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Accountability \* Integrity \* Reliability

Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Waterfront Technologies, Inc.—Protest and Costs

**File:** B-401948.16; B-401948.18

**Date:** June 24, 2011

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Janice H. Kaufmann for the protester.

Fernand A. Lavallee, Esq., Dionis M. Gauvin, Esq., and Nedra S. Adams, Esq.,  
DLA Piper US LLP, for 21st Century Technologies, the intervenor.

Herman J. Narcho, Esq., Department of Labor, for the agency.

Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General  
Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. GAO rejects agency's contention that protester is not interested party to pursue protest, which was based on the assertion that the protester, which is a small business concern, did not comply with solicitation requirement for an interim secret facility clearance; this compliance concerns a matter of responsibility and the protester's proposal could not be rejected for this reason without referring the matter to the Small Business Administration for a certificate of competency review.
2. GAO will not dismiss a protest where the protester's counsel violated the protective order and there is no evidence that the protester knowingly participated in the violation.
3. Protest challenging the evaluation of offerors' past performance, technical proposals, and price realism is denied where the record demonstrates that the agency's evaluations were reasonable.
4. Request for reimbursement of costs for filing and pursuing an earlier protest is granted where the protester raised a clearly meritorious protest ground, and the agency did not take prompt corrective action.

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## DECISION

Waterfront Technologies, Inc., of Baltimore, Maryland, protests the award of a contract to 21st Century Technologies, Inc., of Front Royal, Virginia, by the Department of Labor (DOL), Employment and Training Administration (ETA), under solicitation No. DOL099RP20703 for Enterprise Information Technology Services to support the Office of Foreign Labor Certification (OFLC). Waterfront contends that the award to 21st Century was flawed based on errors in DOL's evaluation of the offerors' past performance, technical proposals, and proposed prices. Waterfront also requests that our Office recommend that DOL reimburse the protester's costs of pursuing its earlier protest concerning this procurement.

We deny the protest, and grant the request for costs.<sup>1</sup>

## BACKGROUND

The RFP was issued on June 29, 2009, and sought proposals to provide support for and expand OFLC's enterprise-level labor certification program (formerly titled the iCERT Visa Portal System). RFP, Statement of Work (SOW) ¶ 1.1. The RFP anticipated award of an indefinite-delivery/indefinite quantity contract with task orders to be issued based on fixed-price labor rates and labor-hour contract line item numbers. The anticipated contract will have a base period of 1 year with four 1-year options. The procurement was set aside for participants in the Small Business Administration's (SBA) 8(a) program.

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<sup>1</sup> As discussed below, Waterfront did not retain outside counsel to represent it in the instant protest (B-401948.18). As a result, we did not initially issue a protective order for this protest. Per our Office's direction, the agency provided redacted versions of the agency report to the protester and to intervenor's outside counsel. In its report on the instant protest, DOL advised our Office of a potential protective order violation during an earlier protest (B-401948.13), in which Waterfront was represented by outside counsel. Because of this allegation, we issued a protective order in this case for the purpose of permitting intervenor's outside counsel to review portions of the record concerning the alleged protective order violation by Waterfront's outside counsel. While we issued a protective order for the limited purpose described above, this decision is not covered by that order; our discussion regarding certain aspects of the agency's evaluation of offerors' proposals is therefore general in nature.

Offerors were advised that their proposals would be evaluated on the basis of three evaluation factors: technical, past performance, and price. RFP amend. 6, at 17. The technical evaluation factor had five equally-weighted subfactors: (1) understanding the requirement; (2) personnel; (3) corporate experience; (4) start-up and phase-out plan; and (5) quality control plan. Id. at 17-19. For purposes of award, the technical evaluation factor was said to be “significantly more important” than past performance, and the technical evaluation and past performance factors together were “significantly more important” than price. Id. at 17.

On September 18, 2009, DOL awarded the contract to Zolon Technologies, Inc. Waterfront, and another offeror, Insero Corporation, filed protests challenging the award to Zolon; these protests were docketed as B-401948.2 and B-401948.3.<sup>2</sup> Prior to providing its report on the protests, DOL advised our Office that it would take corrective action by reevaluating the offerors’ proposals; based on this notice, we dismissed the protests on November 16. DOL subsequently reevaluated the offerors’ proposals, and made a new award—this time to Insero.

On November 23, Waterfront and Zolon protested the award to Insero; these protests were docketed as B-401948.5 and B-401948.6. Prior to providing its report on these protests, DOL again advised our Office that it would take corrective action, by amending the solicitation, obtaining revised proposals and making a new award decision; based on this notice, we dismissed the protests on December 23.

The agency issued RFP amendment 6 on January 20, 2010, and received new proposals from offerors. The agency’s evaluation of the offerors’ revised proposals was as follows:<sup>3</sup>

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<sup>2</sup> This procurement involved a number of other protests, requests for entitlement, requests for reconsideration, and other matters filed by Waterfront and other protesters. Our decision discusses only those filings most relevant to the issues here.

