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Decision

Matter of: CR/ZWS LLC

File: B-414766; B-414766.2

Date: September 13, 2017

Megan C. Connor, Esq., Ambika J. Biggs, Esq., Julia Di Vito, Esq., and Samuel S. Finnerty, Esq., Piliro Mazza PLLC, for the protester.
Christopher Lee, for PBP Management Group, Inc., the intervenor.
Captain Ryan P. Payne, and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee's proposal should have been rejected as technically unacceptable is sustained where the record shows that the awardee's proposal failed to comply with a material requirement of the solicitation.
 2. Protest alleging that the awardee's proposal violated the solicitation's subcontracting limitation clause is denied where the awardee's proposal did not take exception to the limitation.
 3. Protest alleging that the agency, in conducting its tradeoff analysis, failed to consider discriminators in the offerors' technical proposals is denied where the solicitation stated that proposals would be evaluated on a pass/fail basis.
 4. Protest alleging that the agency, in conducting its tradeoff analysis, relied upon an arbitrarily determined, maximum acceptable price premium is denied where the record demonstrates that the agency's maximum acceptable price premium was reasonably based upon the relative merits of the offerors' proposals.
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DECISION

CR/ZWS LLC, an 8(a) small business concern located in Merced, California, protests the award of a contract to PBP Management Group, LLC (PBP Management), an 8(a) small business concern located in Wichita, Kansas, under request for proposals (RFP) No. FA4621-17-R-0002, issued by the Department of the Air Force for

integrated solid waste management services at McConnell Air Force Base in Kansas. The protester contends that the awardee's proposal failed to comply with a material technical requirement and failed to comply with the applicable limitation on subcontracting requirement. The protester also challenges the agency's best-value tradeoff analysis.

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

BACKGROUND

The Air Force issued the RFP on February 27, 2017, as a set-aside for 8(a) small business concerns. RFP at 1. The solicitation sought proposals to provide integrated solid waste management services, which include the collection and disposal of municipal solid waste and recycling. Id. at 4. The solicitation contemplated the award of a fixed-price with economic price adjustment requirements contract for a base year, followed by four 12-month options. Id. at 4-10, 40.

The solicitation incorporated Federal Acquisition Regulation (FAR) provision 52.212-2 (Evaluation--Commercial Items) and provided for award on a best-value basis considering three evaluation factors: technical, past performance, and price. Id. at 16. When combined, technical and past performance were significantly more important than price. Id. The agency reserved the right to conduct discussions if deemed to be in the agency's best interest. Id. at 19.

In further describing the evaluation scheme, the solicitation provided that the agency would evaluate technical proposals on a pass/fail basis and assign either a rating of acceptable or unacceptable. Id. A proposal rated as acceptable was defined as "clearly meet[ing] the minimum requirements of the solicitation." Id. at 17. A proposal rated as unacceptable was defined as "not clearly meet[ing] the minimum requirements of the solicitation." Id. Under the technical factor, the only matter to be evaluated was whether the offerors' Mission-Essential Contractor Services Plans met the criteria established in Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.237-7024.¹ Id. at 16.

¹ This provision is included in all solicitations for services that have been designated as "essential contractor services." DFARS §§ 237.7602, 237.7603(b). Essential contractor services are those services provided to the Department of Defense under a contract to support mission-essential functions. DFARS provision 252.237-7023(a)(1). Contractors providing such services must be prepared to continue providing such services, in accordance with the terms and conditions of their contracts, during periods of crisis. DFARS § 237.7602(a). Contractors who provide government-determined essential contractor services are required to provide a written plan to ensure continuation of these services in crisis situations. DFARS § 237.7602(b).

The solicitation provided that, after evaluating technical proposals, the agency would rank the proposals according to price. Id. at 17. The offerors' proposed prices would be evaluated for balance, completeness, and reasonableness. Id.

Finally, the agency would obtain relevant and recent past performance information from references identified in questionnaires submitted with the proposals and from government and commercial sources. Id. Based on this information, the agency would assign an offeror's past performance one of the following performance confidence assessment ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or neutral confidence. Id.

