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# Decision

**Matter of:** Zafer Taahhut Insaat Ve Tiaret AS

**File:** B-420280

**Date:** January 19, 2022

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## DIGEST

1. Protest challenging price evaluation is denied where the agency evaluated price reasonableness in accordance with the stated evaluation criteria and where the solicitation did not require a price realism analysis.
  2. Protest challenging the agency's evaluation of the awardee's past performance proposal is denied where the evaluation was reasonable, consistent with the stated evaluation criteria, and well documented. Protester's objections did not rise beyond disagreement with the agency's evaluation judgments.
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## DECISION

Zafer Taahhut, Insaat Ve Tiaret AS (Zafer), of Ankara, Turkey, protests the award of a construction contract to Hatcon Insaat Taahhut Ithalat Ihracat Ltd. Sti. (Hatcon), also of Ankara, Turkey, under request for proposals (RFP) No. W912GB21R0008, issued by the Department of the Army, Corps of Engineers (Corps), Europe District, for construction services. The protester contends that the agency conducted a flawed price evaluation, assigned unreasonable ratings to its own and the awardee's proposals, and performed a flawed best-value tradeoff analysis.

We deny the protest.

## BACKGROUND

The RFP, issued on December 30, 2020, and subsequently amended four times, sought proposals for construction of munitions storage area facilities at Powidz Air Base in

Poland. RFP at 000034. The contract will support the requirement to construct joint munitions storage area facilities to include 54 collocated earth covered magazines (ECMs) to provide munitions storage for the North Atlantic Treaty Organization (NATO) Security Investment Program, United States Army Europe, United States Air Force, and the Polish Ministry of Defense. Contracting Officer's Statement at 1.<sup>1</sup>

As amended, the solicitation contemplated the award of a single fixed-price construction contract, with selection of the contractor to be made on a best-value tradeoff basis, considering the following evaluation factors: (1) past performance; (2) management plan; (3) technical approach narrative and schedule;<sup>2</sup> (4) national competitive bidding (NCB) plus requirements; and (5) price.<sup>3</sup> RFP amend. 4 at 000332. The solicitation provided that the past performance, management plan, and technical approach factors were approximately of equal importance, and when combined, were approximately equal to price. *Id.* at 000331. For the NCB plus requirements factor, proposals would be evaluated on an acceptable/unacceptable basis. Proposals rated as acceptable under the NCB plus requirements factor, would then be considered under the past performance, management plan, and technical approach factors in a best-value tradeoff analysis. *Id.* at 000302.

Under the past performance factor, offerors were required to provide a maximum of six past or current contracts, performed within the past 6 years prior to the December 30, 2020 RFP issue date. RFP amend. 4 at 000332. In addition, the RFP required submission of completed contractor performance assessment reporting system reports or completed past performance questionnaires (PPQs) for each contract reference. RFP amend. 1 at 000295. The agency would evaluate the recency, relevancy, and quality of the past performance references. *Id.*

Recency was defined as projects completed or substantially completed no more than six years before the December 30, 2020 RFP date of issuance. *Id.* Relevancy would take into consideration similarity in size (minimum of \$50,000,000); similarity in scope (to include construction of new ammunition magazines or bunkers); construction of rail facilities (specifically railheads and tracks); construction of maintenance buildings or administrative facilities; construction projects performed within the European Union (with projects performed within Poland considered more relevant); and construction of new facilities (which include all major architectural and engineering disciplines with a construction cost of at least \$50,000,000). *Id.* Based on these assessments, each contract would be assigned a rating of very relevant, relevant, somewhat relevant, or

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<sup>1</sup> Citations to page numbers for the contracting officer's statement are to the electronic Adobe pdf pages.

<sup>2</sup> For ease of reference, we use "technical approach" to refer to any discussion of the technical approach narrative and schedule evaluation factor.

<sup>3</sup> The solicitation instructed offerors to submit their price proposal in euros. RFP amend. 1 at 000301.

not relevant.<sup>4</sup> *Id.* at 000303. After considering the relevance of each prior contract, the solicitation provided that the agency would assess the quality of an offeror's past performance record and assign a confidence rating of substantial confidence, satisfactory confidence,<sup>5</sup> neutral confidence, limited confidence, or no confidence. *Id.* at 000303-000304.