<sup>3</sup> The agency used the following ratings for the technical evaluation factor and subfactors: outstanding (O), good (G), acceptable (A), and unacceptable. For past performance confidence, the agency used the following ratings: high confidence, significant confidence (SIG), satisfactory confidence, unknown confidence, little confidence, and no confidence. RFP amend. 6, at 19-20.

|                                    | 21st Century   | Offeror 3      | Waterfront     | Offeror 4      | Offeror 5      |
|------------------------------------|----------------|----------------|----------------|----------------|----------------|
| <b>TECHNICAL EVALUATION</b>        | <b>O</b>       | <b>O</b>       | <b>G</b>       | <b>G</b>       | <b>A</b>       |
| Understanding the Requirement      | O              | O              | G              | G              | A              |
| Personnel                          | G              | G              | G              | G              | A              |
| Corporate Experience               | G              | O              | G              | A              | A              |
| Start-Up and Phase-Out Plan        | O              | O              | G              | G              | G              |
| Quality Control Plan               | O              | G              | G              | A              | G              |
| <b>PAST PERFORMANCE CONFIDENCE</b> | <b>SIG</b>     | <b>SIG</b>     | <b>SIG</b>     | <b>SIG</b>     | <b>SIG</b>     |
| <b>PRICE</b>                       | <b>\$14.4M</b> | <b>\$19.6M</b> | <b>\$24.0M</b> | <b>\$19.8M</b> | <b>\$20.0M</b> |

Agency Report (AR) (B-401948.13) at 13.

Based on these evaluations, the contracting officer (CO), who was also the source selection authority, found that 21st Century's proposal merited award because it was one of two offerors who received the highest overall technical score of outstanding, received an equal past performance score to all other offerors, and proposed the lowest overall price. AR (B-401948.18), Tab 9, Selection Decision, at 21-22. On September 9, 2010, DOL selected 21st Century's proposal for award.

On September 20, Waterfront filed a protest with our Office challenging the award to 21st Century; this protest was docketed as B-401948.13. The protester challenged the agency's evaluation of Waterfront's past performance and technical proposal, and 21st Century's price. Although Waterfront filed protest B-401948.13, as well as all of its previous protests, pro se, the protester subsequently retained outside counsel to represent it in the protest. Our Office issued a protective order for the protest, received and reviewed the protester's outside counsel's application for access to the order, and admitted him to the order. Waterfront's outside counsel received from DOL documents covered by the protective order, including the awardee's proposal and the agency's evaluation documents, and submitted comments on the agency report on behalf of the protester.

On November 18, the Government Accountability Office (GAO) attorney assigned to the protest conducted "outcome prediction" alternative dispute resolution (ADR), during which the attorney expressed his view that GAO would likely sustain Waterfront's protest regarding the agency's evaluation of 21st Century's price. Specifically, the GAO attorney advised that the record showed that the agency did

not conduct a price realism evaluation, as required by the solicitation. The GAO attorney also advised that the protester's challenges to the evaluation of its past performance and technical proposal would not likely be sustained. The agency subsequently advised our Office that it would take corrective action by conducting a price realism evaluation of the offerors' proposals; based on this notice, we dismissed the protest on November 24. Following dismissal of protest B-401948.13, Waterfront requested that GAO recommend reimbursement of its protest costs; this request was docketed as B-401948.16.

On January 24, 2011, DOL advised Waterfront that it had affirmed the award to 21st Century. On February 9, Waterfront filed a protest of the reaffirmed award pro se, again challenging the agency's evaluation of past performance, technical proposals, and price; this protest was docketed as B-401948.17. Prior to providing its report on this protest, DOL advised that it would again take corrective action to further address concerns regarding the agency's price realism analysis; based on the agency's notice, we dismissed the protest on March 14. On March 18, DOL again advised Waterfront that it had affirmed the award to 21st Century. The current protest, which was docketed as B-401948.18, followed.<sup>4</sup>

## PROTEST OF AWARD TO 21ST CENTURY

Waterfront argues that the award of the contract to 21st Century was improper because DOL unreasonably evaluated the protester's past performance and technical proposal, and the awardee's proposed price. For the reasons discussed below, we find no merit to the protester's arguments and no basis to sustain its challenge of the award to 21st Century.

### Interested Party Status

As a preliminary matter, DOL argues that Waterfront is not an interested party to challenge the award to 21st Century because the protester did not meet a mandatory solicitation requirement to have an interim secret facility clearance.<sup>5</sup>

As relevant here, the RFP stated that offerors would be required to hold "at a minimum, an interim secret facility clearance prior to the RFP closing date." RFP amend. 1, at 7. The RFP did not expressly state that offerors were required to

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<sup>4</sup> On March 23, 2011, DOL determined that proceeding with the procurement was in the best interest of the government, notwithstanding the stay of performance required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553 (d)(3)(A) (2006).

