NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Headquarters | 300 E ST SW, Washington, DC 20546

May 26, 2021

VIA ELECTRONIC PROTEST DOCKETING SYSTEM

Evan D. Wesser, Esq.
U.S. Government Accountability Office
Office of the General Counsel
441 G ST NW
Washington, DC 20548

Re: B-419783.1, Protest of Blue Origin Federation, LLC
Agency Report

Dear Mr. Wesser,

In accordance with 4 C.F.R. § 21.3(c), the National Aeronautics and Space Administration (NASA or Agency) hereby submits its Agency Report in response to the above-captioned bid protest (Protest) filed by Blue Origin Federation, LLC (Blue Origin) on April 26, 2021. In accordance with 4 C.F.R. § 21.3(d), this Agency Report is comprised of NASA's Memorandum of Law, below, the Contracting Officer's Statement of Facts (COSOF), and the Agency Record (AR). NASA has filed the COSOF and AR as separate electronic files in the Electronic Protest Docketing System.

MEMORANDUM OF LAW

I. Introduction

Blue Origin protests NASA's decision to award a contract to Space Exploration Technologies, Inc. (SpaceX) under the Appendix H: Human Landing System (HLS) Broad Agency Announcement (BAA) Option A solicitation (Option A BAA or Solicitation). Protest, Tab 001 at Bates 000001-001414. As the second phase of a multi-billion dollar development effort, Option A follows the one-year HLS "base period" of performance during which three contractors—Blue Origin, Dynetics, Inc. (Dynetics), and SpaceX—worked closely with NASA to rapidly mature their unique HLS designs and approaches. COSOF at 1-9. Following the full and open competition of the base period BAA, the Option A BAA operated as a down-select mechanism: NASA conducted a limited sources competition among the three base period firms to determine whether one or more of these contractors would continue their development efforts. COSOF at 9. Spanning roughly four years of performance, Option A culminates in a crewed mission in which the contractor will demonstrate its Human Landing System by transporting the first woman, and first person of color, to the lunar surface. COSOF at 2.

NASA thus issued the Option A BAA to achieve an extraordinary goal—landing American astronauts on the surface of the Moon for the first time in over fifty (50) years. COSOF at 2. For generations, human exploration of other celestial bodies has been stalled. The

majority of Americans alive today were not alive for the last Apollo mission, Apollo 17. ***Since 1972, no human has traveled beyond low Earth orbit.*** As part of NASA's Artemis Program, the Human Landing System is the final piece of architecture necessary to change all of that, actualizing NASA's next generation program of deep space human exploration. COSOF at 3. An incredibly ambitious program, Artemis seeks not only to build a sustainable presence on the Moon, but also to learn from this experience to send astronauts for the first time to Mars. COSOF at 2.

NASA now finds itself in a position to resume human space exploration beyond low earth orbit. It took an extraordinary effort, plus a healthy amount of good fortune, for the stars to align to make the Artemis and HLS Programs a reality; budgets, political will, the buy-in of internal and external stakeholders—any one of these can singlehandedly derail a program like HLS. COSOF at 4. It is not for a lack of trying that NASA has not been back to the Moon in 50 years. And as the final spacecraft necessary to effectuate the crewed Artemis missions, the award of the Option A contract marked a significant turning point for the Artemis Program. COSOF at 3. NASA takes very seriously both the policy direction it has received to lead the United States in returning humans to the Moon and the budgetary constraints imposed on it, including the specific appropriation of funds for the HLS program. The history of ambitious human space exploration plans shows how critical it is to recognize the prevailing policy environment and accordingly to align programs with budget reality. To do otherwise would not represent responsible stewardship of the nation's space program, but is instead a recipe for failure.

But it is not an overstatement to say that all of the successes upon which the Option A procurement is built, all of this once-in-a-generation momentum, can easily be undone by one party—in this case, Blue Origin—who seeks to prioritize its own fortunes over that of NASA, the United States, and every person alive today who dreams to see humans exploring worlds beyond our own. Plainly stated, a protest sustain in the instant dispute runs the high risk of creating not just ***delays*** for the Artemis program, ***but that it will never actually achieve its goal of returning the United States to the Moon.*** What begins as a mere procurement delay all too easily turns into a lack of political support, a budget siphoned off for other efforts, and ultimately, a shelved mission. GAO should, of course, sustain one or more of Blue Origin's grounds of protest if they find them to be availing. But NASA merely wishes to impress upon this office just how high the stakes are in the present dispute.

NASA made the Option A selection on the basis of an evaluation conducted with immense rigor, producing a robust contemporaneous evaluation record. COSOF at 4, 18-19. In accordance with the terms of the Solicitation, this selection was informed, in part, by budgetary considerations. COSOF at 22-26. Nothing about this was improper. And contrary to what Blue Origin would have this Office believe, NASA's award to a single Option A contractor in no way represents a waning commitment to competition. COSOF at 11-14. To the contrary, the HLS program has featured competition from the beginning, and will continue to provide competitive opportunities for future lander procurements beyond the single demonstration mission enabled by the Option A selection. *Id.*

Nonetheless, through its Protest, Blue Origin now seeks to jeopardize the achievement of Artemis's extraordinary goals, casting about wildly to create the illusion of one or more procurement errors where none exist. In the instant Protest, Blue Origin has filed more than ***twenty (20)*** distinct grounds of protest, asking this Office to believe that NASA, in selecting a proposal for the company who will be responsible for safely returning mankind to the Moon, did so carelessly, in apparent flagrant violation of law, regulation, and its own carefully-crafted Solicitation terms and conditions. Nothing could be further from the truth. Despite Blue Origin's multitude of alleged violations by NASA, NASA asks this Office to consider that here, a simpler explanation is the right one.

Specifically, Blue Origin made a bet and it lost. Amidst a Protest spanning more than 1400 pages, it is the 6-page Declaration of Mr. Brent Sherwood, a Blue Origin Senior Vice President, that tells the story of this dispute. Protest, Tab 001 at Bates 000221-000226. As Mr. Sherwood's Declaration goes to great lengths to demonstrate, Blue Origin was able and willing to offer NASA a lower firm fixed price for the scope of work Blue Origin proposed to perform, but it chose not to do so within its Option A proposal. *Id.* Despite clear instructions from NASA that offerors were to submit their "best" proposals first, and that NASA may make selections without opening discussions or post-selection negotiations, Blue Origin gambled that NASA would not do that, but would instead engage Blue Origin in negotiations if NASA desired for Blue Origin to submit a lower price. *See, for example,* Option A BAA, Tab 003 at Bates 001536 ("each Offeror should submit its ***initial proposal*** to the Government using the ***most favorable terms from a price*** and technical standpoint" (emphasis added)).

As convincingly explained by Mr. Sherwood, Blue Origin submitted a fixed price with its Option A proposal that was not its best price, based in part on an incorrect assumption that because NASA had engaged Blue in post-selection price negotiations in the first phase of the HLS procurement, NASA would do so again within the Option A procurement. *Id.* at 000224-000225. After NASA opened price negotiations with Blue Origin during the base period, Blue Origin submitted a revised proposal with a price reduction of more than $300M, amounting to roughly a [redacted] discount for the same exact scope of work. COSOF at 6. This was despite the fact that the base period solicitation contained identical language on this issue as that of Option A, advising offerors that they withheld their best proposal terms in anticipation of discussions or negotiations at their own risk. Base Period BAA, Tab 002 at Bates 001426. Thus, during the base period source selection, Blue Origin took a gamble and offered NASA an initial price that was not its strongest offer; NASA negotiated with Blue; and thereafter, Blue offered NASA its actual best price, a [redacted] discount. As suggested by Mr. Sherwood, Blue Origin took that same gamble within the Option A procurement, trying to get a contract award at its high price, but willing to lower it if only it had been asked. But NASA had no obligation to make this request. This time, the bet simply did not work out in Blue Origin's favor.

Realizing now that it gambled and lost, Blue Origin seeks to use GAO's procurement oversight function to improperly compel NASA to suffer the consequences of Blue Origin's ill-conceived choices, asking this Office to find, for example, that NASA was required to make two Option A contract awards. Protest, Tab 001 at Bates 000049. Blue Origin makes this request despite failing to point to any legal standard mandating such a result, and despite NASA's

repeated use of plain Solicitation language that it would make zero, one, or two Option A awards. Option A BAA, Tab 003 at Bates 001536. Alternatively, Blue Origin asks this Office to find that NASA was required to amend its Solicitation to reduce its requirements, either de-scoping and/or slowing down its stated timeline, in order to allow Blue Origin to submit a less expensive proposal responsive to these degraded requirements. Despite the fact that NASA's selection official identified the most highly-rated offeror and determined that NASA was able to afford making a contract award to this offeror while maintaining its present set of requirements, Blue Origin insists that NASA erred in its determination to award to this offeror. Protest, Tab 001 at Bates 000017-000019. Again, this is a position without factual or legal merit.

The remainder of Blue Origin's complaints are similarly baseless, relying too often on mischaracterizations of fact and law to attempt to obfuscate the fact that it cannot identify any instance in which NASA committed a procurement error, much less a prejudicial one. In response to this kitchen sink protest, NASA respectfully requests that this Office dismiss or deny all of Blue Origin's grounds of protest in their entirety.

II. Discussion

As described within NASA's Agency Request for Partial Summary Dismissal (Request for Dismissal), Blue Origin's protest grounds can be categorized into two overarching types of allegations: (1) policy and budget-related disagreements; and (2) mere disagreements with the Agency's evaluation conclusions. Within this second category, Blue Origin challenges nearly every negative evaluation conclusion reached by NASA, across all three evaluation factors, alleging a multitude of garden variety instances of perceived unreasonable evaluation conduct and conclusions. In this same category, Blue Origin also challenges numerous aspects of the Agency's evaluation of the awardee, SpaceX, alleging disparate treatment in the Agency's evaluation approach. This Memorandum will address first those allegations in the policy and budget-related category, followed by the Agency's response to Blue Origin's evaluation disagreements.

For the reasons set forth below, NASA requests that this Office dismiss or deny all of Blue Origin's grounds of protest.

A. Policy and Budget-Related Allegations

NASA hereby reprises its argument, pled within its Request for Dismissal, that pursuant to 4 C.F.R. § 21.5(f), none of the three policy and budget-related allegations asserted by Blue Origin are issues for consideration by this Office because they amount to nonjusticiable policy disputes, fail to clearly state legally sufficient grounds of protest as required by 4 C.F.R. § 21.1(f), and/or fail to provide a detailed statement of factual and legal grounds of protest as required by 4 C.F.R.§ 21.1(c)(4). Therefore, as explained in greater detail below, and pursuant to 4 C.F.R. § 21.3(b), NASA respectfully requests dismissal of Blue Origin's allegations at sections III(D), III(A)(1), and, footnote 1, page 15 of its Protest. In the alternative, NASA requests denial in full of these grounds of protest.

1. NASA was under no obligation to make two Option A contract awards (protest at III(D)).

Consistent with law and the Solicitation, NASA selected a single proposal for award in the Option A procurement. COSOF at 11. Blue Origin now attempts to overturn that award using various lines of reasoning, each more nonsensical than the last, that NASA was required to make two contract awards. Protest, AR Tab 001 at Bates 000048-000050. Because Blue Origin has failed to state legally sufficient grounds of protest, relies on nonjusticiable policy arguments, and fails to set forth sufficiently detailed legal and factual grounds of protest, the protest ground set forth at section III(D) of Blue Origin's protest should be dismissed. 4 C.F.R. §21.1(i) and § 21.5(f). In the alternative, this protest ground should be denied in its entirety.

a) An agency's stated preference does not create a legal obligation.

First, Blue Origin asks this Office to force NASA to make more than one contract award based entirely on NASA's stated ***preference*** for making multiple awards ("From the program's inception, NASA had correctly planned to select two distinct providers for the next generation crewed lunar lander"). Protest, Tab 001 at Bates 000049. This line of reasoning imagines that when an agency expresses, with appropriate caveats, a preferred outcome within a solicitation, this nonetheless creates a legal obligation for the agency to effectuate said outcome. Even more problematic, Blue Origin would have this Office take the position that this legal obligation exists when the plain language of the agency's solicitation puts offerors on notice that other outcomes are just as likely to occur as the agency's preferred outcome. This line of reasoning has no basis in law and should be rejected in its entirety.

As Blue Origin's Protest accurately notes, NASA has long understood the value of competition within the HLS Program specifically. As such, NASA did have a preference for making more than one Option A contract award if the circumstances were otherwise appropriate to do so. COSOF at section III. This fact is not in dispute. But where Blue Origin's protest ground fails is that neither a preference nor even a plan constitutes an ***obligation***. This is particularly true when the plain terms of an agency's solicitation, as here, specify a range of possible outcomes that includes not just the agency's preferred outcome, but others as well. As stated in the Solicitation:

> "NASA reserves the right to select for award multiple, one, or none of the proposals received in response to this Appendix. The overall number of awards will be dependent upon funding availability and evaluation results." Option A BAA, Tab 003 at Bates 001536.

This language could not be clearer. Blue Origin's Protest fails to even acknowledge the existence of this language, nor attempt to explain why it is inapposite to this ground of protest. It is only in its Consolidated Response to NASA's and SpaceX's Requests for Summary Dismissal (Blue Origin Response) that Blue Origin first addresses this language, and therein attempts to sweep it under the rug as being a mere "generalized reservation" that should have no bearing on the instant dispute. Blue Origin Response at 12. But such an interpretation of the Solicitation

would inappropriately invalidate its numerous statements repeatedly and consistently expressing the possible Option A award outcomes. In addition to the above-quoted language, these statements include:

- "NASA intends to determine whether to award Option A to ***one or more*** Base period contractors" (emphasis added). Option A BAA, Tab 003 at Bates 001484.

- "NASA is currently planning to award Option A CLINs for ***up to two*** of the Base period contractors, with a preference for awarding two, pending availability of funds" (emphasis added). *Id.*

- "Note that NASA anticipates awarding ***up to two*** contracts with performance continuing through 2024 flight demonstration" (emphasis added). *Id.* at Bates 001504.

- "The Government intends to award ***one or more*** contracts to responsible Offeror(s) in accordance with the evaluation process set forth below and otherwise established within this solicitation" (emphasis added). *Id.* at Bates 001528.

- Consistent with FAR 35.016(e), the primary basis for selecting ***one or more*** proposals for award shall be technical, importance to Agency programs, and funds availability…" (emphasis added). *Id.* at Bates 001530.

- "[T]he SSA [Source Selection Authority] will consider each proposal on its own individual merits, and will select for award ***one or more*** proposals that individually each present value to the Government and that optimize NASA's ability to meet its objectives as set forth in this solicitation" (emphasis added). *Id.* at Bates 001535.

- "Following the award of ***one or more*** contracts, NASA will provide informal feedback to any Offeror upon request" (emphasis added). *Id.* at Bates 001536.

