



Decision

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Matter of: EA Engineering, Science, and Technology, Inc.

File: B-417361; B-417361.2

Date: June 13, 2019

Seamus Curley, Esq., Chelsea L. Goulet, Esq., Stroock, Stroock & Lavan LLP, for the protester.

Scott Arnold, Esq., Luke W. Meier, Esq., Michael J. Montalbano, Esq., Blank Rome LLP, for The Louis Berger Group, Inc., the intervenor.

Michael Watson, Esq., Marcos Araus, Esq., Federal Energy Regulatory Commission, for the agency.

Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging deficiencies evaluated in the protester's quotation is denied where the agency's evaluation was reasonable and in accordance with the solicitation.
2. Protest that the awardee's quotation should have been evaluated as technically unacceptable because it failed to address required areas of work is denied where the allegation is without factual support.
3. Protest alleging that the agency failed to take into consideration the acquisition of the awardee by another firm is denied where the record reflects that the acquisition occurred prior to the submission of quotations, the awardee specifically addressed the acquisition in its quotation, and the awardee explained that it will continue to operate as a separate legal entity in performance of the contract.
4. Protest alleging that the agency failed to meaningfully evaluate vendors' past performance is denied where the record reflects that the agency considered past performance information with regard to the awardee, and the protester cannot demonstrate prejudice as a result of the alleged failure to consider its own past performance because the protester was otherwise technically unacceptable.

DECISION

EA Engineering, Science, and Technology, Inc., a small business of Hunt Valley, Maryland, protests the issuance of a task order to The Louis Berger Group, Inc., of Washington, D.C., under request for quotations (RFQ) No. 1344044, which was issued by the Federal Energy Regulatory Commission (FERC), for hydroelectric environmental and engineering services. The protester challenges the reasonableness of the agency's evaluation of technical quotations and past performance, and contends that the agency failed to consider the potential impact of the awardee's acquisition by another firm on its performance of the contract.

We deny the protest.

BACKGROUND

The agency issued the RFQ on December 21, 2018, to holders of General Services Administration's (GSA) Professional Services Schedule contracts for hydroelectric environmental and engineering services, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. The solicitation contemplated the issuance of a task order to provide assistance to FERC's Office of Energy Projects, which is responsible for coordinating and managing FERC's hydropower licensing and compliance program. Agency Report (AR), Exh. C, Sub. Exh. J, Statement of Work (SOW), at 32. As established by the SOW, the prospective contractor would be responsible for preparing technical input and drafting documents to assist FERC in meeting its obligations under a variety of statutes and regulations, including, as relevant here, the National Environmental Policy Act (NEPA). *Id.* The RFQ contemplated the issuance of a time-and-materials task order, with a 1-year base period and four 1-year option periods. AR, Exh. C, Sub. Exh. K, RFQ Instructions and Evaluation Criteria, at 50.

The solicitation established that the vendor would be selected using a price-technical tradeoff selection process, with the non-price evaluation factors, when combined, identified as significantly more important than price. RFQ at 50. Specifically, FERC was to evaluate quotations on the basis of the following equally weighted¹ non-price criteria: (1) technical/management approach; (2) corporate capability and experience; (3) personnel qualifications and experience; (4) past performance; (5) organizational conflict of interest (OCI) list and critical energy infrastructure information (CEII) certifications; (6) non-price components of the vendor's contractor teaming arrangement, if applicable; and (7) non-price related exceptions, if applicable. *Id.* FERC received two timely quotations by the solicitation's January 21, 2019 closing

¹ The RFQ did not specify the relative importance of the non-price evaluation criteria. Our Office has recognized that where a solicitation does not disclose the relative weight of evaluation factors, the factors are understood to be of equal importance to each other. See PricewaterhouseCoopers Public Sector, LLP, B-413316.2, B-413316.3, Dec. 27, 2016, 2017 CPD ¶ 12 at 2-3 n. 4

date--one from EA Engineering and one from Louis Berger. AR, Exh. A, Sub. Exh. A, Award Decision Memorandum, at 1. With respect to the protester's quotation, the agency identified two deficiencies;² which, according to the agency, "raised the risk of awarding to [the protester] to an unacceptable level[.]" Id. With respect to the quotation submitted by Louis Berger, the agency's evaluators did not identify any deficiencies, and the source selection official (SSO) considered Louis Berger's strengths to outweigh its weaknesses. Id. While the protester's quotation was \$1,330,063, or approximately 11.9 percent, lower-priced than that of Louis Berger, the SSO selected Louis Berger's technically superior quotation for the task order. Id. Following a brief explanation of the agency's selection decision, which the agency provided to EA Engineering pursuant to FAR subpart 8.4, this protest followed.

