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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

THE COMPETITVE RANGE

Steven W. Feldman[*]

After completing the initial evaluation, and if award is not made on the original proposals, the Contracting Officer (CO) (and not the CO's technical advisors or evaluators)[1] will determine the "competitive range" for the purpose of holding discussions.[2] In a marked change from prior law, the Clinger-Cohen Act of 1996[3] revised the definition of "competitive range," which concept is now implemented in Federal Acquisition Regulation (FAR) 15.306(c). This regulation defines the competitive range as consisting of the "most highly rated proposals" based on the evaluation of each proposal against "all the evaluation criteria"; additionally, the agency under this regulation may reduce the competitive range based on efficiency concerns. The same rules apply regardless of the proposed contract type—be it fixed price or cost reimbursement[4]—and irrespective of the firm's particular business identity, such as whether it is a small business concern.[5]

This BRIEFING PAPER covers the following topics: the regulatory evolution of the definition of the competitive range; competitive range variations; general principles of evaluation; the single offer competitive range; improper inclusion of the protester in the competitive range; inclusion of unacceptable offerors; the "relative approach" for selecting offerors; the role of price or cost; range revisions; and some key procedural points and protest litigation issues. To a great extent, the determination of the creation of the competitive range depends on the rules for technical and cost or price evaluation of proposals. While this BRIEFING PAPER will reference decisions of the U.S. Court of Federal Claims (COFC) and the U.S. Court of Appeals for the Federal Circuit, this PAPER will rely primarily on the decisions of the Government Accountability Office (GAO), the principal protest forum with the greatest volume of competitive range case law.

The Evolving Definition Of The "Competitive Range"

Before the 1997 FAR Part 15 rewrite,[6] the since-superseded FAR 15.609(a) defined the competitive range as mandating the inclusion of "all proposals that

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have a reasonable chance of being selected for award." The GAO construed this standard to mean it "usually" covered those proposals that were technically acceptable as submitted or that were reasonably susceptible of being made acceptable through discussions.[7] Former FAR 15.609(a) also provided that if doubt exists about whether a proposal is in the competitive range, an agency should include the proposal in the competitive range because this decision would maximize competition and provide fairness to the various offerors.[8] Simply stated, the prior rule was "When in doubt, do not leave them out."

Starting in 1997, however, the rule under FAR 15.306(c) must be deemed "When in doubt, kick them out." As stated in FAR 15.306(c)(1), the CO must establish the competitive range consisting of the "most highly rated proposals" "[b]ased on the ratings of each proposal against all evaluation criteria." Under FAR 15.306(c)(2), the agency may even further reduce the competitive range for purposes of efficiency if the solicitation advised offerors of this possibility, which usually will be accomplished by inclusion of standard solicitation provision, FAR 52.215-1(f)(4). Reducing the competitive range for "purposes of efficiency" means that the CO may limit the number of offers in the competitive range to the greatest number that will permit an "efficient competition" among the most highly rated proposals, although the regulation gives no specific criteria for selecting which offerors would be eliminated.[9] The most rational approach to this last issue would be to reject as needed only amongst the lowest ranking firms in the most highly qualified grouping.

The current policy against retaining marginal offerors in the competitive range saves additional (and largely futile) time, energy, and cost for both Government and industry.[10] By definition, as under prior law, no competitive range is formed when the award is based on initial proposals.[11] For certain high dollar procurements within the Department of Defense, however, agencies are expected to create a competitive range.[12]

In one sense, FAR 15.306(c)(1) on its face is more restrictive than past practice regarding the bounds of CO discretion in composing the competitive range. The reason is that the prior FAR 15.609(a) was based on a probability test—did the firm have a "reasonable chance" of being selected for award? Calculating probabilities in this fashion is inherently judgmental and calls for the sound exercise of discretion. By comparison, FAR 15.306(c)(1) in most circumstances calls only for the inclusion of the most "highly rated" offerors. In other words, the selection of the competitive range proposers under the current regulation depends largely on the proposal ratings as opposed to the CO's subjective determination as to weight of those ratings.

The difference between the former FAR 15.609(a) and the present FAR 15.306(c)(1) is not a matter of semantics. The discrepancy stems from the established view that the CO has wide discretion in using proposal ratings,[13] which ratings are generally aids to sound decision making and not controlling by themselves.[14] By contrast, FAR 15.306(c)(1) requires the agency's heavy reliance on the evaluation scores and other ratings. Therefore, it can be argued that FAR 15.306(c)(1) in placing so much emphasis on ratings installs a wooden approach to procurement decisions instead of a sound, flexible judgment on the relative advantages of proposals.

Another criticism of the regulation is that the literal application of FAR 15.306(c)(1) can lead to irrational results. For example, assume that an offeror has an outstanding technical and management approach, a stellar past performance record, and a fair and reasonable price. However, this offeror's proposal lacks a single mandatory letter of commitment from a key person whom the offeror otherwise mentions extensively in the offer as being part of the team.

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Depending upon the terms of the request for proposals (RFP), such an omission could be a deficiency that would eliminate the offeror from the "most highly rated offerors."[15] No rational CO would conclude that a likely administrative error mandates rejection of this proposer from the competitive range.

Another issue associated with FAR 15.306(c)(1) is whether the protest forums have accepted the revised regulation. True enough, the GAO will comment that contracting agencies are not required to retain a proposal in a competitive range "[w]here the proposal is not among the most highly rated or where the agency otherwise reasonably concludes that the proposal has no realistic prospect of award."[16] However, without saying as much, the GAO has indicated FAR 15.306(c)(1) should not be read (or enforced) literally.

Indeed, the GAO under the revised FAR 15.306(c) has approved offeror exclusions from the competitive range based wholly on the proposition the proposal had "no reasonable chance for award."[17] Under these decisions, competitive range decisions remain within the zone of judgment.[18] While this framework is logical the problem is this approach is no longer the FAR standard. The above-quoted language from GAO decisions is essentially the same as under the superseded FAR 15.609(a). The GAO in a 2017 decision even sustained a protest where the agency eliminated the protester from the competitive range based only on its numerical and adjectival scores (which should have been enough for the agency to prevail) but where the CO otherwise failed to determine whether the offeror had a realistic chance for award.[19] It also appears that the GAO has overlooked the maxim that "technical ratings. . .involve discretionary determinations of procurement officials that a court will not second guess."[20]

The upshot is that the GAO has read out of FAR 15.306(c)(1) the assessment of which offerors are the most "highly rated" and it is evident that the GAO prefers the superseded FAR 15.609(a) "reasonable chance" standard.[21] In general, the COFC has done a better job of staying away from the FAR 15.609(a) standard,[22] although a 2010 COFC opinion applies the (unsupported) rule that the agency "could choose to self-impose the old standard, through the evaluation procedures and methodology incorporated in its source selection plan."[23]

This inconsistency between the decisions and the regulation would likely be finessed by the FAR councils changing the term "most highly rated" to "most highly advantageous." The proper solution is not, as intimated by the above 2010 COFC case, to use an unauthorized FAR deviation.[24] This proposed regulatory change would comport with a CO's broad need for the use of discretion as opposed to being needlessly bound by the ratings.

Because of the GAO's continued usage of the pre-1997 FAR Part 15 rewrite standard, this BRIEFING PAPER similarly will continue to rely on the pre-1997 GAO decisions as appropriate.

Competitive Range Variations

As stated above, FAR 15.306(c)(1) provides that a competitive range is formed for the purpose of holding discussions. Settled law provides that "the acid test for deciding whether discussions have been held after establishment of competitive procurement range is whether it can be said an offeror was provided the opportunity to revise or modify its proposal."[25] Based on these basic principles, when the CO selects offerors for the purpose of conducting clarifications under FAR 15.306(a) or communications under FAR 15.306(b), there is not a competitive range decision.[26] Similarly, the selection of offerors who will participate in a system demonstration as part of the proposal evaluation process may or may not be a competitive range decision under FAR 15.306, depending on the agency's intent, the circumstances of the procurement, and the terms of the RFP.[27]

The hard question here is whether the agency has formed a competitive range when it relies on a single evaluation factor as a "gatekeeper" or "down selection" process for deciding only which offerors will proceed to the next phase of the evaluation process. Assume also that there is no agency plan in place at that point for selecting offerors for discussions, which is the sine qua non of the competitive range. The objection to the proposed gatekeeper procedure, of course, would be that the agency in rejecting offerors upfront ultimately would be making a de facto competitive range decision without consideration of their price (which is generally improper as described below in this BRIEFING PAPER). Until a regulation or decision addresses this scenario, the safest approach would be that the above gatekeeper process would be proper only to eliminate technically unacceptable proposals without consideration of price, which the case law has said is a proper practice.[28]

General Principles Of Evaluation

The evaluation of proposals and the resulting determination of whether an offeror is in the competitive range are matters within the discretion of the contracting agency.[29] The reason is that the agency is responsible for defining its needs and for deciding on the best methods for accommodating them.[30] The GAO also affords the agencies this discretion because contracting officials are most familiar with their requirements and must bear the burden of a defective evaluation.[31] Except as limited by agency regulations, the CO is solely responsible for the competitive range determination.[32] While no FAR requirement exists for a competitive range decision to be made in writing,[33] some agency regulations state otherwise.[34] Certainly it would be prudent for purposes of defending against a possible protest for the procuring activity in every acquisition to create a contemporaneous record of the agency's rationale for the determination of the competitive range.

The initial competitive range determination must be based on the original offers, which means that a firm not submitting its best initial offer runs the risk of exclusion from further consideration.[35] The GAO has said that no matter how capable an offeror might be, if it does not submit an adequately written proposal, it will not be considered in the competitive range.[36] Therefore, in reviewing protests about the reasonableness of the agency's decision to exclude a firm from the competitive range, the GAO will not reevaluate the proposal, independently judge its merits,[37] or refer the controversy to independent technical reviewers.[38] Also, the protester will not meet its burden[39] simply by disagreeing with the agency's judgment[40] or by alleging that the agency took too long in making its decision.[41] Instead, the GAO will only determine from the record whether the evaluation was clearly arbitrary, unreasonable, inconsistent with the announced evaluation factors, or otherwise violative of procurement laws and regulations.[42]

In deciding the competitive range, agencies should treat proposals in a like manner[43] and without unfair or prejudicial motives.[44] The agency may not, however, establish predetermined cutoff scores or other mechanical formulas[45] to qualify firms for additional consideration.[46] The agency also may decide to exclude a firm from the competitive range without discussing the exclusion with the firm beforehand,[47] although the agency may question an offeror about its proposal as part of the ongoing evaluation process provided that these "discussions" do not impact contract requirements or unfairly prejudice other offerors.[48] Also, under the revised FAR 15.306(b), the agency may hold "communications" with firms on the margin of the competitive range.

