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Decision

Matter of: WAI-Stoller Services, LCC; Navarro Research and Engineering, Inc.

File: B-408248.6; B-408248.7; B-408248.8; B-408248.9; B-408248.10;
B-408248.11; B-408248.12

Date: May 22, 2014

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Lee P. Curtis, Esq., Donald J. Carney, Esq., and William J. Bainbridge, Esq., Perkins Coie LLP, for Portage, Inc., the intervenor.

H. Jack Shearer, Esq., Gabriel D. Soll, Esq., Department of Energy, for the agency. Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Source selection decision is unreasonable where, in attempting to distinguish between two proposals whose differences were characterized as slight, the agency relied on several discriminators to differentiate the two proposals, and the record shows that several of these discriminators do not withstand scrutiny.
 2. Agency reasonably discounted Contractor Performance Assessment Reporting System (CPARS) reports regarding performance on incumbent contract and instead relied on detailed award fee determination where CPARS reports were prepared and approved by an agency employee who did not have knowledge of the contractor's performance and did not have authority to complete the reports.
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DECISION

WAI-Stoller Services, LCC (WSS), of Piketon, Ohio, and Navarro Research and Engineering, Inc., of Oak Ridge, Tennessee, protest the Department of Energy's award of a contract to Portage, Inc., of Idaho Falls, Idaho, under request for proposals (RFP) No. DE-SOL-0002716, for legacy management support services at sites across the country. WSS and Navarro challenge the evaluation of proposals

and assert that the agency failed to properly consider an alleged organizational conflict of interest.

We sustain Navarro's challenge to the evaluation; deny WSS's protest; and deny both protesters' allegations of an organizational conflict of interest.

BACKGROUND

Two Department of Energy programs are responsible for the cleanup and long-term monitoring of the environmental legacy created by decades of nuclear weapons development and government-sponsored nuclear energy research. The first program, under the Office of Environmental Management, performs environmental site cleanup, including waste disposal, substantial remediation of sites, and decontamination and decommissioning of facilities. The second program, under the Office of Legacy Management, assumes responsibility for monitoring the sites and remediating any residual contamination. This procurement sought services in support of the Office of Legacy Management. These services were previously performed by S.M. Stoller, part of the WSS team for this procurement.¹

The solicitation, issued as a small business set-aside on November 23, 2011, provided for the award of a cost-plus award-fee contract with a 24-month base period and one 36-month option period. The RFP sought proposals to perform five categories of services: (1) long-term surveillance and maintenance (LTS&M); (2) information technology and records management; (3) asset management; (4) business support; and (5) program-wide support. The first category of services, LTS&M, which comprised the majority of the work under this contract, includes maintaining, operating, and installing environmental remedies; site inspections; monitoring air, soil, surface water, and ground water; active record administration; and coordination with regulators and stakeholders.

Award was to be made on a best-value basis considering costs plus the following non-cost evaluation factors, listed in descending order of importance in the solicitation: (1) technical approach/understanding the requirement; (2) management approach; (3) staffing; and (4) past performance. RFP at 91. The RFP advised offerors that the technical approach/understanding of the requirement factor would include an evaluation of the offeror's technical discussion and its response to a sample task. With regard to past performance, the RFP required offerors to provide a list of three contracts and/or subcontracts, similar in labor mix, level of complexity, and scope as described in the performance work statement, performed within the past 3 years and with an annual value greater than or equal to 10% of the effort

¹ WSS is a mentor-protégé joint venture, which consists of WAI as the protégé and S.M. Stoller Corporation as the mentor. Stoller is the incumbent contractor.

here, including options. Id. at 83. The non-cost factors, when combined, were significantly more important than cost. Id. at 91.

The agency received eight proposals, including those submitted by Navarro, WSS, and Portage, by the February 15, 2012 closing date. On March 29, 2013, the agency made its initial award decision, selecting Portage's proposal as representing the best value to the government. Navarro and WSS then protested the award to GAO; the protests were dismissed after the agency informed our Office that it would take corrective action by reevaluating proposals and making a new award decision (B-408248 et al., May 29, 2013).

In undertaking its corrective action, the agency reevaluated the staffing and past performance factors, and "reexamined" the technical approach, management approach, and cost factors to determine if any changes should be made. WSS Agency Report (AR) at 9; Navarro AR at 8. After reevaluating and reexamining the proposals, the SEB prepared a report, which it presented to the source selection official (SSO). In its report, the SEB evaluated proposals as follows:

Evaluation Factor and Maximum Points Available	Navarro	WSS	Portage
Technical Approach/ Understanding the Requirement - 400 pts	Excellent 400 points 2 sig. strengths 6 strengths 1 weakness	Good 320 points 0 sig. strengths 4 strengths 4 weaknesses	Excellent 400 points 2 sig. strengths 1 strength 0 weaknesses
Management Approach - 300 pts	Good 240 points 0 sig. strengths 3 strengths 1 weakness	Good 240 points 0 sig. strengths 4 strengths 3 weaknesses	Good 240 points 1 sig. strength 4 strengths 1 weakness
Staffing - 200 pts	Excellent 200 points 1 sig. strength 6 strengths	Excellent 200 points 0 sig. strengths 5 strengths	Excellent 200 points 0 sig. strengths 7 strengths
Past Performance - 100 pts	Excellent 100 points 1 sig. strength 0 weaknesses	Good 80 points 1 sig. strength 2 weaknesses	Good 80 points 1 sig. strength 1 sig. weakness
Overall Technical Rating	Excellent 940 points	Good 840 points	Excellent 920 points
Evaluated Cost	\$260,233,172	\$244,451,508	\$251,729,790

AR, Tab E.1, SEB Report, at 26, 30-99,101.

After reading the report and consulting with the SEB, the SSO again selected Portage's proposal for award. AR, Tab F.1, Source Selection Decision Document (SSDD) at 2, 17. In selecting Portage, the SSO stated that, due to the superior ratings that Navarro and Portage received under the three most important evaluation factors, the proposals of Navarro and Portage were clearly more advantageous to the government than any of the other six proposals. SSDD at 15.

The SSO then compared the proposals submitted by Navarro and Portage and found that, although the two offerors received the same adjectival ratings under the first three evaluation factors, Portage's proposal contained certain discriminators that set it apart from Navarro's proposal. SSDD at 16. Under the technical approach factor, Portage and Navarro both received a significant strength in the area of LTS&M and a significant strength for their response to the sample task, while Navarro received 6 additional strengths and Portage one additional strength. SEB Report at 30-31, 37. The SSO, however, stated in his decision that certain strengths of Portage's proposal in the core legacy management mission area of LTS&M set it apart from Navarro's proposal. SSDD at 16. At the hearing our Office conducted in connection with these protests, the SSO identified as a discriminator Portage's commitment to the principle of Plan-Do-Check-Act, which he described as "a commitment to proper planning, doing your work, evaluating the work that you did, and then taking corrective action." Hearing Transcript (Tr.) at 16.² The SSO further testified that another discriminator was a weakness assigned to Navarro's proposal for a lack of "completeness" in the area of calibration models support. Tr. at 163-64. Finally, the SSO noted that Portage's proposal was distinguished by its better ability to link innovation to cost effective performance in the LTS&M area. SSDD at 16. According to the SSO, the combination of these discriminators gave Portage a slight "edge" under the technical approach factor. Tr. at 75.

The SSO also found other discriminators between Portage's proposal and Navarro's under the management approach factor. Specifically, the SSO noted in his decision that Navarro's proposal received a weakness in the area of transition because its transition schedule did not address task assignment. SSDD at 11, 17. The SSO stated that this weakness "greatly increase[d] the risk of unsuccessful performance." SSDD at 11. In contrast, the SSO found in his decision that an identified notable weakness in the Portage proposal, due to the decision to locate key personnel in a different physical location from the rest of the team, was not as concerning because it could be overcome by relocating the personnel, or through communications technology. *Id.* The SSO also considered as a discriminator that Portage's quality transition plan received a significant strength, while Navarro's received only a strength. *Id.* at 17. Finally, the SSO identified as another discriminator in favor of Portage's proposal a consideration that had not been noted by the SEB: that

² In resolving this protest, GAO conducted a 2-day hearing, during which testimony was provided by the agency's SSO, and two members of the SEB.

Portage proposed subcontractors that the SSO thought would be more innovative, especially in the area of beneficial reuse of property. Id. at 11, 17.

With regard to past performance, the SSO acknowledged the SEB's determination that Navarro's past performance was excellent, while Portage's past performance was only good, with Stoller having encountered a number of problems in its performance of the incumbent contract. The SSO also noted that Portage's evaluated cost was about 3.4% lower than Navarro's, but stated that cost was less important than the technical merits of Portage's proposal and was not a determinative factor. SSDD at 18; Tr. at 77 ("the decision [was] not based on cost . . . we really want the best technical performer"). Overall, the SSO determined that, based on several discriminators, Portage's proposal was superior to Navarro's under the three most important technical factors notwithstanding the same adjectival ratings, and therefore, represented the best value to the government. These protests followed.

Navarro and WSS protest that the agency conducted an unreasonable evaluation and made a flawed source selection decision. The protesters also allege that the agency did not sufficiently consider and mitigate an alleged organizational conflict of interest on the part of Portage. As discussed below, we sustain Navarro's protests on the basis that the agency's evaluation of proposals was flawed and that some of the discriminators relied upon in the source selection decision were unreasonable. We do not find any other independent basis for sustaining the protests.³

ORGANIZATIONAL CONFLICT OF INTEREST ALLEGATIONS

As an initial matter, Navarro and WSS both contend that Portage's primary subcontractor for the LTS&M work had an organizational conflict of interest (OCI) that should have resulted in its disqualification from the competition. WSS First Supp. Protest at 2-10; Navarro First Supp. Protest at 2. Specifically, the protesters claim that one of Portage's proposed key personnel worked as a subcontractor for Stoller on the incumbent contract in 2010 and 2011 and may have gained useful insight into Stoller's approach to performing the remediation work here, including insight on costs, schedule, stakeholder views, regulatory approaches, or other important aspects of the LTS&M process, leading to an unequal access to information OCI.⁴ WSS First Supp. Protest at 5.

³ WSS's and Navarro's protests and supplemental protests raised numerous allegations. While our decision here does not specifically discuss each and every argument and/or variations of the arguments, we have considered all of the protesters' assertions and find none, other than as discussed below, furnish a basis for sustaining the protests.

⁴ The protesters also allege that Portage had an impaired objectivity OCI because an individual who now works for one of Portage's subcontractors participated on an (continued...)

The FAR requires that contracting officers identify potential OCIs and “avoid, neutralize or mitigate” significant OCIs. Federal Acquisition Regulation (FAR) § 9.504. Contracting officers are directed to exercise “common sense, good judgment, and sound discretion” in assessing whether a significant potential conflict exists. FAR § 9.505; Gulf Coast Petroleum Reserve Operations, LLC, B-409004.2 et al., Jan. 24, 2014, 2014 CPD ¶ 41 at 14. To demonstrate that an agency’s OCI determination is arbitrary or capricious, a protester must identify “hard facts” that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR § 9.505(b); CapRock Gov’t Solutions, Inc., et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25.

Here, we view the protests as failing to provide the requisite “hard facts” to establish that the agency’s determination was unreasonable. After the dismissal of the initial round of protests in 2013, the contracting officer conducted an investigation into the protesters’ OCI claims.⁵ As part of his investigation, the contracting officer solicited additional information from both WSS and Portage. AR, Tab H.11, CO Memorandum Regarding OCI Investigation, at 2, 4. In response to the contracting officer’s inquiries, WSS identified only one document--an organizational chart that

(...continued)

independent technical review team in 2010, which put her in a position to influence DOE’s views of Stoller’s performance under the incumbent contract. WSS First Supp. Protest at 4. However, an impaired objectivity OCI arises where a firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests. Pragmatics Inc., B-407320.2, B-407320.3, Mar. 26, 2013, 2013 CPD ¶ 83 at 4. Thus, when a firm’s work under a government contract entails evaluating itself or its own products, there is a concern that the firm may not be able to render impartial advice to the government. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. Here, the contracting officer found that there was no evidence to support the claim of an impaired objectivity OCI, noting that the individual’s minimal role in providing evaluations to the agency occurred in 2010, before the current procurement. Therefore, this was not a situation in which a firm’s future ability to render impartial advice to the government would be undermined by the firm’s current competing interests. Id. at 6. We find no basis to object to the agency’s position in this regard.

⁵ WSS’s 2013 protest raised substantially the same OCI issues raised in the current protests.

hung on a wall in Stoller's offices in the 2010-2011 timeframe, and to which WSS claims the individual may have had access. The agency compared Stoller's 2010 organizational chart to the organizational charts submitted in WSS's and Portage's proposals and found numerous differences, including seven significant differences between Stoller's 2010 chart and Portage's chart in the management and function organization for the LTS&M area. Id. The agency also found several differences between Stoller's 2010 chart and the one proposed by WSS in the current procurement, indicating that even if the individual had access to the 2010 chart, it would not have been competitively useful years later in the current procurement. Therefore, the CO concluded that there was no credible evidence to support WSS's claims that Portage had access to proprietary information that allowed Portage to gain a competitive advantage.⁶ Id. at 8. We find the CO's investigation to be reasonable and thorough, and we find no basis to object to the adequacy of the agency's inquiry into the alleged OCIs. Therefore, this protest ground is denied.⁷

⁶ Moreover, it is unclear whether an organizational chart would even be considered competitively useful enough to give rise to an unequal access to information OCI.

⁷ Both WSS and Navarro also argue that Portage's proposal should have been eliminated from the competition because it failed to comply with the limitations on subcontracting clause contained in FAR § 52.219-14, and incorporated by reference into the RFP. RFP at 69. As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. Dorado Services, Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 11; Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. Here, we conclude that this is not a situation where the proposal, on its face, should have led the agency to conclude that Portage did not agree to comply with the limitation. See KAES Enter., LLC, B-408366, 2013 CPD ¶ 192 at 2-3 (protest alleging that awardee proposed to perform only 27% of the hours required under the contract was denied where the protester did not identify anything on the face of the proposal that should have led the agency to conclude that the awardee would not comply with the subcontracting limitation). Although the protesters offer an alternative computation of the percentage of costs allocated to the prime and the subcontractors, arguing that the subcontract handling costs should be attributed to the costs of subcontractor performance, this computation, even if correct, falls far short of the kind of evidence that would lead an agency to conclude that Portage's proposal, "on its face," indicated that it would not comply with the limitation. Moreover, since the subcontract handling costs are to be incurred by the prime in association with its oversight of the subcontractor, the agency reasonably determined that these costs were properly attributed to the prime.

NAVARRO'S PROTEST ISSUES

Navarro challenges the reasonableness of the agency's technical evaluations, arguing that the discriminators identified by the SSO in his selection decision were unreasonable and not supported by the record.

In protests where there is a challenge to the propriety of the agency's evaluation of proposals, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation scheme and applicable statutes and regulations. SOS Int'l., Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. Further, a source selection decision based on inconsistent or inaccurate information concerning the technical evaluation or the relative merits of the offerors' technical proposals is not reasonable. New Breed Leasing Corp., B-259328, Mar. 24, 1995, 96-2 CPD ¶ 84 at 4.

As set forth in greater detail below, this is a procurement where the source selection decision relied upon a number of discriminators to distinguish between two similarly rated proposals. Upon review, the record reflects that several of these discriminators do not withstand scrutiny, and were the result of unreasonable conclusions, unequal evaluations, or inaccurate judgments regarding the differences between the two proposals. As a result, we conclude that the best value decision was flawed.

Technical Approach Factor - Weakness for Calibration Models Support

One of the discriminators the SSO identified under the first evaluation factor, technical approach, was a notable weakness⁸ regarding Navarro's proposal to provide calibration models support. Specifically, Navarro's proposal was criticized for a lack of "completeness" in addressing the requirement. SSDD at 7; SEB Report at 30, 35; see Tr. at 163-64. Navarro contends that the agency's assignment of this weakness and its reliance on the weakness as a discriminator were unreasonable.

The DOE maintains facilities in Colorado, Wyoming, New Mexico, and Texas that contain uniform concentrations of naturally occurring potassium, uranium and/or thorium that may be used to calibrate radiation sensors, such as gamma ray detectors. RFP at 110; Tr. at 165, 328. The RFP required that offerors provide support for the development, standardization and maintenance of these calibration

⁸ The SEB report defined a "notable weakness" as a flaw that does not meet the definition of a significant weakness, but which is considered to be of a more serious detriment to the government than other more ordinary weaknesses. SEB Report at 21.

facilities. Specifically, with regard to calibration model support, the solicitation required the following:

- a) Manage access to the calibration facilities, track usage and provide maintenance and technical support to users.
- b) Manage the leases for the facilities.
- c) Conduct annual and document inspections in conjunction with visits to other [legacy management] sites in the vicinity.
- d) Perform routine maintenance of groundskeeping, painting, minor fence repairs, and incidental sign and lock replacements.

RFP at 111.

The SEB assigned a notable weakness to Navarro's proposal, finding that it demonstrated a lack of completeness in addressing this requirement. SEB Report at 35. In this regard, the report stated that the proposal did not address technical support and that Navarro's lack of recognition of the need to provide technical support would result in the loss of key institutional knowledge. *Id.* At the hearing, the SSO, who had not read the proposals, Tr. at 96, explained that his understanding of this weakness was that "Navarro was more general in the discussion of how the calibration facilities would be managed and Portage was specific." Tr. at 151.

The record, however, does not support the view that there was a significant difference between the proposals in this area. In its entirety, the awardee's proposal stated the following with regard to calibration models support:

Portage will manage calibration facilities per the existing LM procedures and requirements. We will provide access and technical support to users and perform maintenance and facility inspections using our Grand Junction staff on a part-time, as-needed basis. Our approach will include the retention of [DELETED], to execute this PWS [Performance Work Statement] element.

AR, Tab D.2, Portage Technical Proposal, at 123.

For comparison, Navarro's proposal provided the following with regard to calibration models support:

The Navarro Team will manage access to the calibration facilities, track usage, and provide maintenance and technical support to users [PWS 4.3.3 (a)]. We will manage the leases for the facilities [PWS 4.3.3 (b)]. We will assign a qualified Source and Facility Custodian responsible for this support and for radiological survey management, and verification tracking of technical compliance of the calibration

sources. We will perform routine maintenance of grounds-keeping, painting, minor fence repairs, and incidental sign and lock replacements [PWS 4.3.3 (d)], and conduct annual and document inspections in conjunction with visits to other LM sites in the vicinity [PWS 4.3.3 (c)]. The Navarro staff at [DELETED] will support the Primary Field Calibration Facilities. The Navarro Team already has personnel available in offices near the Secondary Field Calibration Facilities that are located in [DELETED], and will fully use these resources. We will coordinate inspections with other visits to these sites when required.

AR, Tab C.5, Navarro Technical Proposal, at 105-06 (citations to PWS in original).

A review of these proposal sections provides no support for the SSO's distinction about the level of detail between these proposals. Specifically, Navarro's proposal contained each of the statements that appear in Portage's proposal, with the exception of the statement that Portage would retain the incumbent, non-key employee, [DELETED]. An SEB member testified that Portage's statement that it would retain the current incumbent employee indicated that Portage understood the importance of technical support. Tr. at 334. In contrast, the SEB found that Navarro's proposal lacked a recognition of the need to provide technical support, which the SEB stated "would result in the loss of key institutional knowledge." SEB Report at 35.

The record also suggests that there is no meaningful difference between the proposals with respect to retention of the incumbent employee, [DELETED]. As an initial matter, we note there was no indication in Portage's proposal (or indeed, even in the current protest record) that the incumbent employee had committed to work for Portage if Portage was awarded this contract. Tr. at 341-42. As for Navarro, the SSO testified that his expectation was that non-key incumbent employees (such as [DELETED]) will generally be retained "because they have the skills [and] expertise." Tr. at 61. Indeed, Navarro's proposal stated that it intended to "maximiz[e] . . . hiring of incumbent staff," and that Navarro was "confident that we will retain the majority of the incumbent personnel with our proven approach." AR, Tab C.5, Navarro Technical Proposal, at 228. In this regard, Navarro's proposed approach included offering incumbent employees [DELETED]. AR, Tab C.5, Navarro Technical Proposal, at 228. The proposal also included statistics for six recent contracts showing that Navarro's staff retention rate ranged from [DELETED]% to [DELETED]%, with four contracts showing [DELETED]% retention rates. *Id.* at 228. In sum, given that Navarro's proposal was assigned a weakness with regard to calibration models support based solely on its failure to state that it would retain the current incumbent employee, and given that Navarro did, in fact, make clear in its proposal that it intended to retain incumbent employees, we agree with the protester that this weakness was unreasonable.

Technical Approach Factor - Portage's Plan-Do-Check-Act Approach

The SSO also testified that Portage's emphasis on the Plan-Do-Check-Act (PDCA) principle was another discriminator that set Portage's proposal apart from Navarro's under the technical approach factor.⁹ Tr. at 15-16, 34-35, 75. Although the SSO acknowledged that Navarro and Portage both received a significant strength for their approaches to LTS&M and a significant strength for their response to the sample task,¹⁰ the SSO testified that this discriminator was based on the impression he had, from speaking with the SEB, that while the Portage proposal placed a strong emphasis on Plan-Do-Check-Act, other offerors took a "lip service approach." Tr. at 20-21. Navarro contends that this evaluation was unreasonable, unsupported by the record, and a result of disparate treatment.

According to the agency, the evaluation in this regard was reasonable because Navarro's proposal contained only one reference to the Plan-Do-Check-Act principle. Navarro AR at 26. However, the agency's position is not consistent with the record. Rather, our review indicates that Navarro's proposal contained several references to PDCA. See, e.g., AR, Tab C.5, Navarro Technical Proposal, at 77 ("The [legacy management environmental management system] is integrated with the safety management system, which follows the 'Plan-Do-Check-Act' cycle to ensure continuous improvement "); id. at 121 ("Our environmental management system is a systematic, continuous cycle with four primary components: planning, doing, checking, and acting"); id. ("Our 'Plan, Do, Check, Act' model is based on the five core elements of the International Organization for Standardization (ISO) 14001, Environmental Management System..."). Navarro's discussion of its PDCA methodology also contains a graphic depicting an explanation of its PDCA concept. Id. at 121; cf. Tr. at 19-20 (explaining the PDCA concept).

Furthermore, the hearing testimony from a member of the SEB does not support the SSO's testimony that the SEB indicated to him that Navarro took a "lip service" approach. When asked at the hearing whether the SEB had the impression that

⁹ Although the tradeoff portion of the source selection decision does not mention PDCA, and instead refers generally to "Portage's [s]trengths in the core LM mission area of LTS&M," SSDD at 17, the SSO made clear at the hearing that this discriminator refers to the emphasis in Portage's proposal on PDCA. Tr. at 15-16, 34-35.

¹⁰ In addition to the two significant strengths both offerors received in the areas of LTS&M and sample task, under the technical approach factor Navarro also received five "notable" strengths (defined by the SEB as attributes that do not meet the definition of a significant strength, but are of a higher value than other more ordinary strengths) and one regular strength, while Portage received one notable strength. SEB Report at 30-34, 36.

any of the offerors were more genuine in their commitment to PDCA, as opposed to simply paying “lip service” to the concept, the SEB member responded in the negative, stating that “I didn’t get a sense...any of ... [them] were, for lack of a better word, lying or trying to fake it. . . . I didn’t have a sense they didn’t mean it.” Tr. at 629-30. Thus, it appears that the SEB, which the SSO supposedly relied upon for this discriminator, did not believe that Portage was more genuine in its commitment to PDCA, or that Navarro’s references to PDCA were merely “lip service.” While the SEB report does reference Portage’s PDCA culture, it provides no indication that Navarro’s proposal lacked a similar commitment to PDCA or that Navarro was simply paying “lip service” to the principle and “didn’t mean it.” Id. Moreover, our review shows that Navarro’s proposal contains several detailed statements regarding its commitment to PDCA. In sum, the record does not support the determination that Portage’s proposal indicated a more genuine commitment to Plan-Do-Check-Act such as to be a reasonable discriminator between the two proposals.

Management Approach Factor - Weakness Regarding Transition Plan

Navarro also challenges the discriminators identified under the second evaluation factor, management approach. One of the discriminators the SSO identified under this factor was a weakness assigned to Navarro’s proposal related to its transition plan schedule.¹¹ Specifically, the SEB found that, although Navarro’s transition plan discussed task assignment during transition, this item was not identified on its transition schedule. Tr. at 43. Portage’s proposal was also assessed a weakness under this factor. Specifically, the SEB assigned a notable weakness to Portage’s proposal due to its decision to locate its key person for real property and its key person for beneficial reuse in Washington, DC, removed from the rest of the asset management team and the team leader in Colorado. Id. at 58. The SEB found that this decision would result in increased travel costs and program costs, and decreased effective communication. Id. at 55, 58-59. The SEB also noted that Portage’s proposed approach would distance the key personnel from the majority of the legacy management support incumbent employees currently employed in the asset management field, and could result in inefficiencies in personnel

¹¹ A second discriminator was a difference not identified in the SEB Report, but rather, the result of the SSO’s independent internet search for two of Portage’s proposed subcontractors. Tr. at 37-38, 187. As a result of his search, which led him to review the companies’ websites, the SSO concluded that Portage’s decision to team with these two companies was “intriguing,” “creative,” and “interesting,” and served as a discriminator in favor of Portage. Tr. at 51, 54, 145. A third discriminator identified under this factor related to quality assurance plans. At the hearing, however, an SEB member described the difference between the two offerors’ plans as “nuance[d]” and involving only “slightly” more detail or thoroughness. Tr. at 502-03.

management. Id. at 58. Navarro contends that the SSO acted unreasonably in disregarding or discounting the notable weakness assigned to Portage while relying on the weakness assigned to Navarro as a discriminator in the selection decision. We agree.

While the SEB clearly considered Portage's decision to split key personnel between locations to be more significant, terming it a "notable" weakness, the source selection decision made clear that the SSO viewed Navarro's failure to include a task assignment entry on the transition schedule to be more significant, serving as a discriminator in favor of Portage. In this regard, the decision stated that Navarro's weakness "greatly increases the risk of unsuccessful performance," while Portage's notable weakness could be "overcome with today's communications technology and/or relocation."¹² SSDD at 11.

However, the SSO's conclusions as expressed in the source selection decision were contradicted by the SSO's own testimony at the hearing. When questioned about Navarro's weakness, the SSO characterized it as simply a "minor issue" and an "administrative error." Tr. at 43, 48. The SSO also admitted that, had Navarro's proposal been selected, this minor omission would have been corrected and "we would have started on time." Tr. at 44. Moreover, when asked at the hearing how the weaknesses assigned to Portage's and Navarro's weakness compared, the SSO stated that the two weaknesses were hard to compare to one another and that Navarro's weakness was, in essence, an administrative error, while Portage's weakness related to a personnel decision. Tr. at 48. Given the SSO's testimony, we find that the record does not support the reliance in the source selection decision on Navarro's transition task assignment weakness as a discriminator in favor of Portage.

Staffing Factor - Portage's Innovative DOD Personnel

Next, Navarro challenges discriminators under the third evaluation factor, staffing. Specifically, the source selection decision indicated that the agency found that Portage's proposal was distinguished from Navarro's because Portage proposed [DELETED] individuals with DOD experience who could bring innovation to LM processes.¹³ SSDD at 17. Navarro contends that reliance on this evaluation

¹² The SSDD did not acknowledge or address the SEB's conclusions that these methods of coping with the weakness would present an additional cost. See SEB Report at 55, 58-59.

¹³ In responding to the protest, the agency now claims that this evaluation conclusion was not used as a discriminator. Navarro AR at 53. Instead, the agency argues that this statement was just one aspect of the agency's overall determination that Portage's staffing was superior, and was merely an observation of Portage's proposal that did not imply the absence of a similar attribute in Navarro's proposal.

(continued...)

conclusion was unreasonable because it was the result of unequal treatment. We agree.

The SSO identified Portage's proposed [DELETED] manager and its [DELETED] manager as having highly relevant DOD experience that could bring innovation to legacy management (LM) processes. SSDD at 12, 17. Specifically, the SSO found that these [DELETED] individuals had significant experience in the remediation field from their work at DOD sites, id. at 12-13, and that their participation would enable Portage "to bring innovative approaches to LM's sites that may be outside the Department [of Energy]'s current practices."¹⁴ Id. at 13.

However, the source selection decision contains no mention of the fact that Navarro also proposed an individual with significant non-DOE remediation experience. Specifically, Navarro's proposal indicated that its proposed manager of [DELETED] has experience working for the Environmental Protection Agency, during which he was responsible for team management at more than 160 [DELETED] sites and directed remedial response activities at hazardous waste sites across the country.¹⁵

(...continued)

Id., Tr. at 198. The reference to Portage's proposed staff with DOD experience, however, is found in the section of the source selection decision that discussed the discriminators the SSO relied on in the tradeoff decision to determine that Portage's proposal was superior to Navarro's. SSDD at 17. Further, the SSO admitted during his testimony that the reason for mentioning the individuals with DOD experience was to explain why Portage's staffing was superior to Navarro's. Tr. at 200. Therefore, the text of the source selection decision and the SSO's testimony indicate that, at the time of the source selection decision, the SSO viewed Portage's inclusion of DOD personnel as a discriminator that set Portage's proposal apart from Navarro's.

¹⁴ The SSO made this assumption notwithstanding the SEB's finding that "there is no documentation of . . . innovation on [the [DELETED] manager's] resume." SEB Report at 78.

¹⁵ Further, while the SSO praised Portage for proposing [DELETED] key personnel with DOD experience, Navarro's proposal identified at least three key individuals with DOD experience. AR, Tab Navarro Technical Proposal, at 239, 268, 289. Each of these individuals was evaluated by the SEB as providing a strength to the proposal, with one considered to provide a significant strength. SEB Report at 109, 111, 113. However, the SSO testified that he disagreed with the SEB's assignment of a significant strength to the individual proposed as program manager because her work as an assistant secretary (and other high level positions) involved only a small percentage of LTS&M work, which the SSO considered to be most important to this contract. Tr. at 203. With regard to the other two individuals proposed by

(continued...)

AR, Tab C.5, Navarro Proposal, at 302. The source selection decision lacks any indication that the SSO credited the non-DOE experience at the EPA of Navarro's proposed manager. Indeed, the record still does not explain why the SSO considered the non-DOE experience of Portage's employees (DOD experience) to be a positive attribute that distinguished Portage's proposal from Navarro's but did not similarly credit Navarro for its proposal of a manager with significant non-DOE remediation experience (EPA experience). Therefore, we agree with the protester that as a result of unequal treatment, the SSO's evaluation did not accurately reflect the differences between the two proposals in this area.

Prejudice

DOE argues that, notwithstanding any shortcomings in its evaluation and tradeoff decision, the protest should not be sustained because Navarro was not prejudiced. The agency contends that, even if Navarro demonstrates that a discriminator was unreasonable or undocumented, there is nothing in the record to demonstrate that the SSO would be willing to pay the price premium associated with Navarro's proposal. Agency Post-Hearing Brief at 3-4.

Competitive prejudice is an essential element of a viable protest. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Supreme Foodservice GmbH, B-405400.3 *et al.*, Oct. 11, 2012, 2012 CPD ¶ 292 at 14; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

Here, while Navarro and Portage received the same ratings for the first three non-cost evaluation factors, under the past performance evaluation factor, Navarro's proposal was rated excellent and Portage's proposal was rated only good. Further, although Portage's evaluated cost was about 3.4% lower than Navarro's, the SSO stated in the source selection decision that cost was less important than the technical merits of Portage's proposal and not a determinative factor. SSDD at 18. Specifically, the SSO testified that "the [selection] decision [was] not based on cost . . . we really want the best technical performer." Tr. at 77. Thus, the record indicates that the SSO found Portage's proposal overall to be slightly superior to Navarro's, due to the discriminators he identified in the source selection decision. The SSO described Portage's superiority as a situation in which a series of "minor issues . . . were enough to add [up] to Portage being superior." Tr. at 43.

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Navarro who had relevant DOD experience and were considered by the SEB to be strengths, the source selection decision included no mention of them.

As discussed above, however, we find that several of these discriminators were the result of unreasonable or unequal evaluations, or at a minimum overstated the differences between the two proposals. In light of the multiple flaws in the agency's selection decision, we have no basis to speculate about how the agency would have viewed the overall relative merit of the Navarro and Portage proposals without relying on the unreasonable discriminators. In this regard, we note that it is permissible to identify relative strengths found under less important evaluation factors (*e.g.*, past performance) to be discriminators for selection purposes, where there are lesser relative differences favoring another proposal under more important evaluation factors. The Boeing Co., B-311344 *et al.*, June 18, 2008 CPD ¶ 114 at 32. Moreover, we resolve any doubts regarding competitive prejudice in favor of a protester; thus, where there is a reasonable possibility that the protester was prejudiced by the agency's actions, we will sustain a protest. Coburn Contracting, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230 at 5. Here, since the selection decision was based on considerations that did not accurately reflect the differences between the two proposals, we conclude that Navarro has met its burden in establishing prejudice and we therefore sustain its protest.

WSS'S PROTEST OF THE EVALUATION

WSS also asserts that the evaluation of its technical proposal was unreasonable. Based on our review of the record, however, we find that none of WSS's arguments furnish a basis for questioning the agency's overall determination that WSS's proposal was less advantageous than Portage's (and Navarro's). We discuss several of WSS's arguments below.

Technical Approach Factor - LTS&M Weakness

WSS's proposal was assigned four weaknesses under the most important evaluation factor, technical approach/understanding the requirement. SEB Report at 42-45. These weaknesses were in the areas of: (1) technical approach and schedule; (2) long-term surveillance and maintenance (LTS&M); (3) LTS&M risk; and (4) asset management, integrated facilities infrastructure support. The agency's concerns with respect to WSS's approach to LTS&M were particularly significant because LTS&M work constituted the majority of the work to be performed under the contract. Tr. at 18; RFP at 399-418 (showing that more than half of the direct productive labor hours for the contract will be in the area of LTS&M). Indeed, according to the SSO, the LTS&M work is most closely related to the office's core mission of protecting human health and the environment. Tr. at 34. The SEB report indicates that WSS's weakness in the area of LTS&M resulted from the fact that its proposal was overly general, without supporting detail. See SEB Report at 43. WSS challenges this weakness, alleging that several of the examples the SEB report cited to demonstrate the proposal's lack of detail were unreasonable.

We find that the agency's evaluation in this area was reasonable. The SEB report includes seven paragraphs of examples of the evaluated lack of detail in WSS's proposal. Id. at 43-44. For example, the report notes that while WSS's proposal stated that it aimed to reduce [DELETED] by [DELETED]% over the contract period, the proposal did not provide detail on how the reduction would be achieved. Id. at 43. At the hearing, an SEB member further explained that while WSS claimed that the cost reduction would be achieved using "optimal staffing," "incentives for cost reductions," and "initiatives to improve operational efficiency," its proposal failed to explain what those terms meant or how WSS could achieve such a significant cost reduction. Tr. at 403 (quoting AR, Tab C.2, WSS Technical Proposal, at 35). The SEB report also noted that some portions of the proposal contained general information that is available from public sources, rather than an in-depth discussion of issues and proposed solutions for the specific problems facing the Office of Legacy Management. For example, while WSS stated that it had "deep insight" of the program that would allow it to create value through innovation, AR, Tab C.2, WSS Technical Proposal, at 33, the SEB found that the proposal lacked the detail to support the offeror's claim of a deep insight into the system. SEB Report at 43; Tr. at 549, 553, 555. Since WSS has failed to point to any significant detail in its proposal that would rebut the agency's criticism in this regard, we find no basis to question the downgrading of the proposal on the basis of a lack of meaningful detail with respect to its LTS&M approach.¹⁶

Technical Approach Factor - Notable Weakness Regarding LTS&M Risk

WSS also challenges the notable weakness assigned to its proposal for failure to sufficiently describe risks and mitigations in the area of LTS&M. WSS Protest at 10. WSS challenges this weakness on two bases: first, the protester contends that the agency applied an unstated evaluation criterion; and second, the protester contends

¹⁶ During the hearing, an SEB member testified that WSS's proposal contained high level descriptions of WSS's approach and slogans, but failed to substantiate its broad claims with details or supporting information. Tr. at 401-03. WSS complains that the hearing testimony "backfill[ed] the record with dozens of new assessments," which the protester contends we should reject as post hoc criticisms that were not part of the contemporaneous record. WSS Post-Hearing Comments at 9. However, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 12. Here, the SEB member's explanation of the conclusions documented in the SEB report merely provided a more detailed rationale for the SEB's contemporaneous conclusions and thus are properly considered by our Office.

that, even if it was reasonable for the agency to evaluate the offerors' identification of risks and plans to mitigate them, the weakness was unreasonable because WSS's proposal sufficiently identified risks. WSS Protest at 11-14.

With regard to WSS's first argument, section M of the RFP informed offerors that the agency would evaluate offerors' approach to identifying risks as well as their approach to eliminating, avoiding, or mitigating risks. RFP at 92. WSS acknowledges that the solicitation provided for evaluating offerors' approaches to identifying risks, but contends that the RFP made no reference to the need to identify risks specific to LTS&M. WSS Protest at 11.

WSS's argument is without merit. While agencies are not permitted to use unstated evaluation factors, an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria. MINACT, Inc., B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 3. Here, under the terms of the RFP, offerors were to discuss not only their approaches to identifying risks, but also their approaches to eliminating, avoiding, or mitigating risks. It is unclear how an offeror could provide a detailed discussion of its approach to eliminating and mitigating risks that it has not yet identified. Moreover, section L of the solicitation specifically instructed offerors to "identify the most significant risks to successful performance of the [performance work statement]." RFP at 78. Therefore, this argument provides no basis on which to sustain the protest.

Next, WSS challenges the agency's determination that it insufficiently identified risks and mitigation approaches related to LTS&M. Our review of the record, however, supports the reasonableness of the evaluated notable weakness. In this

regard, the SEB found that, while the proposal alluded to some general risks, it did not address specific risks and approaches to mitigating those risks. SEB Report at 44. For example, one of the risks that WSS identified was the potential failure of environmental remedies. AR, Tab C.2, WSS Technical Proposal, at 65. WSS's proposal stated that it would mitigate this risk using, among other things, maintenance programs, inspections, data collection, and institutional controls. Id. In the SEB's view, however, the general identification of this risk did not demonstrate that WSS had an understanding of the contract requirements and the types of specific risks that might arise with respect to remediation. Further, according to the SEB, WSS's proposed mitigation techniques were standard practice and "the kind of thing that you would expect to find in a textbook . . . [about] environmental risk." Id. WSS has not shown these conclusions to be unreasonable.

As another example, WSS's proposal identified the "[l]oss of regulator, public, or stakeholder confidence in the remedy" as a potential risk, but the SEB also found this description to be very general. Tr. at 486 (quoting AR, Tab C.2, WSS's Technical Proposal, at 70). WSS proposed to mitigate this risk by basing strategies on sound technical approaches, using peer reviews to ensure technical approaches are sound, and communicating with stakeholders and regulators about remedies, risks, and chance of success. As one SEB member pointed out, however, while it is important not to base strategies on unsound technical approaches, and to communicate with stakeholders and regulators, these mitigation approaches are general and extremely high-level. Tr. at 485-86; see also, Tr. at 487 (discussing another proposed mitigation that offered obvious solutions that are already commonplace); c.f., Tr. at 488-90 (discussing Portage's identification of risks specific to LTS&M work and detailed mitigation strategies).

Thus, the SEB found that WSS failed to sufficiently identify risks and propose mitigation techniques that were specific to the program or detailed enough to show that the offeror understood the work required under this contract. Again, WSS has failed to point to any significant detail in its proposal that would rebut the agency's criticism in this regard. As a result, we find no basis to question the downgrading of the proposal on the basis of a lack of meaningful detail with respect to LTS&M risks and mitigations.

Past Performance Factor - WSS's Past Performance

WSS also challenges the evaluation of its own past performance. Specifically, WSS contends that the agency acted unreasonably when it disregarded two Contractor Performance Assessment Reporting System (CPARS) reports that reflected positive past performance of the incumbent contract, and relied instead on a fee determination for the same period that contained negative information.

In assessing WSS's past performance, the SEB considered Stoller's performance under the incumbent contract to be highly relevant. SEB Report at 99. In the SEB's evaluation, it noted that it had obtained two CPARS reports regarding Stoller's performance on the incumbent contract. These reports contained exceptional ratings for all rated areas. Id. at 98 n.14. However, the agency found that not only were the reports "erroneously written and approved by a government employee without the authority or knowledge of the contracting officer and contracting officer representative," they were prepared by a person unfamiliar with the contractor's performance. Id. Specifically, an individual in DOE's procurement services office realized that the Stoller contract was missing CPARS reports, so she completed two reports (one for February 2012 to January 2013 and another for January 2013 to April 2013) without having actual knowledge of Stoller's performance on the contract. As a result, the SEB determined that the CPARS reports on Stoller's incumbent performance "were not considered valid for purposes of the WSS team's Past Performance evaluation." Id.

Instead, the SEB relied on Stoller's award fee determination for the period of October 2012 to April 2013. SEB Report at 98. In the award fee determination, Stoller received an overall rating of 3.4 out of 4 and a rating of 2.6 out of 4 in the area of management performance.¹⁷ Id.; AR, Tab E.2.E, Stoller Award Fee Determination, at 1, 3. As noted by the agency, the level of detail in this 32-page award fee determination reflected an in-depth knowledge of Stoller's performance on the contract, with numerous specific examples of problems that had been encountered under the Stoller contract. Thus, the award fee official noted that, despite funding increases, Stoller did not provide the technical support requested by the agency. For example, one program was not able to integrate geochemistry with groundwater flow and transport. Id. at 29. As another example, the award fee determination noted that Stoller's staff failed to follow the Office of Legacy Management's policies for review and approval of materials prior to presentations. This resulted in several occasions where agency personnel had to intervene to ensure that presentations received the appropriate level of policy and management review. Id. The award fee determination also stated that many of these issues were raised with Stoller's management on several occasions without satisfactory resolution. Id.

The award fee determination also found that Stoller's support for the Church Rock site had not met expectations with regard to providing timely and complete reviews of documents, recommendations on technical issues, insight and foresight into problems, and preparation of correspondence. Stoller Award Fee Determination at 30. As another example, the determination noted security violations, including open windows, open gates, open vehicle doors, and unsecured building doors and

¹⁷ A rating of 2.5 was considered marginal. AR, Tab E.2.E, Stoller Award Fee Determination, at 29.

doors propped open, most of which occurred after normal working hours. Id. As a result of this information, the SEB assigned WSS a weakness for Stoller's performance of the incumbent contract. SEB Report at 98. Overall, however, WSS's past performance was rated good and was assessed one significant strength for highly favorable past performance on other contracts, a weakness related to the award fee determination, as well as one other weakness.¹⁸ Id. at 97.

We find the agency's evaluation of WSS's past performance to be reasonable. The record reflects that the previous contracting officer for Stoller's incumbent contract was a member of the SEB and informed the SEB that the two CPARS reports referenced above were prepared without authorization and without knowledge of Stoller's performance of the contract. Therefore, the SEB reasonably disregarded those reports and relied instead on the detailed award fee determination which reflected extensive familiarity with Stoller's performance and was supported by numerous examples. Further, the record indicates that the agency reasonably considered and downgraded WSS with regard to Stoller's numerous documented performance problems on the incumbent contract. Accordingly, we find no basis on which to question WSS's overall past performance rating of good.¹⁹

In sum, while the evaluation of WSS's proposal may not have been entirely without error,²⁰ WSS has furnished no basis to question the agency's overall evaluation of

¹⁸ WSS has not challenged the second weakness.

¹⁹ WSS also contends that the SSO failed to consider another more recent award fee determination which showed that Stoller's performance had improved and that many of the previously-identified problems had been corrected. However, the record shows that the SSO did, in fact, reasonably consider the most recent fee determination. In this regard, the SSO prepared an addendum to the source selection decision, which stated that he had considered the improved performance information, but did not believe a change in the overall past performance rating was necessary. Based on the addendum and the SSO's testimony at the hearing, see Tr. 70-73, we find that the record indicates that the SSO reasonably considered the additional information and determined that it did not warrant a change to WSS's rating for the past performance factor.

²⁰ In this regard, while the agency reasonably assigned a weakness due to WSS's lack of detail in its high level schedule, SEB Report at 42, the agency also specifically criticized WSS's schedule for failing to state any assumptions. WSS notes, and the agency does not dispute, that Portage's schedule also failed to include assumptions but was not similarly criticized for this omission. While we will not characterize this error as de minimis, it does not, standing alone, call into question WSS's overall rating of good under the technical approach factor, in contrast to Portage's rating of excellent.

WSS's proposal as less advantageous than the proposals submitted by Navarro and Portage. Therefore, WSS's protest is denied.

CONCLUSION AND RECOMMENDATION

As set forth above, we sustain Navarro's protest of the source selection decision because we find that the decision was based on several discriminators between Navarro's proposal and Portage's that are not supported by the record. We deny WSS's protest and both protesters' OCI allegations. Therefore, we recommend that the agency reevaluate the proposals of Navarro and Portage and make a new source selection decision. If Navarro's proposal is determined to offer the best value to the government, the agency should terminate Portage's contract and make award to Navarro. We also recommend that Navarro be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2013). Navarro should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

Navarro's protest is sustained and WSS's protest is denied.

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