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Decision

Matter of: Global Language Center

File: B-413503.8

Date: June 1, 2017

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Lawrence P. Block, Esq., and Elizabeth G. Leavy, Esq., Reed Smith LLP, for Salient CRGT, Inc., the intervenor.
Tudo N. Pham, Esq., Department of State, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly engaged in post-final proposal revision (post-FPR) discussions only with awardee when it allowed the awardee to submit pricing for travel is sustained where record shows that post-FPR exchange resulted in material changes to awardee's proposal.
 2. Protest challenging an agency's evaluation of past performance is sustained where the agency failed to adequately document its evaluation and where the agency credited the awardee for positive performance without considering the relevance of the performance, while failing to credit the protester for relevant performance under its incumbent contract.
 3. Protest that agency failed to perform price realism analysis is denied where the record reflects that the agency evaluated prices in accordance with the solicitation.
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DECISION

Global Language Translation, Inc., doing business as Global Language Center (Global), of Arlington, Virginia, protests the award of a contract to Salient CRGT, Inc., of Fairfax, Virginia, by the Department of State (DOS) under request for proposals (RFP) No. SFSIAQ16R0001, for foreign language instruction, testing services, and curriculum development.

We sustain the protest in part and deny it in part.

BACKGROUND

The RFP, issued April 22, 2016, provided for the award of multiple indefinite-delivery, indefinite-quantity contracts, consisting of a 1-year base period and four 1-year option periods, for language instruction, curriculum development, and testing support services for over 70 foreign languages taught at the School of Language Studies (SLS) at DOS's Foreign Service Institute (FSI).¹ FSI requires companies to supply approximately 350-400 personnel performing in a variety of work schedules to support student enrollment that annually surpasses 2,000 students, including up to 1,000 distance learning students at FSI's two campuses in Arlington, Virginia. RFP at 34, 58-59. The statement of work (SOW) provided position descriptions setting forth the general and specific requirements for the following 15 positions: (1) Language Instructor I; (2) Language Instructor II; (3) Language Instructor III; (4) Distance Learning Mentor; (5) Language Tester I; (6) Language Tester II; (7) Language Examiner I; (8) Language Examiner II; (9) Curriculum Developer I; (10) Curriculum Developer II; (11) Materials Editor; (12) Evaluation Specialist I; (13) Evaluation Specialist II; (14) Evaluation Specialist III; and (15) Onsite Program Manager. Id. at 36-52. The RFP further provided that at the beginning of contract performance, incumbent personnel were to be granted a right of first refusal for positions for which they may qualify. Id. at 55.

The RFP provided that offers would be evaluated for quality, past performance, and price, and that when combined, technical (quality) and past performance were more important than price. RFP at 106. The quality factor consisted of five subfactors, listed in descending order of importance: (1) understanding and approach; (2) personnel qualifications; (3) compensation plan; (4) small business subcontracting plan; and (5) subcontract management plan.² Id. at 107-109, 111.

For the past performance factor, the RFP required offerors to identify up to six contracts or task orders that would demonstrate recent and relevant past performance. RFP

¹ The RFP, a partial small business set-aside, advised that the competition would be divided into two tracks--one track set aside for small businesses and the other unrestricted. RFP at 26. A single award would first be made to a small business, and thereafter, small businesses that did not receive the set-aside award were considered for award in the unrestricted competition. Id. at 111. This protest concerns the contract award for the unrestricted track.

² The RFP provided an adjectival rating scale, from highest to lowest, as follows: excellent, very good, satisfactory, marginal, or unsatisfactory. RFP at 59-60. The final two subfactors relating to small business subcontracting were to be rated on a pass/fail basis. Id. at 109. We note, however, that the agency used a different scale that provided combined weighted and adjectival ratings in its evaluation, as follows: 5/superior, 4/excellent, 3/acceptable, 2/fair, 1/poor, and 0/not addressed. See Agency Report (AR), Tab 29, Technical Evaluation Panel (TEP) Memorandum, at 1.

at 110. The RFP defined recent as within the last three years, and relevant as work similar in complexity and magnitude to the contract work. Id. The RFP stated that past performance was to be evaluated “on the degree of relevancy and success in past performance efforts of a similar scope, size, and complexity,” and further stated that “[t]echnically complex tasks will be rated more highly than tasks of lesser size, scope, and complexity.” Id. at 109-110.