In selecting an awardee, the solicitation provided that, "[i]f the lowest priced technically acceptable evaluated offer is judged to have a 'Substantial Confidence' performance rating and the offeror is determined to be responsible, that offer represents the best value for the Government and the evaluation process stops at this point." Id. at 18. The award would "be made to that offeror without further consideration of any other offers." Id. If, however, the lowest-priced, technically acceptable offeror is not determined to have a performance rating of substantial confidence, the solicitation stated that the agency would evaluate the next lowest-priced, technically acceptable offeror and that "the process will continue (in order by price) until an offeror is judged to have a 'Substantial Confidence' performance assessment or until all offerors are evaluated." Id. The source selection authority then was to make "an integrated assessment best value award decision."

The agency received five proposals in response to the solicitation, including proposals from PBP Management and CR/ZWS. Agency Report (AR), Tab 17, Source Selection Decision (SSD), at 2. The agency evaluated the technical proposals of all five offerors and determined them to be technically acceptable. Id. at 4. Next, the agency evaluated price proposals and ranked the offers by price. PBP Management was determined to have proposed the lowest price and CR/ZWS to have proposed the second lowest price. Id. at 8. Finally, the agency evaluated past performance. PBP Management received a past performance rating of satisfactory confidence and CR/ZWS received a past performance rating of substantial confidence. Id.

In accordance with the solicitation, see RFP at 18, the past performances of the remaining offerors were not evaluated. Rather, because the second lowest-priced, technically acceptable offeror, i.e., CR/ZWS, was determined to have a substantial confidence past performance rating, the agency explained that "the evaluation process stopped at that point and an integrated assessment best value award decision was made" between the proposals of PBP Management and CR/ZWS. AR, Tab 17, SSD, at 8.

In conducting the integrated assessment, the source selection authority (SSA) noted first that "both PBP [Management] and CR/ZWS were found to be technically acceptable." Id. at 13. Next, the SSA considered the differences in the two offerors' past performance. Id. The SSA also orally discussed the differences in the two

offerors' past performance with the past performance evaluation team (PPET). Agency Resp. to Protester's Objection to AR, July 10, 2017, at 1; SSA Declaration (Decl.), Aug. 9, 2017, ¶ 2. In the source selection decision, the SSA explained that "[t]he PPET agreed that a price difference somewhere between [DELETED]% to [DELETED]% between two offerors would be a reasonable maximum price trade off for a higher confidence rating." Id. The SSA noted, however, that CR/ZWS's price was 14 percent higher than PBP Management's price; and, therefore, the SSA concluded that PBP Management's proposal represented the best overall value to the government.² Id. at 13-14.

On May 25, the agency notified the protester of the award to PBP Management, AR, Tab 19, Award Notice, and provided a debriefing on May 31. This protest followed on June 5. After receipt of the agency report, CR/ZWS filed a supplemental protest on July 17.

DECISION

The protester raises three central protest grounds. First, CR/ZWS contends that the awardee's Mission-Essential Contractor Services Plan does not meet the criteria established in DFARS provision 252.237-7024. As a result, CR/ZWS argues that the agency should have rejected the awardee's proposal as technically unacceptable. Second, CR/ZWS contends that the awardee's proposal, on its face, demonstrates that the awardee does not intend to comply with the Limitations on Subcontracting clause. Accordingly, CR/ZWS argues that the agency should have rejected the awardee's proposal on this basis as well. Finally, CR/ZWS challenges the agency's tradeoff analysis, arguing that the agency failed to consider discriminators in the offerors' technical proposals and that the agency relied upon an arbitrarily determined, maximum acceptable price premium in selecting the lower-priced proposal for award. We sustain the first ground, finding that the awardee's plan did not meet the criteria set forth in the DFARS provision. We deny the remainder of CR/ZWS's grounds.³

Technical Evaluation

The protester alleges that PBP Management's technical proposal failed to meet the material requirements of the solicitation and should have been found technically unacceptable. Supp. Protest & Comments, July 17, 2017, at 2. CR/ZWS argues that PBP Management's Mission-Essential Contractor Services Plan does not address the criteria established in DFARS provision 252.237-7024. Id. at 9.