<sup>5</sup> For this reason, the agency also argues that Waterfront is not entitled to be reimbursed its costs for pursuing protest B-401948.13.

provide documentation concerning this requirement in their proposals. However, in an email to the protester on August 28, 2009, after receipt of proposals, the agency asked Waterfront to address the following question: "Does your company hold at a minimum an 'INTERIM SECRET FACILITY CLEARANCE' prior to the RFP closing date as referenced in paragraph 1.10.2 of the subject SOW?" AR (B-401948.13), Email from DOL Contract Specialist to Waterfront, Aug. 28, 2009. The protester responded that it did not have an interim secret facility clearance. AR (B-401948.13), Email from Waterfront to DOL Contract Specialist, Aug. 28, 2009. Based on the foregoing, DOL has argued throughout the various protests that Waterfront's proposal did not meet a mandatory solicitation requirement and therefore should not have been considered eligible for award. See, e.g., CO Statement (B-401948.13), Oct. 7, 2010, at 3 ("In reviewing the procurement process for this award [in response to Waterfront's protests], the Solicitor's Office disclosed that DOL inadvertently evaluated Protester's proposal, notwithstanding its failure to comply with the facility clearance requirement."); AR (B-401948.13) at 15-16.

Our Office has held that the ability to obtain a security clearance is generally a matter of responsibility, absent an express requirement in the solicitation to demonstrate the ability prior to award. Calian Tech. (US) Ltd., B-284814, May 22, 2000, 2000 CPD ¶ 85 at 10; Ktech Corp.; Physical Research, Inc., B-241808, B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237 at 3. Under the Small Business Act, 15 U.S.C. § 637(b)(7) (2006), the SBA has conclusive authority to determine the responsibility of small business concerns. Thus, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to the SBA for a final determination under its certificate of competency (COC) procedures. Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3.

In connection with Waterfront's challenge of the award to Zolon in protest B-401948.2, DOL argued that Waterfront was not eligible for award based on its failure to possess an interim secret facility clearance. On October 15, 2009, prior to the submission of an agency report on that protest, the GAO attorney assigned to the protest conducted an outcome prediction ADR, in which she advised that Waterfront's asserted failure to provide an interim facility security clearance was a matter of "responsibility," rather than "responsiveness" or technical acceptability, and predicted that our Office would likely sustain Waterfront's protest. She also advised the parties that since Waterfront was a small business concern, a finding of non-responsibility would require the DOL to submit the matter to the SBA for a COC review.

DOL took corrective action in response to the ADR and advised our Office that it would refer the matter of Waterfront's responsibility to the SBA for a COC determination. In its referral to the SBA, however, DOL stated that Waterfront was not the apparent successful offeror for the procurement, and for this reason, the SBA

declined to consider whether to issue a COC to the protester. See AR (B-401948.18), Tab 24, Letter from SBA to GAO Re: B-401948.5, Jan 4, 2010, at 2.

In connection with Waterfront's subsequent protest of the award to Inersso, B-401948.5, DOL again argued that Waterfront was not eligible for award based on the protester's lack of an interim secret facility clearance. Our Office asked the SBA to address this issue. The SBA advised that it should not have previously declined to consider whether to issue a COC. Instead, the SBA stated as follows:

[T]o the extent DOL rejected Waterfront's offer as unacceptable under a responsibility-related evaluation factor or based on Waterfront's failure to meet [a] definitive responsibility criterion, DOL should have referred Waterfront to the [SBA] for a possible [COC], and SBA should have accepted that referral.

Id. at 1. The SBA noted that DOL represented that, as of SBA's Jan. 4, 2010 response, DOL no longer viewed Waterfront as technically unacceptable for failing to meet the interim secret facility clearance requirement. Id. at 4. For this reason, the SBA again concluded that it need not evaluate Waterfront for a COC, but would consider a COC referral in the event that Waterfront was rejected as nonresponsible or unacceptable on the basis of a definitive responsibility criterion. Id.

The record shows that, in connection with the current award to 21st Century, DOL has not found that Waterfront is unacceptable or nonresponsible for failing to have an interim secret facility clearance, and DOL did not request a COC from the SBA.<sup>6</sup> On this record, we think that Waterfront is therefore an interested party eligible to challenge the award to 21st Century.<sup>7</sup>

#### Protective Order Violation

Next, the record shows that Waterfront's outside counsel violated the protective order during the proceedings of protest B-401948.13. For this reason, DOL and 21st Century request that we dismiss the current protest (B-401948.18). As discussed below, we agree that Waterfront's counsel violated the protective order, and that the violation was a serious one, but we do not agree that the violation of the order by outside counsel in the earlier protest warrants dismissal of the current protest.

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<sup>6</sup> Waterfront asserts that it is compliant with the RFP's interim secret facility clearance requirement. Protester's Comments (B-401948.18) at 8-10.

<sup>7</sup> For the same reasons, Waterfront's alleged noncompliance with the interim security clearance requirement does not preclude Waterfront from recovery with regard to its request that GAO recommend reimbursement of its costs in pursuing protest B-401948.13, which we address below.