As to price, offerors were instructed to complete and submit the contract line item number (CLIN) schedule prices for each CLIN, to include any options. RFP at 000045. The solicitation contemplated an analysis to be performed on the prices proposed for each CLIN and total proposed price in accordance with Federal Acquisition Regulation (FAR) section 15.404-1, using one or more of the following techniques to ensure a fair and reasonable price:

- (1) Comparison of proposed prices received in response to the solicitation.
- (2) Comparison of proposed prices to historical prices paid, whether by the [g]overnment or other than the [g]overnment, for the same or similar items.
- (3) Use of parametric estimating methods/application of rough yardsticks to highlight significant inconsistencies that warrant additional pricing inquiry.
- (4) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.
- (5) Comparison of proposed prices with [the independent government estimates (IGE)].
- (6) Comparison of proposed prices with prices obtained through market research for the same or similar items.
- (7) Analysis of data other than certified cost or pricing data provided by the offeror.

RFP amend. 4 at 000337-000338.

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<sup>4</sup> The RFP defined a relevant contract as: present/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires. A somewhat relevant contract was defined as: present/past performance effort involved some of the scope and magnitude of effort and complexities this solicitation requires. RFP amend. 1 at 000303.

<sup>5</sup> Satisfactory confidence was defined as: based on the offeror's recent/relevant performance record, the government has a reasonable expectation that the offeror will successfully perform the required effort. RFP amend. 4 at 000333.

Nine offerors, including Zafer and Hatcon, submitted proposals by the March 16, 2021, extended closing date for receipt of proposals. Contracting Officer's Statement at 8. An agency source selection evaluation board assessed the non-price proposals using the combined technical/risk rating schemes set forth in the RFP: outstanding, good, acceptable, marginal, and unacceptable for the management plan and technical approach factors. RFP amend. 4 at 000334-000336.

After the initial evaluation, the contracting officer established a competitive range comprised of eight proposals, including those of Zafer and Hatcon. Contracting Officer's Statement at 9; Agency Report (AR) exh. 16, Competitive Range Determination at 001138-001139. The agency conducted discussions and requested and received final proposal revisions. The source selection evaluation board prepared a final report, explaining the nature of each offeror's revisions and the board's consensus evaluation judgments concerning the strengths, significant strengths, and weaknesses of each final proposal revision. See generally, AR exh. 21, Source Selection Evaluation Board Report at 001381-001517.

The contracting officer, who also served as the source selection authority, conducted a price analysis of the final price proposals. The price proposals were compared against the IGE and competing offerors' price proposals in order to determine a fair and reasonable price. Zafer's final proposed price, base plus options, of €75,868,002.00 was 7% lower than the IGE and 2% above the average total price of competing offerors' price proposals. Hatcon's final proposed price of €33,058,695.75 was 60% lower than the IGE and 55% lower than the average total price of competing offerors' price proposals. See AR exh. 23, Source Selection Decision Document at 001587-001592. In accordance with FAR subsections 15.404-1(b)(2)(i) and 15.404-1(b)(2)(v), the contracting officer determined each offeror's proposed prices to be fair and reasonable based on adequate competition and comparison to the IGE. *Id.* at 001591.

The following is a summary of the agency's final consensus ratings and evaluated prices for Zafer and Hatcon:

	Zafer	Hatcon
<b>Past Performance</b>	Satisfactory Confidence	Satisfactory Confidence
<b>Management Plan</b>	Acceptable	Acceptable
<b>Technical Approach Narrative &amp; Schedule</b>	Acceptable	Acceptable
<b>NCB Plus Requirements</b>	Acceptable	Acceptable
<b>Total Price (base + options)</b>	€75,868,002.00	€33,058,695.75

AR exh. 21, Final Source Selection Evaluation Board Report at 001381; AR exh. 23, Source Selection Decision Document at 001587-001590.