Are all of these statements, either in isolation or in concert, mere "generalized reservations" such that this Office should now afford them no meaning, and for which offerors were to reasonably understand that they had no effect whatsoever? Such is the position of Blue Origin. NASA unequivocally rejects this position and requests that this Office do the same.

This Office's decision in *Canadian Commercial Corp./Liftking Indus., Inc*., is directly applicable to the present case. B–282334 *et al.*, June 30, 1999, 99–2 CPD ¶ 11. There, as here, the agency's solicitation set forth its expectation for two awards: "The government ***intends to award up to two contracts*** for up to two technologies, to up to two responsible offerors whose proposals, in the Source Selection Authority's [SSA] opinion, represent the best value to the government, based upon the criteria set forth in this Section M" (emphasis added). *Id.* Nonetheless, the agency made only one contract award. Protester asserted, just as Blue Origin has done, that the agency's decision "was inconsistent with the stated intent of the RFP, which provided for multiple awards," and that "making only a single award represented a change in the agency's requirements for which offerors were not given notice or an opportunity to respond." *Id.*

at 6. GAO denied this ground of protest, stating that the agency's expression of intent could not "reasonably be read as stating a legal requirement for multiple awards." *Id.*

GAO's 2017 decision in *Glock, Inc.* further demonstrates why Blue Origin's protest must fail. B-414401, June 5, 2017, 2017 CPD ¶ 180. There, the agency stated, "The Government ***intends to award up to three (3)*** Firm Fixed Price (FFP), Indefinite Delivery/Indefinite Quantity (IDIQ) contracts" (emphasis added). *Id.* at 2. Protester contended that based on this language, the agency "was obligated to award at least two base contracts." *Id.* at 6. But GAO denied this ground of protest, explaining:

> "We think that the most reasonable interpretation of the solicitation is that the Army is permitted to award only one base contract. Although section M expressed the agency's plan to award one, two or three contracts, this expression cannot reasonably be read as creating a legal requirement for multiple awards. In this regard, giving effect to all provisions of the solicitation, a reasonable reading is that the RFP language regarding multiple awards is permissive and does not exclude award of a single contract. In sum, the Army was not required to make a second base award to satisfy the terms of the RFP" (internal citations omitted). *Id.*

Thus, while NASA's Solicitation stated a clear preference for multiple awardees, it also clearly reserved NASA's right to select multiple, one, or none of the proposals received in response to the Solicitation. As *Canadian Commercial Corp.* and *Glock, Inc.* demonstrate, in such situations, an agency is under no legal obligation to make more than one contract award. *See also Hawkeye Glove Manufacturing, Inc.*, B-299741, Aug. 2, 2007, 2007 CPD ¶ 143; *Resource Title Agency, Inc.* B-402484.2, May 18, 2010, 2010 CPD ¶ 118 at 6 n.8 ("[I]t is well-settled under our case law that a statement in a solicitation that the agency intends to award two contracts does not legally obligate the agency to make two awards.") Blue Origin's protest ground alleging otherwise must be denied.

An alternative version of this argument advanced by Blue Origin within its Blue Origin Response is, essentially, "NASA said it had a preference for making two awards, and thus when its selection official decided to make only one award, NASA was required to refrain from making this award and instead, amend its solicitation to enable a two-award scenario." Blue Origin Response at 12-13. This argument conflates and confuses two of Blue Origin's distinct grounds of protest, but regardless, what is clear is that it is a meritless assertion. Upon reaching her conclusion that making one Option A award to SpaceX alone was in the Agency's best interests, Blue Origin implies that the only rational option available to the SSA was to realize that this single award outcome was evidence of a flawed Solicitation that failed to express the Agency's true requirements. This assertion has no basis in law and in any case, flies in the face of the Solicitation statements provided above showing that a single award scenario does not demonstrate a flawed Solicitation, but rather, is perfectly consistent with the terms of that Solicitation.

Finally, Blue Origin makes a statement in support of this protest ground which tellingly reveals that its own error in judgment is the true reason for its complaint. Blue Origin states,

"Here, the Agency must acknowledge that the amount of available funding would likely materially impact offerors' proposals, and hence, the procurement." *Id.* at 13. The Agency acknowledges no such thing, because ***the Solicitation contained no quantitative information at all about the Agency's actual or anticipated amount of available funding*** and did not advise offerors that their proposals should take any dollar values of actual or anticipated funding into account. Blue Origin has not pointed to ***any*** language within the Solicitation that instructs or even suggests to offerors that there was a specific budget or similar value that their proposals were to be based upon. Rather: NASA requested firm fixed price proposals; provided no not-to-exceed value or similar piece of information; utilized a selection methodology in which price was the second most heavily-weighted evaluation factor (among only three factors total, strongly suggesting that the offeror should propose a low price of its choosing in order to be attractive to the Agency); and finally, advised offerors that NASA likely would award on the basis of initial proposals and thus offerors should submit their "best" proposal from the outset. *See, for example,* Option A BAA, Tab 003 at Bates 001488 ("…each Offeror shall submit only one proposal which represents its ***best*** approach to meeting the requirements of the solicitation" (emphasis added).)

It appears, based on Blue Origin's statement, that despite these Solicitation attributes, Blue Origin nonetheless made an assumption about the Agency's HLS budget, built its proposal with this figure in mind, and also separately made a calculated bet that if NASA could not afford Blue Origin's initially-proposed price, the Agency would select Blue Origin for award and engage in post-selection negotiations to allow Blue Origin to lower its price. All of these assumptions were incorrect. But most importantly, they were not based on any language whatsoever within the Option A solicitation. Blue Origin's unfounded and ultimately, incorrect assumptions do not create a legally cognizable basis of protest. As such, this ground of protest must fail.

b) NASA's acquisition strategy does not confer legal rights upon Blue Origin.

Second, Blue Origin imagines that it is within this Office's purview to ensure that every acquisition decision made by an agency is consistent with its acquisition strategy ("NASA's single award decision was inconsistent with NASA's acquisition strategy"). Protest, Tab 001 at Bates 000049. Throughout its Protest, Blue Origin repeats that because NASA merely had a stated goal of making multiple Option A contract awards, NASA's decision to make a single award constituted a procurement error appropriate for review by this Office. It is not. As an initial matter, as explained by the Contracting Officer, NASA's acquisition strategy has never been multiple contract awards at any cost:

> "As illustrated by the base period and Option A solicitation language quoted above, for years, NASA's stated HLS acquisition strategy has been a preference to maintain multiple providers at subsequent phases of the HLS Program as budget would permit. But this preference cannot come at the expense of reducing NASA's requirements or slowing down its performance timeline goals for the sake of keeping more than one firm on contract. That is a trade that NASA is unwilling to

make, and NASA's solicitation language on this issue have never suggested otherwise." COSOF at 12.

But whether NASA's decision aligns with its acquisition strategy is, in any case, irrelevant. GAO has long held that acquisition strategy and planning documents provide "internal agency guidance which do not establish legal rights and responsibilities such as to make actions taken contrary to those statements illegal and subject to our objections." *Reflectone Training Sys., Inc.; Hernandez Eng., Inc.*, B-261224.2, Aug. 30, 1995 95-2 CPD ¶ 95 at 4, citing *Indian Resources Int'l, Inc.*, B–256671, July 18, 1994, 94–2 CPD ¶ 29; *Motorola, Inc.*, B–247937.2, Sept. 9, 1992, 92–2 CPD ¶ 334; *Loral Fairchild Corp.—Recon.*, B–242957.3, Dec. 9, 1991, 91–2 CPD ¶ 524 (internal agency rules intended to help in defining the agency's minimum needs do not confer rights on private parties). "Rather, the relevant inquiry is whether the agency adhered to law and regulation by evaluating proposals in accordance with the evaluation scheme announced in the RFP." *Id.* Thus, not only has Blue Origin failed to show that Agency's single award decision was inconsistent with its acquisition strategy, but critically, Blue Origin has not shown that this decision was inconsistent with law, regulation, or the terms of the Solicitation. Accordingly, this ground of protest must fail.

c) Blue Origin relies upon an application of CICA and its progeny that is without legal precedent and was rejected by GAO in 2019.

Blue Origin asserts that that the overarching requirement for the Federal Government to procure goods and services using competitive procedures "to the maximum extent practicable" mandated that NASA make multiple contract awards. Protest, Tab 001 at Bates 000048-000050. In doing so, this protest ground advances an application of CICA (the Competition in Contracting Act; 10 U.S.C. § 2304), FASA (the Federal Acquisition Streamlining Act; 10 U.S.C. § 2377), and corollary pro-competition laws and regulations that is without legal precedent. By relying on this erroneous application of the law, Blue Origin fails to state legally sufficient grounds of protest. 4 C.F.R. § 21.1(f). In the alternative, this protest ground fails on the merits.

As discussed in the Request for Dismissal, and reprised here, in 2019, Blue Origin Florida, LLC protested on the basis of this same misapprehension of the law and GAO unequivocally rejected it. *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388. NASA requests that this Office do so again in the instant dispute. Blue Origin attempts to distinguish that case from the present case, but the differences Blue Origin points to, even if accurate, have no bearing on that case's clear applicability to this ground of protest. Blue Origin Response at 4-6. As thoroughly explained by NASA in its Request for Dismissal*, Blue Origin Florida, LLC* is directly applicable to the present facts, and Blue Origin's statement that this "prior protest has no meaningful bearing or connection whatsoever to this one" is demonstrably false. In the prior case, Blue Origin advanced a specific ground of protest that relied on an incorrect interpretation of CICA; in response, GAO denied this ground of protest and provided a clear explanation of the bounds of CICA's applicability. In the present case, Blue Origin advances the same incorrect interpretation of CICA, and NASA requests that GAO again deny this type of protest in light of its prior decision. While Blue Origin lists six alleged factual

differences between the disputes that supposedly render *Blue Origin Florida, LLC* inapplicable to the present case, none of these differences bear on the applicability of the case.

For example, Blue Origin states, "The *Blue Origin Florida* protest: (a) involved a **sustained** (in part) ***pre-award*** protest challenging the solicitation framework" (emphasis in original). Blue Origin Response at 5. But as counsel for Blue Origin surely understands, although the *Blue Origin Florida, LLC* protest did have one ground of protest that GAO sustained, it also had a different, separate ground of protest that is germane to the present case and that, critically, GAO denied ("The protest is sustained in part ***and denied in part***," the denial in this statement applying, in part, to protester's allegations that the Government's actions had violated CICA and similar laws. *Blue Origin Florida, LLC*, *supra* at 19.)

Specifically for this latter, relevant ground, the protester asserted that the Government had violated CICA and similar laws by accelerating its procurement and stating its intent to award two contracts thereunder. *Id.* at 8. In support of this ground of protest, the protester in that case argued that these actions by the Government would "unduly restrict future competition" and "stifle further development and new entrants to the commercial space launch market, thereby limiting the number of potential competitors for future requirements." *Id.* Blue Origin qualitatively makes the same arguments in the present dispute, claiming that in making only one Option A award, NASA impermissibly "creates a potential monopoly for all future NASA exploration missions." Protest, Tab 001 at Bates 000050. Thus, the fact that, within *Blue Origin Florida, LLC*, GAO denied this ground of protest while also sustaining a completely separate ground of protest is immaterial to that case's applicability to this dispute.

Similarly, the pre-award nature of the *Blue Origin Florida, LLC* also does not demonstrate that the case is inapplicable to the present protest. Blue Origin's protest in the present case is itself a pre-award protest.[1] But in any case, the timing of the protest is irrelevant to GAO's operative holding, which clarifies the applicability of CICA and is therefore undoubtedly relevant to Blue Origin's allegation that CICA required NASA to make two contract awards. As explained by GAO, "CICA's competition requirements […] seek to ensure full and open competition for the government's requirements; they do not mandate that the government make multiple contract awards in order to incentivize future private investment necessary to satisfy the government's fulfillment of its future requirements." *Blue Origin Florida, LLC*, supra at 11. GAO's clear explanation of CICA's applicability does not turn on whether the protest at issue is pre-award or post-award, and as such, this attempt by Blue Origin to show *Blue Origin Florida, LLC's* inapplicability to the present dispute fails.

Blue Origin's remaining factual distinctions are similarly unavailing. Here, for example, it points to the facts that the *Blue Origin Florida, LLC* case was brought "by a different offeror…

[1] NASA has not yet made an Option A contract award to SpaceX. *See COSOF at 11*: "On April 26, 2021, Blue Origin Federation filed a timely protest with the Government Accountability Office (GAO). In accordance with FAR 33.104(a)(2), NASA has stayed the award of the contract modification contemplated in the Option A solicitation pending resolution of the instant protest. On April 26, 2021, NASA provided SpaceX, the successful offeror, notice of the protest and in accordance with 31 U.S.C 3553(d)(3)(A) and (B) and FAR 33.104(c)(1), immediately stayed all activities pertaining to the pending contract award."

under a different solicitation… with a different agency than involved here." Blue Origin Response at 5. Again, as Blue Origin's counsel surely knows, if these types of factual differences meant that GAO holdings could not apply from one dispute to the next, neither protesters nor the Government would ever be able to rely on the vast majority of GAO jurisprudence when pleading their respective cases. In fact, if a party is only allowed to rely on past cases involving the same exact party, under the same solicitation, and the same agency, then fully all of the cases relied upon by Blue Origin in both its Protest and its Blue Origin Response are, by its own argument, immaterial to the present dispute. Nonetheless, NASA asserts that this is a plainly incorrect assertion about how past GAO decisions apply to present disputes. NASA has demonstrated that GAO's operative holding in *Blue Origin Florida, LLC* is directly applicable to the present case; Blue Origin has not demonstrated otherwise. As such, this protest ground, as was true in *Blue Origin Florida, LLC,* must fail.

d) Blue Origin attempts to turn a policy disagreement into a justiciable legal dispute.

Again, as discussed in the Request for Dismissal, and reprised here, Blue Origin's Protest attempts to transform its policy complaints into legal grounds of protest appropriate for review by this Office. As explained in NASA's Request for Dismissal, GAO rejected a nearly-identical attempt by the protester in *Blue Origin Florida, LLC*, and NASA requests that GAO do so again in the present dispute. Request for Dismissal at 4-5. In its response to the Agency's request for dismissal of this ground of protest, rather than showing how its policy-based arguments are a valid ground of protest, Blue Origin instead abandons them and responds to NASA's argument by stating that its ground of protest at Protest section III(D) is based on the allegation that "NASA's source selection rationale improperly justifies the selection of a lone provider as a result of 'anticipated future funding for the HLS Program.' Unfortunately, this justification lacks precedent." Blue Origin Response at 17. But even if this is the sole basis for Blue Origin's protest ground at III(D), like Blue Origin's policy complains, it too must fail.

