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Decision

Matter of: R. A. Burch Construction Company, Inc.

File: B-420301.2

Date: March 29, 2022

David S. Demian, Esq., Finch, Thornton & Baird, LLP, for the protester.
Daniel M. Aspinwall, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that awardee's past performance, which included performance of requirements that were "essentially the same" as those solicited, was superior to protester's past performance, which reflected performance of requirements that were similar to, but not "essentially the same" as, those solicited.
 2. Agency reasonably concluded that awardee's superiority with regard to non-price evaluation factors outweighed the protester's slight price advantage.
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DECISION

R.A. Burch Construction Company, Inc., of Ramona, California, protests the Department of the Army, Corps of Engineers' award of a contract to The Korte Company, of St. Louis, Missouri, pursuant to request for proposals (RFP) No. W912-PL-21-R-0005, for the design and construction of a flight test engineering laboratory (FTEL) at Edwards Air Force Base, California.¹ Burch challenges the agency's past performance evaluation and its best-value tradeoff determination.

We deny the protest.

¹ Throughout the record, the agency uses the acronym "FTEL" to refer to the requirements of this solicitation.

BACKGROUND

On May 4, 2021, the agency issued RFP No. W912-PL-21-R-0005, seeking fixed-price proposals to design and construct an FTEL complex.² The solicitation provided for a best-value source selection decision based on a tradeoff between price³ and the following non-price evaluation factors: (1) past performance of construction contractor;⁴

² More specifically, the solicitation described the project as:

Design and construct a two-story laboratory, engineering and office complex with reinforced concrete slab foundation, wall panels, standing seam metal roof, and fire protection. Include raised flooring, earthwork, site drainage, parking, site lighting, sidewalks, curbs, gutters, and utilities. The project will also construct a Sensitive Compartmented Information Facility in accordance with Intelligence Community Directive 705. This project will demolish Building 1400 (6,265 Square Meter[s]).

Agency Report, (AR), exh. 1, RFP at 6.

³ The solicitation required offerors to submit fixed prices for contract line item numbers (CLINs) designated as the basic requirement, as well as prices for CLINs identified as option items, see RFP at 38-39, and provided that an offeror's evaluated price would be calculated by "adding the total price for all options to the total price for the basic requirement." *Id.* at 40.

⁴ With regard to the evaluation of past performance under factor 1, offerors were required to identify up to three projects that were: recent ("completed or substantially completed within the last six years"); valued in excess of \$25 million; and, for at least two projects, performed on a military installation. RFP at 72. The solicitation stated that, prior to considering the quality of an offeror's prior performance, the agency would compare each recent project to the scope and magnitude of the effort/complexities of this solicitation, and assign one of the following relevancy assessments to each project: very relevant (project involved "essentially the same" scope and magnitude of effort/complexities); relevant (involved "similar" effort/complexities); somewhat relevant (involved "some" of the effort/complexities); not relevant (involved "little or none" of the effort/complexities). *Id.* at 74.

In this context, the solicitation advised offerors that "past performance of greater relevancy will . . . have more influence on the past performance confidence assessment than past performance of lesser relevance." *Id.* The solicitation further provided that past projects would receive additional consideration if they reflected certain characteristics, including: a successful repetitive relationship with an architect/engineering (AE) firm; experience/capability with Intelligence Community Directive (ICD) 705 (regarding sensitive compartmented information facilities); and repeated successful relationships with HVAC (heating ventilation and air conditioning) and electrical systems subcontractors. *Id.* at 70-71. Finally, based on consideration of all the stated criteria, including the degree of relevance and quality of prior performance,

(2) past performance of lead design firm; (3) technical approach; (4) management plan; (5) proposed schedule;⁵ and (6) small business participation.⁶ The solicitation provided that: non-price factors 1 through 5 were of equal importance, and each was more important than factor 6, small business participation; non-price factors, combined, were approximately equal in importance to price; and “as differences in price become less distinct, differences in ratings and relative advantages and disadvantages between proposals are of increased importance.” *Id.* at 68, 85.