The protective order process is essential to the proper functioning of GAO's bid protest process. The terms of our protective order limit "disclosure of certain material and information submitted in the . . . protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure." Protective Order, Oct. 17, 2010, ¶ 1. The order "applies to all material that is identified by any party as protected, unless [GAO] specifically provides otherwise," and strictly limits access to protected material only to those persons admitted under the order. Id. ¶¶ 1-3.

In addition to documents marked as protected, a party admitted to the protective order may not release "documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents" without first providing the document to the other parties. Id. ¶ 5. Furthermore, such documents may not be released "until the end of the second working day following receipt of the documents by all parties . . . to permit[] parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under this protective order." Id. As our Office has held, parties may not make unilateral judgments as to whether material subject to our protective order may be released to parties not admitted to that order.<sup>8</sup> See Network Sec. Techs., Inc., B-290741.2, Nov. 13, 2002, 2002 CPD ¶ 193 at 8.

The protective order also provides that "[e]ach individual covered under this protective order shall take all precautions necessary to prevent disclosure of protected material," including, but not limited to, "physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession." Protective Order, Oct. 17, 2010 ¶ 6. The protective order and our Bid Protest Regulations provide that any violation of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including dismissal of the protest. Id. ¶ 9; Bid Protest Regulations, 4 C.F.R. § 21.4(d) (2011).

As discussed above, we issued a protective order in connection with protest B-401948.13 and admitted protester's outside counsel to the order. Protester's outside counsel received documents subject to the protective order, and filed comments on the agency report on November 3, 2010. Protester's outside counsel subsequently prepared a version of the comments for his client, which redacted

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<sup>8</sup> Our Office publishes a guide to protective orders, which is available on our website. See Guide to GAO Protective Orders, June 2009, available at: <http://www.gao.gov/special.pubs/d09770sp.pdf>. In our Guide, we cite examples of violations of protective orders, including an instance where we sanctioned outside counsel for a protester because the counsel unilaterally redacted a document and provided it to their client without following the 2-day rule under our protective order. Id. at 16.

certain information. The redacted version, however, did not redact information concerning 21st Century's indirect labor rates and portions of the awardee's explanation as to how it prepared its overtime labor rates. Protester's Comments (B-401948.13) at 8-9. Protester's outside counsel has acknowledged that he did not provide a draft of the redacted version to agency counsel or GAO, as required by paragraph 5 of the protective order. See Email from Protester's Outside Counsel to GAO, April 27, 2011; Protester's Outside Counsel Response to GAO Questions, June 8, 2011, at 3. Waterfront acknowledges that it received the redacted version of the comments on a compact disc (CD) from its outside counsel. Protester's Response to GAO Questions, Apr. 25, 2011, at 1-2; Protester's Comments (B-401948.18) at 22. In addition, Waterfront used the information concerning the awardee's labor rates in its two subsequent protests, which it pursued pro se. See Protest (B-401948.17), Feb. 9, 2011, at 10; Protest (B-401948.18), Mar. 21, 2011, at 13-14.

We think that the facts above demonstrate that the protester's outside counsel clearly violated the protective order. In this regard, the attorney acknowledges that he prepared a redacted version of his comments, and provided it to his client without first providing agency counsel the required 2-day period for review.<sup>9</sup> See Email from Protester's Outside Counsel to GAO, April 27, 2011; Protester's Outside Counsel Response to GAO Questions, June 8, 2011, at 2-3.

DOL and 21st Century argue that the actions of Waterfront and its outside counsel are similar to the facts in PWC Logistics Servs. Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25, where we found that a violation of the protective order warranted dismissal of the protest. We disagree.

In PWC Logistics, the record showed that outside counsel, who was admitted to a protective order, improperly forwarded two documents to the protester. These documents were identified as proposed redacted versions, but were also marked with the following legend: "PROTECTED MATERIAL TO BE DISCLOSED ONLY IN ACCORDANCE WITH GOVERNMENT ACCOUNTABILITY OFFICE PROTECTIVE ORDER." Id. at 3-4. We concluded that the disclosure of the documents by protester's outside counsel was a violation of the protective order. Id. at 8. We also found that the actions of the protester were improper because, upon receipt of the documents marked as protected, the protester should have known that the documents had been improperly disclosed, and could not properly be retained. Id. at 8-9. Although the documents were marked as protected, the protester in PWC Logistics did not contact its counsel, did not destroy or return the documents, and in fact forwarded the documents to numerous personnel within the company. Id. at 8-9. We concluded that the protester's actions were fundamentally inconsistent

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<sup>9</sup> 21st Century was not represented by outside counsel during this time, nor did it participate in protest B-401948.13 as an intervenor.

with the integrity of our bid protest process, and that dismissal of the protest was warranted. Id. at 14.

