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Decision

Matter of: Orbital Sciences Corporation

File: B-414603; B-414603.2

Date: July 26, 2017

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DIGEST

1. Protest is denied where the agency waived a solicitation requirement and the protester did not allege that it was prejudiced by the waiver.
 2. Protests challenging the agency's cost realism evaluation are denied, where the record demonstrates that the agency's conclusions were reasonable with regard to the awardee's proposed hours, and where the agency reasonably adjusted protester's costs.
 3. Protest challenging the agency's past performance evaluation of the awardee is denied, as the agency was not required to consider an inspector general report as part of the evaluation.
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DECISION

Orbital Sciences Corporation, of Greenbelt, Maryland, protests the award of a contract to Universities Space Research Association (USRA), of Columbia, Maryland, under request for proposals (RFP) No. NNA16579196R, which was issued by the National Aeronautics and Space Administration (NASA) for science and mission operations services in support of NASA's Stratospheric Observatory for Infrared Astronomy (SOFIA), the world's largest airborne astronomical observatory. Orbital alleges that NASA improperly waived or relaxed the solicitation's total compensation plan requirement for USRA's proposal, failed to evaluate the difference in proposed hours between Orbital and USRA, made an improper upward price adjustment to Orbital's

travel costs, and failed to consider a NASA inspector general report as part of USRA's past performance evaluation.

We deny the protest.

BACKGROUND

SOFIA is an airborne astronomical observatory consisting of a 2.5-meter aperture telescope permanently installed in a specially-modified Boeing 747SP aircraft that was developed by NASA and the German Aerospace Center, Deutsches Zentrum für Luft- und Raumfahrt. Contracting Officer's Statement of Fact (COSF) at 1. The purpose of the SOFIA Science and Mission Operations (SSMO) contract is to conduct an infrared science guest observer program that provides NASA with astronomical data and scientific research. Id. USRA is the incumbent contractor performing these program and science operations functions. Id.

NASA released the RFP on July 22, 2016, and issued two amendments prior to the receipt of initial proposals. Agency Report (AR), Tab 3, Amend. 0001; Tab 4, Amend. 0002. The SSMO procurement was conducted as a full and open competition under Federal Acquisition Regulation (FAR) part 15 for a single-award hybrid contract consisting of a cost-plus-award-fee (CPAF) core requirement, a cost-plus-no-fee component for the core grants activity, and separate indefinite-delivery, indefinite-quantity (IDIQ) elements for CPAF and cost-plus-fixed-fee (CPFF) task orders. RFP at 88.¹ The performance period consists of a 5-year, 2-month base period (including phase-in), followed by six 2-year options and a single 1-year "shutdown/close-out" option, resulting in a maximum potential performance period of 18 years. RFP at 90, 99-100.

The RFP anticipates award of a contract representing the best value to the agency under three evaluation factors in decreasing importance: mission suitability, past performance, and cost/price. Id. at 177-178, 186. The mission suitability factor consisted of three subfactors of different weights, totaling 1000 points:

Mission Suitability Subfactors	Points
Management Approach	400
Technical & Operational Approach	500
Small Business Participation	100
Total	1000

¹ The entire agency report, including the RFP, included at AR, Tab 2, was continuously paginated. Citations herein refer to this applied pagination, and not to pagination unique to any single document.

Id. at 186. In addition to the point score, the mission suitability subfactors would also receive an adjectival rating, as relevant here:

Adjectival Rating	Definition	Percentile Range
Excellent	A comprehensive and thorough proposal of exceptional merit with one or more significant strengths. No deficiency or significant weakness exists.	91 -100
Very Good	A proposal having no deficiency and which demonstrates overall competence. One or more significant strengths have been found, and strengths outbalance any weaknesses that exist.	71-90
Good	A proposal having no deficiency and which shows a reasonably sound response. There may be strengths or weaknesses, or both. As a whole, weaknesses not offset by strengths do not significantly detract from the Offeror's response.	51-70

Id. at 178.

Also relevant to this protest, as part of the information required under the management approach subfactor, the RFP provided the following:

The Offeror shall provide a Total Compensation Plan (TCP) for all personnel proposed, in accordance with NFS [NASA FAR Supplement] provision 1852.231-71, "Determination of Compensation Reasonableness," and FAR provision 52.222-46, "Evaluation of Compensation for Professional Employees." The Offeror shall require its subcontractors (that will perform 5% or more of the value of the resultant contract, or that the Offeror proposes to award cost reimbursement or non-competitive fixed-price type subcontracts having a total potential value in excess of \$700,000,) provide, as part of their proposals, the information identified in (a) through (c) of NFS provision 1852.231-71, if their employees are not covered by the prime Offeror's TCP. The required TCP must:

* * * * *

(ii) Identify salary ranges and fringe benefits proposed for professional employees – including an itemization of the benefits that require employee contributions and the amount of that contribution as a percentage of the total cost of the benefit – and how they relate to the local employment market.

(iii) Identify employee compensation information regarding: vacations, severance pay, holidays, overtime and shift differentials, sick leave, California Family Leave Act, bonus plans, life insurance, medical/dental/ vision insurance, uncompensated overtime, pension contributions, employee incentives, training, career development, moving expenses, and

compensatory time. Identify benefits that require employee contributions and the amount of that contribution as a percentage of the total cost of each benefit.

Id. at 158. The RFP provided that an offeror’s total compensation plan would be evaluated in accordance with NFS provision 1852.231-71 and FAR provision 52.222-46, and for demonstrating “reasonableness and effectiveness” under the above criteria. Id. at 181-182. Offerors were also advised that, “[i]f the SEB [source evaluation board] determines that a proposal does not adequately demonstrate that the Offeror will be able to perform the work with the resources proposed, the SEB may determine this to be a mission suitability weakness as well as require an adjustment for probable cost.” Id. at 180.

On September 26, 2016, the SEB received timely proposals from Orbital and USRA. During the evaluation process, the SEB found that one of USRA’s proposed small business subcontractors, [DELETED], did not provide a document titled “Total Compensation Plan” as part of its direct submission to NASA. COSF at 8. The total proposed subcontract value for [DELETED] was greater than \$700,000, and therefore it fell under the requirement to provide a total compensation plan. Id., citing AR, Tab 28, USRA and USRA Subcontractors Cost Proposals, at 1708. Based on the information included in the [DELETED] cost proposal, the SEB decided that USRA’s proposal was acceptable under NFS 1815.305-70, but that it also merited a weakness under the management approach subfactor. Id. at 8-9; see also AR, Tab 30, Evaluation Findings, at 1819.

The agency’s final evaluation was as follows:

Offeror	Mission Suitability (points)				Past Perf.	Proposed Cost	Probable Cost
	Mgmt. Appr. (400)	Tech. & Ops (500)	Small Bus. (100)	Total			
Orbital	Good 272	Good 335	Very Good 72	679	High	\$514.6M	\$519.8M
USRA	Very Good 304	Good 340	Good 68	712	High	\$513.6M	\$513.6M

AR, Tab 30, Eval. Findings Presentation.

After performing a best-value tradeoff, the agency made award to USRA. AR, Tab 30, Source Selection Decision, at 1903. This protest followed.²

² Both NASA and Orbital requested that our Office conduct alternative dispute resolution (ADR) in the form of outcome prediction. NASA Email, June 29, 2017; Orbital Email, June 29, 2017. On July 12, the GAO attorney assigned to the protest advised the
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DISCUSSION

Orbital argues that NASA's award to USRA was unreasonable based on what the protester argues were a variety of evaluation errors, consisting of an improper waiver of a material solicitation requirement, a flawed cost realism evaluation, an unjustified upward cost adjustment, and an incomplete past performance evaluation. For the reasons discussed below, we find no basis to sustain the protest.³

Total Compensation Plan

Orbital alleges that NASA waived or relaxed the RFP requirements relating to the total compensation plan when evaluating information provided by USRA's subcontractors, [DELETED] and [DELETED]. Orbital Comments at 2. The protester contends that the agency was required to conclude that the awardee failed to meet a material solicitation requirement and was therefore ineligible for award. *Id.* at 20, citing Wolverine Servs. LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3-4 (denying protest challenging the agency's rejection of the protester's proposal where the RFP advised offerors that failing to provide a required document would render a proposal non-compliant).⁴

In considering challenges to an agency's proposal evaluation we do not reevaluate proposals; rather, we review the agency's evaluation to ensure that it was reasonable, and consistent with the terms of the RFP, and applicable statutes and regulations. Brasfond USA Corp., B-414081, Feb. 6, 2017, 2017 CPD ¶ 51 at 6. Disagreement with an agency's evaluation, without more, is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

The agency acknowledges that, while it received information regarding [DELETED]'s total compensation plan, the documents provided did not address all of the requirements of the solicitation. Memorandum of Law (MOL) at 2-3; COSF at 8-10. NASA asserts that it reviewed the material provided by the subcontractor and reasonably concluded that [DELETED] had nonetheless provided most, but not all, of

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parties that she would draft a decision denying the protest, and that the protest was likely to be denied by GAO. Orbital elected not to withdraw its protest.

³ Orbital raises numerous collateral arguments in connection with these primary arguments, and also disputes the multiple weaknesses its proposal received. Although we do not address every argument in detail, we have reviewed each issue and find no basis to sustain the protest.

⁴ In Wolverine Servs., *supra*, GAO denied a protest challenging an agency's decision to reject a non-compliant proposal. Where, as here, the rejection of a proposal that does not satisfy a solicitation requirement remains discretionary, the agency is not obligated under Wolverine Servs. to do so.

the required information. Id. The agency contends that assessing USRA a weakness--rather than a deficiency--for the missing information was reasonable under the terms of the solicitation and within the agency's discretion. Id. We agree.

The RFP provides that "items within any factor, if found to be unsatisfactory, may be the basis for rejection of an offer." RFP at 186. The use of the word "may" means that the agency has the option, but not the obligation, to reject a proposal that it finds unsatisfactory. See Technology Mgmt. Co., Inc., B-409976, Sept. 26, 2014, 2014 CPD ¶ 294 at 3-4 (explaining that "it is within the agency's discretion to reject [a proposal] as unacceptable" where the RFP advised that an offeror "may have its proposal rejected" if its proposal lacks certain items). Here, Orbital identifies no solicitation provision that required NASA to reject USRA's proposal due to its subcontractor's incomplete total compensation plan. The protester alleges that "NASA failed to enforce material RFP requirements," but provides no clarity as to what "enforc[ing]" such requirements would require in practice for this procurement. Orbital's disagreement with the agency's decision to assess a weakness to USRA's proposal instead of rejecting it, without more, does not render NASA's evaluation unreasonable. Ben-Mar Enters., Inc., supra.

Orbital further contends that the agency waived or relaxed a material solicitation requirement by not disqualifying USRA for its subcontractor's incomplete total compensation plan submission. Orbital Comments & Supp. Protest at 2. With regard to these allegations, even if an agency arguably may have waived or relaxed a solicitation requirement, a protester must still show that it was prejudiced by the agency's actions. See Penn Parking, Inc., B-412280.2, Feb. 17, 2016, 2016 CPD ¶ 60 at 5; Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 7; Alphaport, Inc., B-414086, B-414086.2, Feb. 10, 2017, 2017 CPD ¶ 69 at 11. In order to demonstrate prejudice from the waiver or relaxation of the terms and conditions of an RFP, a protester must show that it would have altered its proposal to its competitive advantage, id., or that the agency did not apply a similar waiver to the protester's proposal. Zodiac of N. Am., B-409084 et al., Jan. 17, 2014, 2014 CPD ¶ 79 at 12.

NASA asserts that if we conclude that it waived or relaxed a solicitation requirement, it should nevertheless prevail because Orbital has not argued that it was prejudiced as a result of the alleged waivers. Supp. MOL at 3. In the record before us, Orbital does not allege that it was prejudiced by the agency's waivers, i.e., the protester does not address how it would have amended its proposal had it known that the agency would waive the total compensation plan requirement for subcontractors. See, e.g., Orbital Comments & Supp. Protest at 2. Even in circumstances where the agency was unreasonable in accepting the awardee's proposal, a protester must still show that it was prejudiced by a waiver of solicitation requirements. Conwal, Inc., B-279260, B-279260.2, May 26, 1998, 98-1 CPD ¶ 153 at 3. This protest ground is denied. Desbuild Inc., supra.⁵

⁵ Orbital also alleges that a second USRA small business subcontractor failed to submit both a total compensation plan and a cost proposal. Orbital Comments & Supp. Protest (continued...)

Cost Realism and Total Labor Hours

Orbital alleges that USRA proposed fewer labor hours than Orbital and that NASA failed to account for this difference in the agency's cost realism analysis. Orbital Comments & Supp. Protest at 24-25. The protester states that the record contains no analysis of USRA's proposed level of effort, and therefore, no analysis as to whether USRA's costs are realistic. Id. NASA contends that its review of offerors' level of effort and proposed staffing was reasonable and that the protester's position is not supported by the record. Supp. MOL at 6-7. We agree with the agency.

Our decisions provide that an agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7; Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 10-11. Because the contracting agency is in the best position to make this determination, we review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8-9.

An adequate cost realism analysis does not require an in-depth verification of each and every item; an agency may reasonably rely on statements in an offeror's proposal which demonstrate the realism of its proposed costs, without independently verifying each item of proposed costs. Pacific Architects & Eng'rs, Inc., B-274405.2, B-274405.3, Dec. 18, 1996, 97-1 CPD ¶ 42 at 7; Ferguson-Williams, Inc.; Hawk Mgmt. Servs., Inc., B-232334, B-232334.2, Dec. 28, 1988, 88-2 CPD ¶ 630 at 6.

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at 21. The agency responds that a total compensation plan was not required from this subcontractor due to the contract type and that, with regard to the cost proposal, USRA provided information sufficient to conclude that the subcontractor's "[labor] rates and estimated costs were reasonable for the work to be performed." Supp. MOL at 1-2. Where, as here, the agency has waived the requirements for any missing information, we need not address these issues to resolve the protest ground. As with the allegations of waiver discussed above, Orbital fails to articulate how it was prejudiced by any waiver or relaxation of solicitation requirements in the agency's evaluation of USRA's proposal. This protest ground is denied. Desbuild Inc., supra.

As an initial matter, while the protester alleges that the awardee's level of effort is "shockingly low," the hours differential is small, as USRA proposed about [DELETED] percent fewer hours than Orbital.⁶ Orbital also claims that "the record is bereft of any realism analysis of USRA's far lower level of effort." Orbital Comments & Supp. Protest, at 24. The protester's argument is not supported by the record, which shows that the agency, as part of its cost realism evaluation, compared offerors' proposed hours by category, for example, by contract management and administration, science and mission operations, and CPFF IDIQ task order. AR, Tab 30, Evaluation Briefing, at 97-106. In this regard, Orbital proposed substantially (approximately [DELETED] percent) more contract management and administration hours than USRA. *Id.* at 97. The difference in hours for science and mission operations was minimal at approximately [DELETED] percent. *Id.* at 99.

The record also reflects that the agency considered, in detail, hours proposed in terms of "WYE," or work year equivalent, rather than raw total hours. *See, e.g., id.* at 98. The agency used this analysis as part of its conclusions that USRA's proposed resources were "appropriate and reasonable," and that USRA's proposed labor rates and rate escalation were "reasonable and realistic." *Id.* at 104. Furthermore, the agency's recognition of USRA's approach was carried across the evaluation, as NASA awarded USRA a strength under the management approach subfactor for "propos[ing] approaches to increase the productivity and efficiency of the SOFIA program." *Id.* at 50. Finally, with regard to USRA's cost proposal the agency "reviewed the hours and skill mix proposed by the Offeror and its subcontractors and determined that they were appropriate and reasonable for accomplishing the Offeror's operational plans and that no adjustments to these resources were necessary." *Id.* at 104. On this record, we find no merit to the allegation that NASA failed to consider the impact of USRA's slightly lower proposed hours. This protest ground is denied. *See BCF Sols., Inc.*, B-409570, June 13, 2014, 2014 CPD ¶ 177 at 14.

Orbital Upward Cost Adjustment

Orbital also challenges the agency's upward cost adjustment to its cost proposal of approximately \$2.2 million for travel costs to allow for [DELETED] trips to New Zealand for the [DELETED] individuals proposed by Orbital, arguing that it was irrational.⁷

⁶ The protester challenges the agency's calculations regarding the hours proposed by the offerors. We need not resolve the issue. The protester's calculation is used above and the agency's calculation would result in a difference of approximately [DELETED] percent. The difference between these is, at best, de minimis.

⁷ Orbital proposed [DELETED] positions that would support the New Zealand work, but included in its proposal travel costs for only [DELETED] "person-trips." COSF at 20. After increasing the person trips to [DELETED] to account for this discrepancy, the agency further increased the estimated cost by 10 trips. *Id.* The protester disputes only the agency's increase from [DELETED] trips to [DELETED] trips. According to the agency, "[t]he number of 'person-trips' includes all deployed staff--those that precede

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Orbital Comments & Supp. Protest, at 28. The agency contends that the cost adjustment was reasonable and that Orbital's arguments represent mere disagreement with the agency's analysis. Supp. MOL at 8, citing TriWest Healthcare Alliance Corp., B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191 at 29.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1), 15.404-1(d); National Gov't Servs., Inc., B-412142, Dec. 30, 2015, 2016 CPD ¶ 8 at 8. Consequently, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1); Noridian Admin. Servs., LLC, B-401068.13, Jan. 16, 2013, 2013 CPD ¶ 52 at 4. An offeror's proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR § 15.404-1(d)(2)(ii). In assessing cost realism, an agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each item; rather, the evaluation requires the exercise of informed judgment by the contracting agency. AdvanceMed Corp.; TrustSols., LLC, B-404910.4 et al., Jan. 17, 2012, 2012 CPD ¶ 25 at 13. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

Here, based on past experience, the agency determined that Orbital's travel costs were "understated" because of the various travel that was not included in Orbital's proposal, including the fact that the protester's "[p]roposed travel to New Zealand was less than . . . the Offeror's sample scenario and lower than the necessary minimum estimated by the" agency. AR, Tab 30, Evaluation Briefing, at 1884. The agency then "used SOFIA historical data from New Zealand deployments in the summer of 2015 and 2016 and adjusted such data to align with the Sample Scenario in [the] RFP [. . .]. The average number of 'person-trips' for the deployment described in the sample scenario was determined to be approximately 32, with an average duration of 28 days." COSF at 20, citing AR, Tab 29, SOFIA Travel Rosters, at 1777-1781. On the record here, we conclude that the agency's upward cost adjustment had a reasonable basis and was not arbitrary, and the protester simply disagrees with the result. This protest ground is denied. Jacobs COGEMA, LLC, *supra*; TriWest Healthcare Alliance Corp., *supra*.

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arrival of the aircraft, those that operate the aircraft during the mission and those that complete shut down after the aircraft leaves for deployment to New Zealand. It also includes rotating and refreshing staff that are unable to stay for the entire deployment." COSF at 20.

Past Performance Evaluation of USRA

Finally, Orbital contends that the NASA erred by failing to consider a NASA Inspector General (IG) report regarding the SOFIA program, issued in July 2014, in evaluating USRA's past performance. The protester argues that this IG report, which identifies problems with the earlier management of the SOFIA Program, was unreasonably not included as part of the agency's past performance evaluation. Protest at 27.

Where, as here, a solicitation contemplates the evaluation of offerors' past performance, the agency has the discretion to determine the relevance and scope of the performance history to be considered, and our Office will not question the agency's judgment unless it is unreasonable or inconsistent with the terms of the solicitation or applicable procurement statutes and regulations. SupplyCore, Inc., B-411648.2, B-411648.3, Feb. 21, 2017, 2017 CPD ¶ 72 at 11. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

The RFP advises offerors that NASA "will review recent and active contracts," and that other past performance information, such as that in the contractor performance assessment reporting system (CPARS) and the past performance information retrieval system (PPIRs), may also be reviewed. RFP at 184-185. Our decisions provide that, while agencies generally need not evaluate all past performance references, or those not reflected in the proposals, in certain limited circumstances an agency evaluating an offeror's past performance also has an obligation (as opposed to the discretion) to consider information that is "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information." International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Our Office has generally limited application of this principle to situations where the alleged "close at hand" information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. TRW, Inc., B-282162, B-282162.2, June 9, 1999, 99-2 CPD ¶ 12 at 5.

Orbital argues that NASA had an affirmative obligation to review the IG report as part of USRA's past performance evaluation. Orbital Comments & Supp. Protest at 29-30, citing DKW Commc'ns, Inc., B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 8 (protest sustained where agency did not refute protester's allegations that it failed to review relevant CPARS reports). NASA first notes that the IG report was not a review of USRA's past performance under a recent and relevant contract. MOL at 4-5. In addition, NASA argues that its review of relevant information, including information in the agency's CPARS reports and in the PPIRs database, was reasonable. Id. at 3-4.

We do not agree with Orbital that the IG report is information that NASA was required to consider as part of USRA's past performance evaluation here. In addition, Orbital does

not explain why DKW Commc'ns would require an agency to review an IG report.⁸ Furthermore, the record shows that the agency's past performance evaluation was reasonable and consistent with the terms of the solicitation.

The protest is denied.

Susan A. Poling
General Counsel

⁸ According to Orbital, the agency's review of USRA's CPARS was also not appropriate because "the CPARS are from 2011 to the present, *after* USRA was stripped of its contract management responsibilities" under the current contract. Orbital Comments & Supp. Protest at 32 (emphasis in original). The protester does not address why the agency would be required to consider information prior to the 5-year relevancy period. RFP at 164.