DISCUSSION

The protester challenges the agency's evaluation of its technical quotation, to include the two deficiencies. The protester also argues that the agency should have evaluated the awardee's quotation as unacceptable due to multiple alleged deficiencies, and that the agency failed to reasonably consider the impact of the acquisition of Louis Berger by WSP Global, Inc. Finally, the protester contends that the agency failed to conduct a past performance evaluation in accordance with the terms of the solicitation. For the reasons that follow, we find no basis to sustain the protest.

Where, as here, an agency issues a solicitation to Federal Supply Schedule (FSS) contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. Windsor Solutions, B-415840, Mar. 23, 2018, 2018 CPD ¶ 118 at 3. A protester's disagreement with the agency's judgment, without more, does not establish that the evaluation was unreasonable. Konica Minolta Bus. Solutions U.S.A., Inc., B-411888, Nov. 10, 2015, 2015 CPD ¶ 352 at 3. In a competitive FSS procurement, it is the vendor's burden to submit an adequately written quotation that establishes the merits of its quotation. SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov., Inc., B-413220.4 et al., May 19, 2017, 2017 CPD ¶ 173 at 10.

Evaluation of Protester's Quotation

As noted above, the agency evaluated two deficiencies in the protester's technical quotation. AR, Exh. A, Sub. Exh. A, Award Decision Memorandum, at 1.³ The agency

² The agency defined "deficiency" as "[a] material failure of the [q]uote to meet a [g]overnment requirement or a combination of significant weaknesses in a [q]uote that increases the risk of unsuccessful performance to an unacceptable level." AR, Exh. B, Sub. Exh. D, Technical Evaluation Guide, at 28.

³ In addition to challenging the two deficiencies, the protester challenges each significant weakness and weakness assessed against its quotation. Protester's Comments and Supp. Protest at 8-14; Protester's Supp. Comments at 9-10. In light of (continued...)

assigned one deficiency because the protester's quotation failed to provide evidence of experience performing headwater benefits reviews. AR, Exh. B, Sub. Exh. B, Protester's Technical Evaluation, at 13. The agency assigned a second deficiency because the protester's quotation did not include a client list for one of its subcontractors, information which was required by the RFQ. Id. at 16. The protester challenges the agency's evaluation of both deficiencies. For the reasons set forth below, we find no reason to question the agency's assessment that the protester's quotation contained two deficiencies.

Deficiency 1--Headwater Benefits Review

Specifically, the record reflects that the agency assigned EA Engineering's quotation one deficiency under the corporate capability and experience factor for failing to "provide any evidence that [the protester has] performed a headwater benefits analysis." AR, Exh. B, Sub. Exh. B, Protester's Technical Evaluation, at 13. The protester argues that it addressed the provision of headwater benefits reviews in its quotation and that the agency's requirement for "evidence" of such constituted the imposition of an unstated evaluation criterion. Protester's Comments and Supp. Protest at 4-5; Protester's Supp. Comments at 2.

The solicitation explained that FERC is responsible for determining and assessing headwater benefits and provided that the scope of work under the task order would include providing technical input for headwater benefits reviews. SOW at 32 and 34. The solicitation advised that vendors "merely proposing to provide services in accordance with the solicitation will not be eligible for award," and instructed that technical and management approach narratives must be "sufficiently specific, detailed and complete to clearly and fully describe the offeror's^[4] proposed solution to meet the requirements of the solicitation." RFQ at 46. The solicitation further instructed vendors

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the reasonableness of the agency's evaluation of the two deficiencies in the protester's technical quotation, which rendered the quotation unacceptable, we need not resolve the additional challenges to the protester's evaluation. Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that but for the agency's actions it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. See e.g., Windsor Solutions, *supra*, at 5 n. 6; SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov., Inc., *supra*, at 26-27.