Here, unlike PWC Logistics, there is no indication that the protester knew that the document provided by its outside counsel had been improperly released. Instead, the redacted comments were provided to Waterfront by its outside counsel without a legend indicating that the material was protected. The protester states that, aside from the redacted comments, it did not receive any other documents from its outside counsel, and that to its knowledge none of the information provided by its counsel “was of a strictly apparent proprietary nature, or was considered to be of a highly competitive value.” Protester’s Second Response to Agency Request for Dismissal, May 11, 2011, at 22-23; see also Protester’s First Response to Agency Request for Dismissal, Apr. 25, 2011, at 3. The protester further states that, upon being advised that the information it received in the redacted comments was protected and should not have been disclosed, it identified and deleted all of the materials, and destroyed the CD it received from its counsel. Protester’s Second Response to Agency Request for Dismissal, May 11, 2011, at 22. Thus, Waterfront’s actions are clearly distinguishable from those of the protester in PWC Logistics.<sup>10</sup>

While we acknowledge that the protester was able to raise arguments in protests B-401948.13 and B-401948.18 concerning 21st Century’s proposed price that it would not otherwise have been able to raise, absent the violation of the protective order, we do not think that the protester obtained this information through its own improper actions. There is no evidence that the disclosure of the protected information was done with the connivance of Waterfront and its attorney in knowing violation of the protective order. We therefore do not think that it would be fair to punish the protester for the improper actions of its outside counsel by dismissing either the specific allegations that arose from the improperly disclosed information, or the protest as a whole.<sup>11</sup>

#### Past Performance Evaluation

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<sup>10</sup> To the extent that the intervenor believes that it was harmed by the release of its proprietary information, we note that our protective order requires attorneys who apply for access to acknowledge the following statement: “I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.” Protective Order Application ¶ 10.

<sup>11</sup> As noted above, our protective order and our Bid Protest Regulations provide for the imposition of appropriate sanctions in the case of a violation of a protective order. Consistent with our Office’s practice, sanctions concerning Waterfront’s outside counsel will be addressed separately from the resolution of this protest.

Waterfront argues that DOL unreasonably evaluated its past performance. The RFP required offerors to submit three past performance references, and advised that offerors would be evaluated on their performance of “projects of similar dollar value, scope, and complexity of work in the SOW.”<sup>12</sup> RFP amend. 6, at 19. Waterfront submitted five past performance references—four for itself, and one for a proposed subcontractor. AR (B-401948.18), Tab 19, Waterfront Proposal, vol. II, at 3-4.

DOL evaluated the protester’s past performance references as follows: two Waterfront contracts with DOL were rated as high confidence; a third Waterfront contract with OFLC was rated as no confidence; a Waterfront contract with a commercial entity was rated as significant confidence; and a contract for Waterfront’s proposed subcontractor was rated as high confidence. AR (B-401948.18), Tab 14, Past Performance Evaluation, at 2-3. Based on these five ratings, DOL rated Waterfront’s past performance as significant confidence, overall. Id.

Waterfront argues that the agency’s no confidence rating for the OFLC contract was unreasonable because the CO improperly considered comments made by an OFLC official concerning Waterfront’s performance of that contract. The agency’s evaluation of Waterfront’s performance under the OFLC contract stated as follows:

Please note that Waterfront . . . has had some past performance issues at the [DOL OFLC]. The [CO] is aware of complaints from [the OFLC official] stating that Waterfront had not satisfactorily completed work in accordance with the requirements of the [SOW] for a contract, with similar requirements to that of the subject solicitation, performed in support of . . . OFLC. [The OFLC official] stated that the work was completed by Waterfront . . . [but] was less than satisfactory and unacceptable.

Id. at 2. The protester contends that, but for the rating for this reference, its past performance would have been rated as high confidence, overall.

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<sup>12</sup> Waterfront also argues that 21st Century’s past performance rating was unreasonable because the awardee did not submit the required number of past performance references. This challenge is untimely raised under our Bid Protest Regulations because the basis for this argument was provided in the record for protest B-401948.13, but was not raised within 10 days of receipt of this information by Waterfront’s outside counsel. 4 C.F.R. § 21.2(a)(2). In any event, our review of the record finds that although the agency’s evaluation of the offerors’ past performance lists only two past performance references for 21st Century, the awardee did in fact submit the required three references. See AR (B-401498.18), Tab 26, 21st Century Proposal, vol. 2, at 1-10.

The protester's arguments here are largely based on a declaration submitted by the OFLC official, which was submitted by DOL in connection with a different protest filed by Waterfront, B-403638.<sup>13</sup> In his declaration, the OFLC official stated that he had spoken with the CO concerning Waterfront's performance on the OFLC contract, as follows:

Beginning in 2008 through early 2009, I had personal knowledge of circumstances in which work products received from Waterfront . . . were not satisfactory, or substantially departed from mutually agreed upon requirements or design documentation. All communications and customer feedback regarding the quality of work performed by, or products received from, Waterfront . . . was transmitted by me to [the DOL Office of Performance and Technology, known as PROTECH] senior management staff and [the Project Manager for] Waterfront.

