the contractor to identify and procure ships for the RRF. The purchase of a vessel would be completed under CLIN 0006. AR, Tab 2, Contracting Officer's Statement (COS) at 17, *citing* AR, Tab 9, RFP amend. 0002 at 4-10. CLIN 0007 was for vessel upgrade and re-delivery. AR, Tab 9, RFP amend. 0002 at 3. Under CLIN 0008, the contractor was to provide a daily rate for vessel custodian management at reduced operating status (ROS). *Id.* Under CLIN 0009, which is of particular significance to this protest, the contractor was to "[p]rovide for the operation, maintenance and repair of the vessel(s) in Full Operating Status (FOS)." *Id.* at 12.

With regard to CLIN 0009, the solicitation required the offeror to “[c]omply with all FOS requirements of Attachment J-13: Ship Manager Contract.^{1]}” *Id.* The ship manager contract requires the ship manager to “crew the vessels while in FOS in accordance with Attachment J-14, FOS tab.” AR, Tab 4i, RFP attach. J-13, Ship Manager Contract at 50. The ship manager contract also provides that, for “maintenance and turbo activations,” the ship manager may crew the vessels at levels lower than those specified in attachment J-14, but no lower than the manning required by the [certificate of inspection² (COI)].” *Id.* Of relevance here, attachment J-14, referenced in attachment J-13, identifies various crew requirements for different types of vessels.³ See AR, Tab 61, J-14.

Offerors were required to provide their pricing on RFP attachment J-2, the pricing table. See AR, Tab 8, RFP attach. J-2, Amended Pricing Table. The pricing table was formatted as a spreadsheet with various tabs corresponding to the RFP’s CLINs. Under CLIN 0009, offerors could identify the number of crew members proposed for full operating status, and the proposed daily rate for those crew members by labor category for each contract year. *Id.* The list of the possible crew members appeared under the heading “FOS Crew (*modify crew composition as necessary per [collective bargaining agreement] CBA*).” *Id.* at line 24 (emphasis in original).⁴ Beneath the lines for price for crew members--lines 25 through 48--the pricing table included lines for other direct and

¹ The agency explains that the ship manager contract “is 200 pages long and states in granular detail the services and performances expected of the VAM once it is responsible for managing and operating a newly acquired MARAD vessel (CLINs 0008, 0009 and 0010).” Agency Post-Teleconference Brief at 3. The ship manager contract “thoroughly discusses VAM functions like Vessel Maintenance Operations; Primary RRF Functions: Activation, Operation, and Deactivation and other Missions; and Shore-Side Staff and Crew Management, among others,” and it is “a source for deliverables expected from the VAM when task orders are issued for CLINs 0008, 0009 and 0010.” *Id.*, citing AR, Tab 9, RFP amend. 0002 at 11-12 and Tab 4i, RFP attach. J-13, Ship Manager Contract at 181-188.

² The certificate of inspection is issued by an Officer in Charge, Marine Inspection (OCMI), to a vessel required to be inspected under 46 U.S.C. § 3301. The COI specifies the minimum complement of officers and crew necessary for the safe operation of the vessel. 46 C.F.R. § 15.501(a). The manning requirements for a particular vessel are determined by the OCMI after consideration of the applicable laws, regulations, and all other factors involved, such as: emergency situations, size and type of vessel, installed equipment, proposed routes of operation including frequency of port calls, cargo carried, type of service in which employed, degree of automation, use of labor saving devices, and the organizational structure of the vessel. 46 C.F.R. § 15.501(b).

³ The agency did not include attachment J-14 in the solicitation.

⁴ The CBAs were also not included in the solicitation, nor did the agency produce them with the agency report.

indirect costs, such as technical and administrative staff, utilities, and shipping costs. See *id.* at lines 50, 51, 61, and 62. As amended, the pricing table calculated an FOS daily crew rate and a total cost per contract year; prior to the issuance of amendment 0002, offerors were not required to submit a price for the proposed crew. Compare AR, Tab 4a, RFP attach. J-2, Initial Pricing Table with AR, Tab 8, RFP attach. J-2, Amended Pricing Table.

While the precise crew required could vary by vessel--and would not be known until the vessel or vessels were purchased under CLIN 0006--the RFP included specifications the procured vessels were required to meet. See AR, Tab 4c, RFP attach. J-3, Operational Requirements Document (ORD). The ORD described in detail key vessel features, including, for example, engine and ship size. See *id.* at 4, 7.