⁴ In several places, the RFQ refers to vendors as offerors and to vendor submissions as offers or proposals. Generally, a vendor's submission in response to an RFQ is a quotation, and is not a submission which the government may accept to form a binding contract. FAR § 13.004(a); Computer Assocs. Int'l, Inc.--Recon, B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3. A vendor's quotation is purely information, and in the RFQ context it is the government that makes the offer, generally based on the information

(continued...)

to include in the corporate capabilities and experience section of their quotations examples of relevant work performed in the last 24 months and to address the vendor's access to resources necessary to meet the SOW requirements, including sufficiently qualified and experienced personnel. Id. at 47.

In support of its contention that it adequately addressed experience with headwater benefits reviews, the protester points to passages in the technical/management approach section of its quotation as establishing its relevant experience with such reviews, and indicating that it would utilize the [DELETED] when conducting such reviews. AR, Exh. D, Sub. Exh. A, Protester's Technical Quotation, at 16 and 24. The cited passages, however, do not identify any actual experience with headwater benefits reviews other than to vaguely indicate that the "EA Team is familiar with the Headwaters Benefit Program."⁵ Id. at 24. Moreover, regarding the protester's use of a [DELETED] to conduct its reviews, the agency specifically noted that "[t]here is no one identified [in the quotation] as having experience using that [DELETED], which requires very specific training." AR, Exh. B, Sub. Exh. B, Protester's Technical Evaluation, at 13. Based on the record, we find no basis to question the agency's assessment of a deficiency for the protester's failure to provide evidence of its experience with headwater benefits reviews. See e.g., Windsor Solutions, supra, at 6; Open Sys. Science of Virginia, Inc., B-410572, B-410572.2, Jan. 14, 2015, 2015 CPD ¶ 37 at 9.

The protester also argues that the agency imposed an unstated evaluation criterion when it required after the fact corroboration of the RFQ's requirements. Protester's Comments and Supp. Protest at 5. The solicitation advised vendors that quotations must explain a vendor's approach in detail, and that vendors should include examples of relevant work as well as evidence of having personnel with sufficient qualifications and experience to meet the requirements set forth in the SOW. It was the protester's burden to submit an adequately written quotation that provided sufficient detail to support its representation of experience performing headwater benefits reviews, and

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provided by the vendor in its quotation. Id. When quoting from the RFQ or quotations in this decision, we maintain the parties' original terminology.

⁵ In support of its contention, the protester also points to the use of the word "headwater" in [DELETED] of the resumes included in the personnel qualifications and experience section of its quotation. AR, Exh. D, Sub. Exh. A, Protester's Technical Quotation, at 56 and 61. It is not clear, however, from the references, nor does the protester explain, if or how either use of the word demonstrates how its personnel have experience performing headwater benefits reviews. Id.; Protester's Supp. Comments at 3-4. A vendor in an FSS competition bears the burden of submitting an adequately written quotation establishing its merits, and based on the record here we find no basis to question the agency's assessment that the protester failed to meet this burden with respect to establishing that its personnel had experience performing headwater benefits reviews. See e.g., SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov., Inc., supra, at 10.

based on the record, we find no basis to question the agency's assessment that the protester failed to meet this burden. See e.g., SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov, Inc., supra, at 10; CSI Aviation, Inc., B-415631 et al., Feb. 7, 2018, 2018 CPD ¶ 68 at 10-11.

The protester further contends that the agency engaged in disparate treatment because the awardee's quotation also allegedly did not address headwater benefits reviews yet the awardee was assigned a strength rather than a deficiency for this factor. Protester's Comments and Supp. Protest at 5; Protester's Supp. Comments at 4. The record reflects that one of the awardee's key personnel⁶ has specific experience conducting headwater benefits reviews, having worked as a project manager from 2001-2014 on the Great Northern Paper, Penobscot River Headwater Benefit Analysis, and that the technical evaluators considered this specific experience a strength. AR, Exh. E, Sub. Exh. A, Awardee's Technical Quotation, at 66; Exh. B, Sub. Exh. A, Awardee's Technical Evaluation, at 4. In contrast, the protester's quotation did not provide information sufficient to establish that it had either corporate experience or personnel with experience performing headwater benefits reviews. Based on the record, we find no basis to question the agency's assessment that differences in the vendors' quotations merited the different evaluations. CSI Aviation, Inc., supra, at 11.