The contracting officer received and reviewed the source selection evaluation board's consensus evaluation ratings and supporting narratives for the ratings assigned. AR exh. 23, Source Selection Decision Document at 001533-001587. The contracting officer performed a comparative assessment of the qualitative merits of proposals and concluded that the Zafer and Hatcon proposals were essentially equal under the past performance, management plan, and technical approach factors. *Id.* at 001593-001594. The contracting officer concluded that Hatcon's lower-priced proposal provided the best value to the government. On September 29, 2021, the agency awarded the contract to Hatcon.

After receiving notice of the award, and a written debriefing on October 6, Zafer filed this protest with our Office.

## DISCUSSION

Zafer argues that the agency conducted an improper price evaluation, failed to perform a price realism analysis, assigned unreasonable adjectival ratings to Zafer's proposal under the management plan and technical approach factors, improperly evaluated Hatcon's proposal under the past performance factor, and failed to perform a proper best-value tradeoff. See *generally*, Protest at 10-15. We have considered all of Zafer's allegations and find no basis to sustain the protest. We discuss the protester's principal contentions below.

### Price Evaluation

As an initial matter, Zafer challenges the agency's price reasonableness assessment. In this regard, as previously stated, the solicitation contemplated that the agency would use "one or more" of seven possible price analysis techniques "to ensure a fair and reasonable price[.]" RFP amend. 4 at 000337. In conducting this assessment, the Corps used two such techniques: comparing prices received in response to the solicitation, and comparing prices received to the IGE. Contracting Officer's Statement at 16-18; Memorandum of Law at 6-13 (*citing, Emergint Techs., Inc.*, B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6). The protester contends that the agency's use of only these techniques was unreasonable because the agency was "permitted and required to perform a price realism analysis." Comments at 4. Zafer argues that had the agency performed a price realism analysis, the agency would have concluded that Hatcon's price was so low as to reflect a lack of understanding of the work required. In other words, the protester asserts that there "is no way to evaluate a price that is 60% lower than [the] IGE as 'reasonable' without sacrificing the RFP and specifications requirements." *Id.*

We find no merit to Zafer's argument because it mistakenly conflates two different concepts: price reasonableness and price realism. In this respect, an agency's concern in making a price reasonableness determination in a fixed-price environment is whether the offered prices are too high, as opposed to too low. *Sterling Servs., Inc.*, B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. In contrast, a price realism

review is to determine whether prices are too low such that there may be a risk of poor performance. *STG, Inc.*, B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 13. Thus, the RFP price reasonableness techniques at issue here are simply not applicable to the question of whether Hatcon proposed prices that were too low.

Despite Zafer's insistence, in the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and where the RFP states that a proposal can be rejected for offering low prices. *HP Enterprise Services, LLC*, B-413888.2 *et al.*, June 21, 2017, 2017 CPD ¶ 239 at 5. Here, because the RFP did not expressly state that the agency would conduct such an analysis, the agency's alleged failure to consider, as part of its price reasonableness analysis, the disparity between Hatcon's low prices and the IGE fails to state a valid basis of protest.

We next turn to the remaining technical and past performance arguments raised by the protester, which we conclude lack merit.

#### Evaluation of Zafer's Proposal

Zafer complains that the agency's evaluation under the management plan and technical approach factors was flawed and failed to follow the terms of the solicitation. Specifically, Zafer argues that based upon the evaluators' findings, the Corps should have assigned Zafer's proposal a rating of "[o]utstanding," rather than a rating of "[a]cceptable," under the management plan factor.<sup>6</sup> Protest at 11-12. Similarly, under the technical approach factor, Zafer alleges that since its proposal was evaluated with one strength and no weaknesses, it should have received a rating of "[g]ood," rather than "[a]cceptable." *Id.*