The RFP also required that the proposed labor rates escalate over the term of the contract. AR, Tab 11, RFP amend. 0004, Q&A 95 at 21. While collective bargaining agreements specified required escalation for the period they were in force, the agreements at issue here did not extend through the term of the contract. *Id.* The agency explained that, for the contract period not covered by the existing collective bargaining agreements, offerors were to propose an increase of two percent per year to their labor rates. *Id.* When the collective bargaining agreements were updated, the contract would also be updated to reflect the difference between the collective bargaining agreement rates and the two percent escalation. *Id.*

The RFP advised offerors that the agency would evaluate the reasonableness of proposed prices/costs using one or more of the price analysis techniques defined in Federal Acquisition Regulation (FAR) 15.404. AR, Tab 9, RFP amend. 0002 at 148. The agency would also evaluate the realism of proposed prices by assessing whether the proposed price is realistic for the proposed contractor statement of work (CSOW), reflects a clear understanding of the requirements, and is consistent with the unique methods of performance and materials described in the offeror's technical approach. *Id.*

The agency received six proposals, including those from Crowley and Pasha. AR, Tab 28, Technical Evaluation Team (TET) Report at 5. The table below summarizes the evaluation of those two proposals:

Factor	Offeror	
	Crowley	Pasha
Technical Approach/ CSOW	Good	Acceptable
Management Approach	Good	Acceptable
Operations and Maintenance Approach	Good	Marginal
Past Performance -- Relevance	Very Relevant	Relevant
Confidence	Substantial	Satisfactory
Price (Including Option Years)	\$56,156,132	\$77,466,860

Id., AR, Tab 27, Past Performance Evaluation Team (PPET) Report at 5-7, 17-19, AR, Tab 38, Source Selection Evaluation Board (SSEB) Report at 22.

In its review, the agency noted that Crowley's price was 34 percent lower, and Pasha's price was 10 percent lower, than the average of all offerors' prices. AR, Tab 38, SSEB Report at 23. The agency also concluded that both of these offerors' prices were realistic, and fair and reasonable. *Id.* at 15. The SSEB noted that "some variation in pricing" could be explained by how this RFP differed from a typical RFP with a statement of work. See *id.* at 24. The SSEB explained that, unlike a statement of work where the government determined the requirement and approach, "the VAM RFP asked for a Contractor Statement of Work (CSOW) from each offeror outlining their tasks and approach they deemed appropriate for this requirement." *Id.*

The SSEB determined that Crowley's proposal was the most highly rated technically, with the highest available past performance rating, substantial confidence. *Id.* at 25. Because the highest technically rated proposal was also the lowest priced, no tradeoff between price and non-price factors was required, and the SSEB recommended award to Crowley. *Id.* The source selection authority (SSA) concurred with the SSEB's recommendation. AR, Tab 40, SSA Memorandum at 4. Award was made to Crowley, and this protest followed.

DISCUSSION

The protester asserts that the agency did not perform a proper price realism analysis of Crowley's proposed price, and that, if it had, it would have found Crowley's proposal presented an unacceptably high performance risk, and would have downgraded it under the technical approach and management approach factors. Pasha also argues that the difference in prices was caused by a latent ambiguity in the solicitation regarding the pricing of CLIN 0009 for the operation and maintenance of the ships to be procured. The protester also challenges the agency's evaluation of technical proposals, and its evaluation of past performance.⁵ As discussed below, we sustain the protest on each of these bases.⁶

⁵ The protester also argued that Crowley had, and the agency failed to evaluate, an impaired objectivity organizational conflict of interest. Protest at 33. In response, MARAD advised GAO that it had issued a waiver of any potential OCI. See Waiver of Any Potential and Actual Organizational Conflicts of Interest, RFP 693JF719R000034 (undated). The protester then withdrew that allegation. Comments on the Supp. at 1. The protester also withdrew its allegation that the agency improperly engaged in discussions with Crowley only. Second Supp. Protest and Comments at 2.

⁶ While we have considered all of the protester's allegations, we address only those that we find to have merit. Any challenge to the conduct of the procurement not addressed we found to be without merit. The protester asserts that the agency's evaluation of Crowley's proposal demonstrates unfairness to another offeror not a party to this protest. See Second Supp. Protest and Comments at 20 (arguing that the agency applied "a more lenient standard" in the evaluation of Crowley's proposal than in the evaluation of another offeror's). We agree with the intervenor that the protester is not

Reasonableness of Pasha's Proposed Price

As an initial matter, the agency argues that, regardless of the merits of any of Pasha's contentions, this protest should be dismissed on the basis that Pasha's proposal was unawardable because Pasha's price was not fair and reasonable. The agency states that, in reviewing its price analysis in response to this protest, it discovered that rather than escalating labor rates by two percent after the expiration of the current collective bargaining agreements, as required by the solicitation, the protester applied an escalation rate greater than two percent.⁷ AR, Tab 1, Memorandum of Law (MOL) at 13; see AR, Tab 25, Pasha Business Proposal at 20. The agency contends that Pasha's failure to comply with the terms of RFP amendments 0002 and 0004 require rejection of Pasha's proposal. *Id.* at 47, *citing* AR, Tab 9, RFP amend. 0002 at 26-27, and Tab 11, RFP amend. 0004 at 20-21.