Regarding price, the RFP required offerors to provide both regular and overtime hourly labor rates for each of the 15 positions required by the SOW for the base year and each option period, accounting for contract line item numbers (CLIN) 001 through 150. RFP at 5-25. The RFP further required that offerors provide Fair Labor Standards Act (FLSA) exempt and non-exempt travel rates, which were not subject to change for the life of the contract, for partial and full day domestic and international travel accounting for CLINs 151 through 158. Id. at 25-26. Offerors were also required to provide both an unloaded labor hour rate and a fully loaded labor hour rate for each CLIN.³ Id. at 27-32. The RFP provided that proposals would be evaluated pursuant to Federal Acquisition Regulation (FAR) subpart 15.4 to determine if the proposed prices are fair and reasonable and reflect a clear understanding of the requirements. Id. at 110. The total evaluated price for the contract was to be determined by multiplying the total number of hours estimated for each position by the proposed rate for the base year and all option years, and the six-month extension authorized by FAR § 52.217-8. Id. at 111.

DOS received nine proposals by the May 25, 2016 due date. Contracting Officer Statement (COS) at 2. Following an initial evaluation of proposals, the agency established a competitive range and engaged in discussions with competitive range offerors, including Global. See AR, Tab 19, Global First Round of Discussion Questions. On July 22, DOS announced its intent to make award on the unrestricted track, and following a debriefing, Global filed a post-award protest with this Office. COS at 3. DOS determined that it would take corrective action by terminating the contract, reevaluating final proposal revisions, and making a new source selection decision; therefore, our Office dismissed the protest. Global Language Translation, Inc., doing business as Global Language Center, B-413503, Aug. 10, 2016 (unpublished decision).

³ The RFP defined the unloaded hourly labor rate and unloaded overtime hourly labor rate for each labor category/position as the rate at “which all contract staff working under each labor category must be paid, regardless of primary or subcontractor employment.” RFP at 33. The fully loaded billable hourly rate was to include direct labor, indirect expenses, and profit, as well as any other expenses for contract management except for unallowable reimbursable travel costs. Id. Fully loaded overtime billable hourly rates applied only to non-exempt FLSA labor categories which require contractors to pay at least one and one-half times the regular rate of pay for all hours worked over 40 in a workweek; overtime hours for professional services were required to be billed at the offeror’s proposed hourly rate for that position. Id.

DOS conducted a second round of discussions with offerors remaining in the competitive range, including Global and Salient. See AR, Tab 22, Global Second Round of Discussion Questions; Tab 24, Salient Second Round of Discussion Questions. After evaluating offerors' final proposal revisions, DOS announced its intent to make award to Salient, and following another post-award debriefing, Global filed a protest with this Office on September 12. COS at 3-4. In response to the agency report, Global filed a supplemental protest on October 24, alleging that the agency had conducted unequal discussions. Id. at 4. DOS again determined that it would take corrective action by reevaluating proposals and making a new selection decision. The protester objected, arguing that the agency's proposed corrective action did not address its unequal discussions allegation. However, because the agency's actions rendered the protest academic, our Office dismissed the protest.⁴ Global Language Center, B-413503.3, B-413503.5, Nov. 2, 2016 (unpublished decision).

