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Decision

Matter of: Picturae Inc.

File: B-419233

Date: December 30, 2020

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Emily Vartanian, Esq., Library of Congress, for the agency.
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DIGEST

1. Protest that the agency unreasonably evaluated protester's technical proposal is denied where the record shows that the evaluation was consistent with applicable procurement statutes and regulations, and the terms of the solicitation.
 2. Protest that the agency conducted inadequate discussions is denied where the record shows that the agency reasonably articulated its concerns with the firm's proposal.
 3. Protest that the agency unreasonably made its source selection decision is denied where the record shows that the decision was consistent with the evaluation results, and the terms of the solicitation.
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DECISION

Picturae, Inc., of New York, New York, protests the award of a contract to Creekside Digital, of Glen Arm, Maryland, under request for proposals (RFP) No. LCFDL20R0015, issued by the Library of Congress (LOC) for digital imaging services. Picturae alleges that the agency unreasonably evaluated its proposal, conducted inadequate discussions, and improperly made the source selection decision.

We deny the protest.

BACKGROUND

On May 14, 2020, the LOC issued the RFP to procure digital imaging services for pre-1978 copyright record books.¹ Agency Report (AR), Tab 3, RFP at 5-6; Contracting Officer's Statement (COS) at 1. Digitization will create searchable images of each record book. RFP at 5. The RFP contemplated the award of a fixed-price contract to be performed over a 1-year base period, and five 1-year option periods. *Id.* at 3-4.

Award would be made on a best-value tradeoff basis considering the following three factors: technical capability, past performance, and price. RFP at 44. The technical capability factor was more important than the past performance factor and, when combined, the non-price factors were more important than price. *Id.* The technical capability factor consisted of five subfactors: technical approach and understanding; proposed equipment and on-site environmental requirements; target images; quality management; and personnel. *Id.* at 44-45.

Eight offerors, including Picturae and Creekside, submitted proposals prior to the June 11, 2020, closing date. COS at 2. Picturae, Creekside, and two other offerors were included in a competitive range. *Id.* Following discussions, the four offerors submitted final revised proposals on July 17, 2020. *Id.* The agency's evaluation produced the following relevant results:

	Picturae	Creekside
Technical Capability	Acceptable	Good
Past Performance	Low Risk	Low Risk
Price	\$5,478,165	\$9,847,000

AR, Tab 10, Final Technical Evaluation Summary Report at 10; AR, 11, Contracts Review Board Memorandum (CRBM) at 4. Based on the evaluation results, the source selection authority (SSA) identified Creekside's proposal as offering the best value. AR, Tab 11, CRBM at 6-7. The SSA compared Creekside's proposal against each of the other three proposals. *Id.*

When comparing the proposals of Creekside and Picturae, the agency noted that Creekside offered the best technical approach, while Picturae offered the least viable technical approach of all offerors in the competitive range. AR, Tab 11, CRBM at 7. The agency noted that Picturae's estimated throughput (*i.e.*, [DELETED] digitized pages per hour) was unrealistic, and that Picturae had overestimated the capacity of its equipment, and proposed an insufficient number of imaging stations to fulfill the

¹ The record books contain such documents as registrations, renewals, Notices of Use, assignments, patent examiner registers, and patent certificates. RFP at 5.

requirement.² *Id.* Also, Picturae unreasonably conditioned its performance on the agency providing notice of the number of anticipated optional quantities to be produced at the beginning of each contract period. *Id.* As a result, the agency concluded that Creekside offered a better value because its technical solution was worth the \$4,953,835 price premium. *Id.*

DISCUSSION

Picturae raises multiple allegations challenging the agency's conduct of the acquisition. First, the protester alleges that the agency unreasonably evaluated proposals. Protest at 4-8. Second, Picturae alleges that LOC conducted inadequate discussions. *Id.* at 9-10. Third, the protester alleges that the agency unequally evaluated proposals. *Id.* at 10-11. Finally, Picturae alleges that the agency's source selection decision was unreasonable. *Id.* at 11.

We have reviewed all of the firm's challenges, and conclude that none provides us with a basis to sustain the protest. We discuss the principal allegations below, but note, at the outset, that in reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. *SaxmanOne, LLC*, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 3.

Technical Evaluation

Picturae alleges that the agency unreasonably evaluated its technical proposal. The firm first argues that the LOC identified risks in its technical approach based on unstated evaluation criteria. Second, the protester argues that it should have received a higher overall technical rating because it was assigned 13 strengths against zero weaknesses. The agency responds that it reasonably evaluated the proposal consistent with the solicitation's terms. Memorandum of Law (MOL) at 8.

