



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: 22nd Century Technologies, Inc.

File: B-417478.3; B-417478.4

Date: February 24, 2020

Daniel J. Strouse, Esq., David Cohen, Esq., and John J. O'Brien, Esq., Cordatis LLP, for the protester.

William T. Welch, Esq., Patrick McMahon, Esq., and Orest J. Jowyk, Esq., McMahon, Welch & Learned, PLLC, for KCI-Acuity, LLC, the intervenor.

Tudo N. Pham, Esq., Department of State, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenges to the evaluation of the protester's technical and price quotations are denied where the evaluations were reasonable and consistent with the terms of the solicitation.

2. Challenge to the agency's evaluation of experience and past performance of the awardee, a joint venture, is denied where the evaluation was consistent with the terms of the solicitation and applicable small business regulations.

DECISION

22nd Century Technologies, Inc., of McLean, Virginia, protests the issuance of a task order to KCI-Acuity, LLC, of Leesburg, Virginia, by the Department of State (DOS), under request for quotations (RFQ) No. 19AQMM19Q0098, which was issued for information technology (IT) support services. 22nd Century argues that the award to KCI-Acuity was improper because DOS unreasonably evaluated the vendors' quotations under the management and technical, price, and similar experience and past performance factors.

We deny the protest.

BACKGROUND

DOS issued the solicitation on July 26, 2019, seeking quotations to provide IT support for the agency's Bureau of Information Resource Management (IRM).¹ Statement of Work (SOW) at 5.² The IRM "strives to provide the IT backbone and infrastructure services to support the Department's mission requirements and provide IT leadership and innovation to inspire excellence in all IT initiatives." Id. Within the IRM, the agency's Systems and Integration Office (SIO) is the "primary source for robust cloud computing, collaborative services, and integrated software solutions." Id. The successful vendor will provide SIO "expertise and support in the execution of enterprise web-based, cloud-based, desktop and mobile computer solutions," to address:

the identification of business need, alignment to business architecture and strategic objectives, solution identification, alternatives of analysis, requirements analysis, software design and development, testing, systems engineering, technical writing, training, project management, strategic planning and governance, and infrastructure services to support SIO.

Id. at 6-7.

The competition was limited to firms that were awarded Streamlined Technology Acquisition Resources for Services (STARS) II contracts, which are multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts awarded by the General Services Administration to participants in the Small Business Administration (SBA) 8(a) program to provide information technology services and service-based solutions.³ RFQ Submission Instructions at 10. The RFQ anticipated the issuance of a time-and-materials task order with a base period of 1 year, with four 1-year options. Id. The

¹ On June 7, 2018, DOS issued RFQ No. 19AQMM18Q0082 for similar requirements in support of the IRM. Memorandum of Law (MOL) at 1. On April 8, 2019, the agency issued a task order to KCI-Acuity. Id. at 2. On April 12, Custom Value Partners filed a protest with our Office (B-417478) challenging the award to KCI-Acuity. The agency advised that it would take corrective action in response to the protest by cancelling the RFQ and issuing a new solicitation. Customer Value Partners, Inc., B-417478, May 13, 2019, at 1 (unpublished decision). Based on the agency's proposed corrective action, our Office dismissed the protest as academic. Id. The agency's corrective action resulted in the issuance of the RFQ at issue in this protest. MOL at 2.

² Citations to the SOW and the sections of the RFQ are to the conformed versions of those documents filed in the Electronic Protest Docket System at entry No. 14.

³ Although firms that compete for task orders IDIQ contracts are generally referred to as "vendors," and responses to an RFQ are usually referred to as quotations, the record and the parties' briefings use the terms offerors and vendors, and quotations and proposals, interchangeably. Our decision uses the terms vendors and quotations for the sake of consistency.

solicitation advised that quotations would be evaluated based on the following four factors: (1) management and technical approach, (2) similar experience and past performance, (3) staffing plan and key personnel, and (4) cost/price. RFQ Evaluation Criteria at 3. Under the similar experience and past performance factor, the similar experience subfactor was “more important” than the past performance subfactor. Id. For purposes of award, the three non-cost/price factors were listed in descending order of importance, and when combined, were “significantly more important” than cost/price. Id.

DOS received quotations from 22nd Century and KCI-Acuity by the closing date of August 26. Agency Report (AR), Tab 51, Source Selection Decision (SSD), at 8. On September 19, DOS selected KCI-Acuity’s quotation for award. 22nd Century filed a protest with our Office (B-417478.2) on September 26, challenging the award to KCI-Acuity. The agency advised our Office on October 22 that it would take corrective action in response to the protest by reevaluating the protester’s quotation and making a new award decision. 22nd Century Techs., Inc., B-417478.2, Oct. 29, 2019, at 1 (unpublished decision). Based on the agency’s proposed corrective action, we dismissed the protest as academic. Id.

As relevant here, the agency’s revised evaluation of the protester’s and awardee’s quotations was as follows:⁴

	22ND CENTURY	KCI-ACUITY
Management and Technical Approach	Marginal	Excellent
Similar Experience⁵	Somewhat Relevant	Very Relevant
Past Performance	Satisfactory Confidence	Substantial Confidence
Staffing and Key Personnel	Acceptable	Acceptable
Price	\$ 127,300,229	\$ 171,059,267

AR, Tab 51, SSD, at 9, 16.

⁴ For the management and technical approach factor and the staffing and key personnel factor, the agency assigned quotations a rating of exceptional, acceptable, marginal, or unacceptable. AR, Tab 51, SSD, at 4-5. For the similar experience subfactor, the agency assigned quotations a rating of very relevant, relevant, somewhat relevant, or not relevant. Id. at 4. For the past performance subfactor, the agency assigned quotations a rating of substantial confidence, satisfactory confidence, or limited confidence. Id. at 5.

⁵ Although the RFQ stated that similar experience and past performance were subfactors of a combined evaluation factor, the agency did not assign an overall rating for this factor. See AR, Tab 51, SSD, at 9

The contracting officer, who was also the source selection authority, reviewed the technical and cost evaluations and concurred with their findings. Id. at 1. The contracting officer compared the evaluations for each vendor's quotation under the non-cost/price factors and found that both 22nd Century's and KCI-Acuity's quotation offered "positive discriminators," but concluded that KCI-Acuity's quotation was more advantageous under the non-price factors than 22nd Century's quotation. Id. at 10-15. The contracting officer also found that 22nd Century's quotation presented high risk that "cannot be easily mitigated without substantial Government effort (e.g., major rewrite and evaluation of the revised proposal)." Id. at 27. In contrast, the agency found that KCI-Acuity's quotation presented low risk that could be "easily mitigated" during performance. Id. at 26-27. Based on these findings, the contracting officer concluded that KCI-Acuity's quotation merited selection for award at a cost/price premium of \$43.8 million. Id. at 29. The agency provided a debriefing to 22nd Century on November 13, and this protest followed.⁶

DISCUSSION

22nd Century raises three primary challenges to DOS's award to KCI-Acuity: (1) the agency unreasonably assigned the protester's quotation a marginal rating under the management and technical approach factor; (2) the agency improperly assigned risk to the protester's price quotation based on the awardee's failure to follow the solicitation instructions; and (3) the agency unreasonably evaluated the awardee's quotation under the relevant experience and past performance factor, based on the agency's failure to consider the awardee's performance record as a joint venture. For the reasons discussed below, we find no basis to sustain the protest.⁷

⁶ This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

⁷ 22nd Century also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest. In addition, the protester raised arguments in its supplemental protest (B-417478.4) that were addressed in the agency's supplemental report, but were not further addressed in the protester's supplemental comments. For example, 22nd Century argued that the agency treated the protester and awardee unequally regarding the assessment of a major weakness to the protester's quotation regarding cloud security. Protester's Comments & Supp. Protest, Dec. 30, 2019, at 6-11. Although the agency addressed this argument in its supplemental report, the protester's supplemental comments did not respond to the agency's arguments as they related to unequal treatment. Supp. MOL at 8-12; Protester's Supp. Comments, Jan. 15, 2020, at 5-6. We consider these arguments abandoned and therefore dismiss them. Bid Protest Regulations, 4 C.F.R. § 21.3(i)(3) ("GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.").

This task order competition was conducted among STARS II IDIQ contract holders pursuant to the provisions of Federal Acquisition Regulation (FAR) subpart 16.5. In reviewing protests of awards in task order competitions, we do not reevaluate quotations but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. DynCorp Int'l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors or vendors equally and evaluate their proposals or quotations evenhandedly against the solicitation's requirements and evaluation criteria. Sumaria Sys., Inc.; COLSA Corp., B-412961, B-412961.2, June 21, 2016, 2016 CPD ¶ 188 at 10. A protester's disagreement with the agency's judgment regarding the evaluation of proposals or quotations, without more, is not sufficient to establish that the agency acted unreasonably. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

Management and Technical Approach Factor Evaluation

22nd Century argues that DOS unreasonably assigned a marginal rating to its quotation under the management and technical approach evaluation factor. The protester challenges the two major weaknesses and three of the five minor weakness identified in its quotation. Protest at 7-30; Protester's Comments & Supp. Protest, Dec. 30, 2019, at 9-26. For the reasons discussed below, we find no basis to sustain the protest. We address two representative examples.

The management and technical approach factor stated that the agency would evaluate "the extent to which the Contractor submitted a clear and complete description of its approach for performing" the RFQ requirements. RFQ Evaluation Criteria at 4. The solicitation further explained that the agency would evaluate "the extent to which the Contractor included a comprehensive technical approach and contract work breakdown structure that identifies innovation and the methods of service delivery to be employed to meet the program and mission requirements set forth in the Statement of Work (SOW)." Id.

Hostile Environment Assumption

22nd Century argues that DOS unreasonably assigned a major weakness to its quotation because it contradicted a required security assumption. The SOW requires the contractor selected for award to perform the following IT security requirements:

all application and data development activities associated with defining, designing, building, and testing the physical and logical security of the application development processes, application development source code, data and data stores, all aspects of the development environment, and all

application development tools and components (hardware and software) according to all applicable federal laws. . . .

SOW ¶ 4.9 at 21.

The SOW further states that the contractor will be “expected to use application security development best practices as a fundamental component of application development and maintenance methodology that encompasses” a list of 14 security design rules. Id. As relevant here, the third security design rule is: “Assume a hostile environment.” Id. The agency explains that “despite having confidence in the defensive protections in place, the Government needs to assume at all times that adversaries have already obtained access to our systems.” AR, Tab 3, Technical Evaluation Team (TET) Response to Protest, at 8.⁸ This security assumption is a “complementary approach to traditional security defenses that focus on preventing breach,” but is intended to ensure that the agency will be able to “address modern adversaries and advanced persistent threats” by assuming the need to operate under conditions where breaches have already occurred. Id.

DOS assigned a major weakness to 22nd Century’s quotation because the agency identified an approach that was not consistent with the SOW’s requirement to assume a hostile environment. AR, Tab 36, Technical Evaluation, at 10-11. The protester’s quotation included a chart that addressed each of the security design rules listed in the SOW. AR, Tab 32, 22nd Century Technical Quotation, at 49-50. For the hostile environment assumption rule, the protester provided the following explanation of its approach:

Our IT Security approach will be risk-based per the [National Institute of Standards and Technology (NIST) Risk Management Framework (RMF)], meaning all aspects of the exchange or storage of information or use of business systems will be assumed safe – all aspects of IT infrastructure will have assessments and security control assignment according to the NIST.

Id. at 50.

The agency found that the protester’s proposed approach merited a major weakness because it assumed a “safe” environment that focused on preventing security breaches,

⁸ 22nd Century argues that reports prepared by the DOS’s TET in response to the initial and supplemental protests contain improper post-hoc responses to the protester’s evaluation challenges and should not be considered. Protester’s Comments & Supp. Protest, Dec. 30, 2019, at 1 n.1; Protester’s Supp. Comments, Jan. 15, 2000, at 1. We conclude that the TET reports reasonably provide additional details in response to the protest that are consistent with the contemporaneous evaluation and as such are appropriate for consideration. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

rather than addressing a “hostile” environment where adversaries already have achieved a security breach. AR, Tab 36, Technical Evaluation, at 10-11. In particular the agency found that the protester’s reference to the RMF standard was inconsistent with the security design rule:

The IT security requirements described in section 4.9 of the SOW reference the design principle to “assume a hostile environment” when developing technology. This is a shift from the traditional security approach of “preventing breach” to the newer approach to “assuming a breach” has already occurred. The vendor’s approach to meet this design requirement is “risk-based per the RMF, meaning all aspects of the exchange or storage of information or use of business systems will be assumed safe” (pg. 50). The NIST RMF does not apply the “assume a hostile environment” design and is instead focused on the “prevent breach” approach. It is also unclear if the vendor is proposing a different meaning for the word “safe”. The vendor’s approach seems to misunderstand the solicitation requirement as it describes the “prevent breach” focused approach only.

Id.

22nd Century does not dispute the agency’s statement that the NIST RMF approach is not consistent with the requirement to assume a hostile environment. The protester instead contends that DOS’s assignment of a major weakness was unreasonable because it “focused exclusively on one block of text” and failed to consider other parts of the protester’s quotation which encompass an approach that assumes a hostile environment. Protest at 12-13. In this regard, the protester argues that its quotation contains numerous references to a DevSecOps (development/security/operations) approach to the overall SOW requirements, and that the agency should have understood these references to encompass the requirement to assume a hostile environment. Id. at 13; Protester’s Comments & Supp. Protest, Dec. 30, 2019, at 26.

22nd Century does not explain, however, why the agency should have understood the references in the protester’s quotation to a DevSecOps approach to mean that the protester was proposing an approach that assumed a hostile environment. In this regard, while the protester cites sources which indicated that DevSecOps can be understood to encompass the required assumption, none of the protester’s post-protest explanations are included in its quotation. See Protest at 13. The record shows that the only express reference in the protester’s quotation to the requirement to assume a hostile environment security design rule (assume breach) addressed the NIST RMF approach (prevent breach)--which is inconsistent with the required assumption. See AR, Tab 32, 22nd Century Technical Quotation, at 50; Tab 36, Technical Evaluation, at 10-11. Further, the agency concluded that the protester’s reference to NIST RMF, in conjunction with the protester’s explanation that “all aspects of the exchange or storage of information or use of business systems will be assumed safe” reflected a misunderstanding of the requirement to assume a hostile environment. On this record,

we conclude that the agency's evaluation was reasonable and find no basis to sustain the protest.

FedRAMP and Cloud Security

Next, 22nd Century argues that DOS unreasonably assigned its quotation a major weakness for failing to adequately address the SOW's cloud security requirements, particularly DOS and Federal Risk and Authorization Management Program (FedRAMP) standards.⁹ The SOW will require the contractor selected for award to perform the following IT security requirements:

The Contractor shall implement and maintain administrative, technical, and physical safeguards and controls for multiple cloud computing models, with the security level and services required in accordance with Department of State [Foreign Affairs Manual and Foreign Affairs Handbook (FAM/FAH)] cloud computing policies as well as [FedRAMP] standards. Current cloud computing services include but [are] not limited to: [Microsoft Office 360] (including SharePoint Online, Dynamics Online, PowerBI, OneDrive, PowerApps, Forms, and Flow), Amazon Web Services, and Microsoft Azure. This list is subject to change at any time.

SOW ¶ 4.12 at 22.

The agency found that 22nd Century's quotation merited a significant weakness because it restated the SOW requirement without clearly explaining how the protester would perform those requirements:

The proposal restates the requirement and did not seem to elaborate or explain on "how" the requirement will be met. The vendor did not submit a clear and complete description of its approach to cloud computing services relevant to "how" they will achieve compliance with DOS FAM/FAH and FedRAMP policies. The proposal provides information regarding performing a technical review of candidate systems for potential migration to the cloud in terms of the different ways in which each technology can be migrated "1) Re-hosting 2) Re-platforming 3) Refactoring" (pg. 53). However, these migration approaches described do not include descriptions relevant to DOS FAM/FAH or FedRAMP requirements. The vendor also describes work performed elsewhere as illustrative of their cloud compliance related capabilities. However, the references to work performed elsewhere do not describe their approach to

⁹ FedRAMP is a government-wide program applicable to federal civilian agencies that provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services. AR, Tab 3, TET Response to Protest, at 4; see also FedRAMP Website, fedramp.gov/faqs/ (last visited Feb. 12, 2020).

the DOS FAM/FAH or federally mandated FedRAMP processes. The vendor's approach to meeting the requirements of SOW section 4.12 seem[s] focused on the technical options on "how" to migrate technologies but lack[s] specificity regarding their approach to complying with industry and government standards, such as FedRAMP and DOS FAM/FAH as stated in the solicitation.

AR, Tab 36, Technical Evaluation, at 10.

22nd Century first argues that the management and technical approach evaluation factor did not specifically state that a vendor's approach to cloud security and compliance with FedRAMP standards would be evaluated. Protester's Comments & Supp. Protest, Dec. 30, 2019, at 9. As discussed above, however, this evaluation factor stated that the agency would evaluate "the extent to which the Contractor included a comprehensive technical approach and contract work breakdown structure that identifies innovation and the methods of service delivery to be employed to meet the program and mission requirements set forth in the [SOW]." RFQ Evaluation Criteria at 4. The SOW, in turn, states that the contractor must "implement and maintain administrative, technical, and physical safeguards and controls for multiple cloud computing models" in accordance with DOS policies and FedRAMP. SOW ¶ 4.12 at 22. On this record, we find no merit to the protester's argument that the agency's evaluation was outside the scope of the terms of the solicitation.

Next, 22nd Century argues that DOS unreasonably found its quotation did not explain how it would implement and maintain administrative, technical, and physical safeguards and controls for multiple cloud computing models in accordance with FedRAMP. Protester Comments & Supp. Protest, Dec. 30, 2019, at 9-10. The protester contends that its quotation contained numerous references to FedRAMP, which indicated that those policies would be followed. Id. Specifically, the protester cites the following section of its quotation, which it contends addresses its approach to FedRAMP: "Approach: Team 22nd understands that a key aspect of migration to the cloud is the incorporation of the FedRamp security model into the SIO's own Authorization processes. . . ." AR Tab 32, 22nd Century Technical Quotation, at 53. The protester also notes that its quotation addressed instances where it had performed cloud security requirements, and further stated that it would follow best practices, such as FedRAMP guidelines, to ensure successful performance. Id. The protester therefore contends that these references "clearly indicated that the government's security processes and procedures would be used for any cloud-based IT solutions supported by this contract." Protester Comments & Supp. Protest, Dec. 30, 2019, at 9.

DOS's evaluation found that although the protester stated that it would comply with DOS FAM/FAH and FedRAMP policies, this blanket statement of compliance did not provide a "clear and complete description of its approach" for performing the SOW requirements--in particular to implement and maintain administrative, technical, and physical safeguards and controls for the agency's cloud computing needs. AR, Tab 36, Technical Evaluation, at 10; see also Tab 3, TET Response to Protest, at 5. For

example, the agency found that the protester's quotation described various efforts for other federal agencies in connection with cloud migration efforts, but did not describe that work in terms of how the work complied with applicable policies, such as DOS FAM/FAH and FedRAMP. Id. The agency also found that the protester's quotation focused on different potential options for cloud migration, but did not address those options in the context of the protester's approach to meeting the SOW's DOS FAM/FAH and FedRAMP requirements. Id.

We conclude that the protester's disagreement with the agency's judgment regarding the adequacy of the detail provided in its quotation does not demonstrate that the agency's evaluation was unreasonable. See NikSoft Sys. Corp., B-415716.33, B-415716.28, July 12, 2019, 2019 CPD ¶ 276 at 13. We therefore find no basis to sustain the protest.

Cost/Price Factor Evaluation

22nd Century also argues that DOS unreasonably assigned its quotation a weakness under the price evaluation factor. The protester contends that the agency performed an improper price realism evaluation. For the reasons discussed below, we find no basis to sustain the protest.

As a general matter, when awarding a fixed-price contract or task order, or a time-and-materials contract or task order with fixed labor rates, an agency is only required to determine whether the offered prices are fair and reasonable. See FAR §§ 16.505(b)(3); 15.402(a); HP Enter. Servs., LLC, B-413888.2 et al., June 21, 2017, 2017 CPD ¶ 239 at 5. An agency may, however, conduct a price realism analysis in awarding a fixed-price contract or task order for the limited purposes of assessing whether an offeror's or vendor's low price reflects a lack of technical understanding or performance risk. See FAR § 15.404-1(d)(3); Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. Where a proposal or quotation does not expressly provide for the evaluation of price realism, we will only conclude that a solicitation contemplates such an evaluation where the solicitation: (1) states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and (2) states that a proposal or quotation can be rejected or assessed technical risk for offering low prices. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 4; DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Absent a solicitation provision providing for a price realism evaluation, agencies are neither required, nor permitted, to conduct a realism evaluation in awarding a fixed-price contract or task order. See Emergint Techs., Inc., supra.

The RFQ did not expressly provide for the evaluation of price realism, nor did it state that the agency would evaluate a vendor's proposed prices to assess its understanding of the technical requirements. Instead, the solicitation stated that it would evaluate proposed prices for "cost/price risks" and compliance with the solicitation instructions:

The Government will review and evaluate all information contained within the submitted cost-price volume for completeness and accuracy, cost/price fair and reasonableness and cost/price risks. The Government reserves the right to reject a submission if it is determined that the pricing information is non-compliant with [the] Attachment 4 Submission Instructions and presents an unacceptable risk to the Government.

RFQ Evaluation Criteria at 8. As relevant here, attachment 4 to the RFQ provided the following instructions for the submission of labor rates:

Pricing based on your discounted 8(a) STARS II labor rates: for [contract line item numbers] proposed on a Time and Materials or Labor Hour basis, the Government requires contractors to propose locality specific prices for each place of performance specified in the RFQ. Contractors must also show the corresponding undiscounted 8(a) STARS II ceiling labor rate next to each proposed discounted labor rate, for price evaluation and comparison purposes.

RFQ Submission Instructions at 11. The RFQ specified that performance would be in the Washington, D.C. metropolitan area. RFQ at 6.

22nd Century's quotation stated that its proposed labor rates were based on salary survey data and Bureau of Labor Statistics data from the Washington, D.C. area. AR, Tab 33, 22nd Century Price Quotation, at 6. The pricing tables in the protester's quotation listed the proposed labor category, STARS II labor category, STARS II labor rates and discounts to those rates for each contract year. AR, Tab 34, 22nd Century Pricing Tables. The agency found, however, that the 22nd Century's proposed STARS II labor rates did not correspond to the protester's STARS II contract for the Washington, D.C. area. Agency Response to GAO Questions, Feb. 12, 2020, at 1-2. In connection with the September 19, 2019, award to KCI-Acuity, the agency advised 22nd Century during its debriefing that its quotation did not include labor rates that corresponded to its STARS II contract for the Washington, D.C. area. Id. 22nd Century's protest of the award to KCI-Acuity (B-414478.2) advised the agency for the first time that the protester's quoted price was based on labor rates for the Richmond, Virginia area, and discounts based on those rates. Protest (B-414478.2) at 25.

The agency's corrective action in response to 22nd Century's protest included a reevaluation of the protester's price quotation and pricing tables. The agency found the protester's proposed labor rates did not comply with the RFQ instructions regarding the submission of labor rates for the place of performance, as those rates corresponded to Richmond, rather than Washington. AR, Tab 37, Cost Evaluation, at 9-10. The agency also found that the proposed rates did not comply with the RFQ instructions because, although the quotation was submitted on August 26, 2019, performance would begin in September 2019, and 22nd Century proposed STARS II labor rates for the contract year ending on August 30, 2019, rather than the rates for the option period encompassing August 31, 2019 through August 30, 2020. Id. at 10. The agency noted that the

protester's proposed labor rates were "significantly lower than [the independent government cost estimate (IGCE)] labor rates per position," and concluded that the "cost-price proposal is not accurate and represents a risk." Id. at 9; see also AR, Tab 51, SSD, at 29.

22nd Century argues that "the agency's concern here appears to be one related to price realism--that is, the pricing is too low." Protester's Comments & Supp. Protest, Dec. 30, 2019, at 27. The protester contends that because the RFQ did not anticipate a price realism evaluation, the agency improperly assigned a weakness based on concerns that its labor rates were too low.

We find that the agency's evaluation did not constitute a price realism evaluation, as it did not address whether the price shows a lack of technical understanding. See FAR § 15.404-1(d)(3); Emergint Techs., Inc., supra. Instead, the evaluation identified concerns that the protester's price quotation did not comply with the terms of the solicitation because it did not use the labor rates for the Washington, D.C. area, and that the labor rates were for an expiring year of the contract. AR, Tab 37 Cost Evaluation, at 9-10. As a consequence of these noncompliant aspects of the quotation, the agency concluded that the protester's price posed a risk to the government because it was based on labor rates in Richmond that were lower than the labor rates for the place of performance in Washington, D.C., and were also based on a lower-priced STARS II contract year than the contract year that would be in effect at the time of award. Id.

We think that the agency reasonably found that the protester's price quotation for Richmond labor rates did not comply with the requirement to "propose locality specific prices for each place of performance specified in the RFQ." RFQ Submission Instructions at 11. We also think that the agency reasonably found that the protester's price quotation was noncompliant because it proposed rates for performance periods other than those listed in the solicitation. Although the RFQ did not state that vendors were required to propose STARS II rates that corresponded to the specified RFQ performance periods, we think the agency's finding was reasonably related to the solicitation's requirement to "show the corresponding undiscounted 8(a) STARS II ceiling labor rate" upon which any discounts were based. See Northrop Grumman Sys. Corp., B-414312 et al., May 1, 2017, 2017 CPD ¶ 128 at 12 (Agencies not required to identify all areas of each factor that might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to, or encompassed by, the stated factors).

In sum, the record shows that the agency found that the protester's proposed labor rates were lower than the IGCE and concluded that 22nd Century's "cost-price proposal is not accurate." AR, Tab 37 Cost Evaluation, at 9; see also AR, Tab 51, SSD, at 29. The basis for the concern, however, was the protester's failure to comply with the RFQ instructions, which provided for an assessment of "cost/price risks" and advised that the agency would review whether the cost/price submission was "non-compliant with [the] Attachment 4 Submission Instructions." RFQ Evaluation Criteria at 8. In light of the

RFQ's broad language regarding the assessment of risks, and the admonishment to follow the RFQ's submission instructions, we conclude the agency was within its discretion to assign a weakness based on the protester's quotation of labor rates that did not correspond to the solicitation's instructions. We therefore find no basis to sustain the protest.

Similar Experience and Past Performance Evaluations

Finally, 22nd Century argues that DOS unreasonably evaluated KCI-Acuity's quotation under the similar experience and past performance evaluation factor. KCI-Acuity is an 8(a) joint venture approved by the SBA; the joint venture is the firm that holds a STARS II IDIQ contract. AR, Tab 35, KCI-Acuity Technical Quotation, at 3. The partners in the joint venture are Kalani Consulting, Inc. and Acuity, Inc. Id. The protester contends that the agency improperly failed to evaluate the experience and past performance of the joint venture, and improperly relied solely on the record of the individual joint venture partners. For the reasons discussed below, we find no basis to sustain the protest.

The Small Business Act requires agencies under certain circumstances to evaluate the individual partners of a joint venture and to attribute those evaluations to the joint venture itself:

When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(q)(1)(C).

SBA promulgated regulations implementing this statutory provision, including the following:

When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

13 C.F.R. § 125.8(e). SBA regulations similarly provide that approved 8(a) joint ventures must be evaluated as follows:

Past performance and experience. When evaluating the past performance and experience of an entity submitting an offer for an 8(a) contract as a joint venture approved by SBA pursuant to this section, a procuring activity must consider work done individually by each partner

to the joint venture as well as any work done by the joint venture itself previously.

13 CFR § 124.513(f). SBA's regulations define the term contract to include "orders issued against Multiple Award Contracts." 13 C.F.R. § 125.1; see also 13 C.F.R. § 124.501(a) ("SBA is authorized to enter into all types of contracts with other Federal agencies" under the 8(a) program including set-asides of orders).

The RFQ included a sample past performance contract profile, which was to be used to provide information regarding the relevance, size, scope, and complexity of vendors' experience and past performance. RFQ Past Performance Contract Profile at 1-2; RFQ Submission Instructions at 8. The similar experience subfactor required vendors to "provide no more than eight (8) Past Performance Contract Profiles," and further specified that "[a]t least three (3) of the Past Performance Contract Profiles shall be for services performed by the prime Contractor." RFQ Submission Instructions at 8. The past performance subfactor required vendors to submit a past performance customer satisfaction survey for each past performance contract profile. Id. The RFQ advised that the agency would evaluate the profiles under the similar experience subfactor based on "the extent to which the Contractor and its team demonstrated experiences comparable" to the SOW requirements. RFQ Evaluation Criteria at 5. For the past performance subfactor, the agency was to "evaluate Past Performance Customer Satisfaction Surveys submitted by references that support the Past Performance Contract Profiles." Id.

KCI-Acuity's quotation included eight past performance contract profiles: four for Acuity, three for subcontractor Northrop Grumman, and one for subcontractor KPMG LLC. AR, Tab 35, KCI-Acuity Technical Quotation, at 121. The agency assigned the awardee's quotation a very relevant rating under the similar experience subfactor, and a substantial confidence rating under the past performance subfactor. AR, Tab 51, SSD, at 9, 14. DOS states that it evaluated KCI-Acuity's quotation in accordance with the SBA regulations cited above, specifically 13 C.F.R. § 125.8(e). Supp. MOL at 4-5; see also AR, Tab 51, SSD, at 13-14 n.4 (agency noted that Small Business Act and implementing regulations required agencies to consider past performance of individual joint venture partners). In this regard, the agency contends that the RFQ did not prohibit the agency from evaluating the experience and past performance of joint venture partners, and that evaluating the joint venture partners was consistent with the requirements of the SBA regulations. Id.

22nd Century does not dispute that the agency appropriately considered the experience and past performance of KCI and Acuity, individually. The protester argues, however, that KCI-Acuity's quotation failed to meet the requirements of the solicitation because it did not submit at least three past performance contract profiles for the KCI-Acuity joint venture. Protester's Comments & Supp. Protest, Dec. 30, 2019, at 2-4. The protester contends that the RFQ's requirement for past performance contract profiles for the "prime contractor" must be interpreted to require a minimum of three profiles for the entity that holds the STARS II IDIQ contract--which in the case of the awardee is the

KCI-Acuity joint venture. Id. For this reason, the protester contends that the agency should have either rejected the awardee's quotation as unacceptable or assigned a lower rating under the similar experience and past performance factor.

We conclude that DOS's evaluation was reasonable and consistent with the terms of the solicitation and the applicable SBA regulations. The RFQ submission instructions regarding the similar experience and past performance factor did not define the term "prime contractor," nor did it address how SBA-approved joint venture vendors should submit information for that factor. See RFQ Submission Instructions at 8.

As discussed above, the SBA regulations state that agencies "must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously." 13 C.F.R. §§ 125.8(e), 124.513(f). These regulations were issued by SBA in its notice of final rulemaking on July 25, 2016, which implemented the requirements of the Small Business Jobs Act of 2010, Pub. L. No. 111-240 (Sept. 27, 2010) and the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 (Jan. 2, 2013). This final rule revised several SBA regulations, including 13 C.F.R. §§ 125.8(e) and 124.513(f), with regard to the requirements to consider the experience and performance records of joint venture partners. 81 Fed. Reg. 48568 (July 25, 2016). The SBA's notice explained that the current version of the regulations were proposed "in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity." Id. The rationale for the SBA's amendment of the regulations included the following concern:

Where an agency required the specific joint venture entity itself to have experience and past performance, it made it extremely hard for newly established (and impossible for first-time) joint venture partners to demonstrate positive past performance. Each partner to a joint venture may have individually performed on one or more similar contracts previously, but the joint venture would not be credited with any experience or past performance of its individual partners.

Id.

In effect, the agency's evaluation treated the individual partners of the joint venture as the prime contractor for purposes of the evaluation. We think the agency's evaluation was reasonable, in light of the express requirements of the SBA regulations to consider the performance records of individual small business joint venture partners, and the SBA's intent in promulgating them. We therefore conclude that the agency reasonably interpreted the requirement that the "prime contractor" provide past performance contract profiles permits a vendor to submit and the agency to consider information submitted by the partners of an SBA-approved 8(a) joint venture. We further conclude that the agency was not required to reject or negatively evaluate vendors who proposed as SBA-approved joint ventures, but relied on the experience and past performance of the individual joint venture partners. We therefore find no basis to sustain the

protester's challenge to the evaluation of the awardee's quotation under the similar experience and past performance factor.

The protest is denied.

Thomas H. Armstrong
General Counsel