Deficiency 2--Failure to Submit Client List

The agency assigned the protester's quotation a second deficiency under the OCI list and CEII certifications evaluation factor because the protester failed to provide client information required by the RFQ, a failure which resulted in the inability of the agency to consider the potential for OCI issues with respect to one of the protester's subcontractors. AR, Exh. B, Sub. Exh. B, Protester's Technical Evaluation, at 16. The protester argues that it provided sufficient information in its quotation to meet the solicitation requirement. Protester's Comments and Supp. Comments at 6; Protester's Supp. Comments at 5.

As relevant here, the solicitation explained that FERC anticipated there would be a need to contract separately for portions of the RFQ's requirements due to the awarded contractor having real or apparent conflicts of interest for specific licensing projects. SOW at 35. The solicitation provided further that the prospective contractor would be required to perform project-specific conflict checks upon receipt of each future assignment under the task order. Id. at 44. As a consequence, the solicitation required vendors to include a list of customers so that the agency could consider the vendor's potential of having future OCIs. Specifically, the RFQ required:

⁶ The RFQ identified the following six key personnel positions: (1) program director; (2) assistant program director; (3) project manager; (4) deputy project manager; (5) fishery biologist level III; and (6) principal engineer. SOW at 40-42.

The offeror and its sub-contractors/teaming partners are to provide a list of all their customers (hydroelectric and non-hydroelectric) for projects located in the United States whose financial interest (i.e. contracts, stocks, etc.) accounts for greater than 1% of revenue for the corporate entity for calendar years 2017 and 2018.

RFQ at 47.

The record reflects that the protester submitted the required client list for itself and seven of its eight subcontractors. AR, Exh. D, Sub. Exh. A, Protester's Technical Quotation, at 44-46. For one of its subcontractors, however, the protester submitted a list of 40 clients, 37 of which were listed as "confidential client." Id. at 44. Two additional clients were listed as "foreign client" leaving one client named. Id. For the 37 confidential clients, the protester provided a description of the type of client--e.g., "Northeast Conglomerate," "State Agency," "Nationwide Manufacturing," "West Coast City," "Southern Energy." Id. The agency, however, did not consider the descriptors sufficient to meet the RFQ requirement. Rather, it found the protester's inclusion of a confidential client list for one subcontractor to present "a major problem" because it did not allow the agency to consider the extent of the firm's potential for future OCIs. AR, Exh. B, Sub. Exh. C, Technical Evaluators Award Recommendation, at 24. The inability to assess the potential likelihood of future OCIs for this subcontractor was particularly problematic for the agency because the protester identified this subcontractor as its primary subcontractor for fisheries and aquatics issues, which are "often the most important and complex issues at projects [FERC] license[s]." Id.; see Exh. D, Sub. Exh. A, Protester's Technical Quotation, at 11. The technical evaluators found "that the uncertainty of the availability of [this subcontractor's] staff to work on FERC projects is highly problematic." AR, Exh. B, Sub. Exh. C, Technical Evaluators Award Recommendation, at 24.

Despite the protester's belief that the descriptions it provided for its subcontractor's confidential clients afforded sufficient information "for FERC to perform the preliminary OCI analysis," and that these descriptors should have enabled the confidential clients to be "easily deemed a non-issue or flagged by FERC," the record is clear that the protester failed to include a client list for one of its primary subcontractors, as expressly required by the RFQ. Protester's Comments and Supp. Protest at 6. It is a vendor's responsibility to submit an adequately written quotation that provides all the information required by the solicitation. See e.g., Konica Minolta Business Solutions U.S.A., Inc., supra, at 4. A vendor's technical evaluation is dependent on the information furnished in its quotation, and a vendor that fails to submit an adequately written quotation runs the risk of having its quotation downgraded. CSI Aviation, Inc., supra, at 11. Because the protester failed to include the required client list for one of its subcontractors, the evaluators reasonably assessed a deficiency against the protester's quotation. See Konica Minolta, supra, at 4. The protester's objection to the agency's evaluation reflects nothing more than its disagreement with the agency's judgment, which is insufficient to render the evaluation unreasonable. See Id.