² The awarded contract price was \$1,657,155, including all option years. AR, Tab 19, Award Notice.

³ Although we do not discuss all of CR/ZWS's challenges, we have fully considered them and conclude that, except as specifically addressed here, none furnishes a basis upon which to sustain the protest.

In reviewing protests challenging an agency's evaluation of proposals, we do not reevaluate proposals, but rather we examine the record to determine whether the agency's judgment was reasonable and in accordance with the stated evaluation criteria and applicable procurement laws and regulations. Wyle Laboratories, Inc., B-413964, B-412964.3, May 27, 2016, 2016 CPD ¶ 144 at 7. It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. Id. at 7-8.

DFARS provision 252.237-7024 states, in relevant part, that the offeror's plan "shall" address, at a minimum, the following:

- (i) Challenges associated with maintaining essential contractor services during an extended event, such as a pandemic that occurs in repeated waves;
- (ii) The time lapse associated with the initiation of the acquisition of essential personnel and resources and their actual availability on site;
- (iii) The components, processes, and requirements for the identification, training and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home;
- (iv) Any established alert and notification procedures for mobilizing identified 'essential contractor service' personnel; and
- (v) The approach for communicating expectations to contractor employees regarding their roles and responsibilities during a crisis.

DFARS provision 252.237-7024(b)(2).⁴

CR/ZWS argues that PBP Management submitted a plan that is fewer than two pages in length, contains only three substantive sections, fails to address key portions of the DFARS provision, and fails to address how it will actually continue to perform mission-essential services.⁵ Supp. Protest & Comments at 10; Supp. Comments, July 28, 2017,

⁴ The agency explains that this provision is intended to "apply across a wide variety of Department of Defense contracts." Agency Supp. Brief, Aug. 18, 2017, at 1. As such, "[t]he interpretation and application of [the] provision will vary depending on the nature, complexity, and location of the services procured." Id. The agency represented during a conference call with our Office on August 16, 2017, that, despite the somewhat non-complex nature of the requirement here, all criteria listed in the DFARS provision were applicable and needed to be addressed in the offerors' plans.

⁵ By contrast, CR/ZWS states that it submitted a plan that is 14 pages in length and separately addresses each of the five criteria outlined in the DFARS provision. Supp. Protest & Comments at 10.

at 3. Specifically, CR/ZWS alleges that the plan fails to address challenges, time lapses, or training issues associated with mobilizing personnel during periods of crisis, as outlined in DFARS provision 252.237-7024(b)(2)(i)-(iii). Id. at 11. As discussed below, we agree that the awardee's plan does not address time lapses and training issues.

Regarding the first requirement (i.e., challenges associated with maintaining essential contractor services during a crisis), the agency explains that the type of challenges a contractor might face depends on "a host of factors from geography to threats and vulnerabilities unique to the specific contracted services." Agency Supp. Brief at 2. The agency contends that the awardee's plan addresses this requirement. Specifically, the agency highlights the plan's discussion of challenges associated with maintaining adequate personnel due to the fact that some employees might be intimidated by the crisis. Supp. Contracting Officer's Statement (COS), July 21, 2017, at 4 (citing AR, Tab 11, Awardee's Plan, at 2). The agency also highlights the plan's discussion of challenges associated with obtaining access to the Air Force base during a crisis. Id.

In response, the protester asserts that a claim "that a crisis may intimidate employees and make it hard for them to work and pass through security" fails to address the challenges associated with maintaining essential services during a crisis. Supp. Comments at 4. We disagree. A contractor clearly faces a challenge where, as a result of a crisis, its employees are too intimidated to report to work. Likewise, it is not unreasonable for a contractor to assume that base access might be restricted during a crisis and to consider such restrictions to be a challenge in fulfilling its contractual obligations. Accordingly, although the awardee's plan may not be as robust as that of CR/ZWS, we agree with the agency's conclusion that the awardee's plan addresses, at a minimum, two crisis-related challenges and, therefore, satisfies the requirement set forth in DFARS provision 252.237-7024(b)(2)(i).

Regarding the second requirement (i.e., time lapses), the agency explains that "[t]his requirement concerns the time required to mobilize personnel to replace personnel who have been affected by the event." Agency Supp. Brief at 2. The agency contends that the awardee's plan addresses this requirement by describing the awardee's intent to (a) pre-identify employees designated as mission-essential employees to ensure proper clearances are in place and (b) gain access to the base en masse, rather than individually, during a crisis. Supp. COS at 4-5.

In response, the protester argues that these actions do not address the time lapse associated with replacing employees affected by the event. Supp. Comments at 4. We concur. Neither action has any bearing on the time lapse associated with the replacement of personnel or the steps the awardee intends to take to minimize such a lapse. For example, the awardee's intent to pre-identify employees designated as mission-essential employees for clearance purposes does not address what the awardee plans to do if those employees are not available. Similarly, the proposed method to streamline base access does not address time lapses associated with the replacement of unavailable personnel.

The only statement in the awardee's plan that arguably addresses the replacement of personnel was not considered by the agency as relevant to this requirement. See Supp. COS at 5. The awardee represented that it will use an existing contractual relationship with another company "to obtain substitute workers." AR, Tab 11, Awardee's Plan, at 2. Despite this statement, however, the plan does not identify the time lapse associated with this proposition, i.e., an estimated period of time to obtain the substitute workers. As a result, the plan fails to furnish the agency with any information to assess the reasonableness of the time lapse associated with replacing employees. For these reasons, we conclude that the awardee's plan does not address the requirement set forth in DFARS provision 252.237-7024(b)(2)(ii).

Finally, with respect to the third requirement (i.e., components, processes, and requirements for the identification, training and preparation of personnel who are capable of relocating to alternate facilities or performing work from home), the agency explains that application of this requirement to the services sought here requires flexibility. Agency Supp. Brief at 2. Specifically, the agency contends that trash collection cannot be performed "from home." Id. Likewise, the agency contends that it is unlikely that trash collection would occur from an alternate location. Id. Hence, the agency asserts that it considered acceptable any description of steps taken to ensure that personnel are trained and "prepared to adjust" in the face of a crisis. Id. at 2-3.

Despite this representation, the agency fails to identify any language in the awardee's plan describing efforts to train or prepare personnel in this manner. See Supp. COS at 5-6. Rather, the agency points, once again, to the awardee's intent to pre-identify employees designated as mission-essential employees for clearance purposes and to have employees enter the base together, as well as to obtain substitute workers when needed and to adhere to the statement of work's days and hours of operation unless notified otherwise by the contracting officer. Id. (citing AR, Tab 11, Awardee's Plan, at 1). These actions, however, do not address the training and preparation of personnel as contemplated in the DFARS provision.

The agency also highlights the fact that the awardee acknowledges, in its plan, that the Air Force's Wing Commander has designated the services here as mission-essential services in accordance with DFARS clause 252.237-7023, Continuation of Essential Contractor Services. Supp. COS at 5-6 (citing AR, Tab 11, Awardee's Plan, at 1). This clause defines mission-essential services and also states, in pertinent part, that "[a]s directed by the Contracting Officer, the Contractor shall participate in training events, exercises, and drills associated with Government efforts to test the effectiveness of continuity of operations procedures and practices." DFARS clause 252.237-7023(c)(3). The agency asserts that, because the awardee's plan references a provision that, in turn, discusses possible government-initiated training, the awardee's plan satisfies the requirement in DFARS provision 252.237-7024(b)(2)(iii). Supp. COS at 6.

The agency's argument is misplaced. The requirement to participate in government-initiated training, as set forth in clause 252.237-7023(c)(3) of the DFARS, is entirely

distinct from the requirement to submit a plan addressing a contractor's own efforts to ensure its employees are trained and prepared to adjust performance during a crisis, as set forth in provision 252.237-7024(b)(2)(iii). For these reasons, we conclude that the awardee's plan does not address the requirement set forth in DFARS provision 252.237-7024(b)(2)(iii).

