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Decision

Matter of: Excelsior Ambulance Service, Inc.

File: B-421122.2; B-421122.3

Date: April 19, 2023

William M. Weisberg, Esq., Law Offices of William Weisberg, PLLC, for the protester. Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency. Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of the awardee's proposal under the past performance factor is denied where the record demonstrates that the evaluation was conducted reasonably and in accordance with the terms of the solicitation.
 2. Protest challenging the evaluation of the awardee's proposal as unreasonable for not assessing whether that firm could perform at the price offered is denied in part and dismissed in part where we conclude that the protest ground represents a misunderstanding of the solicitation's instructions to offerors and otherwise does not advance a valid basis of protest.
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DECISION

Excelsior Ambulance Service, Inc. (Excelsior), a service-disabled veteran-owned small business of Ludowici, Georgia, protests the award of a contract to Pro Care Emergency Medical Services (Pro Care EMS), a small business of Lawrenceville, Georgia, under request for proposals (RFP) No. 36C24722R0029, issued by the Department of Veterans Affairs (VA) for ambulance transportation services. The protester argues that the agency's evaluation of the awardee's proposal was unreasonable.

We deny the protest.

BACKGROUND

The VA issued the RFP on June 24, 2022, as a set-aside for small business concerns using the procedures of Federal Acquisition Regulation (FAR) part 12, acquisition of commercial products and commercial services, and FAR part 15, contracting by

negotiation. Agency Report (AR), Exh. 2, RFP at 1, 93-94. The RFP explained that the prospective contractor would be called upon to furnish stretcher transportation units, basic life support units, advanced life support units, and the necessary personnel and equipment to provide non-emergent, urgent, and emergent ambulance transportations services for the beneficiaries of the Atlanta VA health care system. *Id.* at 16.

The RFP contemplated the award of a fixed-price indefinite-delivery, indefinite-quantity contract with a 1-year base period and four 1-year option periods. *Id.* at 94. Award would be made to the offeror submitting the proposal deemed “most advantageous to the Government,” considering past performance and price, where past performance was considered significantly more important than price. *Id.* at 94-95. Proposals were due by July 14, 2022. *Id.* at 1.

The agency received three proposals by the submission deadline, including proposals from Excelsior and Pro Care EMS. Memorandum of Law (MOL) at 2-3. On August 8, the agency opened discussions and established August 15 as the submission deadline for final revised proposals. *Id.* at 3; AR, Exh. 7, Discussions Material. Final revised proposals were timely submitted by three offerors including Excelsior and Pro Care EMS. MOL at 3. Based on its evaluation of final revised proposals, the agency selected Pro Care EMS for award. *Id.*

On September 30, Excelsior filed a protest with our Office challenging the agency’s evaluation of Pro Care EMS’s proposal. *Excelsior Ambulance Serv., Inc.*, B-421122, Oct. 26, 2022 (unpublished decision). In response to the protest, the VA filed a notice of corrective action pledging to reevaluate proposals and make a new award decision. *Id.* On October 26, our Office dismissed Excelsior’s protest as academic. *Id.*

Following the dismissal of Excelsior’s first protest, the VA implemented its corrective action by reevaluating the final revised proposals submitted by all offerors. MOL at 3-4; AR, Exh. 1, Source Selection Decision Document (SSDD) at 5. The results of the reevaluation are as follows:

	Past Performance¹	Total Evaluated Price
Excelsior	Substantial Confidence	\$32,948,100
Pro Care EMS	Satisfactory Confidence	\$17,445,472
Offeror C	Neutral	\$14,698,713

AR, Exh. 1, SSDD at 5-9. The source selection authority (SSA) concluded that the proposal submitted by Pro Care EMS represented the best value to the government and selected it for award. *Id.* at 11.

¹ The past performance factor was rated on a scale of substantial confidence, satisfactory confidence, limited confidence, or no confidence, where “substantial confidence” represented the highest possible rating and where “no confidence”

On January 3, 2023, the VA notified Excelsior of the award to Pro Care EMS. AR, Exh. 12, Unsuccessful Offeror Notice; MOL at 4. On January 5, Excelsior requested a debriefing, and on January 11, the debriefing was provided. MOL at 4. On January 13, the instant protest was filed with our Office.

DISCUSSION

Excelsior's protest raises the following two challenges: (1) the agency's evaluation of Pro Care EMS's proposal was unreasonable for failing to evaluate whether that firm could perform the required work at the offered price; and (2) the agency's affirmative determination of responsibility was improper. Protest at 4-6.