OFLC Official's Decl., Dec. 30, 2010 ¶ 5. The OFLC official stated that he "informally communicated my personal concerns and observations about Waterfront's performance to [the CO] in a meeting in her office." Id. ¶ 7. He states, however, that "I have no record of preparing and/or submitting any formal evaluative statements regarding the performance of Waterfront . . . as a result of this or any other conversation with [the CO]." Id. Additionally, the OFLC official states that although he received a request for a written past performance evaluation concerning the OFLC contract for the procurement at issue here, he did not provide such an evaluation. Id. ¶ 8. The OFLC official also expressed his belief that, because PROTECH staff served as contracting officer technical representatives (COTR) for the OFLC contract cited in Waterfront's past performance proposal, they should have been consulted to provide a formal evaluation for the protester:

Since PROTECH staff served as formal COTRs on all application development contracts, my understanding was that any past performance evaluations for Waterfront . . . would need to be prepared and submitted by the PROTECH COTR, if such a past performance evaluation was requested by a Federal contracts office.

Id. ¶ 9.

Waterfront contends that the declaration by the OFLC official shows that his comments should not have been used in the evaluation of Waterfront's past performance. We disagree.

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<sup>13</sup> Protest B-403638 concerned a different contract award by DOL, under solicitation No. DOL110RP20850, but involved the same CO as this procurement. Our Office dismissed this protest as untimely in Waterfront Techs., Inc., B-403638.3, Feb. 22, 2011, 2011 CPD ¶ 49.

The evaluation of past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4; Command Enters., Inc., B-293754, June 7, 2004, 2004 CPD ¶ 166 at 4. A protester's mere disagreement with the agency's evaluation does not provide a basis for sustaining a protest. Command Enters., Inc., *supra*. There is no requirement that past performance information be presented in formal, written documents; instead, an agency is generally permitted to consider any relevant past performance information, regardless of its source. NVT Techs., Inc., B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36 at 5. In fact, a CO in some circumstances has an affirmative obligation to consider past performance information that is "close at hand." International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

Here, the record shows that the CO considered the OFLC official's comments regarding Waterfront's performance on the OFLC contract, and that this information led to the no confidence rating for that reference. Although the OFLC official expressed an opinion that other agency officials should have prepared a past performance evaluation for Waterfront's OFLC reference, the CO was within her discretion to consider the information provided by the OFLC official that, in his view, Waterfront's performance under the OFLC contract was not satisfactory. See NVT Techs., Inc., *supra*. On this record, we find no basis to question the no confidence rating assigned for the OFLC contract, nor do we find a basis to question Waterfront's overall rating of significant confidence.

In any event, we conclude that even if Waterfront's arguments had merit, there is no possibility that the protester could have been prejudiced. In this regard, our Office will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; *see also*, Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996). Here, both 21st Century and Offeror 3 had higher technical evaluation ratings and lower proposed prices than Waterfront.<sup>14</sup> As discussed above, the solicitation stated that the technical evaluation factor was "significantly more important" than the past performance factor. RFP amend. 6, at 17. Thus, even if Waterfront received a rating of high confidence, the highest possible rating under the past performance factor, the agency could not have selected its proposal for award over either 21st Century's or Offeror 3's proposal, each of which received a higher

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<sup>14</sup> As discussed below, Waterfront did not timely challenge 21st Century's technical evaluation ratings, and we find no merit to the protester's arguments concerning its own evaluation under the technical evaluation factor.

rating under the technical evaluation factor and was lower-priced. See Coley & Assoc., Inc., B-404034 et al., Dec. 7, 2010, 2011 CPD ¶ 6 at 7.

Finally, Waterfront contends that the no confidence rating for the OFLC reference may constitute a de facto debarment by DOL. The protester notes that FAR part 9 requires a CO to consider past performance as part of an overall responsibility determination. FAR § 9.104-6(b). The protester thus infers that the agency has found Waterfront nonresponsible based on the negative past performance evaluation attributed to the OFLC official, and that the agency will use this information to bar the protester from future contract awards. See Protest at 22-26; Protester's Comments at 32-36. For this reason, the protester argues that the OFLC past performance should be "stricken from the record" and not considered. Protester's Comments at 41.

A de facto debarment occurs when the government uses a nonresponsibility determination as a means of excluding a firm from government contracting or subcontracting, rather than following the debarment regulations and procedures set forth at FAR subpart 9.4. Bilfinger Berger AG Sede Secondaria Italiana, B-402496, May 13, 2010, 2010 CPD ¶ 125 at 6. A necessary element of a de facto debarment is that an agency intends not to do business with the firm in the future. Id. The record here does not show that DOL found Waterfront nonresponsible--based on the past performance evaluation or any other information--nor is there any indication in the record that the agency intends to exclude the protester from future contract awards. We therefore find no merit to the protester's argument.