On or before the June 17, 2021 closing date for receipt of proposals, five offerors submitted proposals. Thereafter, the agency conducted discussions; sought final proposal revisions; and evaluated the final revised proposals of Korte and Burch as follows (the evaluation of the other three offerors is not relevant here):

	Korte	Burch
Past Performance (Construction Contractor)	Substantial Confidence	Satisfactory Confidence
Past Performance (Lead Design Firm)	Satisfactory Confidence	Satisfactory Confidence
Technical Approach	Good	Good
Management Plan	Good	Good
Proposed Schedule	Good	Good
Small Business	Acceptable	Outstanding
Total Evaluated Price	\$39,857,938	\$39,805,820

AR, exh. 25, First Source Selection Decision Document (SSDD) at 16.

the solicitation provided for assignment of the following past performance ratings: substantial confidence (“high expectation” of successful performance); satisfactory confidence (“reasonable” expectation of successful performance); neutral confidence; limited confidence; or no confidence. *Id.* at 75.

⁵ Under factors 3, 4 and 5, the solicitation provided that the agency would assess ratings of outstanding, good, acceptable, marginal or unacceptable. *Id.* at 80.

⁶ In evaluating proposals under factor 6, small business participation plan, the solicitation provided that the agency would consider the “level of proposed participation of U.S. Small businesses in the performance of the contract” and assign ratings of outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 81-82.

On September 28, 2021, the agency selected Korte for award. On October 15, following a debriefing, Burch filed a protest with our Office challenging that award; among other things, the protest challenged the agency's evaluation of past performance and its best-value tradeoff determination. AR, exh. 32, Initial Burch Protest at 1. On November 10, the agency stated that it would take corrective action by reevaluating the proposals "to ensure the evaluation was done in accordance with the solicitation" and, thereafter, would "issue a new best value tradeoff determination." AR, exh. 36, Notice of Corrective Action at 1. Based on the agency's corrective action, we dismissed Burch's October 15 protest.

Subsequently, the source selection evaluation board (SSEB) reevaluated the proposals, but made no changes to the ratings or evaluated prices shown in the table above. See AR, exh. 40, Final SSDD at 26. Thereafter, the source selection authority (SSA)⁷ independently reviewed the procurement record. *Id.* at 16. In documenting the best-value tradeoff, the SSA considered the offerors' total proposed prices (calculated by "adding the total price for all options to the total price for the basic requirement," as required by the solicitation),⁸ as well as the relative non-price benefits reflected in the competing proposals. *Id.* at 20, 26-28.

Among other things, the SSA explained the basis for assigning Korte's proposal a rating of substantial confidence under factor 1, past performance (construction contractor), noting that the rating reflected Korte's past performance of a project that included "essentially the same scope, magnitude, and complexities of effort as this solicitation requires,"⁹ *id.* at 26; accordingly, the agency considered this project to be "very relevant."¹⁰ *Id.* The SSA elaborated that Korte's "very relevant" prior project:

demonstrates Korte's recent experience with [redacted] contracts as well as experience covering each [redacted] described in the solicitation including [redacted]. Of significant importance, the Government recognizes [Korte's] proven experience with [redacted]. This Very Relevant project included [redacted] SF [square feet] of [redacted]. This is three times more [than] the [redacted] of the FTEL at [redacted]. . . . [O]ther key elements that made this project stand out as very relevant are a [redacted]. Project #1 gained additional consideration for demonstrating [redacted]. [O]ther key elements that made this project stand out as very relevant are [redacted];

⁷ The SSA was also the contracting officer for this procurement. Contracting Officer's Statement at 1.

⁸ The Final SSDD also notes that Korte's price for the basic requirements was slightly lower than Burch's price for those requirements. AR, exh. 40, Final SSDD at 29.

⁹ This project involved construction of a "Virtual Warfare Center Operations Facility" at Nellis Air Force Base, Nevada. *Id.* at 24.

¹⁰ Korte's two other projects were both considered "relevant," as they reflected work that was similar to, but not essentially the same as, the solicitation's requirements. *Id.* at 26.

construction of [redacted] which is the same as construction of the [redacted]; use of [redacted] which is the same as the [redacted] solicitation; [redacted] construction in all its [redacted] which exceeds [redacted]. Project #1 gained additional consideration for demonstrating a successful [redacted].

Id. at 26-27.

In contrast, the SSA concluded that all of Burch's prior projects, though "similar" to the FTEL requirements, did not reflect "essentially the same" work. *Id.* at 28; Contracting Officer's Statement at 10. In comparing the specific elements of the two offerors' past performance, the SSA explained:

The key benefits to the Government that [Korte] provided over [Burch] are: 1) [Korte] demonstrated past performance with at least [redacted] than will be required for the [redacted]; 2) [Korte] demonstrated a successful relationship with [redacted]; 3) [Korte] demonstrated repeated successful experience with their [redacted] and their [redacted]; 4) [redacted] which exceeds [redacted]; 5) [redacted] which is the same as construction of the [redacted]; and 6) use of [redacted] which is the same as the FTEL solicitation.