EA Engineering also asserts that the agency engaged in disparate treatment when it assessed a deficiency against the protester's quotation, without assigning the awardee's quotation a similar deficiency despite both vendors having OCI-related clarifications noted in the agency's evaluations. Protester's Comments and Supp. Protest at 6; Protester's Supp. Comments at 5. This argument, however, conflates the deficiency noted above stemming from the protester's failure to provide information required by the RFQ, with separate weaknesses and related clarifications noted for both vendors, resulting from OCI risk assessments conducted by the agency using the client list information that was provided in the vendors' quotations. See e.g., SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov., Inc., *supra*, at 25 n. 32.

Specifically, the record reflects that, in addition to the deficiency noted above regarding the protester's failure to provide required OCI information for one of its primary subcontractors, the agency identified a significant weakness with the protester's quotation based on a high likelihood of potential future OCIs due to the large number of industry clients serviced by its subcontractors. AR, Exh. B, Sub. Exh. B, protester's Technical Evaluation, at 16. In this regard, the agency noted that the protester's primary subcontractor derived more than 85 percent of its work from [DELETED]. Id. The agency assigned the awardee's quotation a comparable weakness⁷ because most of its subcontractors have clients in the industry, which could lead to potential future OCIs. AR, Exh. B, Sub. Exh. A, Awardee's Technical Evaluation, at 6.

Given the similar concerns, the technical evaluators noted the same clarification request for both vendors as follows: "We need to understand how many of the approximately 175 upcoming relicenses due in FY19-23, [vendor's] team ([vendor] and their subcontractors) may have an OCI issue with based on the grounds that staff have worked on those re-license applications." AR, Exh. B, Sub. Exh. A, Awardee's Technical Evaluation, at 6; Exh. B, Sub. Exh. B, Protester's Technical Evaluation, at 17. The technical evaluators also noted a second similar clarification with respect to the awardee, requesting that it identify on which current and upcoming FERC projects it or its subcontractors had worked. AR, Exh. B, Sub. Exh. A, Awardee's Technical Evaluation, at 6.⁸ Where the similar clarifications resulted from similar evaluation

⁷ The record reflects that the difference in evaluations--a significant weakness for the protester compared to a weakness for the awardee--stems from differences in the quotations. Specifically, the awardee's quotation included a larger proportion of [DELETED]--at least two for all but one of the SOW's specified labor categories--which lowered the risk of potential future OCIs because the awardee derives approximately 70 percent of its own work from other federal agencies. AR, Exh. B, Sub. Exh. A, Awardee's Technical Evaluation, at 4 and 6; Exh. B, Sub. Exh. C, Technical Evaluator's Award Recommendation, at 23.

⁸ The record reflects that the agency did not seek further clarification of the vendors' technical quotations. As explained by the agency, it was able to resolve any questions without contacting the vendors. Supp. Memorandum of Law (MOL) at 2.

concerns with the proposals, which were separate and distinct from the unique deficiency identified with regard to the protester's quotation, we have no basis to conclude that the agency's evaluation was unequal.

The protester also argues that the agency's assessment of a deficiency under the OCI list and CEII certification evaluation factor constituted an improper non-responsibility determination.⁹ Protester's Comments and Supp. Protest at 8. The protester contends that the OCI-related evaluation factor constitutes a responsibility-type criterion, and that because the protester is a small business, the agency was required to refer its finding of a deficiency under such a factor to the Small Business Administration (SBA) pursuant to its certificate of competency (COC) program. Id. The agency responds that the evaluation of a deficiency was not based on a finding that the protester had an OCI, but rather was based on the protester's failure to include in its quotation specific information required by the solicitation. Supp. MOL at 3.

Under the SBA's COC program, agencies must refer a determination that a small business is not responsible to the SBA, if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6; see e.g., MicroTechnologies, LLC, B-414670, B-414670.2, Aug. 1, 2017, 2017 CPD ¶ 236 at 5. The SBA's regulations specifically require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility-type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). The SBA is then empowered to certify the responsibility of the small business concern to the agency. 15 U.S.C. § 637(b)(7)(A).

On this record, we do not agree that the agency's evaluation involved a determination of the protester's responsibility that required referral to the SBA. Where, as here, an agency finds a quotation to be unacceptable based on the vendor's failure to submit required information, the finding does not constitute a determination that the vendor is not a responsible prospective contractor.¹⁰ MicroTechnologies, LLC, supra, at 6.

⁹ The protester does not raise a similar non-responsibility argument with respect to the first deficiency assessed against its quotation under the corporate capability and experience evaluation factor for failing to provide evidence of experience with headwater benefits reviews.

¹⁰ Because this was an FSS competition, the initial responsibility determination made by GSA in connection with the award of the protester's underlying FSS contract satisfies the requirement for a responsibility determination and there was no requirement for the agency to make a separate responsibility determination for placement of this order. Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 5-6.

Evaluation of Awardee's Quotation

The protester next challenges the technical acceptability of the awardee's quotation, arguing that it failed to address several sections of the SOW. Specifically, the protester asserts that the awardee's quotation failed to address the following six sections of the SOW: section 3.4 (technical input for documents such as headwater benefits reviews and environmental inspections); section 4 (technical input for NEPA documents); section 5 (preparation of NEPA Environmental Impact Statements (EISs)); section 6 (preparation of NEPA Environmental Assessments (EAs)); section 7 (environmental inspections); and section 14 (communication protocols). See Protester's Comments and Supp. Protest at 14-15. Although we do not address each of the alleged areas of deficiency, we have reviewed them all and find that none provides a basis to sustain the protest.

We address, as a representative example, the protester's erroneous allegation that the awardee's quotation failed to address the requirements of sections 4, 5, and 6 of the SOW related to the provision of technical input for and preparation of NEPA documents. The awardee's quotation provided that, as the incumbent contractor since 1997, it has prepared 112 EAs and 39 EISs for the agency, 22 and 10 of which, respectively, were completed during its performance of the most recent incumbent contract. AR, Exh. E, Sub. Exh. A, Awardee's Technical Quotation, at 11. In the corporate capabilities and experience section of the quotation, the awardee described its work preparing five EAs and EISs for the agency and an additional EIS for an industry client. Id. at 34-36 and 41. The awardee's quotation also contains a detailed description of its approach to preparing EAs and EISs and its processes for quality control and coordinating agency review and approval of those documents. Id. at 13-15 and 19-22. Finally, the awardee's quotation provided information for [DELETED] out of [DELETED] of its key personnel that specifically referenced those personnel having experience with NEPA work. Id. at 53-55, 59-60, 62-64, 66-69, 74-76, 88-92, 94-100. Given this record, we have no basis to question the agency's evaluation of the awardee's quotation.

Acquisition of Awardee

The protester alleges that the agency failed to reasonably consider the impact of the acquisition of Louis Berger by WSP Global, Inc., and that the award should therefore be set aside. Protest at 19. As a general matter, our decisions regarding corporate restructuring after the submission of proposals, or, as in this case, quotations, have involved the question of whether an offeror's proposal, or vendor's quotation, relies on resources that may no longer be available after the corporate restructuring. Honeywell Tech. Solutions, Inc., B-413317, B-413317.2, Oct. 5, 2016, 2017 CPD ¶ 2 at 11. Our analysis in these cases is fact-specific, hinging on whether reliance on any such resources are material to the performance of the contract. Id.; citing FCi Fed., Inc., B-408558.7, B-408558.8, Aug. 5, 2015, 2015 CPD ¶ 245 at 7.

Here, as conceded by the protester, Louis Berger was acquired by WSP Global on December 18, 2018, prior to the submission of quotations. Protest at 19; AR, Exh. E,

Sub. Exh. A, Awardee's Technical Quotation, at 4; Exh. E, Sub. Exh. B, Awardee's Price Quotation, at 140. Moreover, the record reflects that the awardee's quotation expressly addressed the acquisition, effectively indicating that it would not impact its performance of the contract. In its quotation, Louis Berger represented that it "will continue to operate as a separate legal entity as reflected in this proposal," and that "[n]o other aspects of this proposal or capabilities of the company will change for the time being[.]" AR, Exh. E, Sub. Exh. B, Awardee's Price Quotation, at 140. Because the agency clearly considered the acquisition, and there is no indication that the awardee will not be able to perform the task order in the manner described in its quotation, the protester's concerns regarding the agency's evaluation of the issue reflects nothing more than disagreement with the agency's judgment, which does not support a basis to sustain the protest.

Past Performance Evaluation

The protester also challenges the agency's evaluation of past performance, contending that the agency failed to consider past performance as required by the solicitation. Protester's Comments and Supp. Protest at 17; Protester's Comments on Agency's Clarification to the Record at 1. As noted above, the solicitation included past performance and corporate capability and experience as evaluation factors, and required vendors to submit examples of relevant work performed within 24 months of the issuance of the RFQ. The solicitation also provided that the agency "intends to contact a sampling of the offeror's corporate experience references to confirm the experience and request past performance information." RFQ at 47 and 50.

Generally, an agency's evaluation under an experience factor is distinct from its evaluation of a vendor or offeror's past performance. Amyx, Inc., B-410623, B-410623.2, Jan. 16, 2015, 2015 CPD ¶ 45 at 14. Specifically, the former focuses on the degree to which a vendor has performed similar work, and the latter focuses on the quality of the work performed. Id. Where a solicitation called for the evaluation of experience and past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. Divakar Techs., Inc., B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5. The evaluation of experience and past performance, by its very nature, is subjective, and a vendor's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. PricewaterhouseCoopers Public Sector, LLP, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 11.

Here, although the underlying evaluation documents do not denominate a specific section of the record as the agency's past performance evaluation, the record reflects some, albeit limited, consideration of the quality of the vendors' work. Specifically, the technical evaluators assigned the awardee's quotation a strength based on the quality of its performance as the incumbent contractor. In this regard, the agency's evaluators

expressly noted that the “ratings on Berger work products from FERC staff often consist of “very good” and “excellent ratings, as reported in the quote.”¹¹ AR, Exh. B, Sub. Exh. A, Awardee’s Technical Evaluation, at 3. In addition, the evaluators identified a minor weakness because one out of a number of NEPA documents prepared by the awardee during its incumbent performance had been challenged in court and, in 2018, was found to be arbitrary and capricious, leading to rework and increased costs for the agency. Id.

The record regarding the evaluation of the protester’s past performance is more problematic. The only indication of any consideration of EA Engineering’s past performance is the agency’s assignment of a weakness based on an EIS prepared by the protester for the agency approximately 10 years prior to issuance of the solicitation, which, according to the agency, had “significant quality issues” and required multiple rounds of revisions and budget increases to be made acceptable. AR, Exh. B, Sub. Exh. B, Protester’s Technical Evaluation, at 10. Aside from arguing that the information was too old to be considered where the solicitation required vendors to provide references for work performed within the past 24 months, the protester faults the agency for failing to contact any references for the protester or the awardee, as the RFQ indicated the agency would do. Protester’s Comments on Agency’s Clarification to the Record at 1.

As noted above, the evaluation scheme envisioned that vendors would provide references for work performed within 24 months of issuance of the solicitation and the RFQ indicated that the agency “intends to contact a sampling of . . . references.” RFQ at 47 and 50. The agency concedes that it did not contact any references for either vendor. Supp. Contracting Officer’s Statement at 1 ¶ 3. While the solicitation suggested that the agency would contact the vendors’ references, we are not aware of any requirement that the agency do so. See Geographic Res. Solutions, B-260402, June 19, 1995, 95-1 CPD ¶ 278 at 4-5; see also Roca Mgmt. Educ. & Training, Inc., B-293067, Jan. 15, 2004, 2004 CPD ¶ 28 at 5. As noted above, the record reflects that the agency in fact considered both positive and negative past performance information for the awardee. To the extent the agency failed to meaningfully consider the protester’s past performance information, or otherwise considered information that was significantly stale due to the passage of time, the protester was not prejudiced by any error that may have occurred where, as here, the agency reasonably assessed two deficiencies against the protester’s quotation rendering it unacceptable and the protester ineligible for award. See e.g., Beacon Grace, LLC, B-415529, Jan. 16, 2018, 2018 CPD ¶ 29 at 6. Competitive prejudice is an essential element of a viable protest;

¹¹ The protester does not acknowledge this information, or otherwise contest the agency’s reliance on past performance information that was obtained directly from the awardee’s quotation. Moreover, the protester has not specifically contested the quality of the awardee’s past performance. Accordingly, we see no basis to question the reasonableness of the agency’s evaluation of the awardee’s past performance. See e.g., Deva & Assocs., P.C., B-281393, Feb. 1, 1999, 99-1 CPD ¶ 41 at 4.

where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Id.

The protest is denied.

Thomas H. Armstrong
General Counsel