The agency's report in response to the protest substantively addresses each of the protester's allegations. MOL at 5-10. The protester's comments on the agency report raise a supplemental protest challenging the agency's past performance evaluation, address the first protest ground, and do not meaningfully address the second protest ground. See Comments & Supp. Protest. Accordingly, we dismiss as abandoned the challenge to the agency's affirmative determination of responsibility.² 4 C.F.R. § 21.3(i)(3) (GAO will dismiss any protest allegation where the agency's report responds to the allegation but the protester's comments fail to address that response). We discuss the supplemental protest ground and the remaining protest ground below.

The VA's Past Performance Evaluation was Reasonable

In its supplemental protest, Excelsior argues that the agency's evaluation of Pro Care EMS's proposal under the past performance factor was unreasonable because it failed to properly assess the relevancy of that firm's past performance. Comments & Supp. Protest at 2-3; Supp. Comments at 2-3. The protester contends that the dollar value of each of the awardee's past performance contract references was much lower than the value of this procurement and therefore the references should have been found to be

represented the worst. AR, Exh. 1, SSDD at 2. Offerors without an available record of recent and relevant performance or where the record was so sparse that no meaningful confidence assessment rating could have been assigned were to receive a rating of neutral. *Id.*

² In its comments on the agency report, the protester states the following: "To the extent an issue is not addressed in these Comments, Excelsior requests that GAO rely upon the arguments in the Protest." Comments & Supp. Protest at 1. Such a statement does not sufficiently respond to the agency report as required by our Bid Protest Regulations. 4 C.F.R. § 21.3(i)(3). Our Office does not consider such general references to initial protest grounds as rebuttal of the agency's detailed responses on the merits. See *Facility Healthcare Servs., Inc.*, B-418743.2, B-418743.3, Sept. 2, 2021, 2021 CPD ¶ 313 at 5 n.3; *Open Sys. Sci. of Virginia, Inc.*, B-410572, B-410572.2, Jan. 14, 2015, 2015 CPD ¶ 37 at 8 n.3.

not relevant. The VA defends its evaluation as reasonable. As discussed below, we deny this protest ground.

Dollar Value of Past Performance References

Under the past performance factor, offerors were instructed to submit “a narrative describing their past performance history providing Non-Emergent and Emergent Ambulance Transportation Services.” RFP at 87. To evaluate proposals under the past performance factor, the agency was to consider the relevancy and the quality of the respective offeror’s past performance history. *Id.* at 94. For the purpose of determining relevancy, the RFP defined “relevant” as “contracts recently performed that include services that are similar in complexity, dollar value, and contract type.” *Id.* The RFP also stated that “special emphasis” would be given to past performance references “related to areas covered by the [performance work statement (PWS)] for this solicitation.” *Id.*

Pro Care EMS’s final revised proposal included references for five contracts. AR, Exh. 9, Pro Care EMS Final Revised Proposal at 60-61. In evaluating Pro Care EMS’s proposal, the SSA assessed four of the past performance references and rated the proposal as satisfactory confidence. AR, Exh. 1, SSDD at 5-6.

In assessing the relevance of Pro Care EMS’s first reference--valued at \$1.6 million--the SSA noted that it was for the provision of emergent and non-emergent ambulance transportation services performed at the Atlanta VA Medical Center from April 2020 to March, 2021, and concluded that the reference was relevant because it was similar to the instant requirement in dollar value, complexity, and contract type. *Id.* at 5. In assessing the relevance of Pro Care EMS’s second reference--valued at \$2.3 million--the SSA noted that it was for the provision of emergent and non-emergent ambulance transportation services performed at the Life Care Center of Gwinnett (of Gwinnett County, Georgia) from July 2008 to the present, and concluded that the reference was relevant because it was similar to the instant requirement in dollar value, complexity, and contract type. *Id.*

Pro Care EMS’s final two past performance references evaluated by the SSA were each for the provision of emergent and non-emergent ambulance transportation services, were valued at \$144,000 and \$288,000, respectively, and were each found to be somewhat relevant to the instant requirement. *Id.* at 5-6. The SSA ultimately concluded that “based on the offeror’s recent/relevant performance record, the Government has a reasonable expectation that [Pro Care EMS] will successfully perform the required effort.” *Id.* at 6.