AR, exh. 40, Final SSDD at 27.

Overall, the SSA summarized his comparison of the two proposals, stating:

When comparing [Korte's] with [Burch's] technical proposal, I noted [Korte] rated better than [Burch] in relation to level of confidence for Factor 1, equal to [Burch] in relation to level of confidence for Factor 2, equal with [Burch] in relation to the Technical Factors 3-5 and lower than [Burch] in relation to Factor 6, Small Business Participation Plan, the least important factor.

Id. at 26.

The SSA further considered the fact that Korte's total price was higher than Burch's by \$52,118--that is, 0.13 percent--noting: "When comparing [Korte's] and [Burch's] price proposals (Base Bid and Option Items) [Korte] is \$39,857,938.00, and [Burch] is \$39,805,820.00." *Id.* at 28. Based on all of these considerations, the SSA concluded that the superiority of Korte's proposal under the non-price evaluation factors warranted payment of its marginally higher (a fraction of one percent) price, and that Korte's proposal offered the best value to the government. *Id.* Thereafter, Burch was notified of the source selection determination. This protest followed.

DISCUSSION

Burch protests that the agency improperly evaluated the offerors' past performance, and that the agency's best-value determination was flawed. As discussed below, we find no basis to sustain Burch's protest.¹¹

Past Performance Evaluation

First, Burch protests that the agency's evaluation of past performance was flawed in that it "arbitrarily and without rational basis" rated Burch's past performance as relevant/satisfactory confidence "rather than 'Very Relevant' and 'Substantial Confidence.'" Protest at 2. In this context, Burch complains that: the agency's evaluation did not identify any weaknesses, deficiencies or uncertainties in Burch's past performance; Burch's prior projects "met and exceeded" the solicitation's requirements; and the agency did not affirmatively document features of Burch's prior projects that were "dissimilar" to the FTEL requirements. *Id.* at 19, 24. Accordingly, Burch asserts that the agency improperly "downgrad[ed]" its assessment of Burch's prior projects to merely "relevant," maintaining that the agency was required to assess them as "very relevant" and assign its proposal a past performance rating of "substantial confidence." *Id.*

¹¹ In filing and pursuing this protest, Burch has presented arguments that are in addition to, or variations of, those specifically discussed in this decision. For example, Burch complains that, "First and foremost," the agency failed to comply with the Federal Acquisition Regulation's (FAR) informational and debriefing requirements following completion of its corrective action. Protest at 13; see FAR 15.503 and 15.506. However, even assuming that those FAR requirements applied to the agency's corrective action, an agency's compliance with such requirements is not related to the validity of the contract award, and will not be considered pursuant to our bid protest procedures. See, e.g., *Alpine Companies, Inc.*, B-419831, B-419831.2, June 8, 2021, 2021 CPD ¶ 227 at 3 n.1; *HpkWebDac*, B-291538.2, Jan. 22, 2003, 2003 CPD ¶ 28 at 2.

Burch also complains that the procedures the agency employed in its corrective action were flawed because the solicitation provided that the SSEB would evaluate technical proposals "without knowledge of the price offered," see RFP at 63, but the SSEB had learned of the offerors' prices in conjunction with the first source selection decision. As noted above, in performing its corrective action, the SSEB made no changes to the evaluated ratings; additionally, Burch's submissions have not identified any material changes to the narratives supporting the reevaluation of technical proposals; finally, as also noted above, the SSA performed an independent review of the procurement record in making his final source selection determination during the corrective action. See AR, exh. 40, Final SSDD at 16. On this record, we decline to sustain the protest based on the procedures the agency employed in performing its corrective action; further, we have reviewed all of Burch's complaints and find no basis to sustain its protest.

The agency responds that, in evaluating the offerors' past performance, the agency recognized that the prior projects submitted by Burch reflected work that was similar to the requirements of this solicitation, and also demonstrated some of the characteristics reflected in Korte's "very relevant" project. AR, exh. 40, Final SSDD at 27. However, the agency maintains that the degree of similarity demonstrated in Burch's prior projects was not as great as that demonstrated in Korte's. Contracting Officer's Statement at 10. The agency further responds that, in comparing the two proposals, the SSA clearly documented the multiple bases for his conclusion that Korte's past performance was superior, referencing Korte's demonstration of experience with: [redacted] construction greater than [redacted]; construction of a much larger [redacted] construction of [redacted]; [redacted] technology; [redacted] construction [redacted]; and successful repetitive relationships with [redacted]. *Id.* at 9-10. Overall, the agency maintains that Korte's past performance demonstrated "a significantly greater degree of similarity to the solicitation relative to [Burch's]," which supported the agency's determination that Korte's proposal was more beneficial to the agency. *Id.* at 10.

Where, as here, a solicitation contemplates the evaluation of offerors' past performance, the agency has the discretion to determine the relevance of the performance history, and our Office will not question the agency's judgment unless it is unreasonable or inconsistent with the terms of the solicitation or applicable procurement statutes and regulations. *SupplyCore, Inc.*, B-411648.2, B-411648.3, Feb. 21, 2017, 2017 CPD ¶ 72 at 11; *America's Pride*, B-401114, May 27, 2009, 2009 CPD ¶ 116 at 3; *National Beef Packing Co.*, B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. *Beretta USA Corp.*, B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

Here, as discussed above, the record establishes the various bases for the agency's determination that Korte's past performance was superior to Burch's. While Burch expresses its disagreement with the agency's judgment, Burch's protest submissions do not meaningfully challenge the factual bases for the agency's assessments. Further, although an agency is obligated to document its evaluation, that documentation need not affirmatively address aspects of a proposal that meet, but do not exceed, the solicitation requirements and, thus, do not warrant the highest possible rating. See, e.g., *Enterprise Services, LLC*, B-417329 *et al.*, May 30, 2019, 2019 CPD ¶ 205 at 14; *Unispec Enters., Inc.*, B-407937, B-407937.2, Apr. 16, 2013, 2013 CPD ¶ 104 at 8; *Health and Human Services Group*, B-402139.2, Apr. 8, 2010, 2010 CPD ¶ 205 at 4-5. Accordingly, the agency was not obligated to identify areas of Burch's proposal that were similar to, but not "essentially the same" as, the solicitation requirements. Based on our review of the record here, we find nothing unreasonable in the agency's determination that Burch's proposal did not warrant the highest possible past performance rating or that Korte's past performance was superior to Burch's.

Best-Value Determination

Next, Burch asserts that the agency had “no rational basis” for its best-value tradeoff, maintaining, among other things, that the agency “ignored” Burch’s higher rating for factor 6, small business participation plan, and “gave no weight” to that evaluation factor. Protest at 16-17.

The agency responds that, in performing his best-value tradeoff determination the SSA considered whether the benefits of Korte’s superior proposal were worth the slightly higher price. Contracting Officer’s Statement at 11. In this regard, the agency points out that the SSA: considered the benefits associated with the superiority of Korte’s past performance; acknowledged Burch’s superiority under the least important evaluation factor, small business participation; weighed the merits of the competing proposals against Korte’s price premium of 0.13 percent; and concluded that Korte’s proposal was “was worth the slightly higher price.” *Id.*

Where solicitations provide for award on a “best-value” basis, it is the function of the SSA to perform a price/technical tradeoff, that is, to determine whether one proposal’s technical superiority is worth the higher price; the extent to which one is sacrificed for the other is governed only by the test of rationality and consistency with the stated evaluation criteria. See, e.g., *Sevatec, Inc.*, B-413116.52, B-413116.59, May 9, 2017, 2017 CPD ¶ 140 at 4; *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 15; *Chenega Technical Prods., LLC*, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 8. While the tradeoff decision must be documented, such documentation need not discuss every consideration factored into the decision, nor is there a requirement to quantify the specific cost or price value difference when selecting a higher-priced, higher-rated proposal for award. FAR 15.308; *Advanced Fed. Servs. Corp.*, B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 at 5.

Here, based on our review of the record, we find no basis to question the reasonableness of the agency’s best-value determination or its consistency with the stated evaluation factors. In this regard, as discussed above, the agency: reasonably considered the benefits associated with Korte’s superior past performance; acknowledged that Burch’s proposal was superior to Korte’s under the least important evaluation factor, small business participation; weighed the benefits flowing from the relative merits of the competing proposals against Korte’s marginally higher price; and concluded that Korte’s proposal offered the best value to the agency. On this record, we find nothing unreasonable or inadequately documented in the agency’s source selection decision.

The protest is denied.

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General Counsel