The Corps addressed these bases of protest in its report to our Office, see Contracting Officer's Statement at 18 (*citing* AR exh. 23, Source Selection Decision Document at 001564-001565; AR exh. 21, Final Source Selection Evaluation Board Report at 001507-001508); see *also*, Contracting Officer's Statement at 19 (*citing* AR exh. 23, Source Selection Decision Document at 001577); Memorandum of Law at 13-18. In its comments on the agency report, Zafer did no more than restate, essentially verbatim, its original protest allegations. *Compare* Comments at 6 *with* Protest at 11-12. Where, as here, an agency provides a detailed response to a protester's allegations and the protester either does not respond to the agency's position or provides a response that merely references, restates, or alludes to the original protest allegations without substantively rebutting the agency's position, we deem the initially raised arguments

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<sup>6</sup> As relevant, the RFP defined a rating of acceptable as: proposal meets the requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate. RFP amend. 4 at 000334.

abandoned and do not consider them further. *TCG, Inc.*, B-417610, B-417610.2, Sept. 3, 2019, 2019 CPD ¶ 312 at 3-4.

## Past Performance

Zafer also challenges the agency's assignment of satisfactory confidence to Hatcon's proposal under the past performance factor, arguing that Hatcon "is a small company" whose largest prior project was for 7,200,000 euros. Protest at 12. In its comments, the protester complains that the agency "glosses over" Hatcon's alleged failure to submit the necessary past performance to support a finding that the firm is capable of performing the solicited requirements. Comments at 6. In response, the agency states that it properly evaluated Hatcon's record of past performance and reasonably assigned a rating of satisfactory confidence. See Contracting Officer's Statement at 17-19; Memorandum of Law at 18-22.

Our Office will review an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *Richen Mgmt., LLC*, B-409697, July 11, 2014, 2014 CPD ¶ 211 at 4; *MFM Lamey Grp., LLC*, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with the agency's evaluation, by itself, does not demonstrate that those judgments are unreasonable. *Cape Envtl. Mgmt., Inc.*, B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8-9; *FN Mfg., LLC*, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7.

Here, the record shows that Hatcon provided five past performance contract references with its proposal. In its evaluation, the agency concluded that four of the five contract references were completed within six years of the RFP's issue date and therefore were considered recent. In evaluating relevancy, for the four recent contracts, the agency evaluated one contract as relevant, one as somewhat relevant, and two as not relevant. AR exh. 21, Final Source Selection Evaluation Board Report at 001431-001433; AR exh. 23, Source Selection Decision Document at 001533-001536.

With regard to the contract evaluated by the agency as relevant, the evaluation record includes the following:

[The] scope of the project included the design and construction of an ammunition holding area; one munitions storage building, which is similar to the ECMs contemplated by the MSA [munitions storage area] project; an ammunition loading dock, maintenance and warehouse buildings; and rail facilities to include loading ramps, a marshalling area and associated roads. Although the project included construction of rail facilities, it does not appear that the project included construction of an actual rail line. This

project was located in the European Union and was constructed for NATO. The project included construction of rail, construction of ammunition magazines/bunkers, and construction of maintenance facilities. The total project cost was 14.8M EU was significantly less than \$50M, but the project demonstrated the construction of new facilities which included all major architectural and engineering disciplines. The past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires, therefore, the project is considered **Relevant**.

AR exh. 23, Source Selection Decision Document at 001534 (emphasis in original).

Hatcon's proposal included a completed PPQ for this contract evaluated as relevant, with ratings of satisfactory to exceptional and an overall rating of very good. The past performance reference stated that Hatcon was recommended for similar work in the future. *Id.* at 001535. For the other contract evaluated as somewhat relevant, Hatcon's proposal included a completed PPQ, with its performance rated very good overall and Hatcon recommended for similar work in the future. *Id.* Based on Hatcon's record of performance on its recent and relevant/somewhat relevant contracts, and the quality of Hatcon's performance, the agency assigned Hatcon's proposal a rating of satisfactory confidence.

We find the agency's evaluation of Hatcon's past performance to be unobjectionable. As a preliminary matter, and as noted above, the record reflects that the Corps assessed the relevance of Hatcon's past performance references and, of the recent contracts, found one to be relevant and one to be somewhat relevant to the work here. Although neither of these contracts met the \$50M threshold for size, which the agency recognized in its evaluation and selection decision, the agency found the complexity of the work previously performed, matched several requirements of the solicitation.<sup>7</sup> The Corps also reasonably considered the overall "very good" performance assessments from Hatcon's references as well as the PPQ references noting that they would award to Hatcon again. Based on this comprehensive assessment, and the fact that the protester has offered no specific evidence that would rebut that assessment, we find nothing unreasonable in the agency's conclusion that there was a reasonable

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<sup>7</sup> By contrast, the agency found four of the protester's six past performance references to be recent and only somewhat relevant. AR exh. 21, Final Source Selection Evaluation Board Report at 001502-001506. Although the record reflects that several of the protester's four recent contracts exceeded the \$50M threshold, the evaluators found that none of them demonstrated construction of facilities similar to ammunition magazines or bunkers, nor did they demonstrate construction of rail facilities. *Id.* Based on these somewhat relevant past performance references, the agency also rated the protester's past performance as satisfactory confidence. *Id.*

expectation that Hatcon would successfully perform the required effort (*i.e.*, warranted a rating of “satisfactory confidence”). Accordingly, we deny this protest ground.<sup>8</sup>

Finally, in its comments, Zafer for the first time argues that the agency failed to properly analyze two of the technical approaches proposed by Hatcon: its offer to [DELETED], which Hatcon asserts could significantly reduce costs; and its offer to [DELETED], which Hatcon also asserts could significantly reduce the markups and delivery costs associated with the [DELETED]. Comments at 3. We dismiss these protest grounds as untimely.

Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where a protester initially files a timely protest, and later supplements it with independent protest grounds, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. *Neopost USA Inc.*, B-404195, B-404195.2, Jan. 19, 2011, 2011 CPD ¶ 35 at 6. We view allegations raised

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<sup>8</sup> To the extent the protester argues that Hatcon should have received a past performance rating of no confidence because its past performance references did not exceed the solicitation’s \$50M threshold for evaluating similarity in size, the protester is mistaken. First, the solicitation did not categorically preclude consideration of such contracts when they were otherwise relevant in terms of similarity in scope (to include construction of new ammunition magazines or bunkers, construction of rail facilities specifically, railheads and tracks). Second, even assuming that under the terms of the solicitation such contracts should not have been considered, Hatcon would have been assigned a rating of neutral confidence, not a rating of no confidence. As is relevant, neutral confidence was defined as: no recent/relevant performance record is available or the offeror’s performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned; no confidence was defined as: based on the offeror’s recent/relevant performance record, the government has no expectation that the offeror will be able to successfully perform the required effort. RFP amend. 1 at 000303-000304.

Because the solicitation established that an offeror with a rating of neutral confidence “may not be evaluated favorably or unfavorably” *see id.*, we fail to see a reasonable possibility that the protester could have been competitively prejudiced by the alleged error. The protester’s and the awardee’s ratings would have remained essentially equal (the only difference being the protester’s past performance rating of satisfactory confidence versus the awardee’s rating of neutral confidence), the awardee’s price was less than half of the protester’s price, and price was the single most important factor for purposes of award. *See Northrop Grumman Info. Tech., Inc.*, B-401198, B-401198.2, June 2, 2009, 2009 CPD ¶ 122 at 4 (protester was not prejudiced where its higher-priced proposal was found to be essentially equal to the awardee’s proposal, and where this would not have changed even if the protester prevailed on its protest ground).

for the first time in comments to constitute independent protest grounds if, as here, a further response by the agency is needed to adequately review the matter.

Here, the agency report was filed on Monday, November 8, 2021; therefore, any supplemental protest based on information in the agency report should have been filed within 10 calendar days; that is, by November 18. After receiving an extension to file comments on the agency report from our Office, Zafer filed its comments and these additional bases of protest on November 19. An extension of time to file comments on the agency report does not toll the timeline to file supplemental protest grounds. See 4 C.F.R. § 21.3(i); *Chandler Solutions, LLC*, B-409655.2, Aug. 13, 2014, 2014 CPD ¶ 239 at 4.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel