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Decision

Matter of: Erickson Helicopters, Inc.

File: B-418981

Date: October 22, 2020

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DIGEST

1. Protest challenging the agency's consideration of additional past performance references personally known by the evaluators or identified from government databases beyond the three references that the awardee was required to identify in its proposal is denied where the solicitation specifically reserved the agency's right to obtain past performance information from any sources available to the government.
 2. Protest challenging the agency's evaluation of the relevancy and quality of the awardee's past performance is denied where the agency's evaluation was reasonable and in accordance with the terms of the solicitation.
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DECISION

Erickson Helicopters, Inc., of Portland, Oregon, protests the issuance of a task order to Construction Helicopters, Inc. d/b/a as CHI Aviation, of Howell, Michigan, under request for task order proposals (RFTOP) No. HTC71120FR044, which was issued by the Department of Defense, U.S. Transportation Command (TRANSCOM), for rotary wing casualty evacuation (CASEVAC) and logistic movement support in Yemen. Erickson challenges the agency's evaluation of CHI Aviation's past performance.

We deny the protest.

BACKGROUND

The RFTOP, which was issued on May 14, 2020, and subsequently amended one time, was issued to holders of the Worldwide Airlift Services Program – 135 (WASP-135) multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract, for CASEVAC, passenger, cargo, and combination passenger and cargo services in and around the country of Yemen and its territorial waters.¹ The RFTOP contemplated the award of a fixed-price task order with a base year, and four 1-year option periods. Agency Report (AR), Tab 5, RFTOP at 1, 5.² Award was to be made on a best-value basis utilizing the following evaluation factors: (1) technical; (2) past performance; and (3) price.

The solicitation established a multi-step process for making the best-value selection. First, the agency was to calculate the total evaluated price of all offerors and rank them in ascending order. *Id.* at 5. Then, the agency would evaluate the proposal calculated to have the lowest total evaluated price for technical acceptability. *Id.* If the lowest-priced offeror was found to have an acceptable technical proposal, the agency would then evaluate that offeror's past performance. *Id.* at 6. If the lowest-priced offeror's past performance was rated as warranting the highest confidence assessment of substantial, the agency would then evaluate the proposed pricing for balance, fairness, and reasonableness. *Id.* If the lowest-priced offeror's prices were determined to be balanced, fair, and reasonable, then award would be made to that offeror without further consideration of any other offers. *Id.* If the lowest-priced offeror (1) was rated unacceptable in its technical capability, (2) did not receive the highest past performance rating of substantial, or (3) was determined to propose pricing that was not fair and reasonable, or if the offeror's proposal included unbalanced pricing that posed an unacceptable risk to the government, then the agency would evaluate the next lowest-priced proposal. *Id.*

Relevant to the issues in this protest, the agency was to evaluate past performance to assess the offeror's probability of meeting the RFTOP's requirements, considering the offeror's demonstrated recent and relevant record of performance with supplying services meeting the contract's requirements. *Id.* at 4. Offerors were instructed to submit no more than three past performance references for different contracts or efforts it performed demonstrating similar scope and complexity of services as compared to the RFTOP's requirements. *Id.* The RFTOP also specified that past performance information could "be obtained from any sources available to the Government." *Id.* at 7.

¹ The WASP-135 IDIQ contract, which was awarded by TRANSCOM, provides for movement of passengers and cargo, air ambulance, medical evacuation, and other related services; there are currently 18 WASP-135 IDIQ contract holders. AR, Tab 1, Contracting Officer's Statement (COS) at 1-2.

² References to the RFP herein are to the conformed copy inclusive of the amendment that was produced by the agency with its report. Additionally, references to page numbers for the RFTOP and the exhibits to the agency report are to the Bates numbering utilized by the agency.

As relevant to the protest issues raised, the agency assessed the recency and relevancy of each past performance effort using the following relevancy standards:

Rating	Description
Very Relevant	Present/past performance effort involved essentially the same scope and magnitude of effort and complexities this RFTOP requires.
Relevant	Present/past performance effort involved similar scope and magnitude of effort and complexities this RFTOP requires.
Somewhat Relevant	Present/past performance effort involved some of the scope and magnitude of effort and complexities this RFTOP requires.
Not Relevant	Present/past performance effort involved little or none of the scope and magnitude of effort and complexities this RFTOP requires.

Id. at 7-8.

TRANSCOM received four proposals in response to the RFTOP, including those from Erickson and CHI Aviation. AR, Tab 21, Best Value Determination, at 1. CHI Aviation proposed the lowest total evaluated price of \$112,472,090.³ *Id.* at 2. After finding CHI Aviation’s technical proposal to be technically acceptable, the agency proceeded to evaluate CHI Aviation’s past performance.

CHI Aviation identified three past performance references in its past performance proposal. Two of the referenced contracts were performed by CHI Aviation as a prime contractor; the third referenced contract was performed by a CHI Aviation subcontractor. Relevant here, one of CHI Aviation’s prime contract references was its U.S. Central Command (USCENTCOM) Rotary Wing Transportation Support indefinite-delivery, indefinite-quantity contract. In its narrative describing the contract, CHI Aviation discussed two active task orders that it is currently performing under the contract. AR, Tab 10, CHI Aviation Past Performance Proposal, at 6-7. TRANSCOM viewed the two USCENTCOM Rotary Wing task orders as separate efforts and decided that each should be independently evaluated under the past performance factor. AR, Tab 1, COS at 8-9. Additionally, the contracting officer for this procurement, who was also the source selection authority, decided that it was appropriate to consider the other prime contract reference identified in CHI Aviation’s proposal, as well as an additional task order performed by CHI Aviation in Afghanistan, because she had personal knowledge about those references because she is also the contracting officer for those references. *Id.* at 9-10, 12.

³ Erickson proposed the second lowest proposed total evaluated price of \$126,586,447. AR, Tab 21, Best Value Determination, at 2.

The agency ultimately evaluated all five references as having similar or essentially the same scope and magnitude of effort and complexity as required by this RFTOP, and found that all references received ratings ranging from exceptional to satisfactory. Based on these findings, the agency rated CHI Aviation's past performance as substantial confidence. AR, Tab 20, Past Performance Evaluation at 2-7. On July 9, the contracting officer executed her source selection decision selecting CHI Aviation's proposal for award. AR, Tab 21, Best Value Determination, at 3. Following a debriefing, Erickson filed this protest with our Office.⁴

DISCUSSION

Erickson raises a number of challenges to the evaluation of CHI Aviation's past performance, arguing that but for these errors, the awardee would not have received a "substantial confidence" assessment. The protester first challenges the agency's consideration of five past performance references for the awardee. Erickson contends that the agency improperly relied on past performance information known to the agency and obtained from government databases to effectively "rewrite" the protester's proposal. The protester also challenges the agency's relevancy assessments for four of the five evaluated references, and alleges that the agency also failed to reasonably consider certain adverse past performance information. For the reasons that follow, we find no basis on which to sustain the protest.⁵

⁴ The value of the task order here exceeds \$25 million. Accordingly, this protest is within our Office's task order jurisdiction to resolve protests involving task orders issued under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

⁵ Erickson raises a number of collateral arguments. Although our decision does not specifically address each of the arguments, we have reviewed them all and find that none provides any basis on which to sustain the protest. For example, the protester complains that the agency improperly considered a past performance reference submitted on behalf of a CHI Aviation subcontractor, which the protester contends was not permitted by the RFTOP. Specifically, Erickson argues that the RFTOP's requirement that "[t]he *offeror shall* submit no more than three (3) past performance references from different contracts or efforts *it* has performed" precluded offerors from submitting past performance information from its proposed subcontractors. Erickson Comments at 4 (*citing* RFTOP at 4 (emphasis added by protester)). We disagree. We have explained that the past performance of proposed subcontractors may properly be considered in evaluating the past performance of an offeror where the solicitation does not expressly prohibit its consideration. *DBI Waste Sys., Inc.*, B-408304, B-408304.2, Aug. 5, 2013, 2013 CPD ¶ 188 at 6; *Indtai Inc.*, B-298432.3, Jan. 17, 2007, 2007 CPD ¶ 13 at 3. We do not find the RFTOP provision relied on by Erickson--or any other provision of the RFTOP--expressly prohibited consideration of a proposed subcontractor's past performance.

Erickson first complains that the agency improperly evaluated the awardee's past performance when it considered contracts that were not among the three specific contracts identified by CHI Aviation in its proposal. Notwithstanding the unequivocal language of the RFTOP stating that past performance information could "be obtained from any sources available to the Government," AR, Tab 5, RFTOP at 7, the protester contends that the agency improperly considered additional past performance references beyond the three identified by CHI Aviation in its proposal. According to the protester, the solicitation did not allow the contracting officer to use her own knowledge about the awardee's performance on other contracts that were not included in the awardee's proposal, as well as information obtained from government databases, in the agency's evaluation of CHI Aviation's past performance. In conducting a past performance evaluation, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated fairly, reasonably, and in accordance with the solicitation's evaluation scheme.⁶ *ProSecure LLC*, B-418397, B-418397.2, Apr. 15, 2020, 2020 CPD ¶ 156 at 6. We find no merit to the protester's objection.

At the outset, we note that the protester does not identify any decision by our Office where we have limited an agency's consideration of past performance information to the information contained in an offeror's proposal when the solicitation has, as in this case, specifically reserved the agency's right to consider past performance information from any source.⁷ Rather, the protester relies on an inapposite line of our decisions dealing

⁶ Erickson also alleges that the agency's consideration of more than three references for the awardee reflects disparate treatment in the evaluation of proposals. We find no basis to question the agency's evaluation on this basis, however, because it is entirely speculative. Here, since the agency never actually evaluated the protester's past performance, there is no basis to conclude the evaluation was disparate. As addressed above, the specific evaluation methodology set forth in the RFTOP provided that the agency would limit its evaluation to the lowest-priced proposal, and the agency would only evaluate the next lowest-priced proposal if the lowest-priced proposal did not meet the award eligibility requirements. See AR, Tab 5, RFTOP at 6. Thus, Erickson's protest merely speculates that the agency would not have considered additional references if the agency were to have evaluated the protester's proposal. Our Office assumes that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and we will not consider a protest allegation which speculates that an agency would not have evaluated proposals in such a manner. *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4.

⁷ To the extent that Erickson relies on our decision in *ANHAM FZCO*, B-415969 *et al.*, May 8, 2018, 2018 CPD ¶ 184, that decision is readily distinguishable from the facts here. In that protest, the solicitation stated that when evaluating offerors' experience--not past performance--if an offeror identified more than five comparable contracts, then "only the 5 highest dollar value contracts [would] be used for evaluation." *Id.* at 3 (internal citation omitted). In evaluating the protester's experience, the agency elected to substitute a smaller reference for one of the five examples included in the protester's

with situations where we explained that an agency is not generally required to seek out additional information missing from an offeror's proposal.

In this regard, we have recognized that an agency is generally not required to consider past performance not presented in an offeror's proposal, as there is generally no requirement for an agency to remedy an offeror's failure to include information in its own proposal; when a vendor is in control of the information contained in its proposal--and not reliant on third parties to submit that information--the offeror exercises its own judgment as to the information that the agency should consider. Accordingly, in such circumstances, we have concluded that an agency is not obligated to seek out and favorably consider information that the protester was in fact required to have included in its proposal. See, e.g., *Level 3 Comm'ns, LLC*, B-412854 *et al.*, June 21, 2016, 2016 CPD ¶ 171 at 7 (denying protest that agency unreasonably failed to seek out information from another contract demonstrating compliance with the solicitation's requirements where the protester's proposal did not demonstrate compliance with the requirements).

In contrast to the foregoing line of decisions, here the agency, consistent with the terms of the RFTOP, exercised its discretion to consider additional past performance information for CHI Aviation that was personally known to the agency or otherwise obtained from government databases. As noted above, the solicitation expressly advised competitors that the agency could consider past performance from "any sources available to the Government." Given the solicitation's sweeping permission about the scope of past performance information the agency could consider, we find that the protester's objection to the agency's exercise of its discretion to consider the information at issue fails to provide a basis to question the agency's evaluation.

Erickson next attacks the agency's evaluation of the relevancy of four of CHI Aviation's five evaluated references, and argues that the agency failed to reasonably consider certain adverse past performance information. The protester contends that, but for these errors, CHI Aviation would have been evaluated as warranting a lower confidence assessment. The evaluation of the relative merit or relevance of past performance references is generally a matter within the agency's discretion, which our Office will not disturb unless it is shown to be unreasonable or inconsistent with the solicitation's evaluation criteria. *Sayres & Assocs. Corp.*, B-418382, Mar. 31, 2020, 2020 CPD ¶ 134 at 5. The evaluation of past performance, by its very nature, is subjective; an offeror's disagreement with the agency's evaluation judgments, without more, does not

final revised proposal. We sustained the protest because the agency's unilateral substitution of a smaller reference was inconsistent with the solicitation's express evaluation scheme that only the five highest dollar value contracts would be used. *Id.* at 9-11. Thus, the facts of that case, where an agency clearly deviated from the solicitation's stated evaluation scheme by substituting a less relevant experience reference, bears no meaningful relationship to the facts of this case, where the agency considered additional relevant past performance references as expressly permitted by the RFTOP's terms.

demonstrate that those judgments are unreasonable. *Noble Supply & Logistics*, B-417494.3, Aug. 7, 2020, 2020 CPD ¶ 267 at 4-5. For the reasons that follow, we find no basis on which to sustain Erickson's challenges to the agency's evaluation.

With respect to the agency's evaluation of the relevance of CHI Aviation's past performance, Erickson primarily alleges that four of the five evaluated references fail to demonstrate meaningful relevant CASEVAC experience, or otherwise did not involve similar scope or magnitude of effort as compared to the RFTOP's requirements. As an initial matter, we note that Erickson offers no substantive objections to the evaluation of the very relevant relevancy assessment for CHI Aviation's Afghan Air Force Rotary Airlift Support task order (No. HTC711-18-F-R029). The agency evaluated the Afghan Air Force Rotary Airlift Support reference, which has a total value in excess of \$136 million, as very relevant because it involves "Rotary Wing aircraft services for cargo, passenger, and CASEVAC along the remote borders of the Government of the Islamic Republic of Afghanistan and the magnitude falls within the same lines as the solicitation." AR, Tab 20, Past Performance Evaluation Narrative, at 6-7. The relevant assessing official for the reference rated CHI Aviation's performance as warranting exceptional (management), very good (quality and schedule), and satisfactory (regulatory compliance) ratings, and specifically recognized CHI Aviation's successful medical evacuation of two wounded children, who are not "normal passengers," and noting that the intervenor's "direct actions save[d] the lives" of those children. AR, Tab 17, CPAR for HTC711-18-F-R-029, at 2-3. As addressed above, Erickson offers no substantive challenge to the agency's evaluation of this reference. Rather, the protester merely argues that the agency should not have considered this reference because it was not listed in CHI Aviation's proposal; as addressed above, we find no merit to that objection.

While effectively conceding that the awardee demonstrated at least one very relevant past performance reference involving very relevant rotary wing CASEVAC experience with positive quality assessments, the protester nevertheless attacks the agency's consideration of the relevance of CHI Aviation's other evaluated past performance references. For example, Erickson challenges the agency's evaluation of the scope, magnitude, and complexity of CHI Aviation's two USCENTCOM Rotary Wing Transportation Support task orders performed in Afghanistan as being very relevant.

First, the protester alleges that the agency failed to reasonably evaluate the comparative magnitudes of effort of those references as compared to the magnitude of this effort. Specifically, the protester alleges that the agency failed to consider the relative magnitude of the two task orders separately once it determined that the efforts should be considered as separate efforts, as opposed to crediting the protester for the purported combined value of the task orders as presented in CHI Aviation's initial proposal. See Erickson Comments at 11-12. We find no merit to the protester's arguments.

In this regard, the record shows that the agency considered the individual magnitude for each task order reference based on information contained in Contractor Performance

Assessment Reports (CPAR). See AR, Tab 20, Past Performance Evaluation, at 3 (for task order HTC711-17-F-R005), 4 (for task order HTC711-18-F-R028). In this regard, the anticipated value of this effort is approximately \$112 million over an anticipated 5-year period of performance. The most recent CPAR for task order No. HTC711-17-F-R005 reflects a total estimated period of performance of 4 years and 4 months, with a total anticipated contract value of \$82.5 million. AR, Tab 14, CPARs for HTC711-17-F-R005 at 4. The most recent CPAR for task order No. HTC711-18-F-R028 reflects a total estimated period of performance of 3 years and 4 months, and a total anticipated contract value of \$68 million. AR, Tab 13, CPARs for HTC711-17-F-R005 at 4. For each reference, the agency specifically found that these references had values that were comparable to the anticipated magnitude of the RFTOP's requirements. AR, Tab 20, Past Performance Evaluation at 3, 4.

Where, as here, the solicitation does not expressly define scope, magnitude, or complexity, agencies are afforded great discretion to determine the relevance of an offeror's past performance. *DynCorp Int'l LLC; AAR Supply Chain, Inc.*, B-415873 *et al.*, Apr. 12, 2018, 2018 CPD ¶ 157 at 10. On this record, where the agency considered the magnitude of CHI Aviation's individual references in terms of dollar values, and reasonably concluded that they were comparable to the instant requirement, we find that the protester's disagreement, without more, provides no basis to question the agency's exercise of its reasonable business judgment.

Second, Erickson attacks the agency's determination that the two USCENTCOM Rotary Wing Transportation Support task orders warranted very relevant ratings based on their relative scopes of work. The agency rated both references as very relevant because they involved rotary wing cargo, passenger, and cargo/passenger combination services performed in a greater diversity of environmental conditions. See AR, Tab 20, Past Performance Evaluation, at 3-5. Erickson contends that because these references did not also demonstrate CASEVAC services, the agency erred in finding them to have essentially the same scope of effort and complexities as required by the RFTOP. We disagree with the protester's view that the agency could not reasonably find these references, which cover a number of the RFTOP's anticipated performance requirements, to be very relevant.

In this regard, the RFTOP identified the following service types as required by the task order: (1) rotary wing CASEVAC; (2) cargo/passenger services; (3) slingload; and (4) performance outside the continental United States.⁸ RFTOP at 1. The protester does not contest that these references demonstrate relevant experience with

⁸ The RFTOP's past performance questionnaire template did not ask assessors to address whether the offeror had performed CASEVAC services on the assessed effort. Rather, the form asked assessors to indicate whether the contractor provided the following services using rotary wing aircraft: (1) cargo; (2) passengers; (3) passengers and cargo; or (4) sling load. AR, Tab 9, RFTOP, attach. No. 4, Past Performance Questionnaire at 2.

cargo/passenger services, slingload, and performance outside of the continental United States. Because it is uncontested that these references reflect relevant experience with the majority of the service types contemplated by the RFTOP, we have no basis to conclude that the agency's relevance assessment of the subject task orders was unreasonable. Again, while the protester may disagree with the agency's judgment, such disagreement does not provide a basis to sustain the protest.⁹

Lastly, Erickson alleges that TRANSCOM failed to reasonably consider an accident that occurred during performance of one of CHI Aviation's referenced contracts in Afghanistan. We disagree, however, because the record demonstrates that the agency reasonably considered the incident in its evaluation, ultimately concluding that the single instance of potentially adverse past performance information did not undermine the agency's confidence in CHI Aviation's past performance record.

In a memorandum for the record, the agency reviewed the circumstances around an April 20, 2020, crash that resulted in the loss of an aircraft, and three injuries.¹⁰ AR,

⁹ Because the solicitation contemplated the evaluation of three references, and as discussed above we have no basis to question the agency's conclusion that the above three references reflected very relevant past performance, we need not address the protester's arguments about the remaining references. Even assuming that the protester were to prevail on its challenges to the assessed relevance of CHI Aviation's remaining two references, we can discern no reasonable possibility of competitive prejudice.

Competitive prejudice is an essential element of any viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. *Interfor US, Inc.*, B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7. In this regard, even if the protester were correct that the agency erred in its relevancy assessments for the intervenor's other two evaluated references, the agency could not reasonably downgrade or offset CHI Aviation's more relevant references based on the presence of additional, less relevant references. See, e.g., *Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture*, B-401679.8 *et al.*, Sept. 8, 2010, 2010 CPD ¶ 211 (sustaining protest where the agency's past performance evaluation unreasonably penalized the protester based on its submission of performance information for additional less relevant contracts).

¹⁰ The memorandum was executed by the agency on July 13, 2020. AR, Tab 18, Memo. for Record, at 1. Based on the fact that the memorandum was prepared after the past performance evaluation and source selection decision were completed on July 9, Erickson speculates that the agency's analysis in the memorandum was merely a pretext to affirm the agency's prior evaluation and award decision. See Erickson Comments at 20. We disagree. We have consistently explained that government officials are presumed to act in good faith, and a contention that procurement officials

Tab 18, Memo. for Record, at 1. The agency noted that the National Traffic Safety Board had not completed its final investigative report, but the initial indication was that the cause of the crash was mechanical. Notwithstanding the incident, the agency determined that it still had substantial confidence in CHI Aviation's ability to carry out the task order "with the upmost effort and professionalism." *Id.* Specifically, the agency noted that CHI Aviation handled the incident "promptly and efficiently," and maintains Federal Aviation Administration certifications and Department of Defense Commercial Airlift Review Board approval. *Id.*

Additionally, the agency also considered the results of its past performance evaluation in connection with this task order procurement. *Id.* That review demonstrated positive assessments for Erickson's successful maintenance efforts. For example, for its three past performance references performed for TRANSCOM in Afghanistan, including the effort under which the accident occurred, CHI Aviation has maintained operational readiness in excess of 98 percent, exceeding the minimum contractual requirements of 90 percent, and uniformly received quality ratings of very good.¹¹ See AR, Tab 13, CPARs for HTC711-18-F-R028 at 5 ("Maintenance crews are exceptional and provide service round the clock, in a manner which high [operational readiness] rates are consistently achieved."); Tab 14, CPARs for HTC711-17-F-R005 at 6 ("They comply with the generally accepted standards of airmanship, training and maintenance practices and procedures, as well as all Federal Aviation Administration (FAA) Regulations."); Tab 17, CPARs for HTC711-18-F-R-29, at 2 ("Less than 1% of flights were canceled due to maintenance issues. This is a strong testament to their maintenance support team and is 9% above the minimum in the [performance work statement] indicating a positive benefit to the US Government."). On this record, we find that the protester's disagreement with the weight afforded to this single incident by the agency in light of the totality of its evaluation of CHI Aviation's past performance fails to demonstrate that the evaluation was unreasonable or otherwise inconsistent with the RFTOP's terms.

are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Undercover Training, LLC*, B-418170, Jan. 9, 2020, 2020 CPD ¶ 25 at 6 n.4. The memorandum reflects that it was prepared in conjunction with the agency's final decision to send a letter of intent to award the task order to CHI Aviation. AR, Tab 18, Memo. for Record, at 1. In this regard, the memorandum itself reflects that the agency was conducting reasonable due diligence when it confirmed whether a final National Transportation Safety Board report had been issued prior to notifying CHI Aviation of the award. *Id.* On this record, the protester has failed to meet the high burden of demonstrating any bad faith or improper conduct on the part of the agency.

¹¹ For a fourth reference, the assessing official rated CHI Aviation as very good in response to whether the "[c]ontractor's performance of scheduled maintenance on aircraft to ensure limited interruption of service." AR, Tab 12, Past Performance Questionnaire for HTC71120-F-R044 at 4

The protest is denied.

Thomas H. Armstrong
General Counsel