The agency reevaluated the competitive range offerors' final proposals as follows:

	Global	Salient
Quality	3 - Acceptable	5 - Superior
Understanding and Approach	3 - Acceptable	5 - Superior
Personnel Qualifications	4 - Excellent	4 - Excellent
Compensation Plan	4 - Excellent	3 - Acceptable
Small Business Subcontracting Plan	Pass	Pass
Subcontracting Management Plan	Pass	Pass
Past Performance	3 - Acceptable	3 - Acceptable
Price ⁵	\$239,169,379	\$231,621,715

⁴ In our decision, we determined that the protest was academic, stating:

In light of the State Department's stated intention to make a new selection decision, the original source selection decision is no longer valid and [Global] is eligible to receive the award based on the new best-value determination. See VSE Corp.--Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, [94-2] CPD ¶ 260 at 2. The agency's corrective action also does not preclude the agency from taking into consideration the protester's other arguments. As a result, we conclude that the agency's proposed corrective action renders the protest academic.

Global Language Center, B-413503.3, B-413503.5, Nov. 2, 2016 (unpublished decision) at 2.

⁵ The independent government cost estimate (IGCE) is \$247,654,387. AR, Tab 30, IGCE.

AR, Tab 31, Source Selection Decision Document (SSDD), at 9-11, 18. DOS again selected Salient for award, and provided Global with another post-award debriefing on February 17. COS at 4. This protest followed.

DISCUSSION

Global challenges multiple aspects of the agency's evaluation and selection decision. As explained below, we find that DOS engaged in unequal discussions and performed an unreasonable past performance evaluation, and sustain Global's protest on these bases. In resolving the protest, we have considered all of Global's arguments and find that the remaining arguments do not provide a basis to sustain the protest. We address only Global's primary protest grounds.

Unequal Discussions

The protester argues that DOS engaged in discussions with Salient after receipt of final proposal revisions by allowing Salient to provide prices for CLINs 151-158 that had been omitted from Salient's proposal. Protest at 7-8. The agency maintains that its communications with Salient constituted clarifications, and that Salient's provision of travel rates for CLINs 151-158 "did not amount to a material change to [Salient's] proposal because the rates were not a material contract requirement." Memorandum of Law (MOL) at 10-11. In particular, the agency asserts that the travel rates were not required for, or a component of, the total proposed price or price evaluation, and therefore played no part in the best-value determination. *Id.* at 11-12. DOS further asserts that "travel rates for all years of the contract were merely included should the Government require travel, but travel may potentially never be required during the lifecycle of the contract," and that the contracting officer merely clarified an "administrative error." *Id.*

Clarifications are limited exchanges between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of the proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Lockheed Martin Simulation, Training & Support, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 8; *see* FAR § 15.306(d). It is the actions of the parties that determine whether discussions have been held and not the characterization of communications by the agency. Gulf Copper Ship Repair, Inc., *supra*. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Id.* Where an agency reopens discussions with one offeror after the receipt of FPRs, it must afford all offerors in the competitive range an opportunity for reopened discussions. Lockheed Martin Simulation, Training &

Support, supra. Additionally, when holding discussions, agencies are not permitted to engage in conduct that favors one offeror over another. FAR § 15.306(e)(1).

Here, the RFP clearly instructed offerors to “[s]ubmit proposed rates per section ‘B’ and the pricing requirements” and further advised that “offerors are required to meet all solicitation requirements, such as terms and conditions, technical factors, and pricing information.” RFP at 102, 112. Section B of the RFP directed offerors to propose partial and full day domestic and international travel rates for FLSA exempt and non-exempt travel for CLINs 151 through 158 of the contract. Id. at 25-26. Therefore, contrary to the agency’s arguments, the RFP did, in fact, require offerors to provide rates for all CLINs, including the travel CLINs at issue here. While the rates proposed for the travel CLINs were not included in the total evaluated price, as the agency contends, these rates will provide the basis for future reimbursement in the event travel is required for this contract. As a result, the missing rates represented a failure to meet a material requirement of this solicitation. See Business Integra, Inc., B-407273.22, Feb. 27, 2014, 2014 CPD ¶ 88 at 4 (failure to provide rates for all labor categories made proposal unacceptable for award). In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Raytheon Technical Servs. Co. LLC, B-404655.4 et al., Oct. 11, 2011, 2011 CPD ¶ 236 at 9.