Excelsior challenges the agency’s evaluation of Pro Care EMS’s proposal under the past performance factor. The protester notes that the awardee’s total evaluated price for the instant procurement was greater than \$17 million, and argues that the dollar values of Pro Care EMS’s prior contracts were so low that the agency could not have reasonably found them relevant to the instant requirement. Comments & Supp. Protest

at 2-3; Supp. Comments at 2-3. The protester further argues that, based on this allegedly irrelevant past performance, the agency “should have disqualified [Pro Care EMS], or at the least scored it even lower than Excelsior[.]”³ Comments & Supp. Protest at 2.

The VA defends its evaluation as reasonable. The agency argues that the consideration of the dollar value of past performance references was but one component of the relevance aspect of the past performance evaluation. Supp. MOL at 7-10. According to the agency, the RFP provided that the relevancy assessment would consider aspects of the submitted past performance references in addition to dollar value, and argues that its evaluation of Pro Care EMS’s proposal was conducted reasonably and in accordance with the RFP. *Id.*

For example, the VA argues that it reasonably found relevant the awardee’s past performance reference for work performed at the Atlanta VA Medical Center because: (1) it covered “the provision of identical services as those services required in the instant procurement[.]” (2) it was for past work performed in the same geographic area described in the PWS for this procurement; and (3) its dollar value--\$1.6 million per year--was similar to the dollar value of the instant requirement which, based on the contract awarded to Pro Care EMS, is valued at about \$3 million per year.⁴ *Id.* at 6-7. The agency contends that it reasonably assessed Pro Care EMS’s other past performance references in a similar manner. See *id.* at 7-10; AR, Exh. 1, SSDD at 5-6. In sum, the agency argues that it reasonably took into account more than just dollar value when assessing past performance relevancy, and that its ultimate evaluation conclusions were reasonable and consistent with the solicitation.

The evaluation of an offeror’s past performance, including the agency’s determination of the relevance and scope of an offeror’s performance history, is a matter of agency discretion which we will not find improper unless it is inconsistent with the solicitation’s evaluation criteria. *Zafer Taahhut Insaat Ve Tiaret AS*, B-420280, Jan. 19, 2022, 2022 CPD ¶ 157 at 7; *KIC Dev., LLC*, B-309869, Sept. 26, 2007, 2007 CPD ¶ 184 at 3. Our Office consistently recognizes that the evaluation of past performance is, by its nature, subjective. *DynCorp Int’l LLC; AAR Supply Chain, Inc.*, B-415873 *et al.*, April 12, 2018, 2019 CPD ¶ 157 at 17; *JSW Maint., Inc.*, B-400581.5, Sept. 8, 2009, 2009 CPD ¶ 182 at 3. An offeror’s disagreement with an agency’s evaluation judgments, without more, does not demonstrate that those evaluation judgments were unreasonable. *Zafer Taahhut Insaat Ve Tiaret AS*, *supra*.

³ We note that the terms of the RFP provided that in the case of an offeror without a record of relevant performance history, that offeror may not be evaluated favorably or unfavorably under the past performance factor. RFP at 95.

⁴ The agency notes that Pro Care EMS’s total evaluated price of \$17,445,472 included the base year, four option years, and the 6-month option to extend services. Supp. MOL at 6 n.2.

Based on our review of the record, we find no basis to disturb the VA's past performance evaluation. In assessing the relevancy of past performance references, the solicitation required the agency to consider recency, complexity, dollar value, and contract type. RFP at 94. Contrary to the protester's position, the RFP required the agency to consider more than dollar value alone when assessing relevancy, and did not state that a reference would be deemed irrelevant based solely on dollar value. RFP at 94-95.

To the extent that Excelsior disagrees with the agency's evaluation conclusions, we note that the evaluation of an offeror's past performance is a matter within the agency's discretion, and disagreement with evaluation conclusions, without more, is insufficient to demonstrate that those evaluation conclusions were unreasonable. See e.g., *Zafer Taahhut Insaat Ve Tiaret AS, supra* at 7-9 (finding reasonable an evaluation of past performance relevancy considering two contracts valued less than the solicitation's \$50 million threshold for size where the agency's evaluation recognized the size differential and concluded that the contracts were relevant and somewhat relevant because the complexity of the work matched several solicitation requirements); *KIC Dev., LLC, supra* at 3-4 (finding that where a solicitation did not establish a contract dollar value for prior contracts, the agency could reasonably evaluate an offeror's past performance as relevant where the value of the awarded contract was \$4.6 million and the values of the awardee's prior contracts were \$707,000, \$535,000, \$317,000, and \$148,000).

Additional Challenges Representing Untimely Piecemeal Presentation

In addition to challenging the agency's evaluation of Pro Care EMS's past performance references based on their dollar value, in its supplemental comments Excelsior raises new concerns regarding this evaluation. For example, Excelsior argues that three of Pro Care EMS's past performance references are different than the instant procurement and therefore not relevant because they were for work at nursing homes rather than hospitals, that the nursing homes were private facilities rather than public facilities, and that each prior contract involved only one facility rather than a network of facilities. Supp. Comments at 2-3.

We dismiss these new concerns as an untimely piecemeal presentation. 4 C.F.R. § 21.2(a)(2); *Interactive Info. Sols., Inc., B-415126.2 et al.*, Mar. 22, 2018, 2018 CPD ¶ 115 at 3 ("Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process."). In this regard, Excelsior could have raised these concerns based on the information produced in the agency report, which was filed on February 13. See AR, Exh. 1, SSDD at 5-6 (evaluation of Pro Care EMS's past performance); AR, Exh. 9, Pro Care EMS Final Revised Proposal at 60-61 (past performance references). It did not raise them until March 13, which was more than 10 days after Excelsior knew or should have known of the information giving rise to those concerns. Accordingly, we will not consider them.

Other Evaluation Allegations

Excelsior also argues that the RFP required the agency to evaluate proposals for the ability to comply with the PWS at the offered price. Protest at 3-4; Comments & Supp. Protest at 1-2. As the agency admittedly did not evaluate Pro Care EMS's proposal for that firm's ability to comply with the PWS at the offered price, Excelsior argues that the evaluation was unreasonable. *Id.* Excelsior's argument, however, is not supported by the terms of the solicitation.

In presenting its argument, Excelsior does not cite to the RFP's stated evaluation factors. As discussed above, the RFP established that the evaluation of proposals would consider two factors: (1) past performance; and (2) price. RFP at 93-95. In fact, Excelsior concedes that "the solicitation did not have a *per se* technical evaluation process[.]" Protest at 3. Rather, Excelsior conjures its proffered evaluation factor from the RFP's instructions to offerors; more specifically, from the fact that in describing to prospective offerors how to submit proposals, the RFP incorporated FAR provision 52.212-1, Instructions to Offerors--Commercial Products and Commercial Services. *Id.* at 83-91. The protester avers that the incorporation of FAR provision 52.212-1 imposed an obligation on the agency to evaluate proposals for technical compliance with the PWS requirements because the FAR provision includes the following instruction to offerors: "As a minimum, offers must show . . . [a] technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation." FAR provision 52.212-1(b), (b)(4).

In evaluating proposals, agencies must assess their relative qualities solely on the factors and subfactors specified in the solicitation. FAR 15.305(a); *United Med. Sys.-DE, Inc.*, B-298438, Sept. 27, 2006, 2006 CPD ¶ 148 at 3. Our Office has previously explained that information required by a solicitation's instructions to offerors does not have to correspond to the solicitation's evaluation criteria, as instructions to offerors generally provide guidance to *offerors* and do not establish minimum evaluation standards imposed on the procuring agency. See *e.g.*, *All Phase Env'tl., Inc.*, B-292919.2 *et al.*, Feb. 4, 2004, 2004 CPD ¶ 62 at 4.

To the extent this protest ground argues that the RFP's inclusion of FAR provision 52.212-1 imposed minimum evaluation standards on the agency, it is denied. The cited FAR provision is guidance to offerors on how to prepare their proposals; its inclusion in the solicitation does not impose minimum evaluation standards on the agency. RFP at 83-84 (including FAR provision 52.212-1); see also *All Phase Env'tl., Inc.*, *supra*.

To the extent Excelsior argues that the evaluation of Pro Care EMS's proposal was unreasonable for not assessing that firm's ability to perform at the price offered, it is dismissed for failing to state a valid basis of protest under the terms of this solicitation. 4 C.F.R. §§ 21.1(c)(4), (f); § 21.5(f). The RFP contemplated the award of a fixed-price contract and stated that "The government will evaluate information based on the following evaluation criteria: Factor A- Past Performance and Factor B- Price." RFP

at 92, 94. There is no evaluation factor requiring the agency to consider whether an offeror could comply with the requirements of the PWS at the price offered. See Protest at 3-4; Comments & Supp. Protest at 1-2.

The protest is denied.

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General Counsel