As noted above, Picturae was assigned an overall technical rating of "acceptable." AR, Tab 9, Final Technical Evaluation Report at 11. The agency assigned 13 strengths against zero weaknesses to the firm's proposal. *Id.* Many of the strengths were favorable; for example, the agency noted that the proposal stressed safety of the collection over production speed, and that the firm demonstrated a solid understanding of the materials and requirement. *Id.*

² The agency explains that "[t]hroughput means the actual production capacity of the total end-to-end manufacturing process necessary to deliver a sustained output level over a long period, accounting for all variables, including downtime for any number of reasons." Decl. of Technical Expert at 2.

The agency's evaluation also included a "Justification" section for the assigned rating. This summary narrative explained that Picturae demonstrated an outstanding approach to project management and quality assurance, and proposed capable equipment. AR, Tab 9, Final Technical Evaluation Report at 11. However, the agency noted two risks for poor performance. One risk was that the firm's estimated throughput was overly optimistic, and the second risk was that the firm's proposed project manager would be on-site only [DELETED] hours per week. *Id.* at 12.

The protester complains that both risks are based on unstated evaluation criteria. Protest at 7-9. The firm argues that "throughput" was not identified as a metric for evaluating proposals in the solicitation. *Id.* at 8. The firm also argues that the solicitation did not require project managers to be on-site on a full-time basis. *Id.* at 7. The agency responds that its concerns were reasonably encompassed within the evaluation criteria. MOL at 8-11. We agree with the agency.

While agencies are required to evaluate proposals based solely on the factors identified in the solicitation, an agency may properly apply evaluation considerations that are not expressly outlined in the RFP where those concerns are logically and reasonably encompassed within the stated evaluation criteria. *Bannum, Inc.*, B-405548, Nov. 8, 2011, 2011 CPD ¶ 38 at 3.

On this record, we conclude that both risks were reasonably encompassed within the technical approach and understanding subfactor. This subfactor assessed a firm's ability to produce digitized images in sufficient quantities. RFP at 44 ("The Government will evaluate the extent to which the proposed technical solution demonstrates the ability to deliver compliant work products in the required quantities within the required period of performance."). Consistent with the agency's position, we conclude that this subfactor necessarily included assessments of both a firm's production capacity (*i.e.*, throughput), and a firm's commitment to providing the necessary personnel resources to complete the work (*i.e.*, on-site availability of supervisors) because those features largely determine whether the firm will meet the production requirements. MOL at 8-11.

Further, we think the agency reasonably evaluated these features as representing risks of poor performance. Because Picturae's estimated throughput was unrealistic for its proposed imaging system, the agency concluded that the firm had proposed too few imaging stations to meet the quantity requirements. AR, Tab 11, CRBM at 7. The protester has provided no basis for our Office to question the agency's view that having machines not capable of consistently achieving throughput estimates creates a risk that the firm will not be able to meet the overall quota for production. MOL at 10-11.

Additionally, the agency concluded that the firm's limited on-site availability of its project manager represents a risk of poor performance because the firm's production line staff would [DELETED] for long periods of time, and because agency personnel would have to discuss issues concerning daily or routine performance with [DELETED]. Decl. of Technical Expert at 3; see *also* AR, Tab 9, Final Technical Evaluation Report at 9-10. This evaluation was reasonable because we have no basis to disagree with the agency

that lack of supervision often yields poor results, and lack of communication between the producer and the customer often leads to disputes regarding performance. MOL at 9-10. Accordingly, we deny these protest allegations.³

Next, the protester argues that it should have been assigned a higher overall adjectival rating because it received thirteen strengths against zero weaknesses. Protest at 5-7. In other words, the protester argues that the agency undervalued the favorable technical features in its proposal. *Id.* The agency responds that it reasonably assigned an overall rating of “acceptable,” even though the firm was assigned numerous strengths. MOL at 2-7.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of protest, and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(c)(4), (f). Any allegation challenging only the assigned adjectival rating is legally insufficient and therefore subject to dismissal because adjectival ratings are only guides to intelligent decision-making. See *Southwind Constr. Servs., LLC*, B-410333.2, Jan. 21, 2015, 2015 CPD ¶ 64 at 6 (“Generally, when a protester’s challenge to a source selection decision is based solely on the number of evaluated strengths, weaknesses, or other discriminators identified by an agency during its evaluation, the challenge fails to state a valid protest basis since a contracting agency’s ratings, be they numerical, adjectival, or color, are guides to intelligent decision-making.”). Further, the evaluation process is not simply a matter of mechanically counting the assigned strengths and weaknesses, but rather must qualitatively assess the relative technical merit of the proposal. *Id.* Thus, *Picturae’s* contention that it should have been assigned a higher adjectival rating is an insufficient basis for protest because the allegation argues for a mechanical rating based on the number of strengths, and does not demonstrate that the agency unreasonably assessed the underlying technical merit of the firm’s proposal.

In any event, we conclude that the agency reasonably assigned an overall technical rating of “acceptable” because, as noted above, the firm received a mixture of positive and negative criticism, some of which was highly critical of the firm’s ability to perform the requirement. See *Altavian, Inc.*, B-417701, B-417701.2, Sept. 17, 2019, 2019 CPD ¶ 323 at 5 (agency reasonably did not assign a higher adjectival rating because the agency’s technical demonstrating had a mixture of positive and negative criticism). Accordingly, we deny this protest allegation.

³ To the extent the protester complains that the agency did not consider the fact that its project manager could quickly be [DELETED], we note that the record plainly shows that the agency expressly considered this feature as part of its evaluation. AR, Tab 9, Final Technical Evaluation Report at 9 ([DELETED]).

Inadequate Discussions

Picturae alleges that the agency unreasonably conducted discussions because the agency did not disclose its view that the firm's throughput was overestimated, or that the firm's target images portfolio was inaccessible due to a defective website link. Comments at 4-5; Protest at 9-10. The agency responds that it reasonably conducted discussions because it provided the firm with an opportunity to discuss its estimated throughput. MOL at 11-12.

Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Federal Acquisition Regulation (FAR) 15.306; *QinetiQ North America, Inc.*, B-405163.2 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 53 at 12 (applying the standard to a FAR part 12 commercial items acquisition). Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. FAR 15.306(d)(3). *American States Utilities Servs., Inc.*, B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 6.

By way of background, the agency provided Picturae with nine points of inquiry during discussions. AR, Tab 7, Discussions Questions and Answers at 2. One inquiry provided the following: "There is no description of throughput for the proposed installation." *Id.* The agency labeled this inquiry as representing a "weakness" (*i.e.*, a flaw in the proposal that increases the risk of unsuccessful performance). *Id.* In response, Picturae provided its estimated throughput rate. *Id.* at 3.

As to the defective website link, the agency did not discuss that feature of the firm's proposal. AR, Tab 7, Discussions Questions and Answers at 2. This website link was provided to direct the agency to the firm's target images portfolio (*i.e.*, a representative sample of digitized images verifying the firm's performance capability). Protest at 10; AR, Tab 4, Picturae's Proposal at 14. The target images subfactor evaluated a representative sample of each firm's digitized images on a pass or fail basis to determine whether the firm's equipment was capable of performing the requirement. RFP at 44; AR, Tab 9, Final Technical Evaluation Report at 3.

With regard to the firm's throughput, we conclude that the discussions were unobjectionable. We agree with the agency that the relevant inquiry put the firm on notice that the agency had concerns regarding its production rate. MOL at 12. Indeed, the inquiry informed Picturae that the agency wanted to ascertain the firm's specific "throughput" because, as written, the firm's proposal represented a risk of unsuccessful performance. AR, Tab 7, Discussions Questions and Answer at 2. Given this information, we agree with the agency that the firm should have recognized that there were concerns about whether it could perform the requirement using its proposed imaging system. MOL at 12. Further, we do not think these discussions were impermissibly flawed because the agency did not articulate its concern with more specificity; an agency is not required to spoon-feed an offeror as to how exactly it can

improve its proposal. *Integrated Medical Sols., LLC*, B-418754, B-418754.2, Aug. 20, 2020, 2020 CPD ¶ 287 at 4 (stating the requirement to have meaningful discussions “does not obligate an agency to spoon-feed an offeror or to discuss every area where the proposal could be improved”). Accordingly, we deny this protest allegation.

As to the allegation that the discussions were inadequate because the agency did not raise its concerns about the target images portfolio, we dismiss that allegation because the protester did not meaningfully rebut in its comments the agency’s response to the argument. See Comments at 1. Where, as here, an agency responds to allegations in its report but the protester does not rebut the agency’s position in its comments, we dismiss the allegations as abandoned because the protester has not provided us with a basis to find the agency’s position unreasonable. *Medical Staffing Solutions USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3.

Here, the LOC acknowledged that it did not raise the issue of the defective link to the target images portfolio, but argued that the protester did not suffer any competitive prejudice from this omission. The LOC explained that the protester was effectively evaluated as demonstrating acceptable equipment. MOL at 11-12 (“Despite this apparent oversight, the technical evaluators were satisfied that the equipment proposed by Picturae was capable of producing conforming images, and that any nonconformance based on how the equipment was deployed could be addressed during production.”). In its comments, the protester did not demonstrate how it suffered competitive prejudice due to this error, and only summarily responded in its introductory paragraph that the discussions were inadequate. Protester’s Comments at 1 (“LOC also admitted it did not address Target Images, showing further insufficient discussions.”). Thus, we dismiss this allegation as abandoned because the protester did not rebut the agency’s position.

Moreover, we agree with the agency that the protester did not suffer any competitive prejudice due to the agency’s oversight. Competitive prejudice is an essential element of any protest, and our Office will not sustain any allegation, unless a protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. *Orbit Research, LLC*, B-417462, July 17, 2019, 2019 CPD ¶ 258 at 7. Here, the LOC effectively evaluated the firm as meeting the requirement (or, at worst, waived the requirement for the firm). Decl. of Technical Expert at 3-4; AR, Tab 9; Final Technical Evaluation Report at 4. Thus, we agree that the protester’s competitive standing would not have improved in the event the firm had been able to provide its target images portfolio.

Unequal Evaluation

Picturae also alleges that the agency unequally evaluated its and Creekside’s proposals. The firm asserts that the agency evaluated Creekside using a less stringent evaluation standard because Creekside’s proposal was more expensive and offered items not identified in the solicitation. Protest at 10-11. The agency responds that the allegation does not state a valid basis for protest because it is based on conjecture.

Agency's Response to Intervenor's Request for Dismissal at 1-2. We agree with the agency.

A protest allegation which relies on speculation is legally insufficient under our Bid Protest Regulations because our Office will not find improper agency action based on conjecture or inference. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3; see 4 C.F.R. § 21.1(c)(4), (f). Here, the allegation, as pleaded in the protest filing, is based entirely on conjecture because it does not articulate how Creekside's proposal was evaluated differently.

Picturae's subsequent attempts to supplement this allegation are likewise unavailing. In its comments, the firm argues that the agency must have evaluated Creekside's proposal using an easier evaluation standard because the agency did not identify Creekside's imaging system as presenting similar problems as Picturae's system. Comments at 6. We dismiss this argument because it facially does not demonstrate that the agency evaluated the proposals unequally.

To prevail on an allegation that the agency unequally evaluated proposals, a protester must show that the differences in ratings do not stem from differences between the proposals. *GovernmentCIO, LLC, B-418363 et al.*, Mar. 10, 2020, 2020 CPD ¶ 102 at 8-9. Picturae's allegation does not meet this requirement because it expressly acknowledges that both it and Creekside proposed different imaging systems (*i.e.*, Picturae's imaging system relies on [DELETED], whereas Creekside's system is [DELETED]). *Id.* Accordingly, we dismiss this allegation.⁴

Source Selection Decision

Picturae alleges that the agency made an unreasonable source selection decision. It argues that the agency unreasonably determined that Creekside's proposal represented the best value due to the significant price premium. Comments at 6-7. In response, the agency argues that it reasonably determined that Creekside's proposal represented the best value. MOL at 12-14.

Our Office will review an agency's source selection decision to ensure that it is reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *ValidaTek-CITI, B-418320.2 et al.*, Apr. 22, 2020, 2020 CPD ¶ 149 at 11.

⁴ To the extent Picturae asserts that the agency did not evaluate Creekside's throughput, we deny that allegation because it is inconsistent with the record. See Comments at 6. The record shows that the agency evaluated Creekside's proposal as being able to digitize the required quantities of documents. AR, Tab 11, CRBM at 4. Indeed, the agency noted that Creekside's proposal constituted the "superior solution for ensuring consistent throughput to complete the required an optional quantities." *Id.* at 6.

We find the agency's source selection decision to be unobjectionable. As noted above, the agency determined that Picturae's imaging system was inadequate to meet the production requirements, while Creekside's imaging system would successfully perform the requirement. AR, Tab 11, CRBM at 6-7. Based on Creekside's much higher likelihood of success due to its superior imaging system, the agency noted that Creekside's technical superiority was worth the \$4.9 million price premium. *Id.* at 7. Given that the technical factors were more significantly important than the price factor in this procurement, we do not find the agency's price-technical tradeoff to be unreasonable. See RFP at 44. Accordingly we deny this allegation.

Finally, we dismiss Picturae's assertion that the selection decision was unreasonable because the decision was predicated on an erroneous technical evaluation. Protest at 11. We dismiss this allegation because it is derivative of Picturae's challenges-- which we have denied--to its technical evaluation. *Safeguard Base Operations, LLC*, B-415588.6, B-415588.7, Dec. 14, 2018, 2018 CPD ¶ 426 at 4 (derivative allegations do not establish independent bases of protest).

The protest is denied.

Thomas H. Armstrong
General Counsel