A conflict exists in the cases on whether the agency is bound by the conventional competitive range principles where the agency after the closing date for the receipt of final proposal revisions holds touch-up negotiations with a single firm on minor issues, such as obtaining small price reductions, that would have no impact on the acceptability of the proposal or the validity of the award decision.[49] The better view is that this class of discussions is improper (and subject to abuse) even if they are characterized as only "touch-up" negotiations because every offeror within the competitive range has the right to change or modify its proposal, including price, for any reason, as long as negotiations remain open.[50]

FAR 15.306(d)(5) contains specific guidelines on the elimination of proposers without allowing them an opportunity for final proposal revisions. If at any point after discussions have commenced, the agency no longer considers the offeror among the "most highly rated" offerors, the agency may eliminate the proposer. The regulation specifically allows the agency in this situation to dispense with further negotiations or even to forbid the offeror from submitting revisions.[51]This policy is consistent with GAO case law predating the 1997 FAR Part 15 rewrite.[52] Of course, the agency must exercise this discretion reasonably.

It bears noting that the agency may "pull the plug" on the offeror in this scenario even because of factors arising outside the proposal, such as patently incorrect responses during negotiations that place the written proposal in jeopardy of being rejected as reflecting the offeror's flawed understanding of the solicitation. The distinction here is that the agency is rejecting the proposal because it has a better understanding of the proposal and the offeror's documented capabilities. The agency is *not* rejecting the proposal simply because it does not like the offeror's oral information (which usually are not a part of the proposal) during discussions.[53]

When the agency properly eliminates an offeror from the competitive range, the agency has no obligation to allow proposal revisions from the concern or to consider the offer further.[54] Prior GAO case law is consistent with current FAR standards.[55] By comparison, if the agency incorrectly excluded the firm to the latter's competitive prejudice, the ideal remedy is for the agency to reopen the procurement,

conduct additional discussions, and otherwise continue the acquisition.[56]

Sometimes, a CO will select a slate of proposers for the purposes of holding discussions without formally designating a "competitive range." These actions are called "de facto" competitive range decisions subject to the usual rules.[57]

Single Offer Range

A competitive range of one offeror is not inherently illegal or improper.[58] In view of the importance of achieving full and open competition in Government procurement,[59] however, the GAO and the other protest forums generally will "closely scrutinize" the agency's decision to create a competitive range of a single offeror[60] (which is not a sole-source procurement).[61] GAO decisions explain this extra scrutiny as follows: "If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposal; if the informational deficiency could be reasonably corrected by limited discussions, then inclusion of [another] proposal in the competitive range and discussions are in order."[62]

Except as provided by agency regulations,[63] the formation of a competitive range with a single offeror is subject to the usual rule that the agency's decision will stand absent a clear showing that it was unreasonable, arbitrary, or violative of procurement laws or regulations.[64] This standard has led to complications as described below.

Some tension exists between the rule that a single offer competitive range warrants extra scrutiny and the concept that the agency's decision will stand absent a clear showing that it was unreasonable, arbitrary, or violative of procurement laws or regulations. The GAO under the revised FAR 15.306(c) should be more deferential to the agencies seeking to create a single offer competitive range. The reason is that under the prior regulation, FAR 15.609(a), the agency was required to include an offeror in the competitive range when a reasonable chance existed that the firm would get the award. In doubtful cases, the same regulation advised that the CO "should" so include the proposer. Clearly, the "tilt" in the prior FAR 15.609(a) was in favor of the marginal proposer. Now, FAR 15.306(c) instructs COs to narrow the field and to include only those firms that are "the most highly rated," based on the evaluation criteria. No longer does the FAR encourage agencies to include the marginal proposer. Therefore, according to one COFC decision, if a clear demarcation exists between one offeror and the rest of the "pack," the cases dispensing with "close scrutiny" are correct and the CO should have greater discretion in making this single offer decision.[65]

Improper Inclusion Of Protester

The GAO no longer considers protests that an agency improperly included the offeror in the competitive range (or invited it to make an oral presentation). The reason is this agency action does not fall within any of the definitions of a "protest" in the GAO's statutory jurisdiction.[66]

Unacceptable Offers

No per se rule prevents an agency from including a technically unacceptable proposal in the competitive range for the purpose of conducting discussions. While exclusion of technically unacceptable proposals is permissible, it is not required.[67] However, the general principle is that an agency may—and at times should[68]—reject an offeror from the competitive range where the offeror has submitted an unacceptable initial proposal *and* where the revisions required are of such a magnitude as to be tantamount to the submission of a new proposal.[69]

Unacceptable offers that would require "major revisions" have no right to be included in the competitive range[70] even if some or many of the deficiencies could possibly have been resolved fairly easily during discussions.[71] Major revisions in this context are considered in light of the relative deficiencies of other offerors[72] and the cumulative weight of the proposal's inadequacies[73] in light of the information reasonably available to the agency at the time of decision.[74] In fact, the agency may exclude a proposal from the competitive range when the record reasonably indicates the firm's noncorrectable inability to meet even a single mandatory solicitation requirement[75] or when the offeror merely parrots back the agency's stated requirements without responding to RFP provisions that require offerors to explain their offers in detail.[76]

By comparison, it would be improper to eliminate an offeror from the competitive range for mere "nonresponsiveness" (as that term roughly applies to negotiated procurement),[77] because such defects can be cured during discussions if the firm otherwise has a reasonable chance for award.[78] When an agency reasonably rejects an offeror from the competitive range, it has no obligation to hold discus-

sions to resolve a deficiency the protester says would have made it more competitive.[79]

The COFC disagrees with some GAO cases that indicate a technically unacceptable offer, per se, is ineligible for inclusion in the competitive range.[80] The GAO in other decisions adheres to the contrary (and better) view.[81] Thus, it bears repeating that even technically unacceptable original offers *may* be entitled to inclusion in the competitive range where the deficiencies are readily correctable. The GAO has remarked that it is "proper" and "preferable" that such proposals be included.[82] The basis for this statement is the definition of the competitive range, which requires only that the firm be one of the highest rated offerors,[83] which could easily include a proposal with one or more deficiencies that are reasonably susceptible of being made acceptable through discussions.[84] Indeed, one key purpose of discussions under FAR 15.306(d)(3) is for the agency and offeror to resolve "deficiencies," so it is clear that offerors in the competitive range can (and commonly do) have deficiencies in their original proposals.

Perhaps the most common variety of an unacceptable proposal is where the offer contains informational deficiencies. "Informational deficiencies" are either major and material proposal omissions or inadequate discussion of fundamental RFP factors.[85] Sometimes it is self-evident that a mere informational gap underlies a proposal problem, but this is not the case where the proposal fails to provide required features and instead describes lesser, unsatisfactory alternatives.[86]

The former General Services Board of Contract Appeals (GSBCA), whose jurisdiction over certain bid protests involving automatic data processing equipment and services was eliminated in 1996[87] and which has since been merged into the Civilian Board of Contract Appeals,[88] approved the GAO's view of one type of a correctable informational deficiency:

> Our understanding of the term "informational deficiency" is similar to that of the [GAO], namely, "deficiencies that could readily be remedied by additional information during discussions, such as the omission of letters of commitment. . .." Key to the traditional notion of informational deficiency is the fact that this type of deficiency can be "readily remedied." The missing information in question need not be developed by any extensive dialogue and often can be provided by a mere unilateral submission by the offeror—as in the case of a missing letter of commitment.[89]

Proposals with significant informational deficiencies may be excluded from the competitive range whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors.[90] The GAO has found that where a proposal is "so informationally deficient that a virtually new proposal would be required," the agency could properly decide to eliminate the firm from the competitive range.[91] The problem, of course, is that these proposal deficiencies prevent the agency from making an informed evaluation of the offeror's proposal.[92] However, a proposal cannot be excluded from the competitive range for lack of substantiating information called for by the RFP if the agency has independently obtained the information.[93]

Occasionally, it will be a simple matter to determine whether a proposal has material informational deficiencies, such as where the vendor fails to submit a required technical proposal.[94] In other cases, however, the question is more difficult when the agency believes the protesters submitted a proposal that the agency deems contains material gaps, but that the aggrieved offeror contends has readily correctable shortcomings. In a leading 1982 decision,[95] the GAO summarized the factors which an agency is to examine before rejecting an offer on this basis:

(1) How definitely the RFP called for the detailed information, the omission of which was relied on by the agency for excluding a proposal from the competitive range;

(2) The nature of the deficiencies, that is, whether they tend to show that the offeror did not understand what it was required to do under the contract or whether they made the proposal inferior but not unacceptable;

(3) Whether the deficiencies were so extensive that the offeror essentially would have to rewrite its proposal to correct them;

(4) Whether only one offeror was found to be in the competitive range; and

(5) Whether the deficient proposal represented a significant cost savings.[96]

When the issue is informational deficiencies, and before the 1997 FAR Part 15 rewrite changed the definition of the competitive range, the GAO would sometimes follow the principle that the agency must keep an informationally deficient proposal in the competitive range unless discussions would be "truly meaningless."[97] This case law using the "meaningless standard" is no longer valid under FAR 15.306(c)—even if it had any support under FAR 15.609(a),

which it did not. The proper test, as stated in FAR 15.306(c)(1), is whether the firm is in the group of the most highly rated proposers, based on all the evaluation criteria.

Relative Approach

Very commonly, the agency will receive offers of varying quality, with some proposals clearly acceptable, some clearly unacceptable, and the remainder somewhere in between. Other times, the agency may receive all acceptable or all unacceptable offers. What principle in these situations should guide the agency in picking the slate of competitive firms?