Here, Blue Origin appears to be referring to the SSA's stated basis for not selecting Blue Origin specifically for a contract award. While this section of the Source Selection Statement (SSS) in isolation does not, as suggested by Blue Origin, contain the SSA's entire basis for NASA's "selection of a lone provider," (as the entire 24-page SSS must be read in its entirety to understand this decision), it is nonetheless worth nothing that "anticipated future funding for the HLS Program" played a minor role in her decision regarding the non-selection of Blue Origin. Here, Blue Origin thus materially mischaracterizes the SSA's basis for not selecting Blue Origin for a contract award. In her own words:

> "My selection determination with regard to Blue Origin's proposal is based upon the results of its evaluation considered in light of the Agency's currently available and anticipated future funding for the HLS Program. Blue Origin's proposal has merit and is largely in alignment with the technical and management objectives set forth in the solicitation. Nonetheless, ***I am not selecting Blue Origin for an Option A contract award because I find that its proposal does not present sufficient value to***

the Government when analyzed pursuant to the solicitation's evaluation criteria and methodology" (emphasis added). Source Selection Statement, Tab 093 at Bates 027789.

Simply stated, the SSA determined that Blue Origin's proposal did not present a good value to the Government. *Id.* And while she did mention that anticipated future funding was part of her consideration, this is consistent with the Solicitation's terms that the "overall number of awards will be dependent upon funding availability and evaluation results." Option A BAA, Tab 003 at Bates 001536. Thus, even if Blue Origin is correct that such a selection rationale is "without precedent," it remains true that this selection rationale is consistent with the terms of the Option A solicitation—solicitation terms that Blue Origin did not protest. Accordingly, whether this ground of protest is based on policy considerations as originally pled, but now abandoned, by Blue Origin, or is based upon its latest characterization related to a selection rationale that is "without precedent," this protest ground should be dismissed or denied in its entirety.

e) NASA's actions have not unlawfully restricted future competition.

In support of this protest ground, Blue Origin additionally asserts that NASA's single award decision "creates a potential monopoly ***for all future NASA exploration missions***" (emphasis added). Protest, Tab 001 at Bates 000050. NASA's Request for Dismissal explained how this hyperbolic statement is both highly speculative and demonstrably false. Request for Dismissal at 5-6. Blue Origin's response in support of this premature protest ground does not demonstrate otherwise. Blue Origin Response at 17-18. As explained in its Request for Dismissal, NASA has gone on the record numerous times describing its plans for future additional competition. These competitions, both Appendix N and NASA's LETS competition, will be full and open and will both include lunar lander development money provided by NASA (in addition to the evidence presented in support of this position within the Request for Dismissal, *see also* HLS Budget Analyst Spreadsheet, Tab 109 at Bates 028001, showing that NASA's own internal budget planning currently plans for the Agency to provide a total of ***$3 billion*** for development ("Services DDT&E") on the LETS contract alone). Thus, nothing about NASA's Option A award decision ***unlawfully*** creates a monopoly for "all future exploration missions."

GAO's decision in *Blue Origin Florida, LLC* is again apposite to Blue Origin's line of reasoning. *Blue Origin LLC, supra.* In that case, the protester argued that the Air Force's decision to accelerate a competitive, second phase of its procurement precluded "full and effective" competition and favored incumbent providers. *Id.* at 8. Blue Origin makes the same type of allegation here: "the Agency is providing funding to only one company for the Human Landing System, roughly $3 billion for a system that costs about $6 billion. NASA has publicized no plan that would provide other companies with anywhere near the amount of funding they would need to develop competing lunar landers." Blue Origin Response at 17. But GAO's rationale in the former dispute is equally applicable to the present one. There, GAO wrote,

> "This argument fails to state a basis on which to object to the agency's actions. While Blue Origin may be at a disadvantage because it is currently working to develop, test, and certify its launch system as compared to firms that have already secured certification, this does not mean that the agency is improperly restricting competition. […] Furthermore, while we recognize that offerors with fully certified launch systems may have advantages under these circumstances, this does not compel the conclusion that the agency is unduly biased in favor of an incumbent provider, or that the agency is unduly restricting competition. There is no requirement that the government equalize an incumbent contractor's advantage where that advantage is not the result of preferred treatment or other unfair action by the government" (internal citations omitted). *Blue Origin LLC, supra* at 9.

NASA does not deny that any Option A awardee may have an advantage when proposing on future full and open competitions that NASA holds for lunar surface transportation service providers, including the LETS solicitation. But as noted by GAO, absent a showing of improper action by the Government, incumbent advantage is not legally objectionable and certainly does not demonstrate, as Blue Origin claims, that the Agency is improperly restricting "all future exploration missions." Protest, Tab 001 at Bates 000050.

f) Blue Origin's complaint about the Solicitation's plain language is untimely.

Finally, despite the aforementioned fact that the Solicitation is replete with clear language expressing that the Agency might make only one, or even zero, Option A contract awards, Blue Origin waited until April 26, 2021—178 days after Solicitation issuance—to protest these Solicitation terms. COSOF at section II(B) (stating that the Option A solicitation was first released on October 30, 2020). As identified above, the Solicitation contained at least eight distinct statements that NASA was contemplating making fewer than two Option A contract awards. For 178 days, Blue Origin failed to complain about these terms. NASA thus reprises its position that this protest ground is untimely. Request for Dismissal at 3 n.1. Protests alleging improprieties in a solicitation must be filed before the time set for receipt of initial proposals if the alleged impropriety was apparent prior to that time, as is the case here. 4 C.F.R. § 21.2(a)(1).

2. NASA did not change its requirements (protest at III(A)(1)).

Blue Origin protests that due to a change in NASA's requirements, the Agency was required to amend its Solicitation. Protest, Tab 001 at Bates 000017-000019. However, as fully explained by NASA in its *Request for Dismissal*, and reprised here, NASA did not change its requirements, and therefore was under no obligation to amend its Solicitation. Request for Dismissal at 6-9. NASA once again requests that this ground of protest (at section III(A)(1)) be dismissed in its entirety. In the alternative, NASA requests that this ground of protest be fully denied on the merits.

a) Across its two pleadings, Blue Origin fails to point to any evidence in support of its position that NASA changed its Solicitation requirements.

As NASA pointed out in its *Request for Dismissal*, the Agency's requirements never changed, and Blue Origin has proffered no evidence that they did. Within this Agency Report, this fact is yet again confirmed by the Contracting Officer:

> "NASA did not change its contract requirements. Rather, after conducting successful post-selection negotiations with the most highly-rated Option A offeror, the SSA selected that offeror for a contract award. At no point after NASA received its FY21 appropriation did NASA change its HLS Option A requirements, and at no point did SpaceX de-scope or reduce the performance offered in its original proposal in any manner." COSOF at 26.

In response, Blue Origin continues to fail to provide any factual basis for this ground of protest. Blue Origin Response at 6-13. First, Blue Origin states that NASA's "requirements changed due to a perception of dramatically reduced funding." *Id.* at 6. It is unclear who the actor doing the perceiving is in that statement, but in any case, a "perception" of reduced funding, however dramatic that perception may be, fails to constitute the type of hard change in requirements that necessitates a solicitation amendment.

Next, Blue Origin states that "NASA communicated its intent to award two HLS Option A awards, and also made repeated statements about its budgets to do so." *Id.* In regards to this statement, the relevant inquiry is what NASA said in its Solicitation, and the Solicitation does not say anything at all about NASA's budget. Furthermore, in those instances in which the Solicitation states NASA's intent regarding number of contract awards, all of these statements contain some inherent flexibility regarding the ultimate number of awards (e.g., "The Government ***intends*** to award ***one or more*** contracts" (emphasis added)). Option A BAA, Tab 003 at Bates 001528. Blue Origin continues to assert and rely on demonstrable falsehoods because it continues to be unable to point to any actual evidence that NASA's Option A requirements changed.

Similarly, Blue Origin cites to no language ***in the Solicitation*** that discusses budget in any manner. As such, Blue Origin's statement that "NASA … made repeated statements about its budgets to [award two Option A contracts]" is, again, a demonstrable falsehood. Blue Origin Response at 6. Instead, Blue Origin reveals yet again that this ground of protest, as others, is based on its own (incorrect) assumptions and reliance on information outside of the Solicitation. Specifically, Blue Origin states:

> "The Agency further claims offerors did not need to have any idea what the Agency budget was in order to submit a proposal. That assertion is nonsensical: ***Depending on the funding available, an offeror's proposal will change*** – certain developments can be fast tracked or completed earlier to mitigate risk; more testing can be done, which can mitigate risk; more spare parts can be ordered, which can

mitigate schedule delays. A plan for an HLS project with an expected $16 billion of funding will certainly entail less performance and schedule risk than if there is only $2.9 billion of funding. See Protest at 9-10 (NASA's Artemis Plan estimates $16.2 billion for Option A)" (internal citations omitted). Blue Origin Response at 8.

But this entire argument rests on the implication that NASA's Solicitation ever specified, or even obliquely referenced, a specific amount of available funding. ***It did not.*** As has been pointed out by NASA in its *Request for Dismissal*, the Solicitation did not give offerors any specific funding information upon which to base their proposals. To the contrary, the Solicitation repeatedly advised that NASA did not know what its funding would be, and that the number of awards was specifically contingent on funding. Request for Dismissal at 7 ("Fundamentally, Blue Origin attempts to fault NASA for failing to update offerors about ***information that was never in the BAA to begin with***" (emphasis in original).)

Every single dollar figure relied upon by Blue Origin in both its Protest and its Blue Origin Response as stating an alleged NASA-provided budget for HLS Option A comes from a document or source that is not the Solicitation. The Solicitation did not instruct offerors to base any aspect of their proposal on a certain actual or projected budget. It appears now that Blue Origin made an assumption about NASA's Option A budget and built its proposal based, in part, on this number. Then, NASA's actual appropriation fell short of this figure, and NASA elected to make only one Option A contract award to an offeror other than Blue Origin. In response, Blue Origin now seeks relief from this Office to remedy Blue Origin's error in judgment by overturning NASA's reasonable procurement decisions. This attempt must fail.

b) The axiomatic legal principle that changed requirements necessitate a solicitation amendment or cancellation is inapplicable to this ground of protest.

Blue Origin's legal arguments in support of this ground of protest are similarly unavailing. Blue Origin cannot identify any legal standard requiring an agency to amend its solicitation in light of the specific facts of the present situation: an agency that, during solicitation drafting, understood that it could receive a range of appropriations, drafted a solicitation that explicitly reflected this uncertainty, and in fact ultimately received an appropriation on the lower end of what the agency had hoped for. Blue Origin's protest strains to equate these facts to a change in requirements, but they plainly are not. And unable to demonstrate as much, Blue Origin alternatively implies that NASA's receipt of its appropriation should have caused it to change its requirements and advertise downgraded requirements in an amended solicitation (*see, for example,* "Had NASA invited a revised proposal to meet such a schedule [a demonstration mission delayed by eighteen months], we would have eliminated multiple programmatic and technical risks including vendor long-lead procurement penalties, resulting in a reduced total evaluated price and a different funding profile.") Protest, Tab 001 at Bates 000224. But again, Blue Origin fails to point to a single case that stands for this position.

Instead, the cases relied upon by Blue Origin for this protest ground reflect the unobjectionable, axiomatic principle that a change in requirements generally necessitates a solicitation amendment. NASA does not disagree. But as demonstrated by NASA in its Request for Dismissal, this jurisprudence is irrelevant insofar as it is premised on fact patterns that are inapposite to the present dispute. The Blue Origin Response entirely ignores these arguments within NASA's Request for Dismissal, and simply provides lengthier block quotes from many of these cases in an apparent attempt to demonstrate their applicability. But none of this content refutes NASA's simple point, as made in its Request for Dismissal, that the facts of these cases simply are not analogous to the present Protest.

Blue Origin relies anew in its *Blue Origin Response* on *M.K. Taylor, Jr. Contractors, Inc.,* B-291730.2, Apr. 23, 2003, 2003 CPD ¶ 97 as allegedly holding that when an agency's "funding philosophy" changes, "scope of work changes due to funding" should be communicated to all offerors. Blue Origin Response at 12. But despite the case's reference to "funding," *M.K. Taylor* had nothing to do with availability of appropriated funds, but rather an agency that needed to purchase supplies under the base year of a contract in far greater quantities than suggested in the solicitation.

In addition, the *Blue Origin Response* reprises its reliance on *Symetrics Indus., Inc.*, B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59. Blue Origin Response at 10, 30. But NASA has already demonstrated in its *Request for Dismissal*, and Blue Origin has ignored, that this case is inapposite to the present case. There, the Government had actual knowledge that its hard requirements had changed before contract award, but failed to amend its solicitation (in which the Government learned prior to award that it no longer had a requirement for more than 3,000 pieces of hardware it had previously required, which constituted an 86% reduction in the Government's hardware requirements).[2]

Finally, although not cited in the Protest, the *Blue Origin Response* relies heavily on GAO's decision in *Joint Action in Community Service, Inc.*, B-214564, Aug. 27, 1984, 84-2 CPD ¶ 228. Blue Origin Response at 9-10. Blue Origin asserts that in *Joint Action,* "GAO sustained a protest where the Agency engaged in discussions with only one offeror because of limitations on available funding." *Id.* at 9. But here, Blue Origin misleads GAO as to the similarities between this case and *Joint Action*. The facts that led GAO to find legal error in the *Joint Action* protest are not present here; moreover, the key facts that led GAO to find prejudice in *Joint Action* are also missing here. *Joint Action* therefore undermines Blue Origin's protest in both respects.

[2] Each of the remaining bid protest decisions relied on Blue Origin further support NASA's position here or are inapposite. See e.g., *Chronos Sols., LLC; Inside Realty, LLC; BLB Resources, Inc.*, B-4178702.2 et al., Oct. 1, 2020, 2020 CPD ¶ 306 (pre-award protest challenging solicitation terms where changes in law will dramatically increase contemplated scope of contract work evidencing inaccuracy of solicitation estimates); *Global Sols. Network, Inc*., B-298688.2, Dec. 10, 2007, 2007 CPD ¶ 223 (denying protest alleging change in requirements based on agency's response that solicitation continues to reflect its needs); *Info. Ventures, Inc.*, B-297815.2, Feb. 13, 2006, 2006 CPD ¶ 40 (denying protest challenging cancellation of solicitation where record evidenced that all funding for procurement at issue was no longer available); *Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Inc.*, B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 223 (denying protest alleging that provision of additional helicopter constituted a "significant change in government requirements" triggering an amendment and finding that protester also lacked prejudice).

First, Blue Origin mischaracterizes the procurement error identified in *Joint Action*. GAO did not sustain the protest based on any blanket prohibition against negotiating with a single offeror to address funding limitations. Instead, GAO found objectionable the fact that the agency agreed to ***change the performance requirements, specifically substituting government furnished property ("GFP") for contractor-furnished property required by the solicitation.*** While this is plain from the face of the *Joint Action* decision, it is conspicuously omitted from Blue Origin's lengthy block quote. The following quote demonstrates the operative facts in *Joint Action* that Blue Origin ignores:

> "The record shows that Labor excluded JACS from the post-BAFO negotiations ***and apparently altered the RFP's GFP requirements during the post-BAFO negotiations***. Specifically, it appears that Labor established a ceiling price at the level of available funding (approximately 1,200 below WICS's offer). ***Labor then altered the RFP requirements by substituting GFP for what was previously contractor-furnished property.*** The GFP consisted of office space, phone service, office furniture/equip (office GFP), and apparently a list of JACS's volunteers (list GFP). The office GFP, if valued at the prices set out in WICS's cost proposal, was worth approximately $40,500. It is not known what the list GFP was worth to WICS. On this basis, WICS could have reduced its price $40,500; however, both parties agreed to limit the price reduction to the $1,200 necessary to come within the available funding. If it is assumed that Labor negotiated a dollar for dollar reduction for each item of GFP furnished, the outcome would have been a $39,300 balance. The record does not show the exact amount of this balance. Labor refers to the balance as 'savings.' The record shows that Labor and WICS agreed that the 'savings' would be reallocated within the total budget. It is not clear whether Labor and WICS had specific work in mind to which the savings would be reallocated" (emphasis added). *Id.* at 3.

Given that the agency in *Joint* had altered the terms of the solicitation during negotiations, GAO found that the agency violated the rule that "if during final discussions it becomes ***obvious that the contract requirements being negotiated with the sole remaining offeror differ significantly from the requirements stated in the RFP***, the contracting officer must amend the RFP and seek new offers" (emphasis added). *Id.* at 2. Conversely, here, NASA did not revise any BAA term or contract requirements during or as a result of its post-selection negotiations with SpaceX. Accordingly, the impropriety identified in the *Joint Action* decision and relied on by Blue Origin to trigger an amendment is missing here.

Further, *Joint Action* also confirms that even if Blue Origin had identified a procurement error (which it has not), Blue Origin has not met its burden with respect to prejudice here. In *Joint,* after finding that the agency erred by failing to amend the solicitation to reflect the substitution of contractor-provided property with GFP, GAO conducted a detailed prejudice analysis. Critical to GAO was the fact that once the protester, JACS, learned of the agency's offer to provide additional GFP, JACS confirmed how, based on discussions, it would have lowered it price below the awarded price:

> "JACS's argument is premised upon its knowledge of the award price and the GFP furnished to WICS. JACS believes it was prejudiced by Labor's decision to provide GFP because if it had received similar GFP, ***it would have proposed a price below the award price.*** JACS valued the office GFP at $43,100 and the list GFP at $44,900. JACS argues that it would have cut one professional staff position if Labor had provided JACS with a list of WICS's volunteers. *Id.*

Based on the record in *Joint* establishing how the protester could have reduced its price if offered GFP, GAO agreed that the price difference between the two offerors was not large enough to conclude with confidence that the protester was not prejudiced. *Id.*

Blue Origin has failed to establish similar facts in support of a showing of prejudice in the instant dispute. Here, Blue Origin knew ***before*** it filed its Protest on April 26, 2021 that NASA's budget could only accommodate an award valued at approximately $2.9 billion. Option A Source Selection Statement, Tab 093 at Bates 027777 (provided to Blue Origin on April 16, 2021). Blue Origin's Total Evaluated Price of $5.99 billion is more than double the amount that NASA's Source Selection Statement indicates that the Agency can afford. Protest, Tab 001 at Bates 000012. Blue Origin's Protest provides a statement by Brent Sherwood complaining that the Agency did not engage in negotiations with Blue Origin:

> "The Source Selection Authority's opinion did not afford Blue Origin, a well-funded private space company backed by Jeff Bezos, any opportunity to submit a revised business position in light of the 'available funding' (which was never communicated to Blue Origin) even as it was already affording that opportunity to SpaceX." *Id.* at 000222.

This same Declaration makes strong, ***albeit notably non-specific***, statements about Blue Origin's ability and willingness to offer NASA a lower price if only it had opened negotiations. For example, Mr. Sherwood states, "Exhibit A addresses Blue Origin's and its founder's [Jeff Bezos's] financial ability. The Exhibit very clearly points to the fact that Blue Origin could afford a very sizeable contribution to HLS Option A." *Id.* In addition, Mr. Sherwood states, "Blue Origin and the National Team had the financial potential to increase its corporate contribution and private investment above the almost one billion dollars proposed. See Exhibit A. The Source Selection Official's assumption that Blue Origin and our National Team members would not or could not self-fund a greater share of the total cost was erroneous and unfounded." *Id.* at 000224. Mr. Sherwood even goes so far as to note the specific dollar values proposed as corporate contributions by Blue Origin for both the base and Option A periods, as well as the specific dollar values of certain reimbursable Space Act Agreements. *Id.* at 000225.

But what is conspicuously absent is a clear, unequivocal statement from Blue Origin that, given the opportunity, it would have lowered its proposed Option A price, without de-scoping any aspect of its technical or management approaches, to come within the bounds of the Agency's purported budget. Over the course of five pages and 20 paragraphs, the entire purpose of which is plainly to convince this Office that Blue Origin, its team members, and of

course, its founder Jeff Bezos, have the financial means and inclination to offer NASA a "sizeable" discount if only it had asked, it is thus notable that Blue Origin, through Mr. Sherwood, never makes a statement with the kind of specificity required to show prejudice. A vague commitment to a sizeable, non-specific discount is not enough to demonstrate prejudice.

Despite having ***actual*** knowledge of NASA's stated funding limits ***before*** filing its Protest, Blue Origin fails to commit to reduce its price specifically by the more than $3 billion that would be necessary to fall within those funding constraints. Absent such a commitment, Blue Origin does not demonstrate prejudice in any purported failure by NASA to open negotiations with Blue Origin. *Equinoxys, Inc.*, B-419237, Jan. 6, 2021, 2021 CPD ¶ 16 at 5 ("where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding competitive prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found."); *Xtec Corp*., B-418619 et al., July 2, 2020, 2020 CPD ¶ 253 (denying protest and finding no prejudice where protester has not meaningfully articulated how or on what basis it would have altered its proposal to lower its price); *Aerosage, LLC*, B-415607, Jan. 3, 2018, 2018 CPD ¶ 11 (finding no prejudice where protester failed to substantiate how it would have reduced its pricing). *See also Online Video Serv., Inc.*, B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 (denying protest that agency failed to engage in meaningful discussions with protester regarding its high price because protester's mere allegation—with no explanation or evidence—that it would have lowered its price is not sufficient to demonstrate prejudice); *M.K. Taylor Jr. Contractors, Inc.*, B-291730.2, Apr. 23, 2003, 2003 CPD ¶ 97 (denying protest alleging change in requirements for lack of prejudice where protester's own calculations contradicted protester's claim that its total price would have been significantly lower had it known the change in requirements).

And, despite Blue Origin's attempt to fabricate inconsistencies in the NASA and SpaceX dismissal arguments, a finding that Blue Origin has not suffered prejudice does not require one to transform this BAA procurement into a best value determination comparing competitive proposals. The salient facts are that Blue Origin's proposed price was more than double NASA's stated funding limits, and Blue Origin's proffered declaration fails to commit to reducing its price below those funding limitations. There is no basis for GAO to assume that when Blue Origin commits to a "sizeable" discount, it is committing to a $3 billion discount; in any case, Blue Origin had every opportunity to make this specific commitment in its Protest, but elected not to do so. Based on the stated BAA criteria of technical, importance to Agency programs, ***and funds availability,*** Blue Origin had no chance of award.

Based on the foregoing, NASA respectfully requests that the GAO dismiss the protest ground within section III(A)(1) of Blue Origin's Protest in accordance with 4 C.F.R. § 21.1(i) and § 21.5(f), or, in the alternative, deny this ground in its entirety. Finally, even if this Office finds merit to Blue Origin's claim that NASA was required to engage in post-selection negotiations with Blue Origin, this protest ground should be denied for failing to show that NASA's alleged error was prejudicial to Blue Origin.

3. NASA's selection official did not employ an LPTA methodology (protest at 15 n.1).

Blue Origin protests that NASA's receipt of updated budget information caused the SSA to apply a selection methodology that differed from the one set forth in the solicitation (Protest at 15 n.1). Protest, Tab 001 at Bates 000019. Specifically, Blue Origin asserts that NASA converted its evaluation methodology to that of a lowest priced technically acceptable (LPTA) approach without informing offerors of this change through a solicitation amendment. *Id.* As pled by NASA in its request for dismissal, and fully reprised here for this ground of protest, Blue Origin fails to set forth detailed statements of legal and factual grounds of protest. In its response to this request, Blue Origin fails to convincingly show that it has met GAO's applicable pleading burdens for this ground of protest. But even if it has, this protest ground must nonetheless be denied on the merits.

This dispute is primarily a factual one; it is unobjectionable that if an agency makes award decisions based on an LPTA methodology that differs from the methodology set forth in its solicitation, this constitutes an actionable procurement error that is appropriate for review by this Office. But as NASA has demonstrated, that is simply not what happened in the present case. Blue Origin offers no facts or evidence in support of this allegation other than its statement that "the Agency applied undue weight to price due to funding constraints and deviated from Solicitation's evaluation framework and weightings." Protest, Tab 001 at Bates 000019. But NASA's Source Selection Statement demonstrates otherwise. Therein, the selection official recounted the solicitation's evaluation methodology, in which there are three evaluation factors, listed here in descending order of importance: Technical, Price, and Management. Source Selection Statement, Tab 093 at Bates 027773. Further, the selection official stated that she "examine[d] the totality of the [evaluation results] across the Option A solicitation's evaluation criteria, ***as well as the relative weighting of those criteria as stated therein***." *Id.* at 027776.

She also noted that as the selection official, she was "not, as a general matter, tasked with conducting a comparative analysis or trade-off amongst proposals. Rather, as the SSA, I am charged with considering each proposal on its own individual merits and selecting for award one or more proposals that individually each present value to the Government. […] [I]n accordance with section 6.1 of the BAA, NASA is permitted to select for award multiple, one, or none of the Option A proposals. ***Perhaps most critically, the solicitation provides that "[t]he overall number of awards will be dependent upon funding availability and evaluation results. My selection decisions set forth below are based upon these dual considerations"*** (emphasis added). *Id.*

In looking across evaluation results for all three of the offerors, the selection official noted that SpaceX had the highest Technical rating (the same as that of Blue Origin but higher than Dynetics') and the highest Management rating (higher than both Blue Origin and Dynetics). *Id.* at 027777. She further observed that "SpaceX's Total Evaluated Price of $2,941,394,557 was the lowest among the offerors by a wide margin." *Id.* Finally, she stated, "In light of these results, and the funds presently available to the Agency for Option A contract(s), my selection analysis must first consider the merits of making a contract award to the offeror that is most

highly rated and has the lowest price—SpaceX." *Id.* Without replicating the remainder of the selection statement herein, the selection official then preceded to thoroughly examine the qualitative aspects of SpaceX's proposal and concluded that "SpaceX's acceptable technical approach coupled with its outstanding management approach provide abundant value for NASA at its Total Evaluated Price." *Id.* at 027782-027783. She further concluded that it was within the Agency's available budget to make an award to SpaceX. *Id.* at 027784. As a result of these dual considerations, the selection official selected SpaceX's proposal for a contract award. Thereafter, she qualitatively examined the value presented to NASA by the next most highly-rated offeror according to the evaluation scheme, Blue Origin, and followed this same analysis for Dynetics.

The fact that the Agency's most highly-rated offeror for the non-price factors was also, by a wide margin, the offeror with the lowest Total Evaluated Price, does not lead to the conclusion that the selection official used an LPTA methodology. The procedure described above and thoroughly documented within the Source Selection Statement is entirely consistent with, and demonstrates scrupulous adherence to, the evaluation and award methodology prescribed in the Option A solicitation. LPTA procurements are authorized under FAR Part 15, which permits source selection "on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors." FAR 15.101-2(b)(1). Under an LPTA evaluation, the agency merely compares the prices between technically acceptable proposals. By contrast, NASA conducted this procurement under FAR 35.016(d). FAR 35.016 authorizes the use of a BAA, under which the Agency "need not . . . [evaluate proposals] against each other." FAR 35.016(d). Rather, proposals are evaluated independently, on their own merit, through "a peer review or scientific review process." FAR 35.016(d). As the Source Selection Statement demonstrates, the SSS adhered to this stated evaluation approach.

A condition precedent to demonstrating that an agency utilized an LPTA methodology is showing that the selection official compared proposals found to be technically acceptable against one another on the basis of price. *See* FAR 15.101-2(b)(1). Here, the SSA did not do so, and Blue Origin has provided no evidence that she did. The SSA found that all three offerors' proposals were technically acceptable (not containing any technical deficiencies), and yet the Source Selection Statement contains no evidence that when making award determinations, the SSA conducted a comparison between Blue Origin's and SpaceX's proposed prices. Instead, the SSA compared each proposal's price to the Agency's available funding, and then considered whether, under the given "funding availability and evaluation results," NASA should "select for award multiple, one, or none of the Option A proposals." Source Selection Statement, Tab 093 at Bates 027776.

Therefore, after evaluating the individual merits of SpaceX's proposal and finding that "SpaceX's acceptable technical approach coupled with its outstanding management approach provide abundant value for NASA at its Total Evaluated Price," the SSA concluded that "the Agency's budget now permits the award of a contract to SpaceX." *Id.* at 027782-027783. The SSA then considered the value presented by the next most-highly rated offeror, Blue Origin. In her evaluation, the SSA found that "the amount of remaining available funding [in the Agency budget] is so insubstantial" after the award to SpaceX that an award to Blue Origin was not reasonable. *Id.* at 027789. Because the Solicitation was clear that "the overall number of Option

A awards is dependent upon funding availability," the SSA concluded that she "[did] not have enough funding available" for an award to Blue Origin. *Id.* Thus, Blue Origin's proposed price was never compared to SpaceX's price. And absent a showing that it was, or any other evidence in support of this protest ground, Blue Origin fails to demonstrate that the Agency converted its selection methodology to an LPTA scheme without informing offerors.

In sum, NASA's selection official made award decisions using the methodology specified within the Option A solicitation. *See generally Posterity Arora JV, LLC*, B-415760.5, Nov. 2, 2020, 2020 CPD ¶ 361 (protest denied where GAO found that protester's allegation that Government converted from a best-value tradeoff methodology to an LPTA competition had no merit because the record showed that the Government's evaluation was reasonable and consistent with the terms of the solicitation). This was reasonable and consistent with law and regulation. Accordingly, Blue Origin's allegation that NASA improperly converted this source selection to that of an LPTA methodology should be dismissed or denied.

4. NASA's post-selection negotiations were consistent with the terms of the solicitation and were not unequal or otherwise unreasonable.

Finally, to the extent that Blue Origin's Protest contains wholly unsupported assertions that NASA impermissibly conducted "discussions" with SpaceX but no other Option A offerors, NASA does not consider these bare statements to constitute properly pled individual grounds of protest (*see, e.g.,* "NASA arbitrarily decided to only engage in discussions with one bidder, contrary to long established federal procurement principles" within Blue Origin's Protest *Introduction* section, and repeated again in the introduction of its *Argument* section, but never actually pled as its own supported ground of protest). Protest, Tab 001 at Bates 000007 and 000016. Nonetheless, the Agency unequivocally asserts that NASA's post-selection negotiations communications with SpaceX were not discussions, were entirely reasonable, and evidence no violation of law, regulation, or inconsistency with the processes contemplated by and permitted by the plain terms of the Solicitation.

The Solicitation provided two different mechanisms for the Agency to communicate with offerors after receipt of proposals and in a manner that could have the effect of the offeror changing the material terms of its proposal: discussions, and post-selection negotiations. As specified in Solicitation section 4.1.3, Definitions:

> "Discussions" are exchanges with Offerors that occur after receipt of proposals but before selection that result in the Contracting Officer inviting the Offeror to revise only those specific portions of its proposal that have been identified by the Contracting Officer as open to revision.
>
> "Post-selection negotiations" are exchanges with Offerors who have been selected for potential contract award that result in the Contracting Officer inviting the Offeror to revise only those specific portions of its proposal that have been identified by the Contracting Officer as open to revision.

Option A BAA, Tab 003 at Bates 001489.

The Solicitation further advised offerors of how, if at all, discussions or post-selection negotiations would be initiated and utilized by NASA:

> NASA may evaluate and select for award, based on initial proposals, without discussions or negotiations. However, NASA reserves the right to conduct discussions or post-selection negotiations if deemed in the best interest of the Government. Accordingly, each Offeror should submit its initial proposal to the Government using the most favorable terms from a price and technical standpoint.

Option A BAA, Tab 003 at Bates 001536.

Blue Origin did not protest these (or any) Solicitation terms. In fact, Blue Origin was a direct beneficiary of substantially the same exact procedural methodology during the base period, in which NASA selected Blue Origin for award and thereafter engaged them in post-selection negotiations, permitting Blue Origin to offer a substantial discount in order to make their proposal eligible for final award. COSOF at 6. Yet now, only when Blue is not the beneficiary of that same process, does it attempt for the first time to cast these interactions as "discussions," and impermissible ones at that. This attempt must fail.

This Office's decision in *CSRA LLC*, B-417635, Sept. 11, 2019, 2019 CPD ¶ 341, is instructive for the instant case. In *CSRA, LLC*, the protester argued that the agency failed to provide it with meaningful discussions where the agency assigned the protester a significant weakness based on shortcomings in the protester's oral presentation, but the agency did not notify the protester of that significant weakness in subsequent discussions. GAO rejected the protest as an untimely challenge to solicitation terms because the solicitation made clear that discussions would not encompass the oral presentations:

> [T]he amended solicitation expressly informed vendors that the scope of the agency's discussions would not include the oral presentations: "the purpose of this amendment is to provide discussion letters exclusive of the content of oral presentations". The agency reiterated same in the discussion letters provided to each vendor, i.e., the discussions would involve identified significant weaknesses and deficiencies in all areas other than the oral presentations. While CSRA may not have known exactly how its unsuccessful GD.Raptor dashboard demonstration had been evaluated at the time the discussions occurred, we find that it was incumbent upon CSRA to protest the agency's decision to exclude oral presentations from discussions, as established by the terms of the amended solicitation, by the next RFQ closing date.

CSRA LLC, B-417635, Sept. 11, 2019, 2019 CPD ¶ 341 (internal alterations and citations omitted).

The same result is warranted here. The Option A BAA put all offerors on notice that NASA had discretion to select only one specific offeror as a potential contract awardee and engage that offeror alone in post-selection negotiations. Any post-award protest asserting that NASA was obligated to open the same negotiations with another, or all offerors, is untimely.

The facts further demonstrate that NASA's post-selection negotiations were unobjectionable. On April 2, 2021, the SSA selected SpaceX for an Option A contract award and made a determination that it would be in the Agency's best interests to open negotiations with SpaceX. As such, she directed the Contracting Officer to do so. SSA Selection and Negotiations Memorandum, Tab 190 at Bates 035214-035216. She did not select the other two Option A offerors for award, nor direct the Contracting Officer to engage with them in discussions. After sending SpaceX a negotiations letter on that same day, NASA thereafter received appropriately revised proposal terms from SpaceX on April 7, 2021. SpaceX Negotiations Response, Tabs 194-200 at Bates 035229-035332. This sequence of events is fully described within pp. 25-26 of the COSOF.

Even if the Option A BAA had not expressly advised offerors of NASA's discretion to engage only limited offerors in post-selection negotiations, NASA would still be well within its authority to have done so in the context of this BAA procurement. There is no dispute that this procurement was conducted as a BAA pursuant to FAR 6.102(d)(2) and FAR 35.016. This Office has consistently recognized that BAA procurements are not subject to FAR Part 15 discussion standards. While in some cases GAO has referenced FAR Part 15 to evaluate the reasonableness of an agency's BAA communications with offerors, those cases involved circumstances where an agency implicitly adopted a FAR Part 15 discussions model by using discussions as part of the source selection process.

But where, as here, an agency engages in limited negotiations, post-selection, with an apparent BAA selectee, GAO has confirmed that FAR Part 15 is not a relevant standard. Instead, GAO asks only whether the agency conducted itself in an arbitrary manner, and negotiated in good faith and in accord with the solicitation. As demonstrated by *Spaltudaq Corp.*, GAO has recognized the validity of post-selection negotiations within the context of a BAA procurement:

> It is true that in prior cases we have looked to FAR part 15 for guidance in reviewing the agency's conduct of discussions under a BAA when an agency uses negotiated procedures as part of the selection process, in which case the discussions must be meaningful. Here, however, the negotiations that occurred between Spaltudaq and the agency were not part of the evaluation and selection process, but occurred after the evaluation had been completed and Spaltudaq's proposal had been selected for award. As discussed more fully below, by the BAA's terms, the negotiations were not intended as discussions as defined in FAR part 15. Thus, the requirement for meaningful discussions as stated in FAR part 15, and in the cases interpreting that part, does not apply. That is not to say that the agency's conduct of post-selection negotiations under a BAA is not reviewable. Although we find that DTRA had no obligation to follow the specific requirements for discussions set forth in FAR Part 15, agencies may not conduct themselves in an arbitrary manner, and they must

> negotiate in good faith and in a manner consistent with the BAA. As explained below, we find that DTRA met this standard in conducting negotiations with Spaltudaq.
>
> B-400650, Jan. 6, 2009, 2009 CPD ¶ 1 (internal citations omitted).

NASA more than meets this standard here. As explained above, NASA's decision to engage in post-selection negotiations with SpaceX, as the only offeror selected for award, is perfectly "consistent with the BAA." Accordingly, in the context of the limited post-selection negotiations conducted here, NASA amply satisfies its minimal obligations and acted reasonably, well within its broad discretion under the law and the Option A BAA.

B. Disagreements with the Agency's Evaluation Conclusions for Blue Origin

Blue Origin challenges nearly every negative evaluation conclusion reached by NASA, across all three evaluation factors, alleging a multitude of garden variety instances of perceived unreasonable evaluation conduct and conclusions. The Contracting Officer's Statement of Facts sets forth detailed factual responses to each and every one of these protest allegations. In the interest of the efficiency of the administrative review process, NASA will not belabor these points or otherwise restate these responses in this Memorandum. However, to the extent that NASA believes that additional legal arguments would support the reasonableness or propriety of its technical evaluation conclusions, those arguments are set forth and discussed herein.

1. Technical Evaluation Disagreements

Blue Origin alleges that NASA's evaluation of its technical approach was unreasonable. Protest, AR Tab 001 at Bates 000024. Here, Blue challenges eight of its fourteen assigned weaknesses, all of its assigned significant weaknesses, and alleges that one of its strengths should have been a significant strength. *Id.* Once all of these perceived flaws in NASA's evaluation scheme are corrected, Blue Origin concludes that it should have been assigned an adjectival rating of Very Good for Factor 1, Technical. *Id.*

Each of the aforementioned technical allegations advanced by Blue Origin is addressed in great detail within the COSOF at section VI(A); each ones fails as a matter of fact. Furthermore, to the extent that these allegations constitute mere disagreement with the Agency's conclusions, GAO should afford these protestations no weight. GAO has long recognized that a protester's mere disagreement with the agency's judgment about a proposal's relative merit is not a valid basis for protest. *See e.g.*, *Battistella S.P.A.*, B-416597.4, Jan. 24, 2019, 2019 CPD ¶ 27 ("our decisions establish that a protester's disagreement with the agency's judgment does not provide a basis to sustain the protest"); *Billsmart Sols.*, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 ("The evaluation of proposals, including determinations regarding the magnitude and significance of evaluated strengths and weaknesses, is a matter largely within the agency's discretion, and, as here, a protester's mere disagreement with the agency's judgment does not establish a basis for our Office to sustain a protest"); *Envtl. Chemical Corp.*, B-

416166.3, 416166.4, June 12, 2019, 2019 CPD ¶217 at 4 (noting that agencies have discretion to decide whether a proposal deserves a "good" as opposed to a "very good" rating).

Because Blue Origin has failed to demonstrate that NASA's evaluation of its technical approach was flawed or unreasonable in any manner, Blue Origin's assertion that its Technical adjectival rating should have been "Very Good" must also fail. Protest, Tab 001 at Bates 000036-000037. And in the absence of showing that this adjectival rating was assigned in error, Blue Origin's claim that it was prejudiced by NASA's evaluation of its technical approach also fails. Protest, Tab 001 at Bates 000037.

2. Management Evaluation Disagreements

Blue Origin protests that NASA's evaluation of Blue Origin for Factor 3, Management, was unreasonable (encompassing three (3) individual grounds of protest), and further asserts that it should have received an Outstanding rating for the Management factor as opposed to the Very Good rating assigned by NASA. Protest, Tab 001 at Bates 000043. As with Blue Origin's technical allegations, its management allegations similarly constitute nothing more than mere disagreement with the Agency's evaluation conclusions.

In addition, to the extent that Blue Origin complains regarding its data rights evaluation, and specifically about different evaluation results between the base and Option A period, this Office has held that an agency is under no obligation to reach the same evaluation conclusions in two sequential evaluations, particularly when, as here, the inputs have materially changed. Specifically, GAO has held that in the case of a phased procurement and subsequent downselection, particularly in the technology development context, there is nothing *per se* improper about an agency reaching negative evaluation conclusions regarding later phases of an offeror's design where the agency previously evaluated similar design aspects more favorably. *See Martin Marietta Corp.*, B-259823, July 3, 1995, 96-1 CPD ¶ 265 at 6 (finding that "although clearly related in that they represent steps in the ultimate development and acquisition of [a sonar system]," the agency's prior competitions and awards "***were legally separate contracting actions***" and recognizing that "the fact that an agency in a prior procurement reached one conclusion concerning the acceptability of an offeror's approach does not preclude an agency from subsequently reaching, ***upon further consideration***, a different conclusion") (emphasis added).

Finally, as discussed below in (a), the Agency's Option A evaluation conclusions regarding Blue Origin's commercial approach were reasonable and consistent with the terms of the Solicitation.

a) The Agency's evaluation of Blue Origin's Commercial Approach as lacking in sufficient detail was reasonable and in accordance with the Option A solicitation. NASA's base period evaluation panel's assignment of a significant strength for Blue Origin's initial Commercial Approach submission does not render NASA's Option A evaluation irrational or unsupportable.

Blue Origin takes issue with NASA's evaluation of its Commercial Approach, and in particular its assignment of a Weakness for lacking sufficient detail in several respects. Protest, AR Tab 001 at Bates 000041-000042. In particular, Blue Origin believes that the SEP failed to credit it for content is says was in its Management Volume, as well as elsewhere in its proposal. Blue Origin accompanies this allegation with its opinion that its plan was indeed detailed. *Id.* This is textbook disagreement with the evaluation conclusions of NASA's evaluation panel with respect to this aspect of Blue Origin's Option A proposal and should be denied as such. *See Harkcon, Inc.*, B412936.2, March 30, 2017, 2017 CPD ¶110 at 4-5 (denying a protester's challenge to the agency's evaluation conclusions regarding the protester's management approach as disagreements with the agency evaluators' judgments). Moreover, this Office's precedent is clear that when a protester claims that substantiating information may be found elsewhere in its proposal, the agency is under no obligation to seek out this additional content nor investigate and resolve inconsistencies contained therein. This is because it is the responsibility of the offeror to submit a well-written proposal that clearly demonstrates compliance with the solicitation's requirements. *Blue Water Thinking, LLC*; *AcesFed, LLC*, B-418561.9, *et al.*, Feb. 22, 2021 2021 CPD ¶ 142 at 8. Blue Origin's allegations should therefore be denied.

Blue Origin's remaining argument within this allegation is a claim that the Option A SEP's evaluation conclusions with respect to Blue Origin's Commercial Approach must be unsupportable, given that Blue Origin received a Significant Strength for providing "essentially the same approach" during the base period evaluation. Protest, AR Tab 001 at Bates 000042-000043. As set forth in the Contracting Officer's Statement of Facts, this allegation is unavailing and unsupported by legal principles applicable to cases where an agency may reasonably reach different evaluation conclusions in later phases of a procurement.

In particular, this Office's precedent is clear that evaluation ratings and conclusions reached under a different solicitation are generally not probative of alleged unreasonableness in another, subsequent evaluation. *See Sayres & Assocs. Corp.*, B-418374, Mar. 30, 2020, 2020 CPD ¶ 115 n. 9. This principle is applicable in procurements like HLS, where an agency undertakes a phased procurement and subsequent competitive downselection. In those cases, this Office has found it permissible that an agency later reaches evaluation conclusions regarding an offeror's approach than it did upon its initial examination of the offeror in the prior procurement, especially where, an offeror's development approach (or its commercial approach appurtenant to that development approach) should have matured or may have changed. *See Martin Marietta Corp.*, B-259823, July 3, 1995, 96-1 CPD ¶ 265 at 6. Further, this Office will not require reconciliation of prior and current evaluation results where, as here, the agency's solicitation changed and the composition of the evaluation panel changed. *See Nat'l Gov. Servs., LLC*, B-401063.2, Jan. 30, 2012.

As explained by the Contracting Officer in his specific response to this allegation, NASA actually ***did*** modify the Commercial Approach Area of Focus in the Option A BAA solicitation, adding a new requirement for offerors to propose market analyses and marketing plans specific to their approaches for provide commercial services to non-NASA customers utilizing the capabilities developed under the HLS effort. COSOF at 96. Moreover, while the Option A SEP did have some overlap in membership, it bears noting that the Option A management evaluation subpanel (the team that reviewed Blue Origin's Management Volume (and therefore, its Commercial Approach contained therein) was actually comprised of an entirely new team of NASA personnel. COSOF at 19. Therefore, these conditions support the Agency's position that the Option A SEP's evaluation of Blue Origin's Commercial Approach should stand on its own and that it is independently reasonable and sufficiently documented. For these reasons, Blue Origin's protest in this regard should be dismissed.

3. Price Evaluation Disagreements

Protesting a portion of NASA's price evaluation within Factor 2, Price, Blue Origins alleges that NASA's identification of two advance payments within its proposal was erroneous. Protest, Tab 001 at Bates 000019-00023. As discussed below, NASA's identification of advance payments was reasonable and consistent with the terms of the Solicitation. These grounds of protest must accordingly fail.

a) The Agency's Evaluation Properly Determined That Blue Origin Proposed What Appeared to be Advance Payments

Protester alleges that the SEP and the SSA "erroneously and unreasonably determined that Blue Origin proposed what "**appeared to be**" advance payments (emphasis in original). Protest, AR Tab 001 at Bates 000009. Blue Origin maintains that the payments were "proper, calculated consistent with the HLS Base Period contract and Option A requirements, and included an approach to Milestone Payments for previously accepted but deferred long-lead payments previously approved by NASA." *Id*. As explained in detail below, Blue Origin has mischaracterized these payments, and furthermore, the advance payment issue under Option A is very different from the issue experienced under the Base Period evaluation. Accordingly, GAO should deny this basis of protest.

GAO has consistently held that the manner and depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, and it will not disturb such an analysis unless it lacks a reasonable basis. *Gentex Corp.-Western Operations*, B-291793 et al., Mar 25, 2003, 2003 CPD ¶ 66 at 27-28. In reviewing a protest against the propriety of an evaluation, the GAO will review an evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and applicable procurement statutes and regulations. *Decisive Analytics Corp*., B-410950.2, B-410950.3, June 22, 2015, 2015 CPD ¶ 187 at 11. NASA has met this standard here.

The SEP Report for Blue Origin shows that NASA's price evaluation for the Option A contract resulted in the finding of two instances of advance payments. SEP Report for Blue

Origin, AR Tab 092 at Bates 027744. Specifically, these were for "two Kickoff Meeting milestones at the outset of its Option A contract (under CLIN [redacted] ($[redacted])) & CLIN [redacted] ($[redacted]), which were determined to be not commensurate with performance and appear to be advance payments." *Id*. The payments referenced above had a Milestone title of "Option A Kickoff Meeting" with Acceptance Criteria of "Completion of Option A Kickoff Meeting with NASA" with payments requested in the same month as award (March 2021). Proposal Vol IV Att. 13 Milestone Acceptance Criteria and Payment Schedule, AR Tab 034.

Blue Origin did not adequately define or substantiate the "Option A Kickoff Meeting" Performance Based Milestone or Milestone Acceptance Criteria such that NASA was able to verify that the performance event was commensurate with the payment amount. And while Protester relies on the fact that what was proposed could not have been an advance payment because Blue Origin's cashflow was negative at the start of contract performance (Protest at AR Tab 001 at Bates 00021), this argument is unavailing. The fact that a company has a negative cashflow at the start of contract performance does not, in and of itself, preclude that contractor from also proposing advance payments. The Milestone and Acceptance Criteria as proposed (i.e., Kickoff Meeting for $[redacted]) *are not commensurate with the performance event* ***even if*** the expenditure report shows these milestone payments are in line with Blue Origin's projected expenditures (i.e., cashflow). Protester has not demonstrated that NASA's conclusions in this regard were factually incorrect, tainted by error, or otherwise unreasonable.

Blue Origin also takes issue with the Agency's phrasing that these payments "appear to be" Advance Payments. Protest, Tab 001 at Bates 00020. Here, protester implies that the Agency was not firm in its assessment. But the Agency used this language intentionally as NASA had experienced this issue before when Blue Origin proposed advance payments and then corrected them in the Base Period (see discussion below). COSOF at 89. However, what Blue Origin proposed in two instances in its Option A proposal amounted to advance payments based upon the description provided for the performance-based milestone and milestone criteria at face value. If these amounts had been substantiated by further definition of the milestone, or a breakout of long lead items into other milestones ***as it was reconciled in discussions in the Base Period via a revised proposal*** (see discussion below), then these would likely no longer constitute advance payments. Therefore, NASA used the "appear to be" language as it was the Agency's interpretation that this issue may be resolvable if NASA were to enter into discussions with Blue Origin.

Next, Blue Origin argues that the proposed payments amounts that NASA has identified as "Advance Payments" include Long Lead Item procurements. Blue Origin states:

> The Agency also had already been provided knowledge of Blue Origin's Long Lead Item procurement needs through multiple venues including Blue Origin's original Base Period proposal (and revisions of it)[3], multiple interactions during the Base

[3] Protester argues that NASA should have taken into account information that NASA knew because of what had occurred during Base Period negotiations and performance. However, the Option A Solicitation set forth in Section 4.4, "Offerors should not assume the Government has prior knowledge of their facilities and experience. Information previously submitted through other efforts and contracts, or submitted during the base period source selection

> Period[4], multiple references in the Technical Volume (Vol. 1) of the Blue Origin HLS Option A proposal, and multiple references in Blue Origin's Option A proposal attachments including the following: Blue Origin Option A Proposal Attachment 19 – Integrated Master Schedule (IMS) Blue Origin Option A Proposal Attachment 33 - Risk Reports – Initial Demo The original NextSTEP-2 Appendix H proposal submitted to NASA in November 5, 2019. Protest, Tab 001 at Bates 000022.

In its Option A Technical Volume I proposal, while Blue Origin states, "The Att. 13 milestone payment plan includes the remaining long-lead procurements required," (*Id.*) there is no reference to long-leads anywhere in Attachment 13. Also, the Integrated Master Schedule (IMS) at Attachment 19 contains references to long lead with some rows showing start dates of March 1, 2021 for procurement. IMS, AR Tab 40 at Bates 017231 (example). However, there is no reference to Att. 13 Milestone Payment Schedule to long lead in Attachment 19. *Id*. Finally, the Risk Report at Att. 33 includes references to long lead items, but there are no references to long lead payments being built into Att. 13. Proposal Vol IV Att. 33 Risk Reports (PDF), Tab 055 at Bates 022874.

As GAO has repeatedly held, agencies are not required to piece together general statements and disparate parts of a protester's proposal to determine the protester's intent. See, e.g., *Optimization Consulting, Inc*., B-407377, B-407377.2, Dec. 28, 2012, 2013 CPD ¶ 16 at 9 n.17 (agency not required to infer information from an inadequately detailed proposal). Rather, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., *International Med. Corps*, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 8, citing *Mike Kesler Enters*., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 3-4 (agency reasonably determined that the protester's proposal did not provide sufficient detail where the proposal lacked clear and consistent language and information). The onus was on Blue Origin to submit a clear proposal pertaining to the long lead procurement issue, and Blue Origin failed to do so.

Further, Blue Origin states in its protest, "…Accordingly, Blue Origin captured in its Option A proposal these Long Lead Item obligations and the associated expediting fees necessary to meet NASA's 2024 landing goal. This required the placing of a majority of the purchase orders for Long Lead Item into the Option A CLIN 5." Protest, AR Tab 001 at Bates 00022. Furthermore, Susan Knapp's (i.e., Blue Origin's Chief Financial Officer), Declaration filed as part of the protest states:

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process, will be considered by the Government *only if it is resubmitted and explained in the Offeror's Option A proposal.*" Option A BAA, AR Tab 0003 at Bates 01499, Emphasis added. Since Protester failed to include information about the Base Period negotiations/Advance Payments in its Option A proposal, this argument should be dismissed or denied.

[4] See Footnote 1.

Protest, Attachment 5, AR Tab 001 at Bates 00236.

Despite Protester's representations in this regard, Blue Origin's proposal does *not* indicate anywhere that these long lead item costs are built into CLIN 5. As GAO has consistently held, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information, which clearly demonstrates compliance with the solicitation requirements and allows for a meaningful review by the procuring agency. *InnovaSystems Int'l*, LLC, B-417215 et al., Apr. 3, 2019, 2019 CPD ¶ 159 at 6. Agencies are not required to infer information from an inadequately detailed proposal, or to supply information that the protester elected not to provide. *Id*.

Blue Origin next argues that its costing in the Option A proposal "was consistent with the NASA-approved approach under the Base Period performance under similar requirements, and should have been determined acceptable." Protest, AR Tab 001 at Bates 000019. In support of this protest argument, the attached Declaration of Susan Knapp reads as follows:

Protest, Attachment 5, AR Tab 0001 at Bates 00237.

These protest assertions are not accurate – the two approaches that Blue Origin employed in its Base Period and Option A proposals ***were not the same.*** In its Base Period proposal, submitted November 5, 2019, Blue Origin received a similar determination regarding Advance Payments. Protest Attachment 5, AR Tab 001 at Bates 00237-00238. In discussions for the Base Award, NASA informed Blue Origin in writing that the proposed payments at award appeared to be advanced payments. Letter Opening Discussions with Blue Origin during the Base Period, Tab 187 at Bates 035203-035211. In response to this notification, Blue Origin submitted a revised Att. 13 Milestone Payment Schedule that broke out these payments and provided greater

fidelity to NASA as to what these payments were for and the corresponding amounts. Blue Origin Base Period Revised Att. 13, Tab 188 at Bates 035212. Specifically, Blue Origin revised the Att. 13 Milestone Acceptance Criteria Payment Schedule, and mitigated this issue by breaking up its "ATP" Milestone into "Post-Award Conference" and "Placement of Critical Supplier Orders." *Id.* As a result of this revision, NASA was able to evaluate these breakout payments to be commensurate with the value of the performance event due to the breakout providing greater fidelity for evaluation in the Base Period.

Contrary to what Protester claims regarding similarities in the Base Period and Option A evaluations, the Advance Payment issue under Option A is very different from the issue experienced under the Base Period evaluation. Specifically, in the base period evaluation, there were three different issues present. First, the request for payments at ATP violated the criteria required for a Performance-Based Payment. Second, the amounts requested for the payments did not appear to be commensurate with performance. Third, when NASA compared the referenced advanced payments to Blue Origin's base period expenditure report, NASA found that Blue Origin did in fact have a negative level of contractor investment due in part to these advance payments.

In the Option A evaluation, the second issue above from the Base Period evaluation is the only one that was present in the Option A Evaluation (i.e., amounts not commensurate with performance). Regarding the first issue (i.e., payment at ATP), for Option A, Blue Origin did not propose these as "ATP" payments. Regarding the third issue (i.e., negative level of contractor investment), for Option A, in NASA's evaluation of Blue Origin's expenditure report, NASA did *not* determine that Protester had a negative level of contractor investment. Rather, the Agency concluded that Blue Origin had a fair sharing of risk over the life of the contract and that they are cash flow negative during the month of these referenced payments.

The second issue (i.e., amounts requested not commensurate with performance) is the infraction that NASA noted in the Option A price evaluation. Based upon the milestone title "Kickoff Meeting" and description of the acceptance criteria and the requested payments of $[redacted] in the first month of performance, Blue Origin appears to be seeking payment *in advance of work performed*.[5]

In support of its arguments for this protest ground, Blue Origin relies strongly on a Declaration from Susan Knapp. In that Declaration on pages 6-7 (para. 20), Ms. Knapp states:

[redacted]

[5] While Blue Origin is accurate in stating that under the Base Period evaluation NASA did approve a payment milestone for a Post-Award Conference, it is not true that the Agency found this to be acceptable at ***any*** requested payment amount. Nowhere in Blue Origin's Option A proposal does it state, "The March 2021 payment for Kickoff Meeting, *also includes* payments for issuance of long lead purchases and subcontracts." That is the crux of the issue here.

Protest, Attachment 5, AR Tab 0001 at 00237 to 00238.

However, while Protester claims it followed the exact same "structure" NASA agreed to under Base Period negotiations and awarded as such, this is not accurate. Rather, the structure in the Base Period involved removal of ATP payments, and the substitution of Kickoff meeting/Post Award Conference *and* also added "Critical Suppliers Orders" Milestones. Blue Origin *did not include this breakout* of Critical Supplier Order Milestones in its Option A proposal and included the long lead cost as part of the "Kickoff Meeting" milestone, which was not the original agreement or structure under the Base Period negotiations and award. *Id*.

To summarize, Blue Origin failed to provide a clear description or supporting documentation of the milestone performance event or milestone performance criterion anywhere in its Option A proposal. Without this information, NASA was unable to determine that the performance-based payment amount was commensurate with the performance event.[6] Furthermore, Blue Origin's approach for proposing milestones in Option A was not the same as the approach that NASA approved in Protester's revised Base Period proposal.

In its *Blue Origin Response*, Blue Origin states that it "has plainly demonstrated prejudice in the Agency's improper elimination of Blue Origin as eligible to receive an HLS Option A award due to the improper evaluation on the Milestone Payments issue." Blue Origin Response at 29. Blue Origin states it was next in line for award, and was "clearly prejudiced" by the Agency's flawed price evaluation which eliminated it from further consideration. *Id*. The Agency's position is that the Advance Payment issue was a relatively minor issue that the *SSA herself stated could be resolved with Blue Origin through negotiations, should she have decided to engage in them with Blue Origin*. Specifically, the SSA stated in her selection statement, "I concur with the SEP's assessment that these kickoff meeting-related payments are counter to the solicitation's instructions and **render Blue Origin's proposal ineligible for award without the Government engaging in discussions or negotiations with Blue Origin, either of which would provide an opportunity for it to submit a compliant revised proposal**." (Emphasis added), Source Selection Statement, AR Tab 093 at Bates 027787 and 027787 (footnote 1). Thus, the SSA did not see this issue, in and of itself, as one that ultimately would preclude a contract award to Blue Origin.

And while Protester claims in its *Blue Origin Response* that it is "next in line for award," NASA does not agree with this statement. This was a competition under a BAA where the SSA did not compare proposals to one another nor perform a best value tradeoff. While Blue Origin had achieved an Acceptable Technical rating, a Very Good Management rating, and offered the second highest price (by a significant amount), the SSA stated in the SSS, "I find that [Blue

[6] See FAR 32.1004(b)(3)(ii)).

Origin's] proposal does not present sufficient value to the Government when analyzed pursuant to the solicitation's evaluation criteria and methodology." Source Selection Statement, AR Tab 093 at Bates 027789. Thus, in a selection under a BAA, it is not correct for Protester to state that it is "next in line" for an award. In all, the agency's evaluation of the advance payment issue was both reasonable and without prejudice to the protester. *Synergy Sols. Inc*., B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 12-13 (finding no prejudice associated with the challenged agency actions where the protester fails to demonstrate that, but for such actions, it would have had a substantial chance of receiving the award).

For all the reasons set forth above, this basis of protest should be denied.

C. Disparate Treatment

Blue Origin makes four allegations of disparate treatment (Protest, Tab 001 at Bates 000044 – 000048) contending that "[h]ad the Agency evaluated all offerors consistently… SpaceX would have had a lower Technical and Management score, and Blue Origin's proposal would have had a higher technical and management score."[7] *Id*. at Bates 000044. All four disparate treatment grounds of protest should be dismissed or denied.

NASA issued the Human Landing System (HLS) Option A Solicitation as a Broad Agency Announcement (BAA). Option A BAA, Tab 003 at Bates 001528. To achieve the United States' goal "to return American astronauts to the Moon within the next five years," NASA used "other competitive procedures," in order to solicit proposals with varying technical and scientific approaches. *Id*. at Bates 001481. Option A is not a negotiated procurement, and offerors are not competing against each other. *Id*. at Bates 001528.

NASA had good reason to issue this Solicitation as a BAA; issued in accordance with Federal Acquisition Regulation (FAR) 35.016 and 6.102(d), the Option A BAA used "other competitive procedures" to solicit for proposals with varying technical and scientific approaches. COSOF at section II(A)(1). Aside from levying a minimal set of twenty-seven functional and performance requirements, NASA sought innovative ideas from U.S. industry to develop their own human landing systems capable of meeting NASA's overarching performance requirements. *Id.*

U.S. industry rose to the challenge. Following a full and open BAA competition for the first phase of HLS development, NASA awarded one-year "base period" HLS contracts to Consistent with the use of the BAA instrument, each base period contractor's HLS is dramatically different. Nothing illustrates this fact more clearly than hearing from the companies themselves as they describe their own designs and approaches—in April 2021, as part of a short segment on *CBS This Morning,* journalist Mark Strassmann interviewed senior officials from each of the three HLS base period companies, as well as NASA's HLS Program Manager,

[7] The Option A BAA Solicitation did not provide for the assignment of numerical scores. Rather, the Technical Approach (Factor 1) and Management Approach (Factor 3) Factors were assigned adjectival ratings. Option A BAA, Tab 003 at Bates 001530, 001532.

Dr. Lisa Watson-Morgan. As graphical representations submitted by each company flash on the screen illustrating strikingly different lander designs, and senior officials walk Mr. Strassman through their companies' real-life lander mockups, it is readily apparent how unique each offeror's approach is.[8] And this was exactly NASA's plan. By leveraging the speed and innovation of NASA's commercial partners, the Option A procurement represents how NASA is pursuing the next generation of human spaceflight exploration. COSOF at section I. No longer able to rely on Apollo-era level funding to return to the Moon, Option A was designed as a public-private partnership, in which NASA leverages privately-funded development efforts of the commercial space industry combined with NASA's unique human spaceflight expertise to ensure safety and mission success. *Id.*

The HLS Option A solicitation thus sought to maximize the benefits of having a pro-industry approach, recognizing that private investments in space will grow as market opportunities expand, redounding "to the benefit of both the public and private sectors." Option A BAA, Tab 003 at Bates 001482. The Statement of Work sought "to develop the HLS utilizing public-private engagements that will reduce the cost of developing the HLS, reduce the time required for the development cycle, and enhance U.S. competitiveness in the global space industry." SOW, Tab 008 at 015065. Consequently, the HLS SOW was structured to:

> "…specify the ***minimum*** NASA HLS requirements allowing the contractor to tailor their design to best address their commercial interests; launch on industry-procured, commercial launch vehicles; utilize of commercial practices, standards, specifications, and processes; and utilize a collaborative approach with inline NASA subject matter expertise, as requested by the contractors, as well as insight. Each of these items represent ***a significant change*** in how NASA has traditionally worked with industry" (emphasis added). *Id*.

The HLS BAA reflects this significant change in collaborating with industry to establish contractor-unique technical standards for HLS. COSOF at 14. A critical aspect of the base contract period of performance was the adjudication of design and construction, safety, and health and medical technical standards by NASA and each contractor. COSOF at 30. During this base period, a NASA control board approved a "final list of standards uniquely applicable to that Contractor's adjusted proposal for Option A" which were incorporated into each offeror's solicitation as part of Attachment F. Option A BAA, Tab 003 at Bates 001498; COSOF 30-31. This aspect of the BAA reflects NASA's expressed desire to collaborate with industry to make increased use of commercial standards that were comparable to NASA's standards, and that permitted the company to work with more speed and cost-effectiveness. The solicitation provided that "[t]he Offeror shall use these standards in preparing its Option A proposal." *Id*. In addition, each offeror was required to provide its own performance work statement, which the Solicitation instructed shall "document innovative approaches and maximum flexibility to develop cost-effective solutions that satisfy the Government's requirements in clear and understandable terms." *Id*. at Bates 001522.

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[8] CBS This Morning, *Sticking the (Moon) Landing*, four minute and fifty-two second video viewable here: https://www.cbs.com/shows/cbs_this_morning/video/mjr1PiWCR6Qy36UTIxLyXBMRRCiAVJgu/three-companies-compete-for-job-of-landing-next-americans-on-the-moon/

Consistent with NASA's decision to use a BAA to solicit innovative and varying approaches using commercial practices, NASA instructed that "NASA [would] not conduct a comparative analysis and trade-off amongst proposals. Option A BAA, Tab 003 at Bates 001528. Rather, each proposal [would] be evaluated on its own individual merits." *Id*. The Source Selection Authority referred to this aspect of this BAA Solicitation to state that she was not comparing proposals or making a trade-off ("In accordance with the Option A solicitation, the SSA is not, as a general matter, tasked with conducting a comparative analysis or trade-off amongst proposals. Rather, as the SSA, I am charged with considering each proposal on its own individual merits and selecting for award one or more proposals that individually each present value to the Government and that optimize NASA's ability to meet its objectives as set forth in the solicitation.") Source Selection Statement, Tab 093 at Bates 027776.

This Office's precedent in *Microcosm, Inc.* is clear and should apply to the instant matter. B-277326.1-.5, September 30, 1997, 1997 CPD ¶ 11. As GAO found in *Microcosm*, absent a showing of bias by an agency, allegations concerning the evaluations of other offerors' proposals within the context of a BAA do not form valid bases of protest. By making allegations of "unequal treatment" as between Blue Origin's evaluation results and those of SpaceX, Blue Origin is inappropriately using this forum to attempt to adjudicate the type of comparative analyses that were not a part of NASA's evaluation, nor the source selection authority's decisional rationale (and further, that were ***expressly prohibited by*** the HLS Option A Solicitation). Option A BAA, Tab 003 at Bates 001528, 001535. Thus, Blue Origin's multiple allegations concerning NASA's evaluation of SpaceX's proposal be dismissed as a matter of law.

1. NASA's evaluation of Blue Origin's approach to cryogenic fluid management development was fair and reasonable.

Blue Origin's first disparate treatment allegation is that "[t]he Agency treated offerors disparately where it cited Cryogenic Fluid Management (CFM) as a weakness for both Blue Origin and Dynetics, but did not cite CFM as a weakness for SpaceX, even though SpaceX also relies upon advanced CFM technologies." Protest, Tab 001 Bates at 000044. Blue Origin's allegation of disparate treatment fails as a matter of law.

Blue Origin does not even attempt to allege that Blue Origin and SpaceX proposed substantively indistinguishable" or "nearly identical" CFM technologies or CFM approaches. *Battelle Memorial Institute*, B-418047.5-.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6. Nor does Protester allege that NASA "downgraded its proposal for deficiencies that were 'substantively indistinguishable' or nearly identical from those contained in other proposals." *Office Design Group v. United States*, 951 F.3d 1366, 1372 (Fed. Cir. 2020). Instead, Protester does the opposite, citing to multiple aspects of its finding concerning ***unique aspects of its own CFM design approach***, to allege that "nearly all of the above critiques apply equally to SpaceX." Protest, Tab 001 at Bates 000044. The absurdity of this unequal treatment allegation reaches its zenith where Protester cites the SEP's determination that "insufficient detail" was provided [redacted] to support its assertion that "[t]he disparate treatment regarding

CFM is particularly blatant because nearly all of the above criticisms critiques apply equally to SpaceX." *Id*.; "Where a protester alleges disparate treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offerors' proposals." *Envtl. Chem. Corp.,* B- B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 11-12, *citing to INDUS Tech., Inc.*, B-411702 *et al.,* Sept. 29, 2015, 2015 CPD ¶ 304 at 6.

After failing to allege any facts that SpaceX's and Blue Origin's approaches in this area were the same, "substantively indistinguishable" or "nearly identical," Blue Origin resorts to speculation. It claims that SpaceX's "CFM system ***must have*** a low technology readiness level." (emphasis added). *Id*. at 000045. A protester may not meet its burden to allege disparate treatment through pure speculation. *SMS Data Products Group, Inc.*, B-418925.2, Nov. 25, 2020, 2020 CPD ¶ 387 n.5 (dismissing speculative unequal treatment allegation); *All Points International Distributors, Inc.*, B-402993,Sep. 3, 2010, 2010 CPD ¶ 209 ("API challenged the Army's evaluation of Thermo's quotation in certain respects. However, since API did not have access to Thermo's quotation or relevant evaluation documents, these challenges necessarily were based on speculation and did not state a valid basis of protest. [GAO] thus will not consider these issues."). GAO should dismiss this ground of protest on this basis.

Even if Blue Origin's allegation did not fail as a matter of law, it fails on the facts. The premise underlying Blue Origin's disparate treatment allegation is faulty. Blue Origin was not cited for a weakness on the basis that its proposal "relies upon advanced CFM technologies" or because its proposed CFM system has low technology readiness levels. Protest, Tab 001 at Bates 000044. Rather, Blue Origin's weakness cited multiple aspects of Blue Origin's CFM technology ***development and maturation approach***. SEP Report for Blue Origin, Tab 092 at Bates 027727 – 027728. In addition to providing inadequate information on key components, [redacted], the SEP found fault with Blue Origin's technology maturation approach. The SEP's finding concluded that: "Those challenges, in addition to critical technology maturation steps occurring late in the schedule, increase the probability that schedule delays, to redesign and recover from technical performance issues uncovered both in component maturation tests and in system level tests, will delay the overall mission and result in unsuccessful contract performance." *Id*. at 027728.

Finally, Blue Origin further alleges disparate treatment in NASA's evaluation of offerors' "Tipping Point" efforts. Protest, AR Tab 001 Bates at 000045. Blue Origin has failed to demonstrate, must less allege, that its Tipping Point efforts are "substantively indistinguishable" or "nearly identical." As demonstrated in the COSOF, these Tipping Point efforts are unique efforts involving entirely different technology demonstrations. NASA's evaluation of the Tipping Points efforts within the context of each offerors' CFM technology development approach was reasonable. *Id*.

This disparate treatment allegation should be dismissed or denied.

2. NASA's evaluation of the height of Blue Origin's ingress and egress point was fair, reasonable, and in accordance with the evaluation criteria.

Blue Origin next alleges that NASA "inexplicably and unreasonably determined the 33.5 feet height of the egress/ingress points of Blue Origin's lander vehicle merited a weakness, while SpaceX's lander vehicle with an egress/ingress point of *100 feet tall*, merited a significant strength" (emphasis in original). Protest, Tab 001 at Bates 000045. Setting aside for the moment that Blue Origin has mischaracterized the evaluation, Blue Origin bases its allegation on differences in the designs of SpaceX's and Blue Origin's lander vehicles. In addition to noting the heights of each offerors' ingress and egress points, Blue Origin's allegation emphasizes the differences (e.g., SpaceX's vehicle "is three times as tall as Blue Origin's vehicle…"; "Blue Origin's design includes two alternative means of ingress/egress—a powered ascender-lift system and a passive ladder. SpaceX's design, by contrast, contains only one method of ingress and egress—a powered lift."). *Id.* at 000045-000046. Given these different approaches, Blue Origin cannot demonstrate unequal evaluation treatment, and this claim must fail as a matter of law. *Battelle Memorial Institute*, B-418047.5-.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6.

Protester's disparate treatment allegation also fails because it is based on unsupported speculation. Protester ***does not cite anything*** to support its assertion that NASA determined that "SpaceX's lander vehicle with an egress/ingress point at 100 foot tall, merited a significant strength." *Id.* at Bates 000045. Rather, Protester only speculates ("In contrast, the Agency found that SpaceX's vehicle…***apparently*** did not contain these same or greater risks…" (emphasis added)) that the Agency's risk assessment of SpaceX's vehicle, including its height, was flawed. *Id.* GAO's regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). "A protest allegation which relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference." *Raytheon Blackbird Techs., Inc.*, B-417522; B-417522.2, July 11, 2019, 2019 CPD P254 at 3. On this basis alone, this ground of protest should be dismissed.

Protester's allegation also fails because ***its speculation is wrong***. [redacted] ab 105 at Bates 027979. Blue Origin is also wrong in assuming that SpaceX's Significant Strength credited the height of SpaceX's lander vehicle. This finding was assigned for SpaceX's proposed capability to substantially exceed NASA's threshold values, or meet NASA's goal values, as set forth in the Solicitation. Option A BAA, Tab 003 at Bates 001503.

Blue Origin also alleges that the Agency applied an unstated evaluation criteria related to vehicle height. Protest, Tab 001 at Bates 000045-000046. The Solicitation stated: "The Offeror shall address how its design will support EVA considerations, including but not limited to: Operational concept for EVA egress/ingress on the surface (**including EVA hatch size and location**)…" (emphasis added). Option A BAA, Tab 003 at Bates 001504. The Solicitation further provided that "the Government will evaluate the credibility, feasibility, effectiveness, comprehensiveness, suitability, risk, completeness, adequacy, and consistency

of the Offeror's unique proposed approach, as well as its ability to successfully meet the technical, management, schedule, and all other requirements and goals of this solicitation." Option A BAA, Tab 003 at Bates 001529. "In evaluating proposals, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. *In re Harris Corp.*, B-409869, September 4, 2014, 2014 CPD ¶ 265 at 7. It was reasonable for NASA to evaluate the height of the EVA hatch relative to the lunar surface; height is logically encompassed by location. This allegation should be denied.

The Protester further notes it "disagrees" with NASA's assessment that its proposed ascender needed to be fault tolerant. Protest, Tab 001 at Bates 000046. As demonstrated in the COSOF, NASA's evaluation of this aspect of Blue Origin's proposal was reasonable. Moreover, an offeror's mere disagreement is not a valid ground of protest. "An offeror's disagreement with an agency's evaluation, without more, does not establish that the evaluation was unreasonable." *AKAL Sec., Inc*., B- 417840.4, April 27, 2020, 2020 CPD ¶ 160 at 5, *citing to Alutiiq Tech. Servs. LLC*, B-411464, B-411464.2, Aug. 4, 2015, 2015 CPD ¶ 268 at 4.

Finally, Blue Origin alleges the Source Selection Authority "overlooked the risk associated with SpaceX's 100-feet high design…" Protest, Tab 001 at Bates 000046. This is proven false by the Source Selection Statement, which demonstrates precisely the opposite. The SSA reasonably considered the risks associated with the height of lander vehicle's EVA hatch: "And, while I agree with the SEP that the scale of SpaceX's lander also presents challenges, such as risks associated with an EVA hatch and windows located greater than 30 meters above the lunar surface, I find the positive attributes created by this aspect of SpaceX's lander design to outweigh these and other shortcomings as identified by the SEP." Source Selection Statement, Tab 093 at Bates 027778.

All of the allegations within this ground of protest should be dismissed or denied.

3. NASA's evaluation of Blue Origin's abort approach was fair and reasonable.

Next, Blue Origin asserts that it "[s]hould be assessed a 'Significant Strength' for its comprehensive abort strategy and effective capability, while SpaceX likely should have been evaluated with a weakness." Protest, Tab 001 at Bates 000046. Again, Blue Origin fails to allege that its proposed abort approach was "substantively indistinguishable or nearly identical" to SpaceX's proposed abort approach. Instead, Blue Origin goes on to list many differences between its approach and SpaceX's approach with regard to aborts and contingencies (Blue Origin's "approach was superior in terms of providing a dissimilar abort at any time throughout the mission using a separable element with storable propellants;" SpaceX's design has "no independent abort system."). *Id*. at Bates 000046-000047. It is unsurprising that Blue Origin's disparate treatment allegation highlights differences rather than similarities. As is explained in the COSOF, the lander designs proposed by Blue Origin and SpaceX are very different, with SpaceX proposing a single-stage lander and Blue Origin proposing a multi-element lander. As a

consequence, the aborts and contingencies approaches proposed by Blue Origin and SpaceX are uniquely tailored for each offeror's design.

Blue Origin's disparate treatment allegation also mischaracterizes NASA's evaluation. Blue Origin's attempted comparison of SpaceX's and Blue Origin's strengths ignores the fact that SpaceX's finding encompassed its approaches to aborts ***and contingencies***. The content of SpaceX's finding was described in the Source Selection Statement, "I particularly find SpaceX's strength under Technical Area of Focus 1 for its robust approach to aborts ***and contingencies*** to be compelling" (emphasis added). Source Selection Statement, Tab 093 at Bates 027778. The Selection Official went on to discuss "several key features" of SpaceX's finding. *Id*. at Bates 027779. In fact, Blue Origin recognized this difference in the content of SpaceX's and Blue Origin's findings, pointing out that "only one of the attributes highlighted by the selection statement directly apply to abort capability…." Protest, Tab 001 at Bates 000046-000047. Blue Origin's disparate treatment allegation is faulty—if the point of comparison is the content of these two strengths—Blue Origin's protest itself acknowledges the findings are different. This allegation of disparate treatment, which falls far short of the legal threshold required, must fail as a matter of law. *Battelle Memorial Institute*, B-418047.5-.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6.

Protester also touts several aspects of its design approach to aborts ("multi-element architecture allows for propulsive redundancy;" "AE is able to ascend to return to Orion at any time;" "multi-level dissimilar redundancy"). Protest at Tab 001 at Bates 000047-000048. While Blue Origin asserts it should have received a Significant Strength, it fails to develop this argument with any specificity. It does not allege that the NASA evaluation team misapplied the finding definitions, and it makes no effort to explain how the design aspects it describes (either singularly or in combination) warrant a Significant Strength finding rather than the Strength rating it received. As discussed in the COSOF, the Agency thoroughly considered all aspects of Blue Origin's approach to aborts, consistent with the evaluation criteria, and reasonably determined those aspects were a strength rather than a significant strength. "An offeror's disagreement with an agency's evaluation, without more, does not establish that the evaluation was unreasonable." *AKAL Sec., Inc*., B- 417840.4, April 27, 2020, 2020 CPD ¶160 at 5, *citing to Alutiiq Tech. Servs. LLC*, B-411464, B-411464.2, Aug. 4, 2015, 2015 CPD ¶ 268 at 4. "The evaluation of proposals, including determinations regarding the magnitude and significance of evaluated strengths and weaknesses, is a matter largely within the agency's discretion, and, as here, a protester's mere disagreement with the agency's judgment does not establish a basis for our Office to sustain a protest." *Billsmart Sols., LLC,* B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325.

All of the allegations in this ground of protest should be dismissed or denied.

4. NASA's evaluation of offerors' launch vehicle development approaches was fair and reasonable.

Blue Origin's last disparate treatment allegation concerns the evaluation of launch vehicle development. Protester alleges that NASA "failed to evaluate offerors in a consistent

manner by minimizing the benefits of Blue Origin's proposal while overlooking the significant risks in SpaceX's proposal." Protest, Tab 001 at Bates 000048. Like Blue Origin's other unequal treatment arguments, this allegation focuses on differences in the proposed approaches and fail to allege that the proposals are "substantively indistinguishable" or "nearly identical." Instead, Blue Origin's allegation highlights the differences, contrasting SpaceX's approach "to develop an entirely new launch booster" with Blue Origin's proposed "design that could utilize existing launch vehicles." *Id*. Blue Origin's argument should be dismissed as factually inadequate to establish disparate treatment. *Battelle Memorial Institute*, B-418047.5-.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6. As discussed in the COSOF, Blue Origin and SpaceX proposed very different approaches to launch vehicle development.

Blue Origin mischaracterizes NASA's evaluation of SpaceX's launch vehicle development approach. Pointing to NASA's assignment of SpaceX's Significant Strength within Technical Area of Focus 1, Blue Origin asserts that NASA "unreasonably accepted SpaceX's claims, or at least minimized the significant technical and schedule risks of developing" a new launch vehicle. Protest, Tab 001 at Bates 000048. Protester's assertions are incorrect; this finding was not assigned for SpaceX's launch development approach. Rather, SpaceX's Significant Strength within Technical Area of Focus 1 was assigned for SpaceX's "proposed capability to substantially exceed NASA's threshold values or meet NASA's goal values for numerous initial performance requirements." Source Selection Statement, Tab 093 at Bates 027777 – 027778; As is further explained in the COSOF, NASA reasonably and fairly evaluated SpaceX's proposal in the area of launch vehicle development, assigning both positive and negative findings.

Blue Origin asserts that NASA "minimized the substantial technical and programmatic benefits" of its launch vehicle design. Protest, Tab 001 at Bates 000048. In fact, NASA did recognize Blue Origin's proposal in this area, assigning Blue Origin's proposal a Strength finding for its launch approach. SEP Report for Blue Origin, Tab 092 at Bates 027732 – 027733. The finding recognized Blue Origin's proposal for "a combination of critical capabilities and thoughtful concepts of operations that, when integrated together, result in only three required commercial launches for the initial HLS mission." *Id*. This finding also credited Blue Origin for having "matured launch vehicle interfaces and maintained requirements that will allow their HLS elements to interface with multiple commercial launch services, providing increased launch flexibility." *Id*. Protester does not assert that it should have received a significant strength and it makes no effort to explain how the launch vehicle design aspects it describes (either singularly or in combination) warrant more evaluation credit than the Strength rating it received.

Blue Origin also makes an unsupported claim that "Blue Origin developed a design that could utilize existing launch vehicles because Blue Origin understood this would significantly mitigate schedule and development risk." Protest, Tab 001 at Bates 000048. Blue Origin asserts that NASA "did not take ***this*** into account in assigning Blue Origin a significant weakness for development schedule and a weakness for inadequate approach to schedule management." (emphasis added). *Id*. Protester offers nothing to support this bare, underdeveloped claim and corresponding allegation of disparate treatment ("Yet SpaceX schedule was not similarly assessed…") involving these two Blue Origin findings. *Id*. Protester does not state a single, specific error in either finding, and does not address the actual content of these findings. It does

not bother to explain what Blue Origin "understood" about this design that would "mitigate schedule and development risk." Nor does Blue Origin attempt to describe how or why NASA should have taken "into account" the purported benefits of its design in assigning these two findings. GAO's regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). This allegation falls far short of this standard and should be dismissed. If not dismissed, it should be denied as the two findings that Protester complains about contain content that is distinct from launch vehicle development. This disparate allegation should also be dismissed because Protester does not allege that its development schedule or approach to schedule management were "substantively indistinguishable" or "nearly identical" to SpaceX's.[9] *Battelle Memorial Institute*, B-418047.5-.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6.

In sum, all four of Blue Origin's disparate treatment grounds of protest should be dismissed or denied.

D. Blue Origin Has Failed to Demonstrate Prejudice

While NASA maintains that it would have been appropriate for this Office to dismiss Blue Origin's protest for lack of prejudice on its face, the full record development now affirms a lack of prejudice. Regardless of any disagreement Blue Origin may have with NASA's technical evaluation or its untimely complaints about a lack of funding information in the BAA, Blue Origin's proposed price is more than double NASA's stated funding limits, and Blue Origin's proffered declaration fails to commit to reducing its price below those funding limitations. Accordingly, based on the stated BAA criteria of technical, importance to Agency programs, and funds availability, Blue Origin has no chance of award. Blue Origin thus suffered no prejudice from any of the purported procurement errors alleged (which, as noted above and within the COSOF, are substantively incorrect in any event), and lacks standing to challenge NASA's award decision to SpaceX.

GAO's protest regulations define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). GAO has repeatedly has recognized that a "protester is not an interested party where it could not be considered for an award if its protest were sustained." *Unico Mech. Corp.*, B-419250, Oct. 29, 2020, 2020 CPD ¶ 337 at 6. To this end, "Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice. *In re Lockheed Martin Integrated Systems, Inc.*, B–408134.3, B–408134.5, July 3, 2013, 2013 CPD ¶ 169.

[9] Blue Origin contrasts its approach to development schedule ("Blue Origin developed a design that…would significantly mitigate schedule and development risk") with SpaceX's approach to development schedule ("Yet, SpaceX schedule was not similarly assessed, despite the utter novelty of its major launch vehicle development proposal and its history of announcing schedules that it could not meet for prior, smaller, and simpler launch vehicles."). *Id*.

Blue Origin has not and cannot establish prejudice here. As an initial matter, Blue Origin cannot overcome the fact that SpaceX's proposal was reasonably evaluated to offer the most technical merit at the lowest price. The SSA reasonably concluded Blue Origin's proposal "does not present sufficient value to the Government when analyzed pursuant to the solicitation's evaluation criteria and methodology." Option A Source Selection Statement, Tab 093 at Bates 027789. Although Blue Origin disagrees with the SSA's reasoned judgment, that disagreement is not a valid basis for GAO to find prejudice. *Battelle Mem'l Institute*, B-416263.5, Jan. 20, 2020, 2020 CPD ¶ 37 (denying protest and finding no prejudice); *see e.g., Bath & Iron Works Corp.*, B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protest alleging agency was required to disclose additional available funding because "the protester has not shown that it would have increased its proposal effort so as to materially improve its competitive position had it known that additional funding in the amount of any likely overrun would be available").

Moreover, even if the SSA deemed Blue Origin's proposal offered sufficient value for the limited funding available, which the record does not bear, Blue Origin has not committed to reduce its price by the more than $3 billion that would be necessary to fall within those funding constraints. Blue Origin vaguely points to the resources of Blue Origin's founder to claim that had Blue Origin been found to have offered more beneficial capabilities than SpaceX, Blue Origin could have fit within NASA's funding restrictions. As has now been noted multiple times within this Memorandum, however, the declaration submitted by Blue Origin neither commits to increase the corporate investment nor commits to drop Blue Origin's price by the more than $3 billion needed to fall within NASA's funding limits (even before award to SpaceX's higher rated proposal). Instead, the only specific proposal Mr. Sherwood provides as to how Blue Origin would respond, if given the opportunity to negotiate with NASA, is to state that Blue Origin would ask NASA to push back the BAA's stated goal of a 2024 lunar landing demonstration date:

> More specifically, Blue Origin's proposal was built around a 2024 date for the first crewed demonstration landing as prescribed by the Option A Solicitation and reinforced throughout the Base Period by our customer for that work, the HLS Program Office at NASA Marshall Space Flight Center. The Option A Solicitation request an "accelerated schedule" that nonetheless would have to be "credible." In response to repeated questions for clarification, NASA would only say that 2024 "remains very important." Yet the Solicitation also referred in multiple places to the award of a second demonstration landing for a second provider "eighteen months later." Had NASA invited a revised proposal to meet such a schedule, we would have eliminated multiple programmatic and technical risks including vendor long-lead procurement penalties, resulting in a reduced total evaluated price and a different funding profile, including a revised funding profile in Government fiscal years 2021 and 2022. Protest, Tab 001 at Bates 000223.

Notwithstanding that Blue Origin seeks to demonstrate its system at some later unannounced date, Blue Origin offers no specifics about its pricing other than to state "a reduced total evaluated price and a different funding profile." Absent a commitment to and demonstration of how Blue Origin would meet NASA's funding constraints, Blue Origin cannot

demonstrate prejudice here. *Xtec Corp.*, B-418619 et al., July 2, 2020, 2020 CPD ¶ 253 (denying protest and finding no prejudice where protester has not meaningfully articulated how or on what basis it would have altered its proposal to lower its price) (citing *Aerosage, LLC*, B-415607, Jan. 3, 2018, 2018 CPD ¶ 11 (finding no prejudice where protester failed to substantiate how it would have reduced its pricing); *Online Video Serv., Inc.*, B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 (denying protest that agency failed to engage in meaningful discussions with protester regarding its high price because protester's mere allegation-with no explanation or evidence-that it would have lowered its price is not sufficient to demonstrate prejudice); *M.K. Taylor Jr. Contractors, Inc.*, B-291730.2, Apr. 23, 2003, 2003 CPD ¶ 97 (denying protest alleging change in requirements for lack of prejudice where protester's own calculations contradicted protester's claim that its total price would have been significantly lower had it known the change in requirements).

Accordingly, regardless of any disagreement Blue Origin may have with NASA's technical evaluation or the lack of negotiations with Blue Origin, Blue Origin's proposal is ineligible for award because it is priced at a level nearly double what NASA has funding to cover.

III. Conclusion

For the reasons stated above and as set forth in the *Contracting Officer's Statement of Facts*, each ground of protest asserted by Blue Origin should be either dismissed or denied in its entirety.

Respectfully submitted,

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