#### Technical Factor Evaluation

Next, Waterfront contends that the agency's evaluation of its technical proposal was flawed. The protester's argument, however, relates solely to the possible role that the OFLC official's comments regarding Waterfront's past performance may have had on the technical evaluation. See Protest at 17-24. In this regard, the protester contends that the negative past performance evaluation may have influenced its technical evaluation factor rating as well.

We do not think that the record supports the protester's argument. Instead, the evaluation record shows that the agency evaluated Waterfront's proposal under the technical evaluation factor based solely on information from the protester's technical proposal. See AR (B-401948.18), Tab 10, Final Technical Evaluation, at 6-7. Moreover, the evaluation documents do not show that the protester's ratings under

the technical evaluation factor and subfactors were affected by the information provided by the OFLC official concerning the protester's past performance.<sup>15</sup>

### Price Realism Evaluation

Finally, Waterfront argues that DOL's evaluation of 21st Century's proposed price was unrealistically low for the work required under the solicitation. As relevant here, the RFP stated the following concerning the evaluation of price:

Rejection of Unrealistic Offers: The Government may reject any proposal that is evaluated to be unrealistic in terms of program commitments, including contract terms and conditions, or unrealistically higher or low in price when compared to Government estimates, such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risk(s) of the program.

RFP amend. 6, at 18.

Where, as here, an RFP contemplates the award of a fixed-price contract, or a fixed-price portion of a contract, an agency may provide in the solicitation for the use of a price realism analysis for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal or quote. Puglia Eng'g of California, Inc., B-297413 et al., Jan. 20, 2006, 2006 CPD ¶ 33 at 6. The depth of an agency's price realism analysis is a matter within the agency's discretion. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 17. In reviewing protests challenging price realism evaluations, our focus is whether the agency's review was reasonable and consistent with the terms of the solicitation. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

As discussed above, the RFP stated that the agency "may reject any proposal" that was found to be unrealistic in terms of price, "such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and

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<sup>15</sup> The protester also challenges the awardee's technical evaluation rating for the first time in its comments on the agency report for protest B-401948.18. The awardee's evaluation ratings, however, were provided to Waterfront's outside counsel, who was admitted to the protective order for protest B-401948.13, but no challenge to 21st Century's technical ratings was made. Waterfront's challenge here is thus untimely filed under our Bid Protest Regulations because it was not raised within 10 days of receiving the agency report for the protest B-401948.13. 4 C.F.R. § 21.2(a)(2).

risk(s) of the program.”<sup>16</sup> RFP amend. 6, at 18. In its corrective actions in response to protests B-401948.13 and B-401948.17, the agency prepared a price realism evaluation that addressed offerors’ overall proposed price, escalation rates for the option years, and salary data as compared to publicly-available databases. AR (B-401948.18), Tab 5, Revised Price Realism Evaluation, at 1-6.

Waterfront argues that DOL should have rejected 21st Century’s proposed price as unrealistically low. The protester contends that, based on its understanding of the labor market, the costs of performing the work required under the solicitation and its performance as the incumbent contractor, the awardee could not perform the contract at its proposed price, which was 30 percent lower than Waterfront’s proposed price. We have reviewed Waterfront’s various challenges and DOL’s evaluation of 21st Century’s proposed price, including all of the direct and indirect components of that price, and conclude that the agency reasonably found the awardee’s proposed price to be realistic. To the extent that Waterfront believes that the awardee cannot perform the contract at its proposed price, the protester’s disagreement with the agency’s judgment provides no basis to sustain the protest. See Team BOS/Naples–Gemma S.p.A./DeJen, B-298865.3, Dec. 28, 2007, 2008 CPD ¶ 11 at 14.

The protester also contends that the awardee’s price is unrealistically low because it was apparently premised on using personnel who are telecommuting to perform the contract rather than having its personnel work at the contractor’s offsite location, as was assertedly required by the terms of the solicitation. The RFP stated the following regarding the place of performance for the contract:

These services (with exception noted below) will be performed offsite with a secure connection to the DOL-[Employment and Training Administration] network.

Exception: The Database Analyst will perform his/her responsibilities in [DOL’s] Office of Foreign Labor Certification.

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<sup>16</sup> In its response to protest B-401948.13, DOL argued that the solicitation did not require the agency to conduct a price realism evaluation. In this regard, the agency argues that the solicitation stated that “[t]he Government may reject any proposal that is evaluated to be unrealistic.” RFP amend. 6, at 18 (emphasis added). We think that a reasonable reading of the RFP is that the agency would conduct an evaluation of offerors’ proposed prices, and that the term “may” referred to the agency’s discretion to find that a proposal with an unrealistically low price posed a level of risk of unsuccessful performance that warranted rejection.

Place of Performance: All work under this contract will be performed at the Contractor's location "offsite" with the exception of the Database Analyst (DOL). However, the contractor will be required to attend weekly meetings on site at the DOL.

RFP, SOW ¶¶ 1.1, 1.8.

As set forth above, the RFP did not require offerors to identify the place of performance, and 21st Century's proposal did not do so. Whether 21st Century performs the contract in a manner consistent with the place of performance requirements under the SOW is a matter of contract administration, which we will not review. 4 C.F.R. § 21.5(a); Rebecca Ryan d/b/a Flyaway Farm and Kennels, B-404132, Jan. 10, 2011, 2011 CPD ¶ 17 at 2-3. Thus, Waterfront's speculation that the improper use of telecommuting by 21st Century may have resulted in an improper low price provides no basis to challenge the agency's price realism conclusion.

#### Protest Conclusion

In sum, we find no basis to sustain Waterfront's protest of the award of the contract to 21st Century.<sup>17</sup>

#### REQUEST FOR PROTEST COSTS

Waterfront requests that our Office recommend that DOL reimburse its costs of pursuing protest B-401948.13. The protester argued in protest B-401948.13 that the

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<sup>17</sup> Waterfront also raises a number of collateral arguments. We have reviewed all of the protester's arguments, including those pertaining to alleged bad faith actions on the part of the agency, and find that none provides a basis to sustain the protest. For example, the protester contends that DOL made post hoc alterations to the evaluation record in its preparation of redacted versions of the agency report for protest B-401948.13, and that these actions demonstrate that the agency has concealed evidence and otherwise acted in bad faith. We have reviewed the redacted and unredacted versions of the agency report for B-401948.13 and note that the agency changed the manner in which it cited a table that summarized the offerors' evaluation ratings and prices. Compare AR (B-401948.13), Oct. 20, 2010 (unredacted), at 13 with AR (B-401948.13), Oct. 20, 2010 (redacted), at 13 and AR (B-401948.13), Oct. 26, 2010, at 13 (revised redacted). The underlying information in the different versions of the agency report, however, has not changed, and there is no indication in the record that the agency changed any documentation concerning the evaluation of offerors' proposals.

award to 21st Century was improper based on flaws in the agency's evaluation of Waterfront's past performance and technical proposal, and 21st Century's price.<sup>18</sup>

Where, as here, a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Tech. Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Here, we find that Waterfront's argument concerning the evaluation of the offerors' price proposals was clearly meritorious. As discussed above, our Office conducted outcome prediction ADR and the GAO attorney assigned to protest B-401948.13 advised DOL that the protest concerning the agency's failure to conduct a price realism analysis was likely to be sustained, which indicates that our Office regards the protest as clearly meritorious. Indeed, the agency does not dispute that it did not perform a price realism evaluation, as required by the solicitation. See Agency Response to Request for Entitlement, Dec. 21, 2010, at 5-6. Additionally, the agency did not take prompt corrective action in response to this argument, and instead did so only after the submission of its report on the protest, in response to the ADR outcome prediction recommendation.

As a general rule, we recommend that a successful protester be reimbursed protest costs with respect to all issues pursued, not merely those upon which it prevails. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues that it essentially constitutes a separate protest. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined—*i.e.*, whether the successful and unsuccessful arguments share a common set of facts, are based

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<sup>18</sup> DOL argues that the issue regarding 21st Century's price was not raised by the protester, and was instead raised by GAO, sua sponte, during the ADR proceedings. We disagree. This issue was raised in Waterfront's initial protest B-401948.13. See Protest (B-401948.13), Sept. 20, 2010, at 9-10.

on related legal theories, or are otherwise not readily severable. Basic Commerce and Indus., Inc.-Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4. Here, we view Waterfront's challenge in protest B-401948.13 to DOL's failure to conduct a price realism analysis to be a discrete and severable challenge from the protester's challenges to the evaluation of its technical proposal and past performance.

We therefore recommend that Waterfront be reimbursed its costs of pursuing protest B-401948.13 with regard to the clearly meritorious issue of the evaluation of the awardee's price. Waterfront should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).<sup>19</sup>

The protest is denied; the request that we recommend reimbursement of protest costs is granted.

Lynn H. Gibson  
General Counsel

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<sup>19</sup> In contrast, we see no basis to recommend that Waterfront be reimbursed for its costs of pursuing protest B-401948.17. As discussed above, DOL stated that it would take corrective action in response to protest B-401948.13 by performing a price realism analysis. In response to the agency's confirmed award to 21st Century, Waterfront raised the same challenges regarding the evaluation of the offerors' prices in protest B-401948.17; in response to that protest, the agency stated that it would take corrective action by further reviewing its price realism analysis. Our Office has, in some circumstances, recommended that a protester be reimbursed the costs of filing a protest based on an agency's failure to implement its promised corrective action, to the extent the protester was put to the expense of subsequently protesting the very same procurement deficiency. E.g., Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Here, the record shows that the price realism analysis prepared by DOL in its corrective action in response to protest B-401948.13 was materially revised by the agency during its corrective action in response to B-401948.17. Compare AR (B-401948.17), Initial Price Realism Analysis, Dec. 6, 2010, with AR (B-401948.18), Tab 5, Revised Price Realism Evaluation, Mar. 18, 2011. For this reason, we do not recommend reimbursement of Waterfront's costs in connection with protest B-401948.17.