The GAO has frequently held that the agency may properly determine whether to include a proposal in the competitive range by comparing the initial proposal evaluation scores and the offeror's relative standing among its competitors.[98] The GAO has said: "In determining the competitive range, it is an acceptable practice to compare the evaluation scores and to exclude a proposal that is technically acceptable when, relative to other acceptable offers, it has no reasonable chance of being selected for award."[99] To an extent, this doctrine can be valid under the less inclusive standard of FAR 15.306(c)(1), which allows the agency to narrow the field further to the most highly rated offerors. Nonetheless, the agency should have less reason to invoke the pre-FAR Part 15 rewrite version because now the focus is (or should be) more on the most "highly rated" firms, and less on how all the offerors compare among one other.

Accordingly, even where proposal deficiencies are minor and readily correctable through discussions, the GAO has said an agency may properly exclude an offer from the competitive range where, relative to other acceptable offers, the proposal has no reasonable chance of being selected for award.[100] Therefore an agency does not necessarily treat offerors unequally by including in the competitive range proposals with deficiencies that it considered to be easily correctable, while excluding proposals with deficiencies that the agency did not consider to be easily correctable.[101]

On a related point, the fact that other offerors' proposals may have deficiencies similar to the protester's but were not excluded from the competitive range does not necessarily demonstrate unequal treatment. The inclusion in or exclusion of vendors from the competitive range is based not on comparison of the magnitude of deficiencies in offerors' proposals but on the evaluation of the overall proposal.[102]

The application of this "relative approach" may take into consideration differences in prices, technical ratings, or a combination of both price and technical factors.[103] Reasonable agency projections about the effect of technical improvements on an offeror's revised price are also permissible.[104] The agency may use this "relative" technique even when the result is a competitive range of one offeror.[105] It also frequently turns out that a natural break point will appear between the competitive and noncompetitive firms.[106]

Based on its frequent usage of this "relative" doctrine, the GAO has not strictly enforced its view in other decisions that a proposal should be included in the competitive range unless it is so technically inferior or out-of-line with regard to price that discussions would be meaningless.[107] Indeed, some cases and regulations indicate that these "relative approach" and "meaningless approach" doctrines are synonymous,[108] but this comparison is questionable. The reason is the established doctrine that even acceptable proposals can be rejected from the competitive range, which result could not logically occur under the "meaningless" approach, which is a product of the superseded FAR 15.609(a). As indicated above, an even stronger argument exists against this "meaningless" doctrine based on the less inclusive standard of FAR 15.306(c)(1).

In still other issues, a common misconception among both industry and Government personnel is that an offeror submitting a technically acceptable proposal is automatically entitled to inclusion in the competitive range.[109] The point missed by these persons is that the competitive range must be confined only to those firms that are the "most highly rated" under FAR 15.306(c)(1); there is no reward for firms that merely "place" or "show" in the federal acquisition race. In a similar vein, the GAO has said: "[E]ven a proposal which is technically acceptable or susceptible of being made acceptable may generally be excluded from the competitive range if, relative to other proposals received, it does not stand a real chance for award."[110]

Lastly, the GAO commonly considers protests against exclusion from the competitive range by confining the analysis to the protester's evaluation with no additional comparison of the firms inside the competitive range with the protester.[111] Frequently, the outcome is a denied protest. This mode of analysis can be incorrect. Whether the agency correctly evaluated a protester rejected from the competitive range does not automatically mean that the offeror lacked a reasonable chance for award in relation to the other competitors whose proposals might have been of a like (relative)

quality. If the rejected offeror was of like quality, under the relative approach, with the firms in the competitive range offerors, the agency could have abused its discretion in excluding the protester. Analogous authority supports this proposition.[112]

Role Of Price Or Cost

By statute,[113] regulation,[114] and decisional law,[115] the agency must consider cost or price in making the competitive range determination. Moreover, in this regard, cost or price may emerge as the dominant factor in a competitive range decision, even where the RFP states that technical considerations would have primary importance during the valuation.[116]

While it is true that offerors commonly wait to make price reductions until the revisions, a firm that does not submit its best price at the first opportunity runs the risk of being excluded from further consideration.[117] On the other hand, cost or price generally may not be used as a tiebreaker to determine whether one or another technically equal offeror is within the competitive range.[118]

Because of the statutory and regulatory requirements, the GAO has held that the agency may *not* reject a technically acceptable proposal from the competitive range without consideration of price,[119] even if the proposal is technically inferior to its competitors.[120] The same rule applies when the agency makes a subsequent competitive range decision.[121] On the other hand, the agency may reject a technically unacceptable proposal without considering its price or cost.[122] The fact that a contracting agency did not seriously consider price at the discussion stage of procurement does not establish that it did not seriously consider price when establishing the competitive range.[123]

The requirement that a contracting agency consider price before excluding a technically acceptable proposal from the competitive range does not oblige the Government to include all technically acceptable proposals in the competitive range that have a low price.[124] Furthermore, the agency may reasonably decide to reject even a technically acceptable proposal when it considers the price so much higher than the other acceptable offerors' costs or prices (and the Government estimate)[125] that the firm has no real chance of winning in the competition.[126]

Even where a protester alleges that it would have lowered its price, it is unreasonable to expect that only the protester (and not other offerors) would reduce prices.[127] There is no legal requirement that agencies, in establishing a competitive range, attempt to predict whether, or the extent to which, a particular offeror will reduce its price by examining pricing patterns in other similar procurements.[128]

In this regard, the GAO has said that where an offeror's costs are high relative to those of other offerors, the offeror may be rejected from the competitive range where the agency believes it will not lower its price sufficiently to have a chance for award.[129] The former GSBCA had the same view and said that because offerors can be rejected from the competitive range based on a single factor, they may be rejected for price reasons alone as long as their proposals are considered in their entirety.[130]

Despite the requirement for considering cost or price, a firm is not automatically entitled to be included in the competitive range because it has submitted a very low or even the lowest cost or price.[131] Instead, the agency may reasonably reject even the low dollar proposal when the offer is technically unacceptable and not susceptible to being made acceptable through negotiations[132] *or* when compared relatively to the other offerors, the lowest priced offer does not have a reasonable chance of receiving the award.[133]

Range Revisions

Frequently, the agency may make more than one competitive range determination. An example would be where the agency includes an offeror in the initial competitive range, and then rejects it from the second competitive range because the offeror's revised proposal was technically unacceptable after discussions.[134] The GAO has found no impropriety in multiple competitive range decisions as long as the firm's exclusion from the second or subsequent slate of offerors is ultimately justified under the procurement laws and regulations.[135] Thus, it can be seen that an offeror has no vested right to continue in the competition simply because the agency included it in the original competitive range determination.[136] FAR 15.306(d)(4) now clearly resolves the issue and explicitly permits the agency to eliminate the offeror from the competitive range without additional discussions or the submission of any proposal revisions.[137]

Does the agency make a competitive range decision, i.e., a competitive range of one, where it selects the prospective awardee? In the better view, the GAO has answered this question in the negative: "We do not agree that the mere selection of the prospective awardee amounts to revision of

the competitive range to exclude all the other eligible offerors."[138]

Rejected Proposals

Even where the agency rejects a proposal, no statute or regulation prohibits the CO from inviting the offeror back into the competition before the award as the circumstances warrant, so long as no other firm is prejudiced thereby.[139] The GAO has allowed agencies to reverse their competitive range determinations based on their authority to reevaluate proposals after becoming aware of an erroneous rejection.[140]

Thus, where the agency tentatively decides to make the award on original proposals and rejects a proposal, the CO may place the offeror in the competitive range if the CO later decides that award on original proposals was inappropriate.[141] In addition, the CO may retract a rejection to a firm mistakenly eliminated from the competition.[142] Lastly, where the agency rejects a proposal for a reason that no longer exists after a subsequent RFP amendment, the offeror can be allowed to reenter the competition.[143] The GAO has said that these practices can maximize competition and thereby advance the agency's best interests.[144]

Sometimes, the agency will erroneously inform an offeror that its proposal is in the competitive range. Without a showing of competitive prejudice, the GAO has held that the agency is not estopped—barred—from rejecting the offer for the reasons it would have used to reject the proposal originally, once the error is discovered.[145]

Key Procedural & Litigation Issues

When the CO has rejected an offeror from the competitive range, the Government must provide the unsuccessful offeror a notice of rejection in compliance with FAR 15.503.[146] Under FAR 15.503(a)(1), the CO must "promptly" notify an unsuccessful offeror in writing when excluded from the competitive range or otherwise eliminated from the competition. The notice need only state the basis for the determination and must further prohibit a revision of the proposal. The purpose of such regulations is to give vendors sufficient information to avoid needless expenditure of funds in light of their standing in the procurement and further permits rejected offerors to seek redress early in the procurement process, thereby minimizing disruption to the agency if they prevail.[147]

Notwithstanding this FAR command of prompt notification, the GAO has held that the agency's failure to do so is procedural in nature and does not affect the validity of an otherwise proper procurement absent some competitive prejudice.[148] The GSBCA followed a similar view, although the GSBCA would not consider a late notification a mere procedural informality where the late notification affects the firm's opportunity to obtain meaningful review in a protest.[149]

Because competitive range decisions are among the most frequently litigated issues before the GAO and the COFC, this Briefing Paper will mention some important protest principles in this area. The overriding issue in the litigation is frequently the presence of competitive prejudice. With the usual case, the protester files a preaward challenge against its exclusion from the competitive range. Competitive prejudice is an essential element of every viable protest; the GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions.[150] Similarly, the COFC requires a showing of competitive prejudice for a preaward competitive range exclusion protest but the COFC in this setting will employ the standard postaward substantial prejudice doctrine as opposed to the solicitation nontrivial injury standard.[151]

Guidelines

These *Guidelines* are intended to assist you in understanding the legal issues Government agencies and contractors face related to the competitive range. They are not, however, a substitute for professional advice and representation in any particular situation.

1. Despite the clear difference between the definitions of the competitive range before and after the 1997 FAR Part 15 rewrite, both GAO decisions and to a lesser extent COFC cases continue to approve the older FAR 15.609(a) usage regarding inclusion of only those proposers with a reasonable chance for award. Notwithstanding these questionable decisions, agencies to avoid confusion need to adhere to the revised standard, which means they should eliminate any reliance on the former FAR 15.609(a) standards from planning documents, the solicitation, and the source selection documentation.

2. Various procurement procedures resemble the creation of a competitive range, such as the use of a gatekeeper or a downselect process, and the issue becomes whether the agency has created a de facto competitive range. Good arguments exist on both side of the question. Given the uncer-

tainty, the solution lies within FAR 1.102(d), which allows agencies to follow a business practice so long as the FAR does not address the policy and it is not prohibited by law (statute or case law), Executive Order, or other regulation.

3. FAR 15.306(b) contains an infrequently used tool, "Communications with offerors before establishment of the competitive range." Communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range. Agencies should not overlook this valuable process in making their competitive range decisions.

4. A conflict exists in the cases on whether the agency in holding touch-up discussions with just the awardee after the closing date for final proposal revisions has created a new competitive range subject to all the conventional rules. The concept of touch-up discussions is not self-defining and agency personnel should avoid this practice because of the internal organizational pressures that can push the discussions well-past the touch-up category and create protest grounds accordingly.

5. Agencies on occasion will confront whether a single offeror competition is advisable. Although the cases are divided on whether the "close examination" standard of review has survived the 1997 FAR Part 15 rewrite, the better practice is that agencies should forthrightly do what they think is permissible under the procurement rules and not be deterred by the risk of a possible protest. As stated in FAR 1.102-2(c)(2), "to achieve efficient operations, the [FAR] System must shift its focus from 'risk avoidance' to one of 'risk management.' "

6. One frustrating issue for protesters against their exclusion of an offeror from the competitive range is that agencies are not always forthcoming in providing the documentation for applying the relative approach. Even if the agency does not hand over the proposals of firms in the competitive range, the GAO under 4 C.F.R. § 21.3(c) should require upon the protester's request disclosure of all contemporaneous explanations of the competitive range determination.

ENDNOTES:

[1]Nat'l Med. Diagnostics, Inc., Comp. Gen. Dec. B-232238, 88-2 CPD ¶ 553.

[2]FAR 15.306(c); Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; National Ass'n of State Dirs. of Special Educ., Inc., Comp. Gen. Dec. B-233296, 89-1 CPD ¶ 189; Loral EOS/STS, Inc., Comp. Gen. Dec. B-230013, 88-1 CPD ¶ 467.

[3]See 10 U.S.C.A. § 2305(b)(4); 41 U.S.C.A. § 3703.

[4]Info. Sys. & Networks Corp., Comp. Gen. Dec. B-220661, 86-1 CPD ¶ 30.

[5]DDD Co., Comp. Gen. Dec. B-228850, 87-2 CPD ¶ 508.

[6]FAC 97-02, 62 Fed. Reg. 51224 (Sept. 30, 1997) (revising FAR pt. 15).

[7]Info. Sys. & Networks Corp., Comp. Gen. Dec. B-220661, 86-1 CPD ¶ 30; Fairchild Weston Sys., Inc., Comp. Gen. Dec. B-218470, 85-2 CPD ¶ 39.

[8]See Cotton & Co., Comp. Gen. Dec. B-210849, 83-2 CPD ¶ 451.

[9]FAR 15.306(c)(2); see Portfolio Disposition Mgmt. Grp. LLC v. United States, 64 Fed. Cl. 1 (2005) (noting absence of specific guidance for controlling the CO's determination).

[10]Bean Stuyvesant, L.L.C. v. United States, 48 Fed. Cl. 303, 340 (2000), 43 GC ¶ 14 (citing 62 Fed. Reg. 51224, 51226 (1997)).

[11]ACC Constr. Co., Comp. Gen. Dec. B-288934, 2001 CPD ¶ 190; Phoenix Grp., Comp. Gen. Dec. B-250074.3, 93-2 CPD ¶ 264.

[12]See DFARS 215.306(c) (agencies are expected to create a competitive range for acquisitions at or above $100 million).

[13]Lynxnet, LLC, Comp. Gen. Dec. B-409791 et al., 2014 CPD ¶ 233 (technical evaluators have wide discretion when assigning ratings).

[14]See Opti-Lite Optical, Inc., Comp. Gen. Dec. B-281693, 99-1 CPD ¶ 61, 41 GC ¶ 242 (while adjectival ratings and/or point scores may be useful guides, they are generally not controlling and must be supported by an agency's consideration of the relative strengths and weaknesses in firms' proposals).

[15]See Nash, "Evaluating Key Personnel: The Importance of Letters of Commitment or Intent," 19 Nash & Cibinic Rep. ¶ 31 (June 2005) (examining cases).

[16]LINTECH, LLC, Comp. Gen. Dec. B-409089 et al., 2014 CPD ¶ 38; see also Pinnacle Solutions, Inc., Comp. Gen. Dec. B-414360, 2017 CPD ¶ 172, 59 GC ¶ 228 ("[A]n agency may eliminate an acceptable proposal from the competitive range where the proposal is not among the most highly rated or has no realistic prospect of award.").

[17]E.g., TransAtlantic Lines, LLC, Comp. Gen. Dec. B-414148, 2017 CPD ¶ 163 (endorsing agency's determination that "in the agency's judgment, the protester's proposal lacked a reasonable chance of receiving award"); Novavax Inc., Comp. Gen. Dec. B-286167 et al., 2000 CPD ¶ 202, 43 GC ¶ 27 (noting "the entire concept of a competitive range. . .contemplates a selection by the contracting officer of the proposals which, as they stand at the time, have a reasonable chance of award"); Lakeside Escrow & Title Agency, Inc., Comp. Gen. Dec. B-310331.3, 2008 CPD ¶ 14, and cases cited therein.

[18]See ECC Renewables, LLC, Comp. Gen. Dec. B-408907 et al., 2014 CPD ¶ 9, at *5 ("The evaluation of

proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency."); see also QBE, LLC v. United States, 120 Fed. Cl. 397, 402 (2015) ("[COs] have particularly broad discretion in determining the competitive range and such decisions are not disturbed unless clearly unreasonable.").

[19]See Pinnacle Solutions, Inc., Comp. Gen. Dec. B-414360, 2017 CPD ¶ 172, 59 GC ¶ 228. See generally Nash, "Competitive Range Determinations: What Is the Standard?," 31 Nash & Cibinic Rep. NL ¶ 47 (Sept. 2017).

[20]E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996), 38 GC ¶ 172; see also Portfolio Disposition Mgmt. Grp. LLC v. United States, 64 Fed. Cl. 1 (2005) (applying rule to competitive range determinations).

[21]Envtl. Restoration, LLC, Comp. Gen. Dec. B-413781, 2017 CPD ¶ 15, at *2; Pinnacle Solutions, Inc., Comp. Gen. Dec. B-414360, 2017 CPD ¶ 172, 59 GC ¶ 228.

[22]See, e.g., Bean Stuyvesant, L.L.C. v. United States, 48 Fed. Cl. 303 (2000), 43 GC ¶ 14 (approving agency competitive range decision based on the ratings).

[23]USfalcon, Inc. v. United States, 92 Fed. Cl. 436, 459 (2010).

[24]See FAR 1.401 (listing FAR deviations, such as implementing a procurement policy unmentioned in the particular agency's regulations).

[25]Rivada Mercury, LLC v. United States, 131 Fed. Cl. 663, 679 (2017).

[26]Rivada Mercury, LLC v. United States, 131 Fed. Cl. 663, 679-80 (2017) (explaining "clarifications" and "communications").

[27]Firearms Training Sys., Inc. v. United States, 41 Fed. Cl. 743 (1998).

[28]See, e.g., TMC Design Corp., Comp. Gen. Dec. B-296194.3, 2005 CPD ¶ 158; Intraspace Corp., Comp. Gen. Dec. B-237853, 90-1 CPD ¶ 327, 69 Comp. Gen. 351; HCA Gov't Servs., Inc., Comp. Gen. Dec. B-224434, 86-2 CPD ¶ 611; Proffit & Fowler, Comp. Gen. Dec. B-219917, 85-2 CPD ¶ 566.

[29]Hummer Assocs., Comp. Gen. Dec. B-236702, 90-1 CPD ¶ 12.

[30]Talco, Inc., Comp. Gen. Dec. B-235702, 89-2 CPD ¶ 171.

[31]Madison Servs., Inc., Comp. Gen. Dec. B-236776, 89-2 CPD ¶ 475; Hydroscience, Inc., Comp. Gen. Dec. B-227989.2, 87-2 CPD ¶ 501.

[32]National Med. Diagnostics, Inc., Comp. Gen. Dec. B-232238, 88-2 CPD ¶ 553; Loral EOS/STS, Inc., Comp. Gen. Dec. B-230013, 88-1 CPD ¶ 467; Birch & Davis Int'l, Inc. v. Agency for Int'l Dev., GSBCA No. 11643-P-R, 92-3 BCA ¶ 25082, vacated and remanded on other grounds, 4 F.3d 970 (Fed. Cir. 1993) (reasonableness of a competitive range determination is based on the specific circumstances).

[33]Latecoere Int'l, Inc.—Advisory Opinion, Comp. Gen. Dec. B-239113.3, 92-1 CPD ¶ 70. But see Red River Computer Co. v. United States, 120 Fed. Cl. 227, 239 (2015) (stating incorrectly that FAR 15.308 requires such a document even though FAR 15.308 addresses only the final evaluation process).

[34]E.g., Army Source Selection Supplement para. 3.4 (Nov. 28, 2017) (applicable under AFARS 5115.000(1)).

[35]Sys. Integrated, Comp. Gen. Dec. B-225055, 87-1 CPD ¶ 114; Jack Faucett Assocs., Comp. Gen. Dec. B-224414, 86-2 CPD ¶ 310; Informatics Gen. Corp., Comp. Gen. Dec. B-210709, 83-2 CPD ¶ 47.

[36]Jack Faucett Assocs., Comp. Gen. Dec. B-253329, 93-2 CPD ¶ 154; Data Controls/North, Inc., Comp. Gen. Dec. B-233628.4, 89-1 CPD ¶ 354.

[37]Am. Contract Health, Inc., Comp. Gen. Dec. B-236544.2, 90-1 CPD ¶ 59; SECHAN Elecs., Inc., Comp. Gen. Dec. B-234308, 89-1 CPD ¶ 522; S.T. Research Corp., Comp. Gen. Dec. B-232264, 88-2 CPD ¶ 435.

[38]Perceptics Corp., Comp. Gen. Dec. B-227170, 87-2 CPD ¶ 211; Advanced ElectroMagnetics, Inc., Comp. Gen. Dec. B-208271, 83-1 CPD ¶ 360.

[39]Intraspace Corp., Comp. Gen. Dec. B-237853, 90-1 CPD ¶ 327, 69 Comp. Gen. 351; Mark Dunning Indus., Inc., Comp. Gen. Dec. B-230058, 88-1 CPD ¶ 364.

[40]Intraspace Corp., Comp. Gen. Dec. B-237853, 90-1 CPD ¶ 327, 69 Comp. Gen. 351; S. Adelman Assocs., Comp. Gen. Dec. B-234678, 89-2 CPD ¶ 19; Allied Mgmt. of Tex., Inc., Comp. Gen. Dec. B-232736.2, 89-1 CPD ¶ 485; Am. Optical Corp., Comp. Gen. Dec. B-228535, 88-1 CPD ¶ 127.

[41]JDR Sys. Corp., Comp. Gen. Dec. B-224639, 84-2 CPD ¶ 325. Compare Graphics Commc'ns Sys., Inc., Comp. Gen. Dec. B-170504 et al., 1971 WL 5631 (decision should be made as soon as possible after receipt of proposals).

[42]Hummer Assocs., Comp. Gen. Dec. B-236702, 90-1 CPD ¶ 12; Defense Techs., Inc., Comp. Gen. Dec. B-237242, 89-2 CPD ¶ 606; SECHAN Elecs., Inc., Comp. Gen. Dec. B-234308, 89-1 CPD ¶ 522; Validity Corp., Comp. Gen. Dec. B-233832, 89-1 CPD ¶ 389; Data Controls/ North, Inc., Comp. Gen. Dec. B-233628.4, 89-1 CPD ¶ 354; TELESIS Corp., Comp. Gen. Dec. B-299804, 2007 CPD ¶ 150, at *6 (denying protest where the consequence of a sustain decision would have been only a comparatively small change in the protester's evaluation scoring).

[43]See Isometrics, Inc. v. United States, 5 Cl. Ct. 420 (1984). Compare Nations, Inc., Comp. Gen. Dec. B-280048, 99-2 CPD ¶ 94 (competitive range decision improper where two offerors had similar proposal deficiencies but agency admitted one offeror to the competitive range) with NCLN20, Inc., Comp. Gen. Dec. B-287692, 2001 CPD ¶ 136 (competitive range decision proper where based on the entire proposal, and not a single deficiency, and other offerors had deficiencies similar to the protester's, but were not excluded).

[44]Aviation Enters., Inc., Comp. Gen. Dec. B-223175, 86-2 CPD ¶ 340; GTE Gov't Sys. Corp., Comp. Gen. Dec. B-222587, 86-2 CPD ¶ 276; Proffitt & Fowler, Comp. Gen. Dec. B-219917, 85-2 CPD ¶ 566; Advanced ElectroMagnetics, Inc., Comp. Gen. Dec. B-208271, 83-1 CPD ¶ 360.

[45]Modern Sanitation Sys. Corp., Comp. Gen. Dec.

B-245469, 92-1 CPD ¶ 9; Monarch Enters., Inc., Comp. Gen. Dec. B-233303, 89-1 CPD ¶ 222; NKF Eng'g Assocs., Inc., Comp. Gen. Dec. B-205110, 82-1 CPD ¶ 118; National Veterans Law Ctr., Comp. Gen. Dec. B-198738, 81-1 CPD ¶ 58; To the Secretary of Transp., Comp. Gen. Dec. B-169645, 1970 CPD ¶ 69.

[46]But see To Paul & Gordon, Comp. Gen. Dec. B-174870, 1972 CPD ¶ 114 (protest denied because practice not prejudicial under the circumstances); PRC Computer Ctr., Inc., Comp. Gen. Dec. B-178205, 75-2 CPD ¶ 35 (same).

[47]E.-W. Riggers & Constructors, Inc., Comp. Gen. Dec. B-213091, 84-1 CPD ¶ 478.

[48]Allied-Signal Aerospace Co., Comp. Gen. Dec. B-236050, 89-2 CPD ¶ 428; Simulators Ltd., Inc., Comp. Gen. Dec. B-219804, 85-2 CPD ¶ 625.

[49]See Dubinsky v. United States, 43 Fed. Cl. 243 (1999), 41 GC ¶ 263 (citing COFC and GAO cases).

[50]Joint Action In Community Service, Inc., Comp. Gen. Dec. B-214564, 84-2 CPD ¶ 228.

[51]FAR 15.306(d)(5); see FAC 2001-02, 66 Fed. Reg. 65368 (Dec. 18, 2001) (redesignating FAR 15.306(d)(4) as (d)(5)).

[52]United Computing Servs., Inc., Comp. Gen. Dec. B-204045, 81-2 CPD ¶ 247, at *1 ("[W]here it is clear the proposal should not continue in the competitive range, following discussions, it is permissible to drop the proposal without allowing the submission of a revised proposal."); see also McManus Sec. Sys., Comp. Gen. Dec. B-231105, 88-2 CPD ¶ 68; InterAmerica Legal Sys., Inc., Comp. Gen. Dec. B-224443, 86-2 CPD ¶ 304; Johnston Commc'ns, Comp. Gen. Dec. B-221346, 86-1 CPD ¶ 211; Arthur D. Little, Inc., Comp. Gen. Dec. B-213686, 84-2 CPD ¶ 149; RAM Enters., Inc., Comp. Gen. Dec. B-209455, 83-1 CPD ¶ 647.

[53]But see FAR 15.403-3(a)(4) (an offeror who does not comply with a requirement to submit other than certified cost or pricing data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award (and inferentially ineligible for the competitive range) absent the approval of the Head of the Contracting Activity).

[54]FAR 15.307(a).

[55]See Teledyne Brown Eng'g, Inc., Comp. Gen. Dec. B-237368, 90-1 CPD ¶ 285; Madison Servs., Inc., Comp. Gen. Dec. B-236776, 89-2 CPD ¶ 475; Star Techs., Inc., Comp. Gen. Dec. B-233489, 89-1 CPD ¶ 279; StaffAll, Comp. Gen. Dec. B-233205, 89-1 CPD ¶ 195; Senior Commc'ns Servs., Comp. Gen. Dec. B-233173, 89-1 CPD ¶ 37; Micronesia Media Distributor, Inc., Comp. Gen. Dec. B-222443, 86-2 CPD ¶ 72.

[56]RMI, Inc., Comp. Gen. Dec. B-203652, 83-1 CPD ¶ 423.

[57]See M.W. Kellogg Co./Siciliana Appalti Costruzioni S.p.A. v. United States, 10 Cl. Ct. 17, 23 (1986). For other cases exploring this concept, see Serco Inc. v. United States, 81 Fed. Cl. 463 (2008), 50 GC ¶ 89; Brown & Pipkins, LLC v. United States, No. 06-732C, 2007 WL 5172317 (Fed. Cl. 2007); Dubinsky v. United States, 43 Fed. Cl. 243 (1999), 41 GC ¶ 263; CACI Field Servs., Inc. v. United States, 13 Cl. Ct. 718 (1987), aff'd, 854 F.2d 464 (Fed. Cir. 1988).

[58]SDS Petroleum Prods., Inc., Comp. Gen. Dec. B-280430, 98-2 CPD ¶ 59 (applying FAR 15.306(c)); STS Strategic Techs. & Scis., Inc., Comp. Gen. Dec. B-257980, 94-2 CPD ¶ 194; Aerospace Design, Inc., Comp. Gen. Dec. B-247793, 92-2 CPD ¶ 11; Birch & Davis Int'l, Inc. v. Christopher, 4 F.3d 970 (Fed. Cir. 1993) (good summary of GAO cases); Bean Stuyvesant, L.L.C. v. United States, 48 Fed. Cl. 303 (2000), 43 GC ¶ 14.

[59]CSP Assocs., Inc., Comp. Gen. Dec. B-228229, 88-1 CPD ¶ 87; Coopers & Lybrand, Comp. Gen. Dec. B-224213, 87-1 CPD ¶ 100.

[60]Besserman Corp., Comp. Gen. Dec. B-237327, 90-1 CPD ¶ 191; Fed. Servs., Inc., Comp. Gen. Dec. B-235661, 89-2 CPD ¶ 182; Senior Commc'ns Servs., Comp. Gen. Dec. B-233173, 89-1 CPD ¶ 37; CPT Corp., GSBCA No. 8134-P, 85-3 BCA ¶ 18454; Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1 (1983); Int'l Outsourcing Servs., L.L.C. v. United States, 69 Fed. Cl. 40 (2005) (decision can be upheld where reasonable even with close scrutiny); see also Nash, "Competitive Range of One: Is There Special Scrutiny?," 13 Nash & Cibinic Rep. ¶ 61 (Nov. 1999).

[61]Decom Sys., Comp. Gen. Dec. B-215167, 84-2 CPD ¶ 333.

[62]Besserman Corp., Comp. Gen. Dec. B-237327, 90-1 CPD ¶ 191, at *3; see also Nat'l Sys. Mgmt. Corp., Comp. Gen. Dec. B-242440, 91-1 CPD ¶ 408; Optical Data Sys.-Texas, Inc., Comp. Gen. Dec. B-227755, 87-2 CPD ¶ 393.

[63]See DFARS 215.371 (also noting exceptions).

[64]Novel Pharm., Inc., Comp. Gen. Dec. B-255374, 94-1 CPD ¶ 149; InterAm. Research Assocs., Inc., Comp. Gen. Dec. B-253698.2, 93-2 CPD ¶ 288; HITCO, Comp. Gen. Dec. B-232093, 88-2 CPD ¶ 337; Everpure, Inc., Comp. Gen. Dec. B-226395.3, 88-2 CPD ¶ 264; CSP Assocs., Inc., Comp. Gen. Dec. B-228229, 88-1 CPD ¶ 87; Sys. Integrated, Comp. Gen. Dec. B-225055, 87-1 CPD ¶ 114. Compare Coopers & Lybrand, Comp. Gen. Dec. B-224213, 87-1 CPD ¶ 100 (sustaining protest where agency improperly created a competitive range of one offeror); Telcom Sys. Servs., Inc. v. Dep't of Interior, GSBCA No. 12993-P, 95-1 BCA ¶ 27346 (upholding exclusion of an unacceptable initial proposal which could be made acceptable with major modifications or revisions where only one offeror remains in the competitive range); EER Sys. Corp., Comp. Gen. Dec. B-256383 et al., 94-1 CPD ¶ 354 (upholding decision that the single competitive range offer had a decisive technical edge over its competitors and the offers did not differ appreciably from a price standpoint); L-3 Commc'ns EOTech, Inc. v. United States, 83 Fed. Cl. 643 (2008) (decision arbitrary and capricious because of disparate treatment of proposers; also noting that a competitive range of one offeror require "close scrutiny" in a bid protest).

[65]Rivada Mercury, LLC v. United States, 131 Fed. Cl. 663 (2017) (comprehensive discussion of "close scrutiny standard"); accord Sys. Dynamics Int'l, Inc. v. United States, 130 Fed. Cl. 499 (2017); see also Nash, "Competitive Range

of One: Is There Special Scrutiny?," 13 Nash & Cibinic Rep. ¶ 61 (Nov. 1999) (arguing GAO has abandoned the special scrutiny rule).

[66]Champion Bus. Servs., Inc., Comp. Gen. Dec. B-290556, 2002 CPD ¶ 109; 4 C.F.R. § 21.5(j); see also Nash, "Being Kept in the Competitive Range: Not a Protestable Issue!," 16 Nash & Cibinic Rep. ¶ 50 (Oct. 2002).

[67]Beyel Bros., Inc., Comp. Gen. Dec. B-406640 et al., 2012 CPD ¶ 211.

[68]Fairfield Mach. Co., Comp. Gen. Dec. B-228015, 87-2 CPD ¶ 562.

[69]Source AV, Inc., Comp. Gen. Dec. B-234521, 89-1 CPD ¶ 578; CSP Assocs., Inc., Comp. Gen. Dec. B-228229, 88-1 CPD ¶ 87; see also Chant Eng'g Co., Comp. Gen. Dec. B-281521, 99-1 CPD ¶ 45, 41 GC ¶ 173 (technically unacceptable proposal was not required to be included in the competitive range); Clean Serv. Co., Comp. Gen. Dec. B-281141.3, 99-1 CPD ¶ 36 (proposal may be rejected from participation in the competitive range where agency disregards a portion of a proposal because the offeror violated RFP restrictions on page limits).

[70]Abt Assocs., Inc., Comp. Gen. Dec. B-237060.2, 90-1 CPD ¶ 223; Talco, Inc., Comp. Gen. Dec. B-235702, 89-2 CPD ¶ 171; Am. Training Aids, Inc., Comp. Gen. Dec. B-232291, 88-2 CPD ¶ 600; Fairchild Weston Sys., Inc., Comp. Gen. Dec. B-227555.4, 88-1 CPD ¶ 168; CAP, Joint Venture, Comp. Gen. Dec. B-229571, 88-1 CPD ¶ 95; W & D Ships Deck Works, Inc. v. United States, 39 Fed. Cl. 638 (1997).

[71]SECHAN Elecs., Inc., Comp. Gen. Dec. B-234308, 89-1 CPD ¶ 522; Fairfield Mach. Co., Comp. Gen. Dec. B-228015, 87-2 CPD ¶ 562; Jack Faucett Assocs., Comp. Gen. Dec. B-253329, 93-2 CPD ¶ 154 (even where individual deficiencies may be susceptible to correction through discussions, the aggregate of many such deficiencies may preclude an agency from making an intelligent evaluation); Info. Scis. Corp. v. United States, 80 Fed. Cl. 759 (2008) (rejection of an offeror from the competition is not required where clarifications would resolve any concerns with a proposal); ECC Renewables, LLC, Comp. Gen. Dec. B-408907.3 et al., 2014 CPD ¶ 60 (rejection from competitive range reasonable where agency concluded that protesters could not easily overcome their failure to submit the requisite number of acceptable projects).

[72]Pace Data Sys., Inc., Comp. Gen. Dec. B-236083.2, 89-2 CPD ¶ 429; Little People's Productivity Ctr., Inc., Comp. Gen. Dec. B-233070.2, 89-1 CPD ¶ 262; Imagineering Sys. Corp., Comp. Gen. Dec. B-228434.2, 88-1 CPD ¶ 109; Educ. Computer Corp., Comp. Gen. Dec. B-227285.3, 87-2 CPD ¶ 274.

[73]Pace Data Sys., Inc., Comp. Gen. Dec. B-236083.2, 89-2 CPD ¶ 429; SECHAN Elecs., Inc., Comp. Gen. Dec. B-234308, 89-1 CPD ¶ 522; Rice Servs., Ltd., Comp. Gen. Dec. B-232610, 88-2 CPD ¶ 514; Fairfield Mach. Co., Comp. Gen. Dec. B-228015, 87-2 CPD ¶ 562; Magnavox Advanced Prods. & Sys. Co., Comp. Gen. Dec. B-215426, 85-1 CPD ¶ 146; Ctr. for Employ't Training, Comp. Gen. Dec. B-203555, 82-1 CPD ¶ 252. But see Isometrics, Inc. v. United States, 5 Cl. Ct. 420 (1984) (rejecting cumulative defects theory under particular circumstances).

[74]ARINC Research Corp., Comp. Gen. Dec. B-248338, 92-2 CPD ¶ 172.

[75]Swiftships, Inc., Comp. Gen. Dec. B-235858, 89-2 CPD ¶ 349; Digital Equip. Corp., Comp. Gen. Dec. B-207312, 82-2 CPD ¶ 118; To Hollander Assocs., Comp. Gen. Dec. B-170154(2), 1971 WL 5867.

[76]Aquila Techs. Grp., Inc., Comp. Gen. Dec. B-224373, 86-2 CPD ¶ 500, at *6 (citing Roach Mfg. Corp., Inc., Comp. Gen. Dec. B-208574, 83-1 CPD ¶ 547).

[77]See LINTECH, LLC, Comp. Gen. Dec. B-409089 et al., 2014 CPD ¶ 38 (deeming insufficient an allegation that a proposal should have been summarily rejected from the competitive range because it contains a deficiency).

[78]Consol. Controls Corp., Comp. Gen. Dec. B-185979, 76-2 CPD ¶ 261.

[79]Wirt Inflatable Specialists, Inc., Comp. Gen. Dec. B-282554, 99-2 CPD ¶ 34.

[80]See Labat-Anderson, Inc. v. United States, 42 Fed. Cl. 806 (1999) (citing cases).

[81]See Inco, Inc., Comp. Gen. Dec. B-213344, 84-1 CPD ¶ 686; SWR, Inc., Comp. Gen. Dec. B-286229, 2000 CPD ¶ 196 (a proposal can still be in the competitive range when it contains weaknesses or deficiencies); see also A Plus Servs. Unlimited, Comp. Gen. Dec. B-260298.2, 95-2 CPD ¶ 16 (agency can reasonably include in the competitive range offerors originally deemed unacceptable).

[82]Inco, Inc., Comp. Gen. Dec. B-213344, 84-1 CPD ¶ 686, at *3.

[83]FAR 15.306(c)(1).

[84]Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; Leigh Instruments, Ltd., Comp. Gen. Dec. B-233270, 89-1 CPD ¶ 232; Turner Int'l, Inc., Comp. Gen. Dec. B-232049, 88-2 CPD ¶ 434. Compare e-Mgmt., Comp. Gen. Dec. B-407980 et al., 2013 CPD ¶ 115 (agency may exclude offeror from competitive range for failure to meet an RFP requirement where discussions did not pose a reasonable prospect of curing the deficiency).

[85]HITCO, Comp. Gen. Dec. B-232093, 88-2 CPD ¶ 337; Potomac Scheduling Co., Comp. Gen. Dec. B-213927, 84-2 CPD ¶ 162; Scan Optics, Inc., Comp. Gen. Dec. B-211048, 84-1 CPD ¶ 464; Tex. Med. Instruments, Comp. Gen. Dec. B-206405, 82-2 CPD ¶ 122; see also W & D Ships Deck Works, Inc. v. United States, 39 Fed. Cl. 638 (1997) (giving weight to numerous GAO decisions on the competitive range).

[86]Cincinnati Elecs. Corp., Comp. Gen. Dec. B-253814, 93-2 CPD ¶ 205.

[87]Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996).

[88]National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847(a)–(d), 119 Stat. 3136, 3391–95 (2006).

[89]Birch & Davis Int'l, Inc. v. Agency for Int'l Dev., GSBCA No. 11643-P-REM, 95-2 BCA ¶ 27782 (citations

omitted).

[90]Unified Bus. Techs., Inc., Comp. Gen. Dec. B-411056, 2015 CPD ¶ 151. Compare Harris Data Commc'ns, Inc. v. United States, 2 Cl. Ct. 229, 241, aff'd, 723 F.2d 69 (Fed. Cir. 1983) (noting the distinction between "proposals which failed to furnish any information as to one or more RFP requirements, on the one hand, and proposals which respond to the RFP requirements, but merely failed to provide sufficient detail, on the other.").

[91]Inter-Con Sec. Sys., Inc., Comp. Gen. Dec. B-235248, 89-2 CPD ¶ 148, at *3.

[92]Associated Aircraft Mfg. & Labor, Inc., Comp. Gen. Dec. B-241639, 90-2 CPD ¶ 366; Fairfield Mach. Co., Comp. Gen. Dec. B-228015, 87-2 CPD ¶ 562; Twin City Constr. Co., Comp. Gen. Dec. B-222455, 86-2 CPD ¶ 113.

[93]Integrated Sys. Grp., Inc., GSBCA No. 11156-P, 91-2 BCA ¶ 23961.

[94]Talco, Inc., Comp. Gen. Dec. B-235702, 89-2 CPD ¶ 171.

[95]Spectrum Leasing Corp., Comp. Gen. Dec. B-205781, 82-1 CPD ¶ 383.

[96]Accord Source AV, Inc., Comp. Gen. Dec. B-234521, 89-1 CPD ¶ 578; McElwain, Inc., Comp. Gen. Dec. B-225772, 87-1 CPD ¶ 545; XYZTEK Corp., Comp. Gen. Dec. B-214704, 84-2 CPD ¶ 204; Servrite Int'l, Ltd., Comp. Gen. Dec. B-187197, 76-2 CPD ¶ 325; Blue Chip Computers Co., GSBCA No. 11355-P, 92-1 BCA ¶ 24498; Harris Data Commc'ns, Inc. v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983).

[97]Falcon Sys., Inc., Comp. Gen. Dec. B-213661, 84-1 CPD ¶ 658; see also Coopers & Lybrand, Comp. Gen. Dec. B-224213, 87-1 CPD ¶ 100. Compare Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1340 (Fed. Cir. 2001), 43 GC ¶ 29 ("a proposal must be treated as competitive as long as it is not so inferior as to render its terms meaningless"); Birch & Davis Int'l, Inc. v. Christopher, 4 F.3d 970 (Fed. Cir. 1993) (applying "meaningless" test to all competitive range decisions).

[98]KASDT Corp., Comp. Gen. Dec. B-236661, 89-2 CPD ¶ 576; Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; Source AV, Inc., Comp. Gen. Dec. B-234521, 89-1 CPD ¶ 578; Info. Spectrum, Inc., Comp. Gen. Dec. B-233208, 89-1 CPD ¶ 187; Sys. Integrated, Comp. Gen. Dec. B-225055, 87-1 CPD ¶ 114.

[99]MAR, Inc., Comp. Gen. Dec. B-246889, 92-1 CPD ¶ 367.

[100]Cont'l Technical Servs. of Ga., Inc., Comp. Gen. Dec. B-259681, 95-1 CPD ¶ 204.

[101]ECC Renewables, LLC, Comp. Gen. Dec. B-408907 et al., 2014 CPD ¶ 9.

[102]Red River Computer Co. v. United States, 120 Fed. Cl. 227 (2015); see also ABM Gov't Servs., LLC, Comp. Gen. Dec. B-410991.2, 2015 CPD ¶ 130 (no right exists to inclusion in a competitive range based on assertion that the protester's proposal deficiencies were easily correctable notwithstanding that other offerors with easily correctable deficiencies in their proposals were admitted to the competitive range); EER Sys. Corp., Comp. Gen. Dec. B-256383 et al.., 94-1 CPD ¶ 354, 36 GC ¶ 407 (an offer can be rejected from the competitive range even when other firm(s) in the competitive range have weaknesses or deficiencies that must be eliminated through discussions).

[103]Panasonic Indus. Co., Comp. Gen. Dec. B-232168.2, 88-2 CPD ¶ 519; Gould Def. Sys., Inc., Comp. Gen. Dec. B-199392.3 et al., 83-2 CPD ¶ 174 (approving tradeoff analysis); see also Dixon Grp., Inc., Comp. Gen. Dec. B-406201 et al., 2012 CPD ¶ 150 (agencies are not required to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award as compared to a substantially lower priced and higher technically rated proposal, even if that proposal is the second highest rated).

[104]Associated Corp., Comp. Gen. Dec. B-225562, 87-1 CPD ¶ 436; Gould Defense Sys., Inc., Comp. Gen. Dec. B-199392.3 et al., 83-2 CPD ¶ 174.

[105]Source AV, Inc., Comp. Gen. Dec. B-234521, 89-1 CPD ¶ 578; Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; StaffAll, Comp. Gen. Dec. B-233205, 89-1 CPD ¶ 195.

[106]See Arsenault Acquisition Corp., Comp. Gen. Dec. B-276959, 97-2 CPD ¶ 74.

[107]See Ameriko Maint. Co., Comp. Gen. Dec. B-216406, 85-1 CPD ¶ 255; Magnavox Advanced Prods. & Sys. Co., Comp. Gen. Dec. B-215426, 85-1 CPD ¶ 146; Leo Kanner Assocs., Comp. Gen. Dec. B-213520, 84-1 CPD ¶ 299; Univox Cal., Inc., Comp. Gen. Dec. B-210941, 83-2 CPD ¶ 395; ICF, Inc., Comp. Gen. Dec. B-204459, 82-1 CPD ¶ 339. For other forums adopting the meaningless doctrine, see Metro. Van & Storage, Inc. v. United States, 92 Fed. Cl. 232 (2010); Harris Data Commc'ns, Inc. v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983); Rudolph F. Matzer & Assocs., Inc. v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972); Corporate Jets, Inc., GSBCA No. 11049-P, 91-2 BCA ¶ 23998; see USfalcon, Inc. v. United States, 92 Fed. Cl. 436 (2010) (noting questionable vitality of the earlier cases).

[108]M.W. Kellogg Co./Siciliana Appalti Costruzioni S.p.A. v. United States, 10 Cl. Ct. 17 (1986); Birch & Davis Int'l, Inc. v. Christopher, 4 F.3d 970 (Fed. Cir. 1993) (by implication).

[109]See Hummer Assocs., Comp. Gen. Dec. B-236702, 90-1 CPD ¶ 12; Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; see also Red River Computer Co. v. United States, 120 Fed. Cl. 227 (2015) (an agency is not required to include in the competitive range all technically acceptable proposals that have a low price).

[110]Sterling Servs., Inc., Comp. Gen. Dec. B-232578, 88-2 CPD ¶ 513, at *2; see also Info. Sys. & Network Corp., Comp. Gen. Dec. B-237687, 90-1 CPD ¶ 203; Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; Digital Radio Corp., Comp. Gen. Dec. B-216441, 85-1 CPD ¶ 526; Int'l Health Mgmt. Corp.—Reconsideration, Comp. Gen. Dec. B-254468.2, 93-2 CPD ¶ 183 (an agency's determination to exclude a proposal from the competitive range can be unobjectionable where the record shows that lower priced, technically superior proposals have been received).

[111]See, e.g., Cylab Inc., Comp. Gen. Dec. B-402716, 2010 CPD ¶ 163; Lawrence Battelle, Inc., Comp. Gen. Dec. B-404775, 2011 CPD ¶ 100; Hi-Tec Sys., Inc., Comp. Gen. Dec. B-402590 et al., 2010 CPD ¶ 156.

[112]Cf. Nations, Inc., Comp. Gen. Dec. B-280048, 99-2 CPD ¶ 94 (competitive range decision improper where two offerors had similar proposal deficiencies but agency admitted one offeror to the competitive range).

[113]See 10 U.S.C.A. § 2305(a)(3)(A)(ii); 41 U.S.C.A. § 3306(c)(1)(B).

[114]FAR 15.306(c)(1) (citing FAR 15.305(a)).

[115]Fed.Servs., Inc., Comp. Gen. Dec. B-235661, 89-2 CPD ¶ 182; Media Int'l Corp., Comp. Gen. Dec. B-233195, 88-2 CPD ¶ 607; Fed. Servs., Inc., Comp. Gen. Dec. B-231372.2, 88-2 CPD ¶ 215; To Paul & Gordon, Comp. Gen. Dec. B-174870, 1972 CPD ¶ 114 (explaining policy); see also Info. Scis. Corp. v. United States, 75 Fed. Cl. 406 (2007) (citing FAR 15.305(a), 15.306(c)); Ryan P. Slaughter, Comp. Gen. Dec. B-411168, 2016 CPD ¶ 344 (agency improperly eliminated protester's proposal from the competitive range where the agency established its competitive range without considering prices).

[116]Nat'l Med. Staffing, Inc., Comp. Gen. Dec. B-259700, 95-1 CPD ¶ 133; Am. Envtl. Servs., Inc., Comp. Gen. Dec. B-257297, 94-2 CPD ¶ 97; ToxCo, Comp. Gen. Dec. B-254912, 94-1 CPD ¶ 41 (even where technical weaknesses in an offer do not justify rejection, price can emerge as the dominant reason for rejecting a firm from the competitive range); Sys. Integrated, Comp. Gen. Dec. B-225055, 87-1 CPD ¶ 114; Commc'ns Mfg. Co., Comp. Gen. Dec. B-215978, 84-2 CPD ¶ 497; Enviro Controls, Inc., Comp. Gen. Dec. B-205722, 82-1 CPD ¶ 333; G4S Tech. CW LLC v. United States, 109 Fed. Cl. 708 (2013) (agency properly excluded offeror from the competition where the proposal assumptions and exclusions precluded the agency from validating the required price reasonableness and price realism analysis).

[117]Am. Envtl. Servs., Inc., Comp. Gen. Dec. B-257297, 94-2 CPD ¶ 97.

[118]ICF, Inc., Comp. Gen. Dec. B-20459, 82-1 CPD ¶ 339.

[119]HSS-CCEC, Comp. Gen. Dec. B-240610, 90-2 CPD ¶ 465; Fed. Servs., Inc., Comp. Gen. Dec. B-235661, 89-2 CPD ¶ 182; Fed. Servs., Inc., Comp. Gen. Dec. B-231372.2, 88-2 CPD ¶ 215; Howard Finley Corp., Comp. Gen. Dec. B-226984, 87-2 CPD ¶ 4.

[120]HCA Gov't Servs., Inc.—Request for Reconsideration & Claim for Proposal Preparation Costs, Comp. Gen. Dec. B-224434.2 et al., 87-1 CPD ¶ 434.

[121]Fed. Servs., Inc., Comp. Gen. Dec. B-231372.2, 88-2 CPD ¶ 215.

[122]TMC Design Corp., Comp. Gen. Dec. B-296194.3, 2005 CPD ¶ 158; Intraspace Corp., Comp. Gen. Dec. B-237853, 90-1 CPD ¶ 327, 69 Comp. Gen. 351; HCA Gov't Servs., Inc., Comp. Gen. Dec. B-224434, 86-2 CPD ¶ 611; Proffit & Fowler, Comp. Gen. Dec. B-219917, 85-2 CPD ¶ 566.

[123]Femme Comp Inc. v. United States, 83 Fed. Cl. 704 (2008).

[124]Femme Comp Inc. v. United States, 83 Fed. Cl. 704 (2008).

[125]Tracor Mar., Inc., Comp. Gen. Dec. B-222484, 86-2 CPD ¶ 150.

[126]Media Int'l Corp., Comp. Gen. Dec. B-233195, 88-2 CPD ¶ 607; Panasonic Industrial Indus. Co., Comp. Gen. Dec. B-232168.2, 88-2 CPD ¶ 519; Coastal Elecs., Inc., Comp. Gen. Dec. B-227880.4, 88-1 CPD ¶ 120; Coastal Brokers, Comp. Gen. Dec. B-226103.2, 87-2 CPD ¶ 526; Rosser, White, Hobbs, Davidson, McClellan, Kelley, Inc., B-Comp. Gen. Dec. B-224199, 86-2 CPD ¶ 714 (Comp. Gen. 1986), on reconsideration, B-Comp. Gen. Dec. B-224199, B-224199.2 et al., 87-1 CPD ¶ 319 (Comp. Gen. 1987); Dynamics Corp. of America, Comp. Gen. Dec. B-224848, 86-2 CPD ¶ 622.

[127]Nat'l Med. Staffing, Inc., Comp. Gen. Dec. B-259700, 95-1 CPD ¶ 133.

[128]Am. Envtl. Servs., Inc., Comp. Gen. Dec. B-257297, 94-2 CPD ¶ 97.

[129]Info. Sys. & Network Corp., Comp. Gen. Dec. B-237687, 90-1 CPD ¶ 203.

[130]Terminals Unlimited, Inc., GSBCA No. 11114-P, 91-2 BCA ¶ 23963; see also Essex Electro Eng'rs, Inc., Comp. Gen. Dec. B-250862, 94-1 CPD ¶ 80 (sustaining protest against an agency decision to reject the firm from the competitive range because of an unduly low price because it was equally likely that the low price resulted from failure to understand the requirements as the offeror's having particularly skilled personnel or a unique technical approach).

[131]See Shiloh Indus., Inc., Comp. Gen. Dec. B-235949, 89-2 CPD ¶ 290; Electronet Info. Sys., Inc., Comp. Gen. Dec. B-233102, 89-1 CPD ¶ 68; Data Res., Comp. Gen. Dec. B-228494, 88-1 CPD ¶ 94; Proffit & Fowler, Comp. Gen. Dec. B-219917, 85-2 CPD ¶ 566.

[132]Shiloh Indus., Inc., Comp. Gen. Dec. B-235949, 89-2 CPD ¶ 290; Electronet Info. Sys., Inc., Comp. Gen. Dec. B-233102, 89-1 CPD ¶ 68; Rainbow Tech., Inc., Comp. Gen. Dec. B-232589, 89-1 CPD ¶ 66; Int'l Television Prods., Comp. Gen. Dec. B-233147, 88-2 CPD ¶ 639; Instruments & Controls Serv. Co., Comp. Gen. Dec. B-230799, 88-1 CPD ¶ 531; Data Res., Comp. Gen. Dec. B-228494, 88-1 CPD ¶ 94.

[133]Sterling Servs., Inc., Comp. Gen. Dec. B-232578, 88-2 CPD ¶ 513; see also Info. Sys. & Network Corp., Comp. Gen. Dec. B-237687, 90-1 CPD ¶ 203; Inst. for Int'l Research, Comp. Gen. Dec. B-232103.2, 89-1 CPD ¶ 273; Digital Radio Corp., Comp. Gen. Dec. B-216441, 85-1 CPD ¶ 526; see also McDonald Constr. Servs., Inc., Comp. Gen. Dec. B-285980, 2000 CPD ¶ 183 (an agency is not required to include an offeror in the competitive range simply because its price is lower than the ultimate awardee's); Sigma One Corp., Comp. Gen. Dec. B-294719, 2005 CPD ¶ 49 (Government may reject a low priced offeror from the competitive range when the agency reasonably deems that the offer is not among the most highly rated proposals).

[134]Mark Dunning Indus., Inc., Comp. Gen. Dec.

B-230058, 88-1 CPD ¶ 364; Royal Zenith Corp., Comp. Gen. Dec. B-227993, 87-2 CPD ¶ 409; A.T. Kearney, Inc., Comp. Gen. Dec. B-205025, 82-1 CPD ¶ 518; To Cole and Groner, Comp. Gen. Dec. B-175004, 1972 CPD ¶ 90; Acoustic Sys., Comp. Gen. Dec. B-250478, 93-1 CPD ¶ 76 (when agency includes the offeror in the competitive range and advises of its deficiencies, and the offeror's revised proposal confirms its intent not to conform to the specifications, an agency may properly reject the offer as no longer being in the competitive range).

[135]A.T. Kearney, Inc., Comp. Gen. Dec. B-237366, 90-1 CPD ¶ 278; Mark Dunning Indus., Inc., Comp. Gen. Dec. B-230058, 88-1 CPD ¶ 364; Lee J. Kriegsfeld, Comp. Gen. Dec. B-222865, 86-2 CPD ¶ 214; Merret Square, Inc., Comp. Gen. Dec. B-220526.2, 86-1 CPD ¶ 259; Info. Sys. & Networks Corp., Comp. Gen. Dec. B-220661, 86-1 CPD ¶ 30.

[136]Info. Sys. & Network Corp., Comp. Gen. Dec. B-237687, 90-1 CPD ¶ 203; Besserman Corp., Comp. Gen. Dec. B-237327, 90-1 CPD ¶ 191; Dowty Mar. Sys. Inc., Resdel Eng'g Div., Comp. Gen. Dec. B-237170, 90-1 CPD ¶ 147.

[137]Impresa Construzioni Geom. Domenico Garufi v. United States, 44 Fed. Cl. 540 (1999), rev'd on other grounds, 238 F.3d 1324 (Fed. Cir. 2001), 43 GC ¶ 29; see also I.T.S. Corp., Comp. Gen. Dec. B-280431, 98-2 CPD ¶ 89 (agency may eliminate technically unacceptable offer from the competitive range under FAR 15.306(d)(4) without the offeror's having the opportunity to make a revision).

[138]Bromma, Inc., Comp. Gen. Dec. B-225663, 87-1 CPD ¶ 480, at *2. But see Dubinsky v. United States, 43 Fed. Cl. 243 (1999), 41 GC ¶ 263 (noting cases contra)

[139]Ultrasystems Def., Inc., Comp. Gen. Dec. B-235351, 89-2 CPD 198.

[140]Ultrasystems Def., Inc., Comp. Gen. Dec. B-235351, 89-2 CPD ¶ 198. For cases recognizing that FAR 15.307(a) does not prohibit a procuring agency from taking corrective action that results in the firm's restoration to the competitive range, see Asset Mgmt. Real Estate, LLC, Comp. Gen. Dec. B-407214.5 et al., 2014 CPD ¶ 57.

[141]Consol. Eng'g, Inc., Comp. Gen. Dec. B-228142.2, 88-1 CPD ¶ 24.

[142]Aquasis Serv., Inc., Comp. Gen. Dec. B-240841.3, 91-2 CPD ¶ 94; Ultrasytems Def., Inc., Comp. Gen. Dec. B-235351, 89-2 CPD ¶ 198.

[143]Info. Ventures, Inc., Comp. Gen. Dec. B-232094, 88-2 CPD ¶ 443 (good explanation).

[144]Consol. Eng'g, Inc., Comp. Gen. Dec. B-228142.2, 88-1 CPD ¶ 24.

[145]Dowty Maritime Sys. Inc., Resdel Eng'g Div., Comp. Gen. Dec. B-237170, 90-1 CPD ¶ 147; E. Marine, Inc., Comp. Gen. Dec. B-213945, 84-1 CPD ¶ 343; RDW Sys., Inc., Comp. Gen. Dec. B-204707, 82-2 CPD ¶ 61; To Cole & Groner, Comp. Gen. Dec. B-175004, 1972 CPD ¶ 90.

[146]FAR 15.306(c)(3).

[147]Gallegos Research Grp. Corp., GSBCA No. 9983-P, 89-3 BCA ¶ 21907.

[148]Zell Partners, Ltd., Comp. Gen. Dec. B-248489, 92-2 CPD ¶ 141; Sikora & Fogleman, Comp. Gen. Dec. B-236960, 90-1 CPD ¶ 611; Fed. Servs., Inc., Comp. Gen. Dec. B-235661, 89-2 CPD ¶ 182; Talco, Inc., Comp. Gen. Dec. B-235702, 89-2 CPD ¶ 171; Electronet Info. Sys., Inc., Comp. Gen. Dec. B-233102, 89-1 CPD ¶ 68; Rainbow Tech., Inc., Comp. Gen. Dec. B-232589, 89-1 CPD ¶ 66; John W. Gracey, Comp. Gen. Dec. B-232156.2, 89-1 CPD ¶ 50; Hamilton Enters., Inc., Comp. Gen. Dec. B-230736.6, 88-2 CPD ¶ 604; Worldwide Primates, Inc., Comp. Gen. Dec. B-294481, 2004 CPD ¶ 206 (an agency's failure to give a rejected offeror timely notification of its rejection from the competitive range, while inappropriate, does not create grounds for protest unless it causes competitive prejudice).

[149]Sys., Terminals & Commc'ns Corp., GSBCA No. 10578-P, 90-3 BCA ¶ 23043; SMS Data Prods. Grp., Inc., GSBCA No. 8589-P, 87-1 BCA ¶ 19496, vacated and dismissed, 87-2 BCA ¶ 19821.

[150]Presidio Networked Solutions, Inc., Comp. Gen. Dec. B-408128.33, et al., 2014 CPD ¶ 316 (no competitive prejudice where the agency's evaluation was reasonable and supported by the record).

[151]Med. Dev. Int'l, Inc. v. United States, 89 Fed. Cl. 691 (2009).

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BRIEFING PAPERS