In sum, we conclude that the awardee's Mission-Essential Contractor Services Plan fails to address two out of the five criteria established in DFARS provision 252.237-7024. Because the solicitation stated that the technical requirement "is met when the offeror's proposal contains a Mission-Essential Contractor Services Plan that meets the requirements established in DFARS Provision 252.237-7024," RFP at 16, we find that the awardee's technical proposal failed to meet the minimum requirements of the solicitation and should have been rated as unacceptable.

Compliance with Subcontracting Limitations

The protester also argues that the agency should have rejected PBP Management's proposal because the proposal on its face demonstrates that PBP Management does not intend to comply with applicable limitation on subcontracting requirements. Protest at 5-6; Supp. Protest & Comments at 7-9. In this regard, the solicitation incorporated by reference FAR clause 52.219-14, Limitations on Subcontracting, which provides that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."⁶ FAR clause 52.219-14(c)(1). CR/ZWS contends that the awardee's use of a "major subcontractor," which is not an 8(a) concern, "calls into question" whether the awardee will comply with this limitation. Supp. Protest & Comments at 8.

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. See 4 C.F.R. § 21.5(a), (c). However, as our Office has consistently explained, 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

⁶ The protester argues that this provision is at odds with the Limitations on Subcontracting Rule passed by Congress in section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013), which was subsequently implemented by the Small Business Administration (SBA) in its regulations, 13 C.F.R. § 125.6(a)(1). Protest at 6 n.2. For a variety of reasons not detailed here, the protester contends that "the relevant authority is the SBA regulation and not the FAR provision." Id. To the extent the protester believes that the solicitation should have included a different provision regarding limitations on subcontracting, such a challenge is untimely. 4 C.F.R. § 21.2(a)(1).

matter concerns the proposal's acceptability. Geiler/Schrudde & Zimmerman, supra, at 7-8. This is because the limitation on subcontracting is a material term of the solicitation, and a proposal that fails to conform to a material term or condition of a solicitation is unacceptable and may not form the basis for an award. Id. at 8.

An offeror, however, need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Express Med. Transporters, Inc., B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. Rather, such compliance is presumed unless specifically negated by other language in the proposal.⁷ Id. 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)(1) ("By submission of an offer . . . the Offeror/Contractor agrees that . . . [a]t least 50 percent of the cost of the contract performance incurred for personnel shall be expended for employees of the concern."). 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 and, in the absence of any contradictory language, the agency may presume that the offeror agrees to comply with the subcontracting limitations. Express Med. Transporters, Inc., supra, at 6.

Of course, this presumption may be rebutted by other language in the proposal. It is the protester, however, that bears the burden to affirmatively demonstrate that the awardee's proposal takes exception to the limitations on subcontracting. Id. This burden is met where the protester demonstrates that the awardee has specifically taken exception to the subcontracting limitation. Id. That is, the protester must identify information in the offeror's proposal that shows that the offeror has not agreed to comply with the subcontracting limitation. Mere assumptions, inferences, and speculation are generally insufficient to demonstrate noncompliance. Id. at 7. As we have previously noted, overcoming the presumption of compliance is even more challenging where, as is the case here, the solicitation does not require offerors to submit cost data in their proposals. Id. at 7 n.7. In such situations, the protester does not have the benefit of information indicating the anticipated cost of contract performance incurred for personnel. Id.

Here, we conclude that nothing on the face of PBP Management's proposal should have led the agency to conclude that the awardee had taken exception to the subcontracting limitation. To the contrary, the awardee accepted "the Solicitation terms and conditions for the resulting contract," and explained more specifically that "[t]he Subcontract Agreement will be structured to ensure at least 50% of the cost of contract performance incurred for personnel shall be expended by employees of the Prime."

⁷ For this reason, CR/ZWS is incorrect when it argues that the awardee was required to "clearly indicate that it will abide by the Limitations on Subcontracting Rule[.]" Supp. Protest & Comments at 7. See also id. at 9 (The awardee's "proposal fails to demonstrate that it will abide by the SBA or FAR Limitations on Subcontracting rules[.]").

AR, Tab 12, Price Proposal, at 2; Tab 13, Teaming Agreement, at 5. See also AR, Tab 13, Teaming Agreement, at 7 (“At least 50% of the cost of contract performance incurred for personnel shall be expended by employees of the concern.”).⁸ We find CR/ZWS’s arguments to the contrary to be unavailing and based largely upon speculation.

Tradeoff Analysis

Finally, the protester challenges the agency’s tradeoff analysis. We address two central arguments in our decision. Neither provides a basis upon which to sustain the protest.

Failure to Consider Discriminators in the Technical Proposals

First, CR/ZWS alleges that the SSA, in conducting the tradeoff analysis, failed to consider clear discriminators between the technical proposals of the two offerors. Supp. Protest & Comments at 2, 7. Had the SSA compared the relative merits of each offeror’s Mission-Essential Contractor Services Plan, CR/ZWS argues that the SSA would have noted “the obvious superiority” of CR/ZWS’s plan, which, when combined with CR/ZWS’s superior past performance, would have warranted the price premium associated with its proposal. Id. at 7.

The record reflects that the SSA, in conducting the tradeoff analysis, considered all three evaluation factors. AR, Tab 17, SSD, at 13 (“The integrated assessment is based on determining which offeror provides the best value considering technical acceptability, past performance, and price.”). In comparing the technical proposals of CR/ZWS and PBP Management, the SSA noted that both were determined to be technically acceptable. Id. Having concluded that both proposals met the minimum requirements of the solicitation, the SSA did not consider any distinctions in the relative technical merit of each offeror’s Mission-Essential Contractor Services Plan. AR, Tab 17, SSD, at 13-14. Rather, the SSA compared the two offerors’ past performance and conducted a tradeoff between past performance and price. Id.

The agency asserts that the SSA’s tradeoff analysis is consistent with the solicitation’s evaluation criteria. In this regard, the agency argues that the solicitation did not require the SSA to consider varying degrees of technical acceptability or discriminators

⁸ CR/ZWS contends that the use of the term “concern” rather than prime contractor in this instance is ambiguous, rendering the awardee’s proposal language unclear regarding whether the awardee or its subcontractor will incur at least 50 percent of the cost of contract performance for personnel. Supp. Protest & Comments at 8. We disagree. In light of the nearly identical language in the same document indicating that the awardee, as the prime contractor, will incur at least 50 percent of the applicable costs, we find the protester’s interpretation to be unreasonable.

between the offerors' Mission-Essential Contractor Services Plans.⁹ Memorandum of Law (MOL) at 17. Rather, the solicitation only contemplated a tradeoff when there were varying degrees of performance confidence. Id.

Where a dispute exists as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions. TASC, Inc., B-412674.2 et al., Aug. 25, 2016, 2016 CPD ¶ 230 at 5. To be reasonable, an interpretation of a solicitation must be consistent with such a reading. Id. Reading the solicitation as a whole, we conclude that the agency's interpretation of the solicitation's evaluation criteria is reasonable, and the protester's differing interpretation is not reasonable.

Here, the solicitation advised offerors that technical proposals would be evaluated on a "pass/fail basis" to determine whether the "[p]roposal clearly meets the minimum requirements of the solicitation." RFP at 16, 17. Proposals meeting the minimum requirements would be assigned a rating of acceptable, and those failing to meet the minimum requirements would be assigned a rating of unacceptable. The solicitation did not provide for the consideration of degrees of acceptability. If we were to accept the protester's interpretation of the solicitation with respect to technical acceptability, the solicitation provision for evaluating offerors' plans on a pass/fail basis would be rendered meaningless.

Failure to Perform a Comparative Assessment

In its second challenge to the agency's tradeoff analysis, CR/ZWS alleges that the SSA failed to perform a comparative assessment of proposals and, instead, relied upon an arbitrarily determined, maximum acceptable price premium in selecting the lower-priced proposal for award. Protester's Resp. to SSA's Declaration, Aug. 11, 2017, at 1; Supp. Protest & Comments at 3-5. For support, CR/ZWS relies upon the following statement in the source selection decision:

The PPET agreed that a price difference somewhere between [DELETED]% to [DELETED]% between two offerors would be a reasonable maximum price trade off for a higher confidence rating.

AR, Tab 17, SSD, at 13.¹⁰ According to CR/ZWS, this statement demonstrates that the SSA summarily concluded that any higher-rated proposal with a price more than

⁹ The agency explains that an extensive technical proposal was not requested nor required because the procurement was considered a "performance-based, relatively non-complex acquisition." MOL at 2. The agency determined that a more extensive technical proposal and evaluation would add little-to-no value as a discriminating factor in determining the best value for the procurement. Id.

¹⁰ The agency represented that this statement references a conversation between the SSA and PPET. Agency Resp. to Protester's Objection to AR at 1.

[DELETED] percent higher than the lower-rated proposal was not worth the price premium. Supp. Protest & Comments at 5. Put another way, CR/ZWS states that the source selection decision “suggests that no offeror with Substantial Confidence past performance could ever merit more than a [DELETED]% price premium over an offeror with Satisfactory Confidence past performance no matter what kind of past performance either offeror had.” Protester’s Resp. to SSA’s Declaration at 3. In doing so, CR/ZWS asserts that the SSA’s tradeoff analysis was unreasonably based upon a pre-determined formula, rather than any consideration of whether CR/ZWS’s higher-rated proposal merited a 14 percent price premium. Supp. Protest & Comments at 5.

Read in isolation, we agree with CR/ZWS that this statement in the source selection decision appears to suggest that the agency pre-determined the price premium it was willing to pay for a higher confidence rating--regardless of the comparative merits of the specific proposals. Read in context, however, the meaning of the statement is less certain. Specifically, this statement is located at the conclusion of a detailed comparative discussion of the past performance of CR/ZWS and PBP Management. See AR, Tab 17, SSD, at 13. The statement is followed by the SSA’s conclusion that “because the price difference between the two offerors was significant, it was determined that [PBP Management] . . . represents the best value to the Government.” Id. (emphasis added). As a result, it was not clear to our Office whether the SSA relied upon a pre-determined formula or whether the statement is a reflection of inartful drafting and was intended to convey the agreed-upon price premium the agency was willing to pay with respect to the two offerors in question. Because of this ambiguity, we requested that the SSA provide further clarification in the form of a declaration.¹¹

In his declaration, the SSA clarified that the [DELETED] to [DELETED] percent premium referenced in the source selection decision “represented the maximum reasonable price trade off premium for this particular best value integrated assessment comparison[.]” which was “based on the specific integrated comparative trade-off assessment of the proposals [of] PBP Management and CR/ZWS[.]” SSA Decl., ¶ 2 (emphasis added). The SSA further stated that “[t]his determined price premium value was not based on a hard and fast rule, but was based on my judgement [sic] of what a reasonable premium was worth based on the specific integrated best value assessment of PBP Management’s and CR/ZWS’s proposals.” Id., ¶ 5 (emphasis added).

¹¹ Although we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, see Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rational for contemporaneous conclusions, and simply fill in previously unrecorded details will generally be considered in our review of the reasonableness of evaluation decisions, provided those explanations are credible and consistent with the contemporaneous record. MSI-Tetra Tech, B-414517, B-414517.2, June 22, 2017, 2017 CPD ¶ 194 at 12 n.5.

In response, CR/ZWS argues that there is no contemporaneous documentation to support the SSA's contention that the maximum reasonable price premium referenced in the source selection decision was based upon a comparison of CR/ZWS's past performance and PBP Management's past performance. Protester's Resp. to SSA's Declaration at 3. In this regard, CR/ZWS alleges that "there is no evidence in the record that the SSA compared the actual benefits of CR/ZWS's past performance against PBP Management's past performance prior to determining that a [DELETED]% price premium was the maximum reasonable price premium." Id.

Our review of the record leads us to conclude otherwise. As noted above, the SSA's statement regarding the maximum reasonable price premium follows a detailed discussion of the relative merits of both offerors' past performance, as well as the similarities and differences between the two past performance records. AR, Tab 17, SSD, at 13. The source selection decision also reflects the SSA's determination that, in comparing the two proposals, CR/ZWS's past performance provides a "higher expectation" of successful performance, whereas PBP Management's past performance provides a "reasonable expectation" of successful performance. Id. Thus, the record reflects that the SSA considered the relative benefits of the offerors' past performance.

Additionally, the record reflects that the SSA, in explaining the basis for his decision, determined the 14 percent difference between the two offerors' prices to be "significant[.]" whereas he determined the difference between the offerors' past performances to be "slight[.]" Id. at 13, 14. Accordingly, the SSA concluded that PBP Management's "significantly lower price for a slightly lesser degree of confidence represents the best value to the Government, and I have a reasonable expectation that PBP Management Group can successfully perform the required effort." Id. at 14.

We find the SSA's conclusion to be unobjectionable. To the extent CR/ZWS believes that PBP Management's "significantly lower" price, combined with its only "slightly less" favorable past performance, did not present the best value to the government or that CR/ZWS's higher-rated proposal merited the 14 percent price premium, we find the protester's arguments to amount to no more than disagreement with the agency's judgment. A protester's disagreement with the agency's judgment, by itself, is not sufficient to establish that an agency acted unreasonably. Cybermedia Techs., Inc. d/b/a CTEC, B-413156.25, Apr. 6, 2017, 2017 CPD ¶ 116 at 6.

Finally, in challenging this aspect of the source selection decision, CR/ZWS also argues that the SSA failed to exercise his independent judgment in making the selection decision, alleging that the SSA appears to have let the PPET set this arbitrarily defined upper bound. Supp. Protest & Comments at 5. See FAR § 15.308 ("While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment."). The language in the source selection decision indicating that the "PPET agreed" with the maximum reasonable price premium is somewhat ambiguous in this respect. See AR, Tab 17, SSD, at 13. The SSA clarified in his declaration, however, that, in conducting the tradeoff analysis, he consulted with the PPET to obtain its recommendation regarding an acceptable price

premium for the superior past performance offered by CR/ZWS. SSA Decl., ¶ 2. The SSA represents that the PPET recommended a price premium of [DELETED] to [DELETED] percent. Id. The SSA further represents that “[b]ased on a comprehensive review of all the source selection documentation/record and a careful and thorough consideration of the recommendations and rationale provided by the source selection team members, and based upon my independent judgment, I concurred with the source selection team member recommendations and rationale.” Id., ¶ 4. We find nothing objectionable in the SSA’s process and conclude that the record—including the SSA’s declaration—indicates that the SSA exercised his independent judgment.¹²

Competitive Prejudice

Prejudice is an essential element of a viable protest. AdvanceMed Corp., B-414373, May 25, 2017, 2017 CPD ¶ 160 at 16. Here, pursuant to the evaluation method in the solicitation, RFP at 18, had the agency determined the awardee’s proposal to be technically unacceptable, CR/ZWS, as the lowest-price, technically acceptable offeror with a substantial confidence past performance rating, would have been awarded the contract. Accordingly, we conclude that the protester was prejudiced by the agency’s action.

RECOMMENDATION

For the reasons detailed above, we conclude that the agency’s evaluation of the awardee’s technical proposal was unreasonable. We further conclude that CR/ZWS was prejudiced by this evaluation. We recommend that the agency either reject PBP Management’s proposal as unacceptable or open discussions, obtain revised proposals, and make a new selection decision. We also recommend that the agency reimburse the protester’s reasonable costs associated with filing and pursuing its protest, including attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained in part and denied in part.

Susan A. Poling
General Counsel

¹² Here, we conclude that the SSA’s declaration is consistent with the source selection decision and merely fills in unrecorded details.