There is no dispute in this record that Salient failed to provide travel rates for CLINs 151-158. AR, Tab 27, Salient Price Final Proposal Revision, at 20-21. Since Salient did not provide all required prices, its proposal did not conform to the material terms of the RFP, and therefore could not be accepted for award. By obtaining the missing rates after the common cutoff established for receipt of final proposal revisions from all remaining competitive range offerors, the agency engaged in discussions with only Salient and thereby allowed it to revise its proposal.⁶ Raytheon Technical Servs. Co. LLC, supra at 7; Manthos Eng’g, LLC, B-401751, Oct. 16, 2009, 2009 CPD ¶ 240 at 8-10 (failure to submit option year pricing not a mistake that could be addressed through clarifications); cf. STG, Inc., B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 8-10 (where two offerors submitted no pricing for several CLINs, agency engaged in clarifications when it did not permit the offerors to provide any missing information, but only to clarify whether the blank CLINs were intended to mean “zero”). Accordingly, the agency’s conduct of discussions was unequal in this respect, and we sustain the protest.

⁶ The contracting officer’s communication with Salient stated that Salient “left out their travel rates for CLINs 151-158” and asked whether this was an inadvertent omission. AR, Tab 28, Communication with Salient, at 2. The communication also stated that the travel rates were “required” by the RFP. Id. The contracting officer now states that to the extent her communication with Salient stated that the travel rates were “required” by the RFP, the statement was made in error and inconsistent with the solicitation. COS at 5. As discussed above, we disagree.

Past Performance Evaluation

Global argues that the agency failed to reasonably evaluate proposals under the past performance factor because the agency did not properly credit Global with its experience as one of the incumbent contractors, and its success in fulfilling the agency's requirement. Protest at 8-12. With regard to both proposals, the protester argues that the agency failed to properly assess the relevance of the past performance, and should have concluded that Global's past performance was far more relevant. Id. at 10. Global argues further that it should have received a past performance rating superior, rather than equal, to the awardee's rating. Id. at 11. As explained in detail below, we sustain these bases of protest.

The evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based evaluation ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a protester challenges an agency's evaluation of past performance, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that it is adequately documented. Veteran Technologists Corp., B-413614.3, B-413614.5, Nov. 29, 2016, 2016 CPD ¶ 341 at 6. Our Office will question an agency's past performance evaluation where the record indicates that the agency either failed to evaluate, or otherwise unreasonably considered, the relevance of past performance references in accordance with the solicitation's stated evaluation criteria. Arctic Slope Mission Servs., LLC, B-410992.5, B-410992.6, Jan. 8, 2016, 2016 CPD ¶ 39 at 12. In addition, when reviewing an agency's evaluation of proposals, we consider not only whether the agency deviated from the RFP evaluation criteria, but also whether the actual evaluation was reasonable. American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49 at 10.

As noted above, the RFP stated that past performance would be assessed on the "degree of relevancy and success in past performance efforts of a similar scope, size, and complexity." RFP at 109. In its proposal, as required by the RFP, Global identified six past performance reference contracts, and advised that past performance questionnaires had been requested from the contacts identified. AR, Tab 17, Global Initial Proposal, at 67. In addition, Global provided a detailed description of its performance under its incumbent contract with FSI. Id. at 67-71. Global specifically indicated that its incumbent contract reference applied to all sections of the SOW, except for the sections relating to the onsite program manager, subcontracting management plan, and small business subcontracting plan. Id. at 68.

The agency received four completed past performance questionnaires to support Global's proposal. AR, Tabs 33-36, Global Past Performance Questionnaires. With the exception of satisfactory ratings for cost control, Global's Contractor Performance Assessment Reports (CPARs) for its performance of the incumbent contract were comprised of exceptional ratings. AR, Tab 38, Global CPARs. In addition, the past performance questionnaire completed for Global's incumbent contract assigned ratings

of excellent for quality of product or service, timeliness of performance, business relations and management, and customer service; a rating of good for cost control; and provided a positive narrative regarding Global's performance. AR, Tab 36, Global Past Performance Questionnaire from FSI.

In its evaluation of Global's past performance, the agency provided the following rationale for assigning a rating of acceptable:

The past performance reference submitted by [Global] is the current BPA [Blanket Purchase Agreement] contract [Global] supports for FSI, and [Global] provided no other supporting past performance for size, scope, or complexity. Therefore, when considering the increase of size, scope, and complexity, [Global] provided no external past performance references to address the new solicitation....

The TEP finds the past performance reference did not include evidence of successful past performance in providing support in evaluation design, delivery, training and analysis. The current solicitation includes three separate position descriptions (Evaluation Specialist I-III pp. 48-50) designed to meet the evaluation needs of FSI/SLS. The absence of past performance references demonstrating technical capability for providing evaluation-related work is a concern for the TEP, as the need for evaluation support staff, albeit smaller than for language instruction staff, is a critical component for supporting the SLS Evaluation and Measurement Unit, implementing FSI/SLS standards for evaluation, and assessing language training program effectiveness.

AR, Tab 29, TEP Memorandum, at 14-15. The TEP further determined that only the past performance questionnaire for Global's incumbent contract was relevant,⁷ as defined by the RFP, and that the incumbent contract "still lacked some of the complexities established in this new requirement." Id. at 15.

In response to the protest, the agency explains that the incumbent contract included only six positions related to language instruction and testing, and thus was less complex than the current solicitation. COS at 6; MOL at 16-18. The agency further states that Global did not provide evaluation specialists under its incumbent contract. COS at 7-8; MOL at 17-18. In its comments, the protester disputes the agency's claim that it has not provided evaluation specialists under its incumbent contract, and submitted two emails

⁷ The agency determined that Global's previous contract with FSI from 2009 through 2011 was not relevant because it fell outside of the RFP definition of recent (within the last three years). AR, Tab 29, TEP Memorandum, at 15. The other two references were found to be not relevant because one was for document translation services and the other was a reference for having provided a single German language instructor. Id. We find these conclusions to be reasonable and consistent with the RFP.

from the agency, dated April 10, 2015, and March 11, 2016, each respectively requesting Global to provide two “Evaluation Consultants” or “Evaluation Assistants.” Comments at 5-7, Exhibits A and B. In those emails, the agency attached position descriptions, which have duties similar to the current RFP’s evaluation specialist CLINs. Global also cites to a resume included in its proposal for a proposed evaluation specialist which reflects that the individual has been working at FSI as an evaluation specialist since 2015. Id. at 6; see also AR, Tab 17, Global Initial Proposal, at 63-64.

We find the agency’s evaluation of Global’s past performance is not supported by the record. First, although the record states that the evaluators considered the past performance questionnaire and CPARs for Global’s incumbent contract, there is no discussion of the ratings or other positive statements regarding Global’s performance to demonstrate that the agency evaluated the “success” of the performance as required by the RFP. Instead, the contemporaneous record indicates only that Global has demonstrated that it had some of the requisite experience required by the RFP. Second, the protester has provided evidence rebutting the agency’s conclusion that Global has not provided evaluation services under its incumbent contract, and indicating that the agency has not credited the protester for having relevant experience that it possesses.⁸ Accordingly, we sustain the protest on this basis.

With respect to the agency’s evaluation of Salient’s past performance, the agency concluded that Salient had “provided past performance documentation and justification that demonstrated sufficient and relevant experience.” AR, Tab 29, TEP Memorandum, at 33. In further support of its assignment of an acceptable rating for Salient, the agency explained: “Salient CRGT demonstrated a depth of experience in the full range of requirements; however, subcontractors provided the most closely relevant experience in providing foreign language training.” Id. at 34.

In its proposal, Salient also provided six past performance contract references, three for itself and three for its proposed subcontractors, however all references indicated a contract value ranging between approximately \$2-\$29 million. AR, Tab 26, Salient Technical Final Proposal Revision, at 24-30. Two of the three reference contracts identified for Salient were clearly for training services, however, the training does not appear to relate to foreign language instruction.⁹ Id. at 24-25. The record also includes

⁸ Even if evaluation services were not part of the incumbent contract, the record does not support the agency’s emphasis on evaluation experience in relation to the overall RFP requirements. The record shows that of the 428 personnel included in the agency’s IGCE, only four of those personnel are categorized in evaluation specialist positions. AR, Tab 30, IGCE.

⁹ One contract reference summary states that the services provided include “[task order] program management support,” “subject matter expertise in support of [Royal Saudi Naval Forces] C4SR training initiatives,” and “development of training courses, curriculum, and associated documentation.” AR, Tab 26, Salient Technical Final Proposal Revision, at 25. The other contract reference summary states that Salient

(continued...)

two CPARs for Salient, however, the largest contract covered by these reports is valued at \$35 million, and both reports relate to contracts for information technology support services.¹⁰ AR, Tab 39, Salient CPARs.

In sum, the agency's evaluation of Salient's past performance is not supported by the record. As an initial matter, given the significantly lower contract values of the Salient proposal's reference contracts when compared to the RFP requirement, the agency does not explain how or why it determined that any are relevant, much less why contracts for services other than foreign language instruction would be relevant. Further, although the evaluation mentions consideration of Salient's CPARs, there is again no explanation as to why the contracts for information technology support services valued well below the RFP requirement would be relevant. Finally, there is no discussion of the ratings or comments in the CPARs, and there is no evidence in the record to demonstrate that the agency did, or even could, evaluate Salient's "success" performing relevant contracts. Accordingly, we sustain the protest on this basis.

Evaluation of Quality Factor

Global further challenges other aspects of the agency's evaluation of its proposal under the quality factor, and the agency's assignment of an overall rating of acceptable. Protest at 14-19. The agency rated Global as acceptable under the understanding and approach subfactor of the quality factor and assigned Global several strengths and weaknesses. For example, the agency assigned Global a weakness because the offeror's training plan did not reflect a depth of understanding of the most critical and fundamental training needs for the staff. AR, Tab 29, TEP Memorandum, at 8.

Global argues that it was unreasonable for the agency to conclude that its proposal failed to demonstrate that it would satisfy the RFP requirement to provide continual training opportunities for staff to maintain skill levels in keeping with industry standards for language teaching, curriculum development, testing, and/or program management. Protest at 14-18; see also Comments at 13-18. In its report, the agency maintains that it reasonably evaluated Global's proposal, and the report quotes from, or cites to, the underlying evaluation document to conclude that its evaluation was reasonable. COS at 13; MOL at 23-34. The record also indicates that the issue was twice raised with Global in discussions, and in both instances Global provided additional details regarding the training it will provide. AR, Tab 20, Global Response to First Round of Discussions, at 7-9; Tab 23, Global Response to Second Round of Discussions, at 9-10. Specifically, Global stated in response to a discussion question that [DELETED]. AR, Tab 23,

(...continued)

"provides subject matter experts in cybersecurity planning, training, and curriculum development." Id. at 26.

¹⁰ The agency report did not provide any past performance questionnaires for Salient.

Global Response to Second Round of Discussions, at 10. Global also states that [DELETED]. Id.

It is not clear from the record that the agency, in its final evaluation, adequately considered the information provided by Global in response to the discussion questions regarding staff training. Specifically, the agency discusses only [DELETED] and concludes that [DELETED] offered by Global “do not reflect a depth of understanding of the most critical and fundamental training needs for SLS training staff.” AR, Tab 29, TEP Memorandum, at 8. The evaluation is silent regarding any of the other staff training Global stated it would provide in response to the agency’s discussion questions, and it is not apparent that the agency considered this information in its evaluation. The weakness assigned to Global’s proposal relating to staff training was one of several weaknesses considered in the selection decision when concluding that Global should not be considered for award. AR, Tab 31, SSDD, at 20.

Because, as discussed above, we conclude that the agency engaged in unequal discussions and that the agency’s past performance evaluation was not supported by the record, and because we are recommending below that the agency reopen discussions with offerors and receive revised proposals, we need not address every argument concerning adequacy of the agency’s evaluation of Global’s proposal. However, to the extent that the record does not reflect that the agency fully considered Global’s responses to the discussion questions regarding staff training, or adequately documented the agency’s evaluation, the agency may want to consider these allegations when taking the corrective action recommended below.

Price Evaluation

Finally, Global argues that the agency’s evaluation of Salient’s price was unreasonable and that the agency was required to conduct a price realism analysis to determine whether Salient’s rates were too low. The protester argues that nearly all of Salient’s proposed rates are below the historical rates paid as indicated in the IGCE, and that Salient’s proposal failed to indicate that it would escalate its rates over the life of the contract. Protest at 12-13. Global further asserts that based on its own experience as one of the incumbent contractors for this requirement, Salient’s proposed rates are as much as \$[DELETED] per hour less than what has been paid to incumbent personnel, and that Salient will have challenges recruiting and retaining incumbent personnel when offering such reduced compensation. Id. at 14.

The agency responds that the solicitation did not require that it perform a price realism analysis, and that when it performed a price reasonableness analysis it found Salient’s price to be fair and reasonable. MOL at 20-22. The agency argues that to the extent it found Salient’s rates to be low following its initial evaluation, it raised the issue in discussions, and Salient adequately addressed the agency’s concerns by raising its rates such that the agency concluded that Salient had demonstrated its understanding of the RFP’s requirements. Id. at 21. The agency further argues that its price

evaluation is supported by its evaluation of Salient's compensation plan (subfactor 3) in conjunction with its proposed rates. Id.

In its comments, the protester argues that the agency failed to properly evaluate the offerors' proposed compensation plans, as set forth in the RFP, and that the evaluation of offerors' compensation plans itself required the agency to perform a price realism analysis. Comments at 9-12. Specifically, the protester argues that the agency should have generated its own market survey data rather than rely on data supplied by Salient in its proposal to determine whether its proposed rates were realistic. Id. at 10. The protester further argues that the agency also failed to properly evaluate the rate of escalation reflected in Salient's proposed rates, and alleges that Salient's proposed rates will fail to keep pace with the cost of living. Id. at 10-11.

We find that the solicitation did provide for a price realism analysis. The RFP stated that the agency would separately evaluate price proposals "to determine if they are fair and reasonable, and reflect a clear understanding of the requirements." RFP at 110. The RFP further stated that the agency "may reject any proposal that is evaluated to be unrealistic in terms of technical requirements, to include terms and conditions, and price, such that the proposal reflects an inherent lack of competence or failure to comprehend the overall requirements of the solicitation."¹¹ Id. at 112. The solicitation

¹¹ The RFP incorporated by reference FAR provision 52.222-46, Evaluation of Compensation for Professional Employees. RFP at 99. This provision anticipates that the agency will perform a price realism analysis of offerors' proposed employee compensation plans, and requires agencies to evaluate an offeror's "total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract." FAR § 52.222-46(a); ELS Inc., B-283236, B-283236.2, Oct. 25, 1999, 99-2 CPD ¶ 92 at 10-11.

Further, the RFP stated the agency would evaluate compensation plans under the quality factor as follows:

The compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep suitably qualified personnel to meet mission objective. . . . [P]roposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees. Offerors are cautioned that lowered compensation for essentially the same professional work may indicate a lack of sound judgment and lack of understanding of the requirement.

RFP at 108. The record reflects that the agency considered proposed rates when evaluating offerors' compensation plans under this factor. See AR, Tab 29, TEP Memorandum, at 12 and 31.

required that offerors provide unloaded and fully loaded labor hour rates for each CLIN. See id. at 27-32.

In any event, despite the agency's contentions here, the record shows that the agency did review the labor rates to determine if they were too low. The source selection decision explains that the prices Salient provided for each CLIN were supported by salary survey data submitted in Salient's proposal. AR, Tab 31, SSDD, at 19. Further, the agency evaluated proposed rates by comparing offerors' proposed rates to each other and to the IGCE. COS at 10-11; AR, Tab 31, SSDD, at 19.

The record also shows that, after its initial evaluation, the agency had concerns that Salient's proposed rates were too low, and that Salient would not be able to successfully recruit and retain qualified personnel throughout the life of the contract. COS at 11-12; AR, Tab 24, Salient Second Round of Discussion Questions. These concerns were raised with Salient in the second round of discussions, and in response, Salient revised and increased its rates in its final proposal revision. See AR, Tab 25, Salient Response to Second Round of Discussions, at 11-12. The agency also engaged in discussions with Salient regarding different aspects of its compensation plan, and Salient provided additional information regarding the benefits offered to its employees. Id. at 1-3.

In its final evaluation, the agency concluded that Salient's price proposal "was well within a fair and reasonable range for loaded and unloaded rates, to support the requirements set forth in the solicitation." AR, Tab 29, TEP Memorandum, at 31. The agency further assigned Salient a rating of acceptable under the quality factor for its compensation plan because [DELETED]. Id. Finally, the SSDD explained that Salient's increase in labor rates after discussions, along with its fringe benefits, established Salient's clear understanding of the requirements since the rates became commensurate with market values for the positions. AR, Tab 31, SSDD, at 19. Under these circumstances, we find the agency's price evaluation to be reasonable. Technology Concepts & Design, Inc., B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 11 (comparison of offerors loaded labor rates to each other, the government estimate, and GSA Federal Supply Schedule rates satisfied RFP's realism analysis requirement).

Prejudice

Competitive prejudice is an essential element of every viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. Global Dynamics, LLC, B-407966, May 6, 2013, 2013 CPD ¶ 118 at 4. Although Salient's price is lower than Global's and we deny the protest with respect to the price evaluation, we nevertheless conclude that there is a reasonable possibility that Global's proposal could be selected for award. The RFP provides for a best-value tradeoff between proposals where the non-price factors, when combined, are more important than price. RFP at 106. In light of the fact that we sustain the protest on the basis that the agency engaged in unequal discussions, and recommend that the agency reopen discussions

and accept revised proposals, Global will have an opportunity to improve the results of its evaluation under the most heavily-weighted quality factor. In addition, since we have also sustained the protest on the basis that the agency's past performance evaluation was unreasonable, Global may improve its rating and standing with respect to other offerors under the past performance factor, further improving Global's chance of selection for award. On this record, we conclude that Global has been prejudiced by the agency's actions and sustain the protest.

SUMMARY AND RECOMMENDATION

For the reasons discussed above, we conclude that DOS engaged in unequal discussions with Salient. In this regard, the agency's discussions with Salient provided the offeror with an opportunity to revise its proposal and comply with an RFP requirement to make the proposal eligible for award. We also conclude that the agency's past performance evaluation is unreasonable, and that the agency has failed to follow the criteria set forth in the solicitation.

We recommend that the agency reopen discussions, accept revised proposals, reevaluate, and make a new selection decision. We also recommend that the agency reimburse the protester for the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f) of our Bid Protest Regulations, the protester's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel