



Decision

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Matter of: MacAulay-Brown, Inc.

File: B-417205; B-417205.2; B-417205.3

Date: March 27, 2019

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DIGEST

1. Protest challenging agency's evaluation of proposals and source selection decision is denied where the record shows that the agency reasonably performed a price realism analysis and evaluated technical proposals in accordance with the solicitation.
 2. Protest alleging agency's requirements changed in a manner that obligated agency to revise the solicitation and provide offerors an opportunity to submit revised proposals is denied where the record shows that the requirements had not, in fact, changed.
 3. Protest alleging that the agency unreasonably evaluated proposals based on solicitation's intended use of protester's proprietary software is dismissed as untimely where protest was not filed prior to deadline for submission of proposals.
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DECISION

MacAulay-Brown, Inc., of Dayton, Ohio, protests the award of a contract to Deloitte & Touche, LLP, of Arlington, Virginia, under request for proposals (RFP) No. W52P1J-19-R-0004, issued by the Department of the Army, Army Contracting Command-Rock Island, for cyber analytics services. MacAulay challenges several aspects of the procurement, including the agency's evaluation of proposals and source selection decision.

We deny the protest.

BACKGROUND

The RFP, issued on October 3, 2018, contemplated the award of a fixed-price contract with cost-reimbursable no-fee contract line item numbers (CLINS), for a two-year base period and three 1-year options, for cyber analytics services. Agency Report (AR), Tab 5, RFP, at 2. The procurement was conducted pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 13.5, Simplified Procedures for Certain Commercial items, in conjunction with FAR Part 12.101, Acquisition of Commercial Items. Id.

Cyber Analytics is an Army program that manages and maintains the Army's cyberspace analytics solution. AR, Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 2. The RFP sought a cyberspace analytics capability consisting of a secure, common, community-wide analytical framework. RFP at 2. The Army currently utilizes a Big Data Platform (BDP) cyber analytics solution referred to as "Gabriel Nimbus" (GN). Id. The RFP stated that the Army would provide a BDP solution to the awardee as Government Furnished Equipment (GFE). Id. The RFP required the contractor to execute all requirements delineated in the scope of work utilizing the Army's BDP, or a "BDP-like" solution. AR, Tab 12, Statement of Work (SOW), at 6.

By way of additional background, MacAulay, through a subsidiary, developed GN, the Army's current BDP solution, on a predecessor effort under an Other Transaction Agreement (OTA).¹ Consolidated and Supp. Protest at 15. The Army explains that the present solicitation reflects the agency's strategy to now utilize a FAR-based contract for sustainment and integration efforts, while development work will continue to be handled under OTAs, as is appropriate for prototype development. Supp. AR on Independent Government Cost Estimate (IGCE), at 4.

Award was to be made on a best-value tradeoff basis, considering the following factors: oral presentation, technical/management approach, and cost/price. The oral presentation factor was significantly more important than the technical/management approach and cost/price factors, and the technical/management approach factor was slightly more important than cost/price. AR, Tab 8, Evaluation of Offers (section M), at 3. The non-price factors, when combined, were significantly more important than cost/price. Id. The RFP additionally stated that, in the event the non-cost/price factors were evaluated as comparatively equal, the cost/price factor might become the determining factor in award. Id. at 1.

¹ "Other transactions" are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts. These instruments are used for various purposes by federal agencies that have been granted statutory authority permitting their use. See Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 1 n1.

The agency received four proposals in response to the solicitation, and evaluated proposals as follows:

	MacAulay	Deloitte
Oral Presentation	Outstanding	Outstanding
Technical/Management Approach	Outstanding	Outstanding
Price	\$100,389,949	\$54,943,978

AR, Tab 49, Source Selection Decision Document (SSDD), at 5.

The agency assigned several strengths, and no weaknesses, to the proposals of both MacAulay and Deloitte. Id. Under the oral presentation factor, the agency noted that both offerors’ presentations indicated an exceptional approach and understanding of the requirements, warranting outstanding ratings. Id. The agency also assigned both proposals outstanding ratings under the technical and management approach factor, finding that both indicated exceptional approaches with low corresponding risk of unsuccessful performance. Id.

The Decision Authority reviewed the Technical Evaluation Team’s (TET) evaluation and concluded that Deloitte’s proposal represented the best value to the agency. Id. at 6. In this regard, she noted that both offerors were rated outstanding under the non-price factors. Id. After reviewing the strengths assigned to each proposal under the non-cost/price factors, she stated that she “cannot conclude that either offer lowers risk in a significant manner which sets it apart from the other,” and found the proposals to be technically equal. Id. She stated that it was therefore not in the best interest of the agency to pay an 82.7 percent price premium for an equally-rated proposal. Id. The agency made award on December 12. COS/MOL at 12. MacAulay’s protest followed.

DISCUSSION

MacAulay raises multiple challenges to the evaluation of proposals and selection decision. The firm argues that the agency performed an unreasonable price realism evaluation. In addition, the firm argues that the agency changed its requirements prior to award. Finally, the firm alleges that the Army impermissibly utilized simplified acquisition procedures for this procurement. We note at the outset that, in reviewing protests challenging an agency’s evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency’s evaluation was reasonable and consistent with the solicitation’s evaluation criteria, as well as applicable statutes and regulations. ManTech Advanced Sys. Int’l, Inc., B-413717, Dec. 16, 2016, 2016 CPD ¶ 370 at 3. For the reasons that follow, we find that we have no basis on which to sustain the protest.

Price Realism

MacAulay argues that agency failed to perform a price realism analysis, as was required by the RFP. Consolidated and Supp. Protest at 20. MacAulay further alleges that,

independent of the agency's obligation to evaluate price proposals for realism, the RFP required the agency to assess proposals for significant inconsistencies between proposed price and technical/management approach. Id. at 23. In this regard, MacAulay argues that Deloitte offered to perform the present requirement at a price that is inadequate to cover the cost of sustaining the incumbent work, let alone the expanded work contemplated by the RFP. Id.

The RFP provided that price proposals would be evaluated for reasonableness. AR, Tab 8, § M at 7. The RFP instructed offerors to complete a price matrix by proposing fixed prices for 11 CLINS, which corresponded to the requirements of the solicitation. AR, Tab 7, RFP § L, at 11-12. Offerors were also expected to propose prices for 18 optional CLINS. Id. Additionally, and at issue here, the RFP stated:

[A]ny significant inconsistency between proposed Oral Presentation, Technical/Management Approach, and Price submitted, if unexplained in the offer, may be grounds for rejection of the offer due to an Offeror's misunderstanding of the work required or an inability to perform any resultant work under the contract.

Id. at 4.

In response to MacAulay's allegations, the Army contends that this language did not trigger a requirement to perform a price realism analysis. COS/MOL at 13-14. However, the Army asserts that, even if such an evaluation was required, the record shows that it performed a sufficient analysis of Deloitte's price to conclude that it was not unrealistically low. Id. at 15.

We agree that the solicitation required the agency to perform a price realism analysis. As our Office has noted, in the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and where the RFP states that a proposal can be rejected for offering low prices. See Apextech, LLC, B-415153.2, B-415153.3, Mar. 15, 2018, 2018 CPD ¶ 112 at 5. Here, the RFP stated that the agency could reject a proposal if it contained a "significant inconsistency" between proposed oral presentation, technical/management approach, and price. AR, Tab 8, § M at 4. Accordingly, we find that this language triggered a requirement for the Army to perform a price realism analysis. See Apextech, LLC, supra, at 5.

While we find that the agency was required to perform a price realism analysis, we do not agree with MacAulay that the agency's price evaluation was unreasonable, or that it otherwise failed to identify any significant inconsistencies between Deloitte's proposed price and its technical approach. Where, as here, an RFP contemplates the award of a fixed-price contract, an agency may provide for the use of a price realism analysis for the limited purpose of measuring offerors' understanding of the requirements or to assess the risk inherent in an offeror's proposal. R3 Gov't Solutions LLC, B-404863.2,

Sept. 28, 2012, 2012 CPD ¶ 284 at 5. The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis. Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 4; Robinson's Lawn Servs., Inc., B-299551.5, June 30, 2008, 2009 CPD ¶ 45 at 6; Apextech, LLC, supra (finding agency's realism analysis sufficient despite the fact that the record showed that the agency did not use the term "price realism" to describe its price analysis).

The Army explains that while it did not explicitly use the term "price realism" in evaluating proposals, it did perform an analysis of pricing to determine if Deloitte's price was too low by comparing it to the IGCE. COS/MOL at 15. The agency notes that first the price evaluation team (PET) reviewed price proposals and determined that the two technically acceptable offerors, MacAulay and Deloitte, proposed fair and reasonable prices. AR, Tab 47, PET Price Analysis, at 4. The PET noted that Deloitte's price was roughly 10 percent higher than the IGCE of \$49,938,693. Id. Based on this finding, the agency did not find Deloitte's price to be unrealistically low or unreasonably high. COS/MOL at 15.

MacAulay responds that this price analysis was irrational as it was based on a flawed IGCE. Comments on Agency Report at 11. In this regard, MacAulay asserts that the Army irrationally estimated that the "incumbent work could be sustained with less than [deleted] [percent] of the incumbent level of effort." Protester Comments on Supp. AR on IGCE at 4 (emphasis omitted). MacAulay contends that sustaining this effort alone could cost \$[deleted] to \$[deleted] million a year, totaling \$[deleted] million to \$[deleted] million over the life of the contract, indicating that the Army's IGCE is too low based on the historical burn rates of the incumbent and predecessor contracts, and the Army's concessions that this contract will require some development work. Id. at 6-7 (citing Protest, Exhibit E, Declaration of Director of Client Engagement for MacAulay Subsidiary, at 2).

The agency responds that it performed a robust analysis to develop the IGCE, analyzing a broad cross-section of relevant labor categories and rates from contracts performed on similar types of work. Supp. AR on IGCE, at 3. Additionally, the agency notes that although this procurement includes some limited development work, the procurement does not include the level of development work that MacAulay has completed under the predecessor OTA. Id. at 4.

In a supporting declaration, the Army explains that the IGCE reflects an intended reduction in scope from aspects of the predecessor OTA efforts, including in the areas of innovation and emerging technology, which resulted in fewer estimated labor hours and personnel than the current OTA effort. AR, Tab 61, Declaration of Product Manager for DCO, at 1. Additionally, the IGCE reflects the "removal and reduction of hosting infrastructure costs, removal of innovation items such as artificial intelligence. . . and a reduction in advanced dashboard development." Id.

On this record, we have no basis to question the reasonableness of the agency's IGCE,² and, by extension, the agency's price evaluation. The agency has provided a reasonable explanation as to why the IGCE reflects a rational estimate of the effort contemplated by the present requirements, and why MacAulay's reliance on historical pricing data is inapplicable given the reduction of development work which it has performed in an OTA environment.

We note also that, by MacAulay's own estimation, a reasonable estimate for "sustainment alone," which the agency has explained represents the requirements contemplated here, would be \$[deleted] million, or [deleted] the IGCE amount of \$49,938,693. Moreover, we find entirely reasonable the agency's belief that utilizing competitive procedures would further drive prices down. As such, the record does not provide us with a basis to find the agency's IGCE unreasonable. It follows that we have no basis to question the Army's assessment of Deloitte's price, where it was 10 percent higher than the reasonably developed IGCE. See General Dynamics--Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 3 (agencies may use a variety of price evaluation methods to assess realism, including a comparison of prices received to one another, to previously proposed or historically paid prices, or to an independent government estimate).³

Changed Requirements

MacAulay also argues that the agency made award based on requirements that were materially different from those set forth in the RFP. The protester asserts that the Army knew before award that one of the four infrastructures delineated in the RFP--the Garrison Deployable Platform (GDP)--would be unavailable during performance and that the awardee would have to deploy the solution to an entirely different infrastructure, the Global Enterprise Fabric (GEF). Consolidated and Supp. Protest at 30-31. To support this allegation, MacAulay cites an email provided by agency personnel indicating that "budget issues" required the agency to halt its plan to utilize GDP on this requirement, as well as a supporting declaration asserting that the Army notified

² The agency acknowledges that it erred in not factoring one of the 18 optional CLINs into the IGCE, but argues that this "administrative error" does not affect the reliability of the IGCE, nor was this error prejudicial to MacAulay. Supp. AR on IGCE, at 5. We agree. MacAulay proposed a price of \$[deleted] for this CLIN, and Deloitte proposed \$[deleted] for this CLIN. Neither amount would substantially affect the IGCE, or Deloitte's price in relation to the IGCE.

³ The record provides us with no basis to object to the evaluation of Deloitte's proposal and its purported failure to identify an inconsistency between its oral presentation, technical/management approach, and its price. In this regard, MacAulay has not actually identified a specific inconsistency between Deloitte's technical approach and price which is not derivative of its assertion that Deloitte's price is unrealistically low.

MacAulay just six days after award that the GDP project was cancelled. Id. (citing Second Declaration of Director of Client Engagement for MacAulay Subsidiary).

Where an agency's requirements materially change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. See Northop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct.4, 2017, 2017 CPD ¶ 312 at 14; Murray-Benjamin Elec. Co., L.P., B-400255, Aug. 7, 2008, 2008 CPD ¶ 155 at 3-4.

The Army responds that MacAulay's assertions reflect a misinterpretation of the Army's communications. COS/MOL at 25. While the Army is constantly reviewing how it could leverage prototypes developed under OTAs, and assess capabilities and their interoperability with current platforms, its requirements for the present RFP remain unchanged. Id. The Army explains that it communicated with MacAulay about halting, and potentially cancelling, the GDP under the OTA, not under this solicitation. Id. at 26. Further, the Army has provided a declaration stating that one week after award, it hosted an integration meeting to first discuss the "development of a pilot" to integrate the GDP and the GEF. AR, Tab 56, Declaration of Army Product Manager for Defense Cyber Operations, Cyber Platform Systems, at 1.

Our review of the record indicates that the Army had not actually changed its requirements prior to award. To the contrary, while the record indicates that it was contemplating potentially integrating existing infrastructures, no such change occurred prior to award. Further, the only changes that appear to have been made are with regard to a GDP OTA, which is not at issue here. It follows that the underlying premise of this protest basis--that the Army's requirements changed prior to award--lacks merit.⁴

Untimely Allegations

MacAulay also argues that the Army unreasonably evaluated proposals based on the erroneous assumption that the Army could provide the BDP-GN with cloud functionality to Deloitte as GFE. MacAulay asserts that the BDP-GN will not function in the cloud without MacAulay's proprietary software, which the Army does not have the authorization to provide to Deloitte. Consolidated Protest at 26-29. MacAulay thus argues that Deloitte will be unable to deploy BDP-GN into a cloud environment, which was required by the solicitation, and that a reasonable evaluation would have reflected this by rating Deloitte marginal or unacceptable under the non-price factors. Id. at 28.

⁴ MacAulay also argued that the best-value tradeoff was unreasonable. As detailed above, the record does not support MacAulay's challenges to the evaluation of proposals. Accordingly, we find no merit to these objections to the selection decision, insofar as they are based upon those alleged errors. Further, on this record, we find nothing unreasonable, or inconsistent with the solicitation, in the selection official's decision to select, as between two technically equal proposals, Deloitte's lower-priced proposal. See Synergetics, Inc., B-299904, Sept. 14, 2007, 2007 CPD ¶ 168 at 8.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. See 4 C.F.R. § 21.2(a). Pursuant to our timeliness rules, a protest based upon alleged improprieties in a solicitation, or allegedly flawed ground rules under which a competition is conducted, that are apparent prior to the closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1); DynCorp Int'l LLC, B-415349, Jan. 3, 2018, 2018 CPD ¶ 12 at 9. A protester may not wait until after an award has been made to protest alleged flaws in the procurement's ground rules that are apparent prior to submission of proposals.⁵ See DynCorp Int'l LLC, supra.

As noted above, the RFP stated that the Army would provide a BDP solution as GFE. AR, Tab 12, SOW at 6. Additionally, the SOW stated that offerors will be responsible for deploying analytics on four different infrastructure platforms, one of which was the cloud. Id. at 5, 11. The solicitation therefore required the awardee to deploy analytics capabilities in the cloud utilizing the BDP solution provided by the Army.

MacAulay alleges that the Army's current BDP--the GN--will not function in the cloud without MacAulay's proprietary software. We construe MacAulay as essentially arguing that it is the only firm that can satisfy the requirement to deploy analytics in the cloud with the Army's BDP, given that no other firm has authorization to use the proprietary software necessary to perform this requirement. However, the solicitation provided for competition on a full and open basis, thus contemplating that award could be made to a firm other than MacAulay. RFP at 2.

As a result, the Army's purportedly erroneous assumption that it could provide its BDP solution with cloud functionality to the eventual awardee was clear on the face of the solicitation. Thus, MacAulay's assertion that no firm other than itself can satisfy the requirements of the solution alleges an impropriety in the terms of the solicitation which MacAulay was required to protest prior to the receipt of proposals. Since it MacAulay failed to do so, we dismiss this allegation as untimely. 4 C.F.R. § 21.2(a)(1); see AOC Connect, LLC--Recon., B-416658.3, Feb. 12, 2019, 2019 CPD ¶ __ at 3 (allegations that awardee's technical solution would not satisfy solicitation requirements is untimely where solicitation expressly provided that such a solution was technically acceptable).

Use of FAR Part 13 Procedures

Finally, MacAulay argues that the Army improperly used the simplified acquisition procedures in FAR subpart 13.5 for this procurement. Consolidated and Supp. Protest

⁵ This principle promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government, as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007).

at 24. MacAulay acknowledges that this protest ground is an untimely challenge to the terms of the solicitation,⁶ but asks that we consider the issue under our significant issue exception to the timeliness rules. Id.

As a general rule, FAR subpart 13.5 authorizes the use of simplified acquisition procedures for procurements of commercial items when the value does not exceed \$7 million. FAR § 13.500(a). Section 13.500(c) of the FAR raises the threshold for using simplified acquisition procedures to \$13 million for procurements of commercial items that facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack.⁷ FAR § 13.500(c). In addition, section 1641 of the National Defense Authorization Act for Fiscal Year 2017, Pub. Law No. 114-328, added cyber as a basis for using the simplified acquisition procedures authorized under FAR § 13.500(c). The Department of Defense subsequently issued a class deviation applicable to FAR § 13.500(c) to implement this statutory addition. See AR, Tab 71, Class Deviation No. 2018-00018, attach.1, at 4. Specifically, the class deviation permits defense agencies to use simplified acquisition procedures for acquisitions to facilitate defense against cyber attack when the acquisition value does not exceed \$13 million. Id. at 5.

In addition to noting that this protest ground is untimely, the Army asserts that FAR § 18.202 provides it the authority to use simplified acquisition procedures for procurements, such as this one, valued above the \$13 million limit imposed by FAR § 13.500(c), and modified by the above-referenced class deviation to include procurements to defend against cyber attacks.⁸ Supp. MOL at 2-3.

MacAulay argues that the Army has violated the dollar limits set on the use of this authority in statute, in the FAR, and in the class deviation. Protester's Comments on Supp. AR on Use of FAR 13.5 at 2. MacAulay contends that there is no language in FAR § 18.202 that independently authorizes agencies to raise the simplified acquisition threshold above the level set in FAR § 13.500(c). Id. Instead, FAR § 18.202 simply refers the reader to other FAR provisions that authorize the use of simplified acquisition

⁶ As noted above, pursuant to our timeliness rules, a protest based upon alleged improprieties in a solicitation, or allegedly flawed ground rules under which a competition is conducted, that are apparent prior to the closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1).

⁷ Section 13.500(c) provides that “[u]nder 41 U.S.C. [§] 1903, the simplified acquisition procedures authorized in this [subpart 13.5] may be used for acquisitions that do not exceed \$13 million when--(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used . . . to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack.”

⁸ Section 18.202 states, in relevant part, that the threshold for the authority to use simplified procedures for certain commercial items “may be increased when it is determined the acquisition is to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, (See 13.500(c)).” FAR § 18.202(d).

procedures, such as FAR § 13.500(c). Id. In this regard, MacAulay notes that the final rule implementing FAR part 18 explains that it “provides a single reference to the acquisition flexibilities already available in the FAR.” Id. at 3 (quoting FAR Case 2005-038, Emergency Acquisitions, 72 Fed. Reg. 46,343 (Aug. 17, 2007)).

Under 4 C.F.R. § 21.2(c), our Office may consider a protest that raises issues significant to the procurement system. What constitutes a significant issue is to be decided on a case-by-case basis. Cyberdata Techs., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. GAO has limited this exception to protests that raise issues of widespread interest to the procurement community and that have not been considered on the merits in a previous decision. The record does not show that the issues raised are of widespread interest to the procurement community that would otherwise warrant their resolution in the context of an otherwise untimely protest allegation. We therefore decline to consider this issue under our significant issue exception to our timeliness rules.⁹

The protest is denied.

Thomas H. Armstrong
General Counsel

⁹ In any event, we agree with Deloitte that MacAulay has failed to demonstrate competitive prejudice due to the agency’s alleged misuse of simplified acquisition procedures. Olympus America, Inc., B-414944, Oct. 19, 2017, 2018 CPD ¶ 151 at 3-4. In its pleadings, MacAulay argues that it was prejudiced by the use of simplified procedures because had the agency utilized the procedures of FAR part 15, it would have had to evaluate past performance. Comments on AR at 28-29. Class Deviation 2018-00018 authorizes contracting officers to treat any acquisition of supplies or services that are to be used to facilitate defense against or recovery from cyber attacks as an acquisition of commercial items. It has not been disputed that, pursuant to this deviation, the agency properly utilized Part 12 procedures. Moreover, in FAR part 12 procurements, the evaluation of past performance is discretionary, not mandatory. See Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 6 (explaining that while FAR § 12.206’s statement that “[p]ast [p]erformance should be an important element of every evaluation” urges agencies to consider past performance, it does not require them to do so). Further, FAR § 12.102(c) provides that “[w]hen a policy in another part of the FAR is inconsistent with the policy in this part, this part 12 shall take precedence for the acquisition of commercial items.” Thus, had the agency utilized FAR Part 15 procedures in conjunction with FAR part 12, FAR part 12’s permissive treatment of past performance would take precedence of FAR part 15’s requirement that agencies must evaluate past performance. Accordingly, even if we were to find that the agency impermissibly utilized FAR part 13 procedures here, MacAulay still has not demonstrated prejudice by this error because the agency still would not have been required to evaluate past performance.