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Comptroller General  
of the United States

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## Decision

**Matter of:** Mare Solutions, Inc.

**File:** B-413238; B-413238.2

**Date:** September 14, 2016

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### DIGEST

1. Protest challenging an evaluation of past performance and technical proposals, as well as the agency's best-value decision, is denied where record shows that the agency's evaluation and award decision were reasonable and consistent with the terms of the solicitation.
  2. Protest alleging that the awardee cannot meet the solicitation's subcontracting limitation clause is denied where the protester identifies nothing on the face of the awardee's proposal that indicates an intention not to comply with the limitation.
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### DECISION

Mare Solutions, Inc., a service-disabled veteran-owned small business (SDVOSB) of Pittsburgh, Pennsylvania, protests the award of a contract to SAW Contracting, Inc., a SDVOSB of Virginia Beach, Virginia, under request for proposals (RFP) No. VA244-15-R-1582, issued by the Department of Veterans Affairs (VA) for boiler plant replacement services. Mare contends that the VA's evaluation of its proposal, the evaluation of the awardee's proposal, and the agency's award decision were unreasonable. Mare also argues that the awardee's proposal failed to provide the information necessary to determine whether SAW would comply with the subcontracting limitation in Federal Acquisition Regulation (FAR) clause 52.219-14.

We deny the protest.

## BACKGROUND

On January 5, 2016, the agency issued the RFP as a total SDVOSB set-aside, seeking proposals for the replacement of existing boiler plant systems along with other related general construction services at the James E. Van Zandt VA Medical Center, in Altoona, Pennsylvania. RFP at 1, 6-9. The solicitation was conducted pursuant to the procedures of FAR part 15, contracting by negotiation, and contemplated the award of a fixed-price contract with a performance period of 300 days. Id. at 1, 22, 32.

The solicitation contemplated that award would be made on a best-value basis, considering the following three factors: (1) past performance; (2) technical; and (3) price. Id. at 21-22. Pursuant to the solicitation, the two non-price evaluation factors were of equal weight, and when combined, were significantly more important than price. Id. at 23.

With regard to past performance, offerors were instructed to provide information on up to four construction projects of similar size and scope, as compared to the work required by the solicitation. Id. at 19. Offerors were also required to provide a list of major subcontractors they intended to use if awarded the solicitation. Id.

Past performance was to be evaluated based on an offeror's business practices, its customer relationships, and its ability to successfully perform as proposed. Id. at 24. The evaluation contemplated that the VA would consider past performance information of predecessor companies, key personnel, subcontractors performing major or critical aspects of the requirement, and/or subcontractors an offeror planned to use. Id. at 24-25. Another aspect to be evaluated under the past performance factor was the relevancy of projects an offeror submitted with its proposal. Id. at 25. The RFP advised that in determining relevancy, the agency could take into consideration whether previously performed projects employed similar construction methods, were of similar scope and complexity, and were performed in a similar environment to the effort to be performed under the solicitation. Id. at 25.

As it pertains to the relevancy aspect of past performance, the solicitation provided that the projects submitted by an offeror with its proposal would be rated as very relevant, relevant, semi-relevant, or not relevant. Id. Relevancy, however, was only one aspect of past performance. Considered together with the other identified areas, an offeror's overall past performance evaluation would be assessed using one of the following performance risk ratings: low risk, average risk, above average risk, high risk, and neutral. Id. at 26. As relevant here, an average risk rating was merited when:

Performance met most contract requirements. Adequate quality. Problems may have been identified however[,] contractor usually took adequate corrective action. Performance was current and generally very relevant to semi-relevant. OR Although performance exceeds expectations and was rated excellent to very good the projects submitted were generally semi-relevant to the efforts required by this solicitation. Fair probability of success with an average degree of risk in meeting the government's requirements.

Id.

The RFP's technical evaluation factor contained the following eight subfactors: (1) capability and experience; (2) organization; (3) specific personnel; (4) scheduling methodology; (5) quality control; (6) safety; (7) infection control; and (8) construction materials management. Id. at 27. Subfactors one and two were of equal importance, and were somewhat more important than the remaining six subfactors, which were of equal importance. Id.

With regard to the technical factor, offerors were required to provide all the information necessary for the evaluators to "form a concrete conclusion of [an] offeror's ability to perform complete project management and construction." Id. As relevant to this protest, under the capability and experience subfactor, the solicitation instructed offerors to submit responses to various questions, identified in an exhibit of the solicitation, related to the offeror's capabilities, personnel, and experience. Id. at 27, 94-97. For example, exhibit D required offerors to describe their experience and capability in managing construction projects that were of similar size and scope to the work identified in the solicitation. Id. at 94-97.

The solicitation provided that the agency would evaluate the quality and extent of the offeror's related experience, and determine if the offeror had the ability to manage projects comparable to the work required by the solicitation.<sup>1</sup> Id. at 27. Under this subfactor, proposals also were to be evaluated to determine whether an offeror had experience with management of construction projects of similar size and scope. Id.

For the overall technical evaluation factor rating, an offeror's proposal could be assigned a color rating of blue, green, yellow, pink, or red. Id. at 30. As relevant here, the solicitation contemplated a yellow rating when an offeror's proposal:

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<sup>1</sup> Exhibit A of the solicitation required offerors to identify the names of their subcontractors, and required the subcontractors to provide their consent so that the agency could assess the relevancy of a subcontractor's past performance. RFP at 83-85.

[met] some but not all the RFP requirements, but offers disadvantages (weaknesses) outweighing other advantages (strengths). Examples may include little or no experience cited; weak proposal; mimics RFP language rather than expressing offeror's approach or understanding of the RFP. Probability of success considered less than full confidence (moderate to high risk).

Id.

Also, of relevance here, the RFP incorporated, by reference, FAR clause 52.219-14, Limitations on Subcontracting (Nov. 2011). Id. at 52. This clause provides, in relevant part:

(c) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

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(3) General construction. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

FAR clause 52.219-14(c)(3).

The agency received seven proposals by the solicitation's February 19 closing date, including Mare's and SAW's.<sup>2</sup> Contracting Officer (CO) Statement at 1; Agency Report (AR), exh. 31, Source Selection Board Minutes (SSBM), at 1; RFP amend. 1, at 1. The agency's source selection board (SSB) evaluated the proposals and assigned ratings based on the solicitation's various rating schemes. AR, exh. 31, SSBM, at 2-25. Mare's and SAW's proposals were evaluated as follows:

	SAW Contracting, Inc.	Mare Solutions, Inc.
Past Performance Factor	Very Low Risk (Very Relevant Projects)	Average Risk (Semi-Relevant Projects)
Technical Rating Factor	Blue	Yellow
Overall Price	\$6,825,000	\$6,084,000

Id. at 18-25. The SSB assigned a very low risk rating to SAW's past performance based on the feedback SAW received on one project that was deemed to be

<sup>2</sup> The agency evaluated six proposals, rather than seven, because one was determined to be late, and therefore was not evaluated. CO Statement at 1.

semi-relevant to the solicitation's requirement, and three projects submitted by SAW's subcontractor, Greenland Enterprises, Inc., which were deemed to be very relevant. Id. at 18-19. The SSB found that the three Greenland projects directly involved work related to boiler systems. Id. In addition, the SSB assigned a blue rating to SAW's proposal under the technical evaluation factor. Id. In reaching this conclusion, the SSB evaluated SAW under the capability and experience subfactor as follows:

provided [r]elevant to [v]ery [r]elevant work as their recent past experience, including VA boiler projects equivalent to the project for this solicitation. They have experience working on high dollar amount VA projects and are 'dedicated to the retrofit and construction with boiler and chiller plant projects for the VA.' In addition to the VA boiler experience it was noted that they also received excellent reviews on the management of these projects.

Id. at 19.

The SSB assigned an average risk rating to Mare's past performance based, in part, on one project deemed to be relevant to the solicitation's requirement, and three projects deemed to be semi-relevant. Id. at 22. The SSB also noted concerns in a contractor performance assessment report (CPAR) related to work Mare performed under a different VA project for a parking garage in Erie, Pennsylvania. Id. at 23. In evaluating Mare's past performance, the SSB noted that the CPAR for the Erie parking garage identified concerns with quality, schedule, environmental controls, and trenching issues.<sup>3</sup> Id. The SSB assigned a yellow rating to Mare's proposal for the technical evaluation factor, in part based on the following finding under the capability and experience subfactor:

Contractor provided semi-[r]elevant to relevant work as their past experience. They also have experience working on VA projects with high dollar amounts. They state that their strong past performance has led to high bond lines including \$20 [m]illion for single projects and \$30 million for aggregate projects. However, it was noted that there were no details for past [b]oiler [p]lant projects or large mechanical projects other than the cooling tower replacement ([p]roject 2 above).

Id. at 23.

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<sup>3</sup> The SSB also considered CPARs for other projects identified for Mare, where Mare received favorable ratings, and in which the CPARs "gave praise for exceptional work." AR, exh. 31, SSBM, at 23.

The source selection authority (SSA) adopted the SSB's ratings for Mare's and SAW's proposals and ultimately determined that the proposal submitted by SAW represented the best value to the government, price and other factors considered. AR, exh. 32, Source Selection Decision (SSD), at 3-5. In reaching this conclusion, the SSA recognized that Mare's proposal was evaluated as having a lower price than the proposal submitted by SAW, but concluded that SAW's higher-priced proposal offered a better value to the VA because of its higher technical and past performance ratings. Id. at 5.

On March 23, the VA awarded the contract to SAW. CO Statement at 3. The protester received a telephonic debriefing from the VA on June 1. Id. Mare filed its protest with our Office on June 6.

## DISCUSSION

Mare challenges multiple aspects of the agency's evaluation and award decision. First, the protester objects to the agency's evaluation of its past performance, contending, for example, that the agency improperly considered a CPAR which contained inaccurate information and was in the process of being revised. The protester also challenges the evaluation of proposals under the RFP's technical evaluation factor. In addition, the protester argues that the VA should have rejected SAW's proposal because it allegedly failed to comply with the RFP's limitations on subcontracting clause. Finally, Mare alleges that the agency's best-value decision was flawed because it was based on the agency's allegedly unreasonable evaluation. After reviewing the record, we find no basis to sustain Mare's protest.

### Past Performance Factor

With respect to the evaluation of Mare's past performance, first, the protester argues that the agency unreasonably assessed its projects as being only semi-relevant to the work identified in the solicitation. Mare contends that the four projects it submitted were complex mechanical/electrical installation contracts that required performance in active VA medical centers occupied with patients and staff. The protester also asserts that it deserved a better than average past performance risk rating because, in its view, its proposal demonstrated a very good history that exceeded expectations.

Our Office reviews an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. L&J Bldg. Maint., LLC, B-411827, Oct. 27, 2015, 2015 CPD ¶ 344 at 3; Herve Cody Contractor, Inc., B-404336, Jan. 26, 2011, 2011 CPD ¶ 27 at 3. An agency has broad discretion, when evaluating an offerors' experience and past performance, to determine whether a particular contract is relevant. L&J Bldg. Maint., LLC, supra. The evaluation of experience and past performance is, by its very nature, subjective, and an offeror's disagreement with an agency's evaluation

judgements, without more, does not demonstrate that those judgements are unreasonable. Id.

Here, we find unobjectionable the agency's evaluation of Mare's past performance. First, the agency reasonably assessed Mare's projects as being semi-relevant to the work required by the solicitation. Specifically, the SSB noted that three of the projects submitted by the protester were semi-relevant to the work required by the solicitation because they included "little-to-no mechanical plumbing" work, a very vague description of the work to be performed, or identified work with a much smaller scope and magnitude than the boiler plant system work required by the solicitation. AR, exh. 31, SSBM, at 22. The SSB also deemed one of Mare's projects to be relevant to the solicitation's scope of work because it involved semi-large mechanical work, including the installation of a new chiller, cooling tower, and associated equipment. Id.

Our review of the record confirms the SSB's findings. See AR, exh. 8, Mare Proposal Vol. 2, at 3-11. In this regard, one project submitted by Mare was related to work for electrical distribution alterations, another was for emergency plumbing upgrades,<sup>4</sup> and another was for ventilation upgrades. Id. at 3-5, 8-11. We agree that none of the projects evaluated by the agency as being semi-relevant warranted a higher relevancy rating because none of them involved the magnitude and complexities of the work here. Indeed, the solicitation made clear that although an offeror's past performance may have exceeded expectations, an average rating could be assigned by the agency if the projects submitted were generally semi-relevant to the efforts required by the solicitation, as was the case here. RFP at 26. Therefore, we find reasonable the agency's assignment of an average risk rating to Mare's overall past performance due to the agency's assessment that several of Mare's prior projects were only semi-relevant to the project here. While Mare may disagree with the agency's assessment, its disagreement does not demonstrate that the VA's judgements were unreasonable. L&J Bldg. Maint., LLC, supra.

Finally, we note that Mare complains that the VA should not have considered the Erie parking garage CPAR, which contained inaccurate negative information, during the agency's evaluation of past performance. The protester argues that the negative information should not have been reported in the CPAR, that the VA acknowledged that the information was incorrect, and that the agency had agreed to

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<sup>4</sup> The SSB noted that the plumbing upgrade project submitted by Mare only contained a vague description of work and found that the work described was of smaller magnitude and scope than the work required under the RFP. AR, exh. 31, SSBM, at 22. The SSB also considered the fact that Mare received exceptional or very good ratings for every element of the past performance questionnaire that was associated with this project. Id.

correct it. In response, the agency explains that Mare was not prejudiced by VA's decision to consider the information from the challenged CPAR, because the revised CPAR also identified similar concerns as the original CPAR. We agree.

Competitive prejudice is an essential element of a viable protest, and 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, and our Office will not sustain the protest. SunGard Data Sys., Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 6-7.

Here, the record reflects that many of the concerns identified in the challenged CPAR were also noted in the revised document. Compare AR, exh. 38, Prior CPAR, at 1-3, with exh. 39, Revised CPAR, at 1-2. For example, the original CPAR identified concerns during the performance of that contract with Mare's quality, schedule, safety and environmental practices, as well as issues with trenching. AR, exh. 38, Prior CPAR, at 2. The revised CPAR still identifies quality issues, rates Mare marginal for schedule, and identifies concerns related to safety, environmental issues, and trenching. AR, exh. 39, Revised CPAR, at 2. Because the record reflects that issues identified and considered by the agency in the challenged CPAR were also identified in the revised CPAR, we agree with the agency that Mare has failed to establish that it suffered prejudice. Specifically, Mare has not demonstrated that had the agency considered the revised CPAR, its past performance would have improved or that it would have altered the agency's best-value decision.<sup>5</sup>

#### Technical Factor

The protester asserts that the agency's evaluation of Mare's and SAW's proposals under the technical factor failed to comply with the terms of the RFP. In this regard, the protester challenges the agency's evaluation of both proposals under the capability and experience subfactor.<sup>6</sup> With respect to the agency's evaluation of Mare's proposal, the protester alleges that it should have received a higher rating under the technical factor, because its proposal demonstrated that it had prior work experience with infection control requirements that were significantly more complex and stringent than those in the solicitation.<sup>7</sup> With respect to the agency's evaluation

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<sup>5</sup> Moreover, the Erie parking garage CPAR was only one of many different data-points considered by the agency when it was evaluating all the various aspects of Mare's overall past performance.

<sup>6</sup> We note that the capabilities and experience subfactor is only one of the eight subfactors that comprise the technical factor evaluation. The other subfactors are not challenged by the protester.

of SAW's proposal, Mare contends that the evaluation was flawed because it impermissibly considered projects that were performed by SAW's subcontractor.

In reviewing protests of an agency's evaluation of an offeror's technical proposal, our Office does not reevaluate proposals; rather, we review the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6. A protester's disagreement with the agency's evaluation, without more, is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Based on our review of the record we find the agency's technical factor evaluation of both proposals to be reasonable. As explained by the agency, installation of a new boiler system is a highly complex and technical undertaking, because such a project requires comprehensive knowledge of boiler systems and how all the components work together. CO Statement at 3. These components are unique to boiler system installations, and include a variety of different systems. Id. The agency maintains that experience can only be obtained through the prior installation of other boiler systems. Id.

For the purpose of evaluating proposals under the capabilities and experience subfactor, the RFP required offerors to describe their experience and capability managing construction projects that were of similar size and scope to the work identified in the RFP. RFP at 94. The terms of the solicitation required the agency to evaluate whether an offeror's proposal demonstrated the ability to manage projects that were comparable to the work required by the solicitation. Id. at 27.

Here, the SSB analyzed the projects Mare included with its proposal for evaluation, and concluded that three of the four projects lacked enough detail to demonstrate experience with work on boiler plants or large mechanical projects. AR, exh. 31, SSBM, at 23. In assigning a yellow rating to Mare under the technical factor, the SSB reviewed and assessed all eight technical subfactors. Id. at 23-24. Specifically, in assessing Mare's capability and experience, the SSB concluded that Mare's past projects demonstrated little to no relevant experience comparable to the

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(...continued)

<sup>7</sup> Although the technical evaluation factor contained a separate subfactor to evaluate infection control, the protest did not appear to directly challenge the agency's evaluation of that subfactor. Rather the protest mainly argues that the agency improperly evaluated proposals under the capability and experience subfactor. To the extent that Mare is protesting the reasonableness of the agency's evaluation of the infection control subfactor, after reviewing the record, we find nothing improper about the agency's evaluation.

work required by the solicitation. Id. at 23. Furthermore, in adopting the SSB's evaluation of Mare's proposal under the overall technical factor, the SSA found that Mare's technical rating was based, in part, upon Mare's "limited experience, unclear subcontractor participation, and unclear schedule sequencing." AR, exh. 32, Source Selection Decision Document at 4. Our review of the record confirms that the SSB accurately characterized the projects that were submitted by Mare. Therefore, we find the agency's evaluation of the protester's proposal under the technical factor, and more specifically, under the capability and experience subfactor, to be unobjectionable. See AR, exh. 8, Mare Proposal Vol. 2, at 3-11. While the protester may disagree with the agency's assessment, its disagreement, without more, is not sufficient to render the agency's evaluation unreasonable. Ben-Mar Enters., Inc., supra.

We also find no basis to sustain the protester's allegation that the agency impermissibly considered the capability and experience of SAW's subcontractor during its evaluation of SAW's technical proposal. The solicitation directed offerors to identify the subcontractors and/or teaming partners they intended to use while performing the contract. RFP at 84. Therefore, subcontractor information was to be used to evaluate the quality and extent of an offeror's related experience, and whether the offeror had the ability to manage projects comparable to the work required by the solicitation. Id. at 27. Since the solicitation expressly requested this information, the agency was permitted to consider subcontractor experience as part of its evaluation. Given this, our review confirms that the agency's evaluation of the experience of SAW's subcontractor was reasonable and consistent with the solicitation's evaluation scheme. Wackenhut Servs., Inc., supra.

#### Limitations on Subcontracting

The protester claims that SAW's proposal failed to provide the information necessary to determine whether SAW could, or would, comply with the solicitation's limitations on subcontracting clause. In this respect, and as discussed above, the proposal submitted by SAW identified the use of Greenland Enterprises, Inc., as a subcontractor that would be performing some of the effort here. AR, exh. 11, SAW Proposal Vol. 2, at 2. Specifically, the protester contends that because SAW's proposal indicated the SAW/Greenland team would perform the minimum percentage of work required, SAW has "made it impossible for the agency to evaluate SAW's separate self-performance capability." Supplemental Comments at 2.

As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. Geiler/Schrudde & Zimmerman, B-412219 et al., Jan. 7, 2016, 2016 CPD ¶ 16 at 7. Neither issue is one that our Office generally reviews. 4 C.F.R. § 21.5(a), (c); Geiler/Schrudde & Zimmerman, supra, at 7-8. As our Office has consistently held,

however, where a proposal, on its face, should lead an agency to conclude that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of proposal acceptability. See e.g., Geiler/Schrudde & Zimmerman, supra, at 8; Sealift, Inc., B-409001, Jan. 6, 2014, 2014 CPD ¶ 22 at 4. An offeror, however, need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Dorado Servs., Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. The plain language of the subcontracting limitation clause provides that the act of proposal submission itself is sufficient to demonstrate agreement to be bound by the limitation. FAR clause 52.219-14(c)(3). Accordingly, where an offeror submits a proposal in response to an RFP that incorporates FAR clause 52.219-14, the offeror agrees to comply with the limitation, Dorado Servs., Inc., supra, and in the absence of any contradictory language, the agency may presume that the offeror will comply with the subcontracting limitations. Of course, this presumption may be rebutted, but it is the protester that bears the burden to affirmatively demonstrate that the awardee's proposal takes exception to the limitations on subcontracting. KAES Enters., LLC, B-408366, Aug. 7, 2013, 2013 CPD ¶ 192 at 3.

Here, the protester has not identified where, in SAW's proposal, the awardee took exception to the subcontracting limitation and therefore has provided our Office with no basis to sustain its protest. Although the protester contends that the agency was unable to evaluate SAW's ability to comply with the subcontracting limitation, the VA was under no obligation to perform such an evaluation, since SAW agreed to comply by submitting its proposal, and the RFP did not contemplate a separate assessment of compliance with the subcontracting limitation. Furthermore, Mare has not shown that the awardee's proposal took exception to the subcontracting limitation. In this regard, the protester fails to cite to any aspect of SAW's proposal showing that the awardee did not agree to comply.<sup>8</sup> Dorado Servs., Inc., supra, at 12. Accordingly, we deny this protest ground.

#### Best-Value Decision

Finally, the protester contends that the agency's best-value decision was flawed because it was based on an unreasonable evaluation. Based on our review of the record, and as discussed above, we find no merit to this argument. Additionally, the record demonstrates that the contracting officer, who was also the source selection

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<sup>8</sup> Overcoming the presumption of compliance is even more challenging where, as is the case here, the RFP does not require offerors to submit cost data in their price proposals.

authority, provided a well-reasoned basis for a tradeoff that identified discriminators between the proposals and justified the agency's decision to pay higher prices for SAW's proposal.

The protest is denied.

Susan A. Poling  
General Counsel