We note for the record that an offeror's proposed escalation rate was not documented in the agency's contemporaneous price reasonableness analysis. See AR, Tab 29, Cost/Price Evaluation Realism Report. In addition, the agency's contention that an escalation rate greater than two percent requires rejection of a proposal from further consideration is advanced for the first time during our consideration of this protest. Because this evaluation conclusion is found nowhere in the contemporaneous record, and was apparently prepared for this litigation, it may not represent the fair and considered judgement of the agency. See *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15 (expressing concern that post-protest documents that constitute reevaluations and redeterminations prepared in the heat of an adversarial process may not represent the fair and considered judgment of the agency). As a result, on this record, we cannot conclude that Pasha's price was unreasonable, and we will not dismiss the protest.

Price Realism Analysis of Crowley's Proposed Price

Pasha argues that the agency's realism analysis of Crowley's price was flawed because it was based on incorrect facts. The protester further asserts that, had MARAD conducted a proper price realism analysis, it would have discerned that Crowley's price was unrealistically low, reflected a lack of understanding of the requirements, and posed a risk to contract performance. Second Supp. Protest and Comments at 11. As discussed below, we conclude that the record supports that protester's contentions, and we sustain the allegation that the agency's price realism analysis was unreasonable.

an interested party to raise such allegations. See Intervenor's Comments on Supp. AR at 14-15, *citing Gulf Civilization Trading & Contracting Co.-Recon.*, B-416140.3, Nov. 20, 2019, 2019 CPD ¶ 391 at 4 (dismissing challenge to the agency's exclusion of other offerors from the competition, because the protester was not an interested party to raise those allegations on behalf of other offerors).

⁷ The agency calculated the protester's escalation rate to be between [DELETED] percent. See COS at 18.

Where a solicitation contemplates the award of a fixed-price contract (or, as here, a contract that includes fixed-price CLINs), an agency may provide in the solicitation for the use of a price realism analysis for the purpose of measuring an offeror's understanding of the requirements. *IBM Corp.*, B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 10-11. A price realism analysis may be used by the agency to evaluate whether an offeror can realistically perform its technical solution at the fixed price proposed, and to assess the risk inherent in an offeror's proposed approach. *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9; *Triad Int'l Maint. Corp.*, B-408374, Sep. 5, 2013, 2013 CPD ¶ 208 at 8.

Analyzing whether an offeror's fixed price is so low that it reflects a lack of understanding of solicitation requirements is the crux of a price realism evaluation. *Science Applications Int'l Corp.*, B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 10. Likewise, consideration of whether an offeror's fixed price is so low that it creates a risk that the firm cannot perform its proposed technical solution at the price offered also forms the basis of a price realism analysis. *NJVC, LLC*, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8; *IBM Corp.*, *supra*. It is axiomatic that a proper realism evaluation alerts agencies to those aspects of an offeror's technical proposal which do not appear to be feasible based on what the offeror has indicated in its price proposal. *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 24.

The agency defends the adequacy of its analysis and argues that Crowley reasonably proposed an FOS crew with [DELETED].⁸ The agency explains that the question of whether an offeror's price was so unrealistic as to raise questions about an offeror's understanding of the RFP's requirements was properly considered by the cost/price evaluation realism team (CPERT) in its realism analysis. *Id.*

Pasha contends that the difference between Pasha's and Crowley's total evaluated price largely resulted from Crowley proposing an "unrealistic" and "deficient" number of crew for the full operational status anticipated by CLIN 0009 for the vessels the VAM contractor will acquire under this contract. Second Supp. Protest and Comments at 6. The protester notes that nearly all of the difference (\$[DELETED] million of the \$21 million difference) between Pasha's and Crowley's total evaluated prices is attributable to their respective CLIN 0009 prices. *Id.* See AR, Tab 29, Cost/Price Evaluation

⁸ For the record, neither the agency nor the contractor will know the precise number of crew members required for each vessel until the ships are purchased pursuant to CLIN 0006. The agency notes that the actual FOS crew for any vessel will depend in part on a certificate of inspection issued by the Coast Guard. COS at 17. Other factors may also play a role in determining the actual number of FOS crew for any task order issued for CLIN 0009, the agency notes, including union negotiations and the specific circumstances of a voyage; the COI merely sets forth the minimum number of crew members required to operate a vessel. MOL at 7. We consider the issue of the RFP's manning requirement below, in our discussion of the protester's allegation that the RFP contained a latent ambiguity with respect to the crew requirements.

Realism Report at 5. Pasha argues that since CLIN 0009 was to provide labor to crew the vessels purchased, an offeror’s CLIN 0009 price was heavily impacted by the number of crew members proposed. Thus, Pasha asserts that the “record demonstrates that MARAD either ignored or missed these pricing gimmicks and the inherent performance risks inherent in Crowley’s approach.” Comments and Second Supp. Protest at 6.

The table below displays a sample crew from attachment J-14 to the ship manager contract, and the crews proposed by Pasha and Crowley. This table shows the difference in crew levels between the two proposals:

Crew Members ⁹	Comparison of Crews		
	J-14 Ship Group 1	Pasha	Crowley
Master	1	[DELETED]	[DELETED]
Chief Mate	1	[DELETED]	[DELETED]
2nd Mate	1	[DELETED]	[DELETED]
3rd Mate	2	[DELETED]	[DELETED]
Radio Officer		[DELETED]	[DELETED]
Chief Engineer	1	[DELETED]	[DELETED]
1st Assistant Engineer	1	[DELETED]	[DELETED]
2nd Assistant Engineer	1	[DELETED]	[DELETED]
3rd Assistant Engineer	2	[DELETED]	[DELETED]
Bosun	1	[DELETED]	[DELETED]
AB Deck Maintenance	5	[DELETED]	[DELETED]
Ordinary Seamen	1	[DELETED]	[DELETED]
QMED/Electrician	1	[DELETED]	[DELETED]
Oiler	3	[DELETED]	[DELETED]
GUD/E	2	[DELETED]	[DELETED]
GVA	1	[DELETED]	[DELETED]
Chief Steward	1	[DELETED]	[DELETED]
Chief Cook	1	[DELETED]	[DELETED]
Steward Assistant	2	[DELETED]	[DELETED]
TOTAL CREW	28	[DELETED]	[DELETED]

AR, Tab 61, J-14, Ship Group 1 Crew; Tab 25, Pasha Business Proposal at 20, and Tab 18, Crowley Proposal, J-2.

In explaining its analysis, the agency notes that the CPERT report stated that “[f]or ROS/FOS CLIN 0008/0009,” Crowley “proposes complements of personnel as applicable to Ship Manager Contract guidance to include [DELETED].” AR, Tab 29,

⁹ This table contains only crew categories applicable to this chart, and not all categories contained in attachment J-14. See AR, Tab 61, J-14. A bosun is the ship’s officer in charge of equipment and the crew. A QMED/electrician is an electrician that meets specific maritime qualifications; both the GUD/E and the GVA are entry level assistants.

CPERT Report at 6. This statement, however, does not accurately reflect Crowley's proposal. Instead--and as shown in the table above--Crowley did not propose [DELETED] for CLIN 0009. See AR, Tab 18, Crowley's J-2.

In this regard, while the precise vessel or vessels to be purchased under this contract is unknown, the agency provided detailed specifications for potential purchases. See AR, Tab 4c, RFP attach. J-3, ORD at 4. The protester contends that a vessel meeting the ORD specifications would require a crew of at least 26, and the agency does not dispute the protester's claim. Comments on Supp. AR at 6-7.¹⁰ As noted above, Crowley has proposed a crew [DELETED] for this requirement. Tab 18, Crowley Proposal, J-2.

In our view, the analysis was flawed by the lack of any explicit finding in the CPERT report that Crowley's proposed crew was realistic to perform the work. The CPERT concluded that the "offeror provided realistic rates, categories, and hours," but did not connect these rates, categories, or hours with a finding that Crowley proposed a sufficient crew.¹¹ AR, Tab 29, CPERT Report at 7. To the extent the agency contends that this finding was implied, the analysis was flawed because it was based on an inaccurate description of Crowley's proposed crew.

In addition to proposing the lowest price of the six offerors, the record shows that Crowley proposed the lowest price for CLIN 0009. See AR, Tab 31, CPERT Report, attach. B, VAM Cost-Price Summary Comparison Spreadsheet. It appears that this lower price was largely based on [DELETED]. The record also shows that the agency's analysis appears to have overlooked [DELETED]. In summary, the agency's analysis was based on a material error of fact about the number of crew members proposed by Crowley. We therefore see no basis to find the agency's analysis reasonable, and thus sustain the allegation that the agency failed to perform a reasonable price realism analysis of Crowley's proposed price.

Latent Ambiguity in the Crew Requirements

Pasha argues next that the RFP required offerors to crew vessels according to the levels contained in the ship manager contract requirements, and the agency failed to recognize that Crowley's proposal did not comply with these requirements. As support, the protester points to the solicitation language instructing offerors to "[c]omply with all FOS requirements of Attachment J-13: Ship Manager Contract." AR, Tab 9,

¹⁰ Crowley notes that it currently operates vessels that are part of the Ready Reserve Force, which are the same type of vessels covered by this requirement. AR, Tab 15, Crowley Operations & Maintenance Proposal at 9. Crowley's proposal states that, when those vessels are "activated," full manning is "[DELETED] crew members, depending upon vessel and mission." *Id.*

¹¹ The CPERT's analysis also repeated one entire paragraph of its findings, verbatim, in its analysis of Pasha's proposed price. See *id.* at 9.

amend. 0002 at 12. Specifically, the RFP directed offerors to address “the requirements of the Ship Manager Contract (Attachment J-13)” under the operation and maintenance approach factor. *Id.* at 134. The ship manager contract then directs that “[t]he ship manager shall crew the vessels while in FOS in accordance with Attachment J-14, FOS tab,” and further provides that, “[f]or maintenance and turbo activations the ship manager may crew the vessels at levels lower than those specified in J-14, but no lower than the manning required by the COI.” AR, Tab 4i, RFP attach. J-13, Ship Manager Contract at 50.

Solicitations must contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis. *Coastal Int’l Security, Inc.*, B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 4. Where requirements are not clearly defined, a solicitation may contain either a patent or a latent ambiguity. An obvious, gross, or glaring error in the solicitation is a patent ambiguity; a latent ambiguity is more subtle. *Id.* Where there is a latent ambiguity, both parties’ interpretation of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. *Id.*

Despite the provisions cited by Pasha, the agency maintains that the RFP “contained no specific crew complements that were required to be priced, and offerors had discretion to use their business judgment with the knowledge that the vessel to be operated is not yet known and the actual crew billeting requirement is not yet determined.” Suppl. MOL at 9. MARAD offers various reasons for why the protester’s claimed interpretation of the staffing requirements in the RFP cannot be reasonable.

For example, the agency points to the fact that attachment J-14--referenced in attachment J-13--was not appended to the RFP, and therefore should not have been used to interpret the solicitation. MARAD also contends that Pasha’s interpretation of the solicitation is inconsistent with the agency’s answer to a question raised by a potential offeror. The agency notes that the answer was included in the questions and answers (Q&As) added to the solicitation by amendment and, in the agency’s view, should have alerted Pasha to a patently obvious conflict between the agency’s response to the question and Pasha’s claimed interpretation of this solicitation. Finally, the agency contends that Pasha’s arguments are undercut by the fact that the protester proposed a larger crew than required by the documents upon which the protester relies to support its claim that it was misled by the solicitation. In our view, none of the agency’s contentions support a conclusion that Pasha’s interpretation of this solicitation was unreasonable.

First, with respect to the contention that attachment J-14 was not appended to the solicitation, we think an offeror could reasonably conclude that its compliance with this document was a requirement here. As set forth above, the solicitation required compliance with attachment J-13 and appended that document. Within attachment J-13

was a directive to comply with attachment J-14.¹² This J-13 directive, in a nutshell, permitted staffing at levels below those in attachment J-14, but not lower than specified in the COI. There is no suggestion in the record that attachment J-14 was unavailable. In our view, there was nothing unreasonable about Pasha's interpretation that the solicitation was establishing a lower limit on the staffing requirement below which an offeror's proposal should not fall.

Second, with respect to the agency's answer to a question posed during the competition, a close reading of this question and the agency's answer does not support the agency's interpretation of the solicitation here. Instead, this example buttresses Pasha's view of the requirements. In this regard, a prospective offeror asked MARAD whether the offeror was supposed to determine the crew complement. AR, Tab 11, RFP amend. 0004, Q&A 108 at 26. The agency responded: "No." *Id.*¹³ While the agency contends, without elaboration, that "this Q&A on its face appears to contradict" the protester's interpretation of the RFP, MOL at 8, we view the opposite as true. Indeed, Pasha contends that "both the question itself and MARAD's answer were entirely consistent with [Pasha]'s understanding of the RFP." Comments on Post-Teleconference Brief at 8. The agency's direction to the offerors in this Q&A--that they were not to determine the crew complement--supports the reasonableness of the protester's contention that proposals instead were to conform to the crew requirements of the ship manager contract (attachment J-13), which permitted a crew lower than required by attachment J-14, but not lower than the COI. As a result, we see no basis to conclude, as the agency urges, that this answer created a patent ambiguity in the solicitation that had to be raised prior to the time proposals were due.

Finally, MARAD argues that Pasha's claimed interpretation of the solicitation is undercut because Pasha's proposed CLIN 0009 pricing included additional crew members

¹² As noted above, attachment J-13 stated that "[t]he ship manager shall crew the vessels while in FOS in accordance with Attachment J-14, FOS tab," and further provides that, "[f]or maintenance and turbo activations the ship manager may crew the vessels at levels lower than those specified in J-14, but no lower than the manning required by the COI." AR, Tab 4i, RFP attach. J-13, Ship Manager Contract at 50.

¹³ The full question and answer were as follows:

Q.108 J2 [CLIN] 8 and [CLIN] 9 row 17 are highlighted in yellow which according to the instructions are for input by the Offeror. Given the fact that according to G 7.3 Crew costs are Reimbursable and a required [CLIN] Crew 8 has not been provided and the Required crew in [CLIN] 9 will depend on the ship COI, is the formula in row 17 [the daily rate] only suppose to include costs in Row 50-73 [which were the non-crew personnel]? If we are to include Crew in either [CLIN] 8 or [CLIN] 9? Is the Offeror suppose[d] to determine the crew Compliment?

A. No.

AR, Tab 11, RFP amend. 0004, Q&A 108 at 25-26.

beyond the minimum 26 from the ship manager contract. Agency Post-Teleconference Brief at 5. Pasha responds that any variance in crewing is minor, and contends that the agency's argument misses the point. With respect to the existence of a variance, Pasha argues that, while it is true that the crew requirements for the ship manager contract vessels vary, the actual variance for most vessels is relatively small. Comments on Post-Teleconference Brief at 8. For FOS crews, the protester notes that most of the required positions are the same across all vessels for the ship manager contract, and the number of FOS crew members per labor category for a given vessel is in many instances consistent across all vessels. *Id.* at 9.

With respect to whether the agency's argument misses the point, the protester contends that the issue is not the slight variance of the protester's proposed crew from one of the crews in attachment J-14. Rather, the protester argues, "the issue is whether the RFP instructed offerors to use the Ship Manager Contract FOS crewing requirements set forth in the Crewing Attachment or whether [the] RFP provided no guidance to offerors about their FOS crew billeting." *Id.* In our view, the protester's responses on this issue are more persuasive than the agency's.¹⁴

On this record, we conclude that Pasha's interpretation of the RFP was reasonable. We find that the agency's urged interpretation of this solicitation is unreasonable, or, at best, the solicitation contained a latent ambiguity. As noted previously, where there is a latent ambiguity in a solicitation, the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. *Coastal Int'l Security, Inc., supra.*

Past Performance Evaluation

Pasha asserts three challenges to the reasonableness of the agency's evaluation of past performance. First, Pasha argues that the agency unreasonably considered the awardee's positive past performance under a ship building contract, while ignoring negative past performance under that same contract. Second Supp. Protest and Comments at 36-37. Second, the protester asserts that MARAD unreasonably credited Crowley with past performance for which the agency had no performance reviews. See *id.* at 37-38. Finally, Pasha contends that the agency's evaluation utilized an unstated evaluation criterion when it evaluated past performance involving government-owned

¹⁴ The protester also notes that the agency issued RFP amendment 0002, directing offerors that they must "[c]omply with all FOS requirements of Attachment J-13: Ship Manager Contract." Comments on Post-Teleconference Brief at 5, *quoting* AR, Tab 9, RFP amend. 0002 at 12. The protester further notes that the revised J-2 pricing sheet contained detailed pricing information for CLINs 0008 and 0009, including labor categories, crews, and labor rates. Comments on Post-Teleconference Brief at 6-7. Pasha argues that the issuance of these RFP revisions supports its interpretation of the solicitation because the amendments appear to add language to the requirements and the pricing table directing offerors to propose a crew conforming to the ship manager contract requirements. We agree.

vessels as more relevant than experience with commercially owned ones. Second Supp. Protest and Comments at 21.

While the agency asserts that its past performance determination was consistent with the terms of the solicitation, see Supp. MOL at 17, as set forth below, we agree with the protester. Although, with respect to the protester's last assertion that the agency used an unstated evaluation criterion, we find that Pasha has not demonstrated that it was competitively prejudiced by the agency's evaluation error. As a result, we sustain the protester's two remaining past performance allegations and conclude that the agency unreasonably evaluated past performance.

Pasha alleges that the agency unreasonably failed to consider negative aspects of Crowley's performance of a shipbuilding contract. In this regard, the RFP advised offerors that the agency would evaluate "the Offeror's relevant past work performance history to draw a Performance Confidence Assessment of the Offeror's ability to successfully perform as proposed." AR, Tab 9. RFP amend. 0002 at 146. Proposals could include up to five references for the prime offeror and up to three references for subcontractors "expected to perform aspects of the effort that the Offeror considers critical to the overall success of the program." *Id.* at 135. The RFP required offerors to provide recent contracts, defined as "no more than 7 years from release date of the RFP," that the offeror considered "most relevant in demonstrating the Offeror's ability to perform the proposed effort." *Id.* The agency reserved the right to consider other sources of past performance information, to include, for example, Contractor Performance Assessment Reporting System (CPARS) reports, or information not provided by the offeror. The RFP "encouraged" offerors to provide references demonstrating past performance in the following areas: vessel acquisition and reflagging/reclassification; vessel operations and maintenance; and vessel modifications. *Id.*

The agency advised offerors that "consideration will be given to projects like this solicitation in scope, magnitude and complexity." *Id.* at 146. The agency would consider "efforts performed for agencies, foreign or domestic, including federal, state, or local governments as well as commercial customers." *Id.* References would be given a relevancy rating of very relevant, relevant, somewhat relevant, or not relevant. *Id.* The agency advised offerors that, after determining the relevance of an offeror's past performance references, the agency would then "determine how well the contractor performed on previous efforts." *Id.* The agency would assign confidence ratings of substantial, satisfactory, limited, no, or neutral confidence. *Id.* at 147.

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. *Kiewit Infrastructure West Co.*, B-415421, B-415421.2, Dec. 28, 2017, 2018 CPD ¶ 55 at 8. Where an agency fails to document its past performance evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency's evaluation had a reasonable basis. *US21, Inc.*, B-415045.9, Sept. 10, 2018, 2018 CPD ¶ 404 at 4;

Trident Vantage Sys., LLC; SKER-SGT Eng'g & Sci., LLC, B-415944 et al., May 1, 2018, 2018 CPD ¶ 166 at 11-12.

With respect to the protester's argument that the agency unreasonably considered the positive aspects, but not the negative aspects, of Crowley's performance of a shipbuilding contract, we note, as a threshold matter, there is no support in the record for considering this performance whatsoever in this evaluation. The shipbuilding contract at issue was not a Crowley past performance reference, no adequate description of the contract is in the record, and the past performance evaluation contains no evidence of the quality of Crowley's performance of the contract.

Moreover, in responding to this protest, Crowley asserts that the shipbuilding contract was performed by its parent company, and that "Crowley's proposal does not indicate that its parent company, Crowley Maritime Corporation, will have meaningful involvement in contract performance." Intervenor's Comments at 51. Accepting Crowley's representations at face value, the agency had no reasonable basis to include this contract reference in its evaluation of Crowley's past performance, because the performance was by the parent company that will not participate in performance of this contract. *Doyon-American Mech., JV; NAJV, LLC, B-310003, B-310003.2*, Nov. 15, 2007, 2008 CPD ¶ 50 at 4 (noting that an agency may consider the past performance of an offeror's parent company where the proposal demonstrates that the resources of the parent will affect contract performance, and there is no solicitation provision precluding such consideration).

The protester also challenges the reasonableness of the agency's past performance evaluation, given that "Crowley's experience with vessel modification was, in the agency's words, 'not completely verifiable.'" Second Supp. Protest and Comments at 26, *quoting* AR, Tab 27, PPET Report at 5. The agency includes in its overall rating of substantial confidence Crowley's past performance modifying a vessel known as the [DELETED], despite the fact that the agency had no past performance questionnaire or CPARS for this effort. See AR, Tab 27, PPET Report at 7. The agency offers no rationale for why it was reasonable to consider this past performance reference that was without past performance questionnaires or qualitative CPARS evaluations. See AR, Tab 9, RFP amend. 0002 at 146-147. Pasha contends that the agency improperly gave Crowley "the benefit of the doubt," and we agree. Second Supp. Protest and Comments at 26. Without any documentation to support its conclusions, we see no basis for the agency's finding that Crowley's past favorable past performance of this effort was "not completely verifiable"; it was unverified.

Pasha also contends that the agency's evaluation of past performance utilized an unstated evaluation criterion. The RFP advised offerors that "[t]he Government may consider efforts performed for agencies, foreign or domestic, including federal, state, or local governments as well as commercial customers." AR, Tab 9, RFP amend. 0002 at 146. We agree with the protester that the RFP's list of acceptable types of "efforts" failed to identify certain types of experience as more relevant. The agency was free to express an evaluation preference for experience with government-owned vessels over commercial ones, but in this instance the agency failed to do so.

We also agree with the agency, however, that the protester has not demonstrated competitive prejudice from this impropriety. Prejudice is an essential element of every viable protest, and where none is shown or otherwise apparent, we will not sustain a protest, even if the agency's actions may arguably have been improper. *TELESIS Corp.*, B-299804, Aug. 27, 2007, 2007 CPD ¶ 150 at 7. The protester has not demonstrated how it would have revised its past performance proposal in order to be more competitive, if Pasha had known of the agency's preference for past performance involving government-owned vessels. We therefore find no basis to sustain the allegation that the agency utilized an unstated evaluation criterion in evaluating past performance.

The agency's past performance evaluation was inconsistent with the terms of the solicitation, and we thus sustain the protester's challenge to the reasonableness of the evaluation.

Evaluation of Management Approach Factor

Finally, the protester asserts that the agency unreasonably assigned its proposal a weakness under the management approach factor. Protest at 42-43. The agency assigned the weakness because it concluded that the protester's integrated master schedule failed to include scheduling activities for "the reflagging/reclassification, upgrade/modification, and ship custodian phases of the program." AR, Tab 28, TET Report at 23. These are tasks to be completed under CLINs 0007, 0008, and 0009. See RFP at 13-16. The agency now argues that the solicitation contained a patent ambiguity about these scheduling activities, and contends that the protester had to challenge this ambiguity before submitting its proposal. We again disagree.

The evaluation of an offeror's technical proposal is a matter within the agency's broad discretion, and our Office will not substitute our judgment for that of the agency. Rather, we will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *Agile Def., Inc.*, B-415774, B-415774.2, Mar. 13, 2018, 2018 CPD ¶ 110 at 7.

The record here shows that the solicitation advised offerors that they were to "develop and provide a comprehensive Integrated Master Schedule (IMS) and describe how it will be monitored and controlled as a project baseline." AR, Tab 9, RFP amend. 0002 at 133. During the course of the procurement, the agency received and answered a question about this requirement. This Q&A was incorporated into the solicitation via amendment 0004 as set forth below:

Q67: Please confirm as mentioned in the pre-proposal conference that IMS should be done through the acquisition of the ship CLIN 0006?

A: Yes

AR, Tab 11, RFP amend. 0004 at 13.

The agency argues that the solicitation's requirement to develop and provide a comprehensive IMS, and the answer quoted above, created a patent ambiguity in the RFP's requirements that the protester was required to protest prior to the deadline for proposal submission. Supp. MOL at 10. In our view, the agency's answer to question 67 (quoted above) clarified the requirement for an IMS, but did not contradict the requirement to develop and provide a comprehensive IMS. Instead, the answer can reasonably be read to both confirm the requirement, and to provide guidance about when the requirement applies.

We note that the record here shows that performance of this contract undergoes a significant shift from CLIN 0006 to CLIN 0007, with the vessel purchase finalized in the earlier CLIN. AR, Tab 2, COS at 17, *citing* AR, Tab 9, RFP amend. 0002 at 4-10. We think that an offeror could reasonably understand this guidance to require the schedule for the more linear and predictable work of procuring vessels, and not for the contract performance required after completion of the purchase. The agency confirmed that was the case. Moreover, the Q&A above, apparently, simply memorialized instruction that offerors were given at the pre-proposal conference. Since we conclude it was reasonable to understand the agency to be excluding CLINs 0007, 0008, and 0009 from the IMS requirement, the agency's assignment of a weakness in Pasha's proposal for failure to address those CLINs in the IMS was unreasonable. We sustain the protest on this ground as well.

RECOMMENDATION

We sustain Pasha's allegations that the agency performed an unreasonable price realism analysis of the awardee's proposed price, and that the solicitation contained a latent ambiguity about the crew requirements. We also find that the agency unreasonably evaluated technical proposals and past performance. We recommend that the agency revise the solicitation, clarifying the requirement so that offerors can compete on an equal basis. We also recommend that the agency request revised proposals and evaluate them consistent with this decision. In addition, we recommend that the agency reimburse Pasha the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Pasha's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel