



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: W-T, Joint Venture

File: B-417905.2

Date: December 7, 2020

Alan W. Bardell, Esq., and Robert L. Magrini, Esq., Hayes Magrini & Gatewood, for the protester.

Michael A. Gordon, Esq., Michael A. Gordon PLLC, for G.M. Hill Engineering, Inc., the intervenor.

Thomas J. Warren, Esq., Phillip Paradise, Esq., and Connie L. Baran, Esq., Department of the Army, for the agency.

Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging evaluation and selection of technically superior, higher-priced proposal in a two-phased design-build process is denied where the record shows that the evaluation and selection decision were reasonable and consistent with the stated evaluation factors.

DECISION

W-T Joint Venture, of Oklahoma City, Oklahoma, protests the award of a contract to G.M. Hill Engineering, Inc., of Jacksonville, Florida, under request for proposals (RFP) No. W912HN19-R-3000, issued by the Department of the Army, Army Corps of Engineers (Corps), for general construction. The protester challenges the agency's evaluation and the selection decision.

We deny the protest.

BACKGROUND

The RFP, which was set aside for 8(a) small businesses, was issued on August 23, 2019, under the two-phase design-build provisions of Federal Acquisition Regulation

(FAR) subpart 36.3.¹ Contracting Officer's Statement (COS) at 1. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract (which the agency refers to as a "single award task order contract (SATOC)") with a 2-year base period and three 1-year option periods for general construction work on military installations in Georgia, South Carolina and North Carolina. Agency Report (AR), Tab 3a, Phase I Solicitation at 3, 10. The maximum dollar value for all task orders under this contract, including the base period and all options, was \$95,000,000. *Id.* at 53.

The procurement was to be conducted using the two-phase design-build selection process.² Under phase one, the agency was to evaluate proposals against two evaluation factors, past performance and design experience. AR, Tab 3h, RFP at 27-32. The solicitation stated that the government would then select no more than five of the most highly qualified offerors to submit proposals for phase two. *Id.* at 26. Those offerors selected to proceed to phase two would be required to submit proposals for a sample or "seed" task order. In phase two, proposals were to be evaluated using the following evaluation factors: past performance, design experience, technical approach, and price.³ *Id.* After completing the phase two evaluations, the solicitation advised that the agency would make its best-value award decision based on a comparative assessment of proposals, considering all price and non-price factors. *Id.* at 34.

For the price factor, offerors were to propose area coefficients and a home office overhead rate. RFP at 6, 32. The coefficients would be applied to the estimated amount of work in each location and the total was used to establish a total evaluated price, which would be used to make the best-value tradeoff decision. *Id.* The solicitation stated that the government would perform a price analysis to determine fairness and reasonableness. *Id.* at 32.

The agency received timely phase one proposals from 25 offerors, including W-T and G.M. Hill. COS at 1. A source selection evaluation board (SSEB) evaluated proposals

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

² The phase one solicitation was issued on August 23, 2019, and was amended twice. The phase two solicitation was issued on March 31, 2020 with amendment 3 and subsequently amended five times. Unless noted otherwise, all citations to the RFP are to the final version as amended and reflected in amendment 8.

³ For the non-price factors, past performance was the most important, with design experience being the least important factor. When combined, the non-price evaluation factors were significantly more important than the price factor. RFP at 34.

and the contracting officer, who served as the source selection authority (SSA), selected five offerors, including W-T and G.M. Hill, to proceed to phase two of the competition. *Id.* The agency released the phase two solicitation on March 31, 2020. *Id.* at 2. The five firms subsequently submitted phase two proposals. *Id.* W-T's and G.M. Hill's proposals were evaluated as follows:⁴

	W-T	G.M. Hill
Past Performance	Substantial Confidence	Substantial Confidence
Design Experience	Outstanding	Outstanding
Technical Approach	Good	Outstanding
Price	\$73,047,509	\$109,864,992

AR, Tab 10, Source Selection Decision Document (SSDD) at 4, 9, 10.

The SSA performed a tradeoff analysis, considering the evaluation of all four evaluation factors, and concluded that G.M. Hill's technically superior, higher-priced proposal, represented the best value to the government and selected it for award. *Id.* at 19.

The agency notified W-T on August 7 that it had not been selected for award. COS at 2. After the conclusion of debriefings on August 24, W-T filed this protest with our Office on September 3.

DISCUSSION

W-T challenges the agency's evaluation of both its and G.M Hill's proposal under the technical approach factor, as well as the agency's best-value tradeoff decision. In filing and pursuing this protest, W-T has made arguments that are in addition to, or variations of, those discussed below, as well as arguments that were withdrawn or abandoned during the development of the protest.⁵ While we do not address every issue raised, we

⁴ The available confidence assessment ratings for the past performance factor were: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, and no confidence. RFP at 30. The available adjectival ratings available for the design experience and technical approach factors were: outstanding, good, acceptable, marginal, and unacceptable. *Id.* at 31.

⁵ For example, the protester argued in its initial protest that the Corps improperly considered the seed task order pricing in the agency's evaluation under the technical approach factor and best-value determination. Protest at 2-5. Where, as here, an agency responds to allegations in its report but the protester does not rebut the agency's positions in its comments, we dismiss the allegations as abandoned because the protester has not provided us with a basis to find the agency's positions unreasonable. *Johnson Controls Sec. Sols.*, B-418489.3, B-418489.4, Sept. 15, 2020, 2020 CPD ¶ 316 at 4 n.3; *Medical Staffing Sols. USA*, B-415571, B-415571.2, Dec. 13,

have considered all of the protester's arguments, to the extent they have not been withdrawn or abandoned, and conclude that none furnishes a basis on which to sustain the protest.⁶

Evaluation of W-T's Proposal Under the Technical Approach Factor

W-T raises numerous arguments challenging the agency's assessment of a weakness for its proposed design fee. Protest at 7-9; Comments at 4-7. The protester primarily argues that the agency should have found its proposed design fee for the seed project to be complete, fair, and reasonable--rather than excessive--because, according to the protester, its fee was "consistent with R.S. Means"⁷ and the amount paid by the government on other projects of similar scope and complexity. *Id.* The agency provided a detailed explanation of why W-T's proposed fee for the seed project was considered to be high. As part of its report, the agency included a statement from the professional engineer that prepared the independent government estimate (IGE) for the seed project, describing how the agency developed the IGE. In its comments, the protester argues that the agency's assessment regarding the necessary design effort was incorrect and that the agency should have considered historical price information from other projects. Comments at 5-6.

In reviewing protests challenging an agency's evaluation, our Office does not reevaluate proposals; rather, we review the record to determine whether the evaluation was reasonable, consistent with the terms of the solicitation, and compliant with procurement statutes and regulations. *See, e.g., Cybermedia Techs., Inc. d/b/a CTEC*, B-413156.25, Apr. 6, 2017, 2017 CPD ¶ 116 at 6. An offeror's disagreement with an agency's evaluation, without more, does not establish that the evaluation was unreasonable.

2017, 2017 CPD ¶ 384 at 3. Since W-T did not respond to the agency's position in its comments, we dismiss these arguments as abandoned.

⁶ Our Office issued a protective order in connection with this protest and protester's outside counsel were admitted to the protective order. On November 4, the agency requested that our Office dismiss the protest because the Corps asserts there was a serious violation of the protective order by protester's counsel. Agency Req. for Dismissal at 9 (citing 4 C.F.R. § 21.4(e)). Our Office views any possible violation of a protective order with the utmost concern. While we decline to dismiss the protest, consistent with our Office's practice, any potential sanctions concerning counsel will be addressed separately from the resolution of this protest.

⁷ The agency explains that R.S. Means Construction Cost Data, or R.S. Means, is a database of construction costs for materials, labor or equipment prices by unit, assembly, or square foot level of detail and is publically available at a fee. Memorandum of Law (MOL) at 7 n.14. According to the agency, the costs for individual materials, labor, or equipment are assigned a number based on the designation by the CSI and the cost for specific materials, labor or equipment is included in the R.S. Means data base by CSI number. *Id.*

Alutiiq Tech. Servs. LLC, B-411464, B-411464.2, Aug. 4, 2015, 2015 CPD ¶ 268 at 4. Offerors are responsible for submitting well-written proposals with adequately detailed information that allows for meaningful review by the procuring agency. See *Hallmark Capital Grp., LLC*, B-408661.3 *et al.*, Mar. 31, 2014, 2014 CPD ¶ 115 at 9.

Offerors selected for phase two of the competition were to be provided the technical requirements package for a seed task order that would be representative of the type of work and task orders anticipated under the contract.⁸ RFP at 26. The RFP instructed offerors to submit a quantitative proposal for the seed project utilizing R.S. Means Cost Works, a construction cost estimating software tool. *Id.* at 33. The solicitation also instructed offerors to provide a price breakout and total price for each line item for the seed task order and a cost breakdown for each of the three projects. Under this factor, offerors would be evaluated on their approach to developing price proposals using the applicable Construction Specification Institute (CSI) numbers and appropriate quantities from R.S. Means Cost Works. *Id.* Offerors would also be evaluated on how well they understood the required application of the proposed coefficients and mark-ups. *Id.*

Under the technical approach factor, W-T was assessed two strengths, one weakness, and an overall rating of “good.” AR, Tab 9b, Phase II SSEB Report at 18-20. Relevant here, the SSEB found W-T’s proposed design fee (13.20%) to be extremely high, compared to the IGE. *Id.* at 18. Furthermore, the SSA, in conducting her independent assessment, noted that W-T’s proposed design fee was also higher than any other offerors’ proposed fee, noting that typical design fees for renovations “range between 6-10%,” and that the proposed fee was considered a moderate weakness because “the design fee was excessive relative to the simplicity of the work associated with projects” in the seed task order. AR, Tab 10, SSDD at 16.

In support of its argument challenging the agency’s assessment of a weakness due to its proposed design fee, W-T points to the fact that one of its joint venture (JV) members was the awardee of a previous SATOC and that the JV member performed a “considerable volume of work at Fort Benning over the years.”⁹ As a result, the protester argues that its proposed design fee should have been considered fair and reasonable when compared to the average design fee on task orders at Fort Benning

⁸ The seed task order provided to the phase two offerors is referred to as “Pierce Range Improvements” and consists of three projects: (1) converting an existing vault-type latrine to a flushable latrine and providing positive site drainage to correct and prevent future erosion; (2) making repair to an existing ammunition issue point and designing and constructing a new ammunition point adjacent to the existing issue point; and (3) the demolition of an existing small arms control tower and the design and construction of a new one. RFP at 15; see *also* AR, Tab 3d, RFP amend. 3 at 33-37, 48-102.

⁹ W-T is a joint venture between Waldrop Construction, Inc. and Trend Construction, Inc., formed for the purpose of this solicitation. AR, Tab 4b, W-T Phase I Proposal, Vol. II at 6, 23.

for “range type projects.” W-T also contends that if the agency had properly compared W-T’s design fee with historical prices paid by the government, which is one of the preferred methods of price analysis techniques set forth in FAR 15.404-1, the agency would have recognized that the fee was not high. Protest at 8-9.

Here, we agree with the agency when it points out that the protester’s reference to design fees it used when competing for a different contract (and the task orders on that different contract) is not relevant to the issues raised in its protest. MOL at 11. As the agency notes, W-T neither explains what types of projects it is referring to other than its general characterization of these projects as “range type projects,” nor does it explain in what ways the other projects were similar in size and complexity or the amount of design effort needed to successfully perform the work. *Id.* As our Office has repeatedly observed, each procurement stands alone. *See, e.g., Sayres & Assocs. Corp.*, B-418374, Mar. 30, 2020, 2020 CPD ¶ 115 at 5 n.9; *Genesis Design and Dev., Inc.*, B-414254, Feb. 28, 2017, 2017 CPD ¶ 79 at 3 n.2.

In support of its argument that its proposed design fee was “consistent with R.S. Means,” W-T provided in its protest a worksheet showing a total calculated fee of 14.50% and argues that its proposed design fee of 13.20% for all three projects was reasonable.¹⁰ Protest at 8-9; Protest, exh. 12, New Method Worksheet. The agency explains that the calculation provided by W-T: (1) reflected a higher starting percentage of the design fee for all three projects than was warranted; (2) assumed that all three projects required renovation effort (when they did not); and (3) assumed that all three projects required drainage calculations and required design of utility connections, rather than determining the design effort for each project individually. MOL at 12-13. In its comments, the protester disputes the accuracy of the agency’s IGE, contending that it did not take into consideration the civil engineering fees necessary to evaluate, calculate, and design the grade contours and storm drainages plans. Comments at 5. The protester also argues that the agency failed to take into consideration the necessary utility connections, which, based on W-T’s experience on other projects, were required to provide the design and install utility connections to satisfy the requirements of the project. *Id.*

While the protester may disagree with the agency’s assessment of a weakness, its disagreement alone provides no basis to sustain the protest. The IGE for the design fee for all three projects was estimated to be [DELETED]% based on the size of the project and the estimated design effort. AR, Tab 6a, Seed Task Order IGE at 6, 14, 18; AR, Tab 7, Decl. of Area Engineer at 2-3. The agency provided a detailed explanation of how it estimated the design fee for each project considering the required engineering effort and the percentage of the cost of the project included in R.S. Means. MOL at 11-12; AR, Tab 7, Decl. of Area Engineer at 2. On this record, W-T’s arguments do not provide a basis to sustain the protest.

¹⁰ W-T’s proposal neither included this worksheet, nor provided an explanation of how its proposed design fee was developed. MOL at 12; AR, Tab 4d, W-T Phase II Proposal at 13, 23, 51, 66.

Evaluation of G.M. Hill's Proposal Under the Technical Approach Factor

W-T argues that G.M Hill's proposal contained significant flaws that warranted a lower adjectival rating, if not outright rejection of its proposal. Specifically, the protester asserts that the agency treated offerors disparately when assessing only a "minor weakness" to G.M. Hill's proposal for failing to utilize "any assembly cost line items," which was inconsistent with the solicitation, while assessing a "moderate weakness" to W-T's proposed design fee under the technical approach factor. The protester also alleges that G.M. Hill failed to use the estimating software required by the solicitation, and instead used a different software. Comments at 8-9; Supp. Comments at 5-6.

At the outset we note that adjectival ratings are merely guides for intelligent decision-making in the procurement process. *Automation Precision Tech., LLC*, B-416078, June 5, 2018, 2018 CPD ¶ 203 at 4. Information regarding strengths and weaknesses of proposals is the type of information that source selection officials should consider, in addition to ratings, to enable them to determine whether and to what extent meaningful differences exist between proposals. *WellPoint Military Care Corp.*, B-415222.5, B-415222.8, May 2, 2019, 2019 CPD ¶ 168 at 8.

It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Rockwell Elec. Commerce Corp.*, B-286201 *et al.*, Dec. 14, 2000, 2001 CPD ¶ 65 at 5. However, when a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the proposals. *IndraSoft, Inc.*, B-414026, B-414026.2, Jan. 23, 2017, 2017 CPD ¶ 30 at 10; *Paragon Sys., Inc.*; *SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9.

On this record, we do not find that W-T's arguments provide a basis to sustain the protest. First, as discussed in detail below, the SSA's tradeoff decision did not rely solely on the adjectival ratings alone but a detailed comparative assessment of the offerors' strengths and weaknesses.

Further, we fail to see unequal treatment in the agency's assessment of a minor weakness to G.M. Hill's proposal for its failure to use assembly cost line items in its seed project pricing, and the agency's assessment of a moderate weakness to W-T's proposal for its high design fee. In this regard, W-T has not shown that these two issues were interchangeable in their impact, but were rated differently, which is a prerequisite for showing that the agency treated the two proposals unequally. *Alphaport, Inc.*, B-414086, B-414086.2, Feb. 10, 2017, 2017 CPD ¶ 69 at 5.

With respect to W-T's contention that the agency improperly waived the solicitation requirement to use a specified estimating software, we disagree. We note that contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing offerors of the changed

plan and providing them an opportunity to submit proposals on that basis. *Fintrac, Inc.*, B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 6. An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. *Lockheed Martin Corp.*, B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14; *Safety-Kleen (TS), Inc.*, B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Our Office will sustain a protest that an agency improperly waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. *Datastream Sys., Inc.*, B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

Here, even if we were to conclude that the agency waived the requirement to use a specified estimating software, we do not find that this waiver provides a basis to sustain the protest. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21-22.

In this regard, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver, *i.e.*, that the protester would have submitted a different proposal or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. *AAR Integrated Techs.; VT Miltope*, B-417092 *et al.*, Feb. 13, 2019, 2019 CPD ¶ 81 at 10. While we agree that the solicitation clearly stated that offerors were required to purchase and use the Electronic Version of R.S. Means Online Commercial Package, RFP at 8, W-T does not explain how it was prejudiced by the waiver of this requirement, that is, what the protester would have done differently had it been given an opportunity to use a different estimating software. For the reasons discussed above, we have no basis to question the agency's evaluation of G.M. Hill's proposal under the technical approach factor.

Best-Value Tradeoff Decision

Finally, W-T argues that the agency's best-value tradeoff decision improperly relied on an unstated evaluation criterion and failed to meaningfully explain how the benefits of G.M. Hill's proposal were worth the price premium. Comments at 10-11. Specifically, W-T argues that the agency utilized an unstated evaluation criterion in identifying as a discriminator the fact that G.M. Hill was a fully-integrated design-build firm. W-T also contends that this was unreasonable because, according to the protester, G.M. Hill is not a fully-integrated design-build firm. W-T also argues that the agency failed to articulate how the "tangible benefits" of W-T being a fully integrated design-build firm justified paying G.M. Hill's higher total evaluated price. *Id.*

The Army denies that it used an unstated evaluation criterion. Instead, the agency contends that it properly assessed the capabilities of G.M. Hill as represented in its

proposal, *i.e.*, that G.M. Hill could provide design and construction services as a single firm. Supp. MOL at 9.

Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. *Client Network Servs., Inc.*, B-297994, Apr. 28, 2006, 2006 CPD ¶ 79 at 9. Where, as here, a solicitation provides for a tradeoff between price and non-price factors, the agency retains discretion to make award to a firm with a higher technical rating, despite the higher price, so long as the tradeoff decision is properly justified and otherwise consistent with the stated evaluation and source selection scheme. FAR 15.101-1(c), 15.308; *ADNET Sys., Inc.*, B-413033, B-413033.2, Aug. 3, 2016, 2016 CPD ¶ 211 at 17. In reviewing an agency's source selection decision, we examine the supporting record to determine if it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *The SI Org., Inc.*, B-410496, B-410496.2, Jan. 7, 2015, 2015 CPD ¶ 29 at 14.

In the SSA's tradeoff analysis between G.M. Hill and W-T, the SSA observed that while G.M. Hill and W-T had been assigned identical ratings for the past performance and design experience factors, discriminators existed between the two offerors under the past performance factor. AR, Tab 10, SSDD at 19. Specifically, the SSA observed that the members of the W-T joint venture had not performed the reference projects together and only one member of the joint venture had worked with the designer of record. *Id.* By contrast, the SSA noted that G.M. Hill was a fully integrated designer and builder, which provided an additional benefit to the government not offered by W-T. *Id.* Under the technical approach factor, the SSA found that G.M. Hill was assigned a higher adjectival rating under this evaluation factor; the SSA also identified discriminators between the two proposals, which included the weakness assessed for W-T's high design fee. *Id.* The SSA concluded that the non-price factors, when combined, were significantly more important than the total evaluated price. In making the tradeoff decision, the SSA found that while W-T had a lower total evaluated price than G.M. Hill, based on the discriminators identified in the SSA's tradeoff analysis, G.M. Hill's proposal represented the best value to the government and selected it for award. *Id.*

On this record, W-T's arguments provide no basis to disturb the selection decision. First, we do not find that the agency utilized an unstated evaluation criterion. Although agencies are required to identify in a solicitation all major evaluation factors they are 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 established factors. *Northrop Grumman Sys. Corp., et al.*, May 1, 2017, 2017 CPD ¶ 128 at 12. While there is nothing in the solicitation that defines an "integrated design-builder," the solicitation clearly contemplated that an offeror may provide design services and construction services as one entity or through another firm. Under the design experience factor, offerors were instructed to submit information describing their design experience or the design experience of their designer of record. RFP at 30. The solicitation stated that the agency would consider a

demonstrated record of experience for the offeror's designer of record on recent and relevant projects involving a similar scope and magnitude of effort and complexities. *Id.* at 31. The solicitation provided for additional considerations under this factor which included the designer of record's level of commitment to the offeror. *Id.* Further, the solicitation clearly indicated that under the past performance factor, one of the considerations that would increase the agency's level of confidence included demonstrating previous experience where the offeror and the design firm identified in the design experience factor worked together. *Id.* at 30. As such, we see nothing inconsistent with the agency's consideration of the fact that G.M. Hill would be the designer of record and provide the construction services (*i.e.*, integrated design-builder) with the solicitation's stated evaluation criteria.

Further, the protester disputes the agency's conclusion that G.M. Hill is an integrated design firm, because according to the protester, G.M. Hill "relies upon third party subconsultants for geotechnical, civil, mechanical, electrical, plumbing and other engineering work." Comments at 10; Supp. Comments at 6. Despite this contention, the record shows that G.M. Hill proposed to be the designer of record and perform the construction services, and shows that the company had the capability to do so. AR, Tab 5b, G.M. Hill Phase I, Vol. II Proposal at 42, 45, 48-49.

Finally, as discussed above, the record shows that the SSA performed a comparative assessment between the proposals under each evaluation factor, identified benefits offered by G.M. Hill under each non-price factor, and ultimately concluded that G.M. Hill's proposal offered benefits worth the price premium over W-T's proposal. While W-T disagrees with the agency's judgment regarding the relative merits of the offerors' proposals, this disagreement, without more, does not provide a basis to sustain the protest. *See, e.g., Yulista Tactical Servs. LLC, B-417317.3 et al.*, Jan. 15, 2020, 2020 CPD ¶ 29 at 12. Here, the record shows that the selection decision had a reasonable basis and was properly documented. Accordingly, we see no basis to disturb it.

The protest is denied.

Thomas H. Armstrong
General Counsel