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Decision

Matter of: Kauffman and Associates, Inc.

File: B-421917.2; B-421917.3

Date: January 29, 2024

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DIGEST

1. Protest challenging the agency's interpretation of the solicitation is sustained where the solicitation was latently ambiguous with regard to information vendors were required to submit with their quotations under the technical approach factor.
 2. Protest alleging the agency failed to evaluate vendors' quotations on an equal basis is sustained where the record demonstrates the agency did not evaluate quotations in an even-handed manner.
 3. Protest challenging the agency's technical evaluation of quotations is sustained where the agency's evaluation was inconsistent with the terms of the solicitation, unsupported by the contemporaneous record, and otherwise unreasonable.
 4. Protest challenging the agency's price evaluation of the awardee's quotation is sustained where the agency unreasonably determined the awardee's pricing to be fair and reasonable despite the awardee proposing labor rates in excess of its Federal Supply Schedule contract rates.
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DECISION

Kauffman and Associates, Inc., a women-owned small business of Spokane, Washington, protests the issuance of an order to Octane Public Relations, a small disadvantaged business of Washington, District of Columbia, under request for quotations (RFQ) No. 231122, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for training planning and

meetings support services. The protester raises multiple challenges concerning the agency's evaluation of vendors' quotations and subsequent best-value decision.

We sustain the protest.

BACKGROUND

On April 25, 2023, CMS issued the solicitation to five vendors under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, seeking quotations for in-person and virtual training services for the Indian Health Service on CMS benefits and programs, among other benefit programs. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) at 5; AR, Tab 2.1, RFQ at 13.¹ The RFQ was set aside for small businesses and contemplated the issuance of a fixed-price order for a 12-month base period with up to four 12-month options. RFQ at 1.

The RFQ advised that CMS intended to issue an order to the vendor with the best-value quotation "by awarding to the highest technically rated [vendor(s)] that also demonstrate fair and reasonable pricing." *Id.* at 9. The RFQ further stated that tradeoff decisions would be made to the extent necessary. *Id.* The solicitation established that the agency's evaluation would consider five factors, each holding equal weight: (1) technical approach; (2) personnel; (3) management plan; (4) past performance; and (5) cost.² *Id.* at 10-11. The solicitation further advised that based on the prescribed evaluation scheme, the best-value quotation could be other than the lowest-price quotation, if the best-value quotation was the highest technically rated and had a fair and reasonable price. *Id.* at 9.

The solicitation explained that CMS would assign adjectival ratings to assist in the evaluation of the four non-cost factors. *Id.* at 9-10. Under each evaluation factor, a quotation could be assigned a rating of unacceptable, good, or excellent. *Id.* To merit a rating of good or excellent under a particular factor, a vendor's quotation needed to demonstrate one or more strengths, and contain no significant weaknesses or deficiencies. *Id.* at 9. The RFQ advised that "[a] combination of related [s]ignificant [w]eaknesses will result in a [d]efficiency, which would result in an elevated risk of performance and shall result in being removed from consideration of award." *Id.* at 10.

¹ All page number citations to agency report documents refer to the Adobe PDF page number of the document provided by the agency, unless otherwise indicated.

² Each of the evaluation factors held equal weight, therefore the RFQ advised that the non-cost factors, when combined, were significantly more important than cost. RFQ at 10. We note that this decision uses the terms "price" and "cost" interchangeably; though this is a fixed-price order, the RFQ uses the term "cost" and this decision accordingly does the same in some parts. Further, though not relevant to the protest, the RFQ advised that agency would also conduct a conflict of interest evaluation and "Section 508 risk assessment," neither of which would result in a score or rating for evaluation purposes. *Id.* at 11-12.

Two vendors, Kauffman and Octane, timely submitted quotations. COS at 5. In its initial evaluation of quotations, CMS determined that Kauffman’s quotation contained two significant weaknesses and was therefore technically unacceptable; the agency concluded that Octane’s quotation represented the best value to the government. *Id.* at 5-6. The agency notified Kauffman of its decision to select Octane for the order on August 14 and provided Kauffman with a brief explanation of the decision on August 17. AR, Tab 8.1, Kauffman Initial Unsuccessful Vendor Notice at 1; Tab 8.3, Kauffman Initial Brief Explanation at 1. The protester filed an initial protest with our Office on August 24. COS at 6.

In response to the initial protest, CMS elected to take voluntary corrective action consisting of a reevaluation of quotations and a new best-value decision and subsequent order. *Kauffman and Associates, Inc.*, B-421917.1, Sept. 20, 2023 at 1 (unpublished decision). Our Office subsequently dismissed the initial protest as academic. *Id.* at 2.

CMS completed its corrective action on October 10. COS at 6. The agency’s reevaluation of quotations yielded the following results:

	Kauffman and Associates	Octane Public Relations
Technical Approach	Unacceptable	Excellent
Personnel	Excellent	Excellent
Management Plan	Excellent	Excellent
Past Performance	Excellent	Excellent
Cost	N/A – Not Evaluated	Excellent ³

AR, Tab 7.1, Order Decision Memorandum at 4. The agency assigned the same two significant weaknesses to Kauffman’s quotation as during the initial evaluation. COS at 6. Specifically, under the technical approach factor, the agency assessed a significant weakness because the protester’s quotation did not demonstrate “experience working directly on the tasks outlined in the [statement of work (SOW)], specifically the requirements to execute successful training events.” AR, Tab 7.1, Order Decision Memorandum at 5. The agency assessed a second significant weakness because the protester’s quotation “does not outline a plan of how they will track and deploy [CEUs (continued education units)] for training participants.” *Id.* The agency then concluded that because of the two significant weaknesses, the quotation was technically

³ The Order Decision Memorandum indicates the awardee received a rating of excellent under the cost factor. AR, Tab 7.1, Order Decision Memorandum at 4. The memorandum also indicates award was made to Octane at a price of \$3,746,974. *Id.* at 7. Though its price was not evaluated, Kauffman proposed a price of \$2,496,104. *Id.* at 3.

unacceptable, and therefore the protester's proposed cost was not evaluated or considered. *Id.*

CMS found, on the other hand, that Octane's quotation "surpasse[d] the expectations outlined in the RFQ, demonstrating numerous strengths and no weaknesses." *Id.* at 4. After also finding the awardee's proposed cost to be fair and reasonable, the selection authority again determined Octane's quotation represented the best value to the government. *Id.* at 5, 7. On October 10, CMS notified Kauffman that it had issued the order to Octane, and also provided a brief explanation of its selection decision. AR, Tab 8.5, Kauffman Brief Explanation at 1. On October 20, the protester timely filed the instant protest.

DISCUSSION

Kauffman raises numerous challenges to CMS's evaluation of quotations. Specifically, the protester argues: (1) the agency's assessment of two significant weaknesses to Kauffman's quotation and subsequent decision to find the quotation ineligible for further consideration was unreasonable; (2) the agency's evaluation of Kauffman's and Octane's quotations under each of the non-cost factors was otherwise unreasonable; (3) the agency's price evaluation was flawed and unreasonable; and (4) the resultant best-value decision was unreasonable. See Protest at 9-46; Comments & Supp. Protest at 2-42.

Where, as here, an agency issues a solicitation to Federal Supply Schedule (FSS) vendors under FAR subpart 8.4 and conducts a competition for the issuance of an order, our Office will not reevaluate the quotations nor substitute our judgment for that of the agency; rather, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *Guidehouse LLP, B-419336 et al.*, Jan. 21, 2021, 2021 CPD ¶ 60 at 6. A protester's disagreement with the procuring agency's judgment, without more, does not establish that an evaluation was unreasonable. *Id.*

For the reasons explained below, we sustain the protest. The protest contains numerous grounds of protest. To the extent this decision does not specifically address all of the arguments raised by the protester, our Office has considered each protest ground, and find none afford an additional basis on which to sustain the protest.

Technical Evaluation of Quotations

Kauffman raises multiple challenges to CMS's technical evaluation of quotations. In this regard, the protester argues that two significant weaknesses assigned to its quotation were unreasonable, and that various aspects of Octane's technical volume should not have been assessed strengths, or otherwise should have been assessed weaknesses or significant weaknesses under the different evaluation criteria. Protest at 10-30; Comments & Supp. Protest at 2-37.

CMS generally argues that its technical evaluation was reasonable and consistent with the terms of the solicitation. Supp. Memorandum of Law (MOL) at 4. The agency contends that its decisions relating to the assessment of strengths and weaknesses were reasonable, and that the protester's arguments amount to disagreement with the agency's rational discretionary judgment. *Id.*

Technical Approach Factor

Kauffman challenges the agency's assessment of two significant weaknesses to its quotation under the technical approach factor, and the resulting conclusion that its quotation contained a deficiency and was therefore ineligible for award. Protest at 10-27. The protester contends that the agency's assessment of the first significant weakness, which was due to the agency's concern that Kauffman's quotation demonstrated "limited experience in training planning and support," amounted to application of an unstated evaluation criterion. The protester asserts that the technical approach factor contemplated a "forward-looking" evaluation, and not an evaluation based on prior experience. Protest at 10, 13. In the alternative, the protester argues that the solicitation was latently ambiguous. Comments & Supp. Protest at 7 n.2. In this regard, the protester maintains that had it been aware the agency would interpret the solicitation to require vendors to demonstrate their previous experience providing training support services, it would have provided such information in its technical approach. *Id.*

CMS contends that its evaluation of Kauffman's quotation under the technical approach factor was reasonable and consistent with the terms of the solicitation. With respect to the first significant weakness, the agency argues that it did not apply an unstated evaluation criterion because the RFQ explicitly advised that the agency would consider the vendors' "documentation of 'the interrelationship between this effort and others already out in the field, others in relation to this same or similar model programs, and any other pieces of information that the offeror feels pertinent to raise and address[.]'" MOL at 7. The agency contends that this language "makes clear that experience in planning training events is intrinsic" to the technical approach factor. *Id.* at 8. According to the agency, because the protester failed to document experience with respect to SOW requirements involving the execution of successful training events, the agency was justified in assessing a significant weakness. *Id.*

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. *Point Blank Enters., Inc.*, B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Desbuild, Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous our inquiry ceases; an ambiguity exists, however, where two or more reasonable interpretations of the solicitation are possible.

If the ambiguity is an obvious, gross, or glaring error in the solicitation, it is a patent ambiguity; a latent ambiguity is more subtle. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. Where there is a latent ambiguity, both parties' interpretations of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. *Qwest Gov't Servs., Inc. d/b/a CenturyLink QGS*, B-419597, B-419597.2, May 24, 2021, 2021 CPD ¶ 217 at 5 n.2.

As relevant here, the RFQ provided that vendors' technical approaches should "demonstrate an understanding of all aspects of the scope of work[.]"⁴ including providing "sufficient detail in the [quotation] to indicate a technical understanding of, and capability for performing all aspects of the SOW." RFQ at 4. The SOW required the successful contractor to "conduct planning sessions with [agency] staff, and provide the necessary personnel, materials, facilities, and equipment to accomplish the tasks needed to plan, prepare, and execute in-person trainings and virtual trainings." *Id.* at 14. The SOW contained specific requirements for both in-person and virtual training meeting support. *Id.* at 16-17. The RFQ advised that "[t]he government will evaluate each [vendor's] submission to assess the [vendor's] understanding of the SOW" and would "also consider each [vendor's] documentation of the interrelationship between this effort and others already out in the field[.]" *Id.* at 10.

In evaluating Kauffman's quotation, CMS documented its findings that the protester had "no experience working directly on the tasks outlined in the SOW, specifically the requirements to execute successful training events." AR, Tab 5.1, Technical Evaluation Report at 3. The agency accordingly assessed the protester's quotation a significant weakness, explaining that "a contractor without extensive experience in planning trainings places CMS at a high risk of not having successful training events." *Id.* at 19. In making its best-value decision, the agency highlighted this finding, explaining "the scope of this contract requires experience specifically in training events," and that "[p]articipants need this training to meet their training requirements to perform their jobs." AR, Tab 7.1, Order Decision Memorandum at 5. The agency's technical evaluation forms and order decision memorandum did not document any strengths assessed to the protester's quotation for its proposed technical approach, noting only that "the offeror has experience working with CMS and other agencies on meeting and events logistics[.]" *Id.*

The agency's assessment of a significant weakness was based on its interpretation that the RFQ language stating that the evaluation would "consider each [vendor's] documentation of the interrelationship between this effort and others already out in the field" required vendors to demonstrate their prior experience with efforts that involved training support. See MOL at 7-8. In contrast, Kauffman argues that the RFQ "did not expressly or implicitly require vendors to describe in their [t]echnical [a]pproach submissions their prior experience performing similar work." Protest at 12. The protester contends that the RFQ language at issue did not contemplate the assessment

⁴ The agency uses "scope of work" interchangeably with "statement of work."

the agency performed because the evaluation “was forward-looking and would assess a vendor’s understanding of the SOW requirements, including how the vendor believed the performance of those requirements would dovetail with others ‘already out in the field’ at the time of award and into the future.” Comments & Supp. Protest at 7.

Based on our review of the record, we find that the agency’s and protester’s interpretations of this RFQ language may both be reasonable, and therefore the solicitation was latently ambiguous with respect to whether vendors’ quotations were required to demonstrate in their technical approaches previous experience conducting and managing training events. On the one hand, it is possible that this language anticipated vendors explaining how their prior experience was similar to the requirements under this effort, but on the other hand the RFQ was not clear and did not put vendors on notice that the agency was seeking a demonstration of prior experience from the vendors. Accordingly, we sustain the protester’s challenge to the agency’s evaluation of its quotation on the basis that the solicitation contained a latent ambiguity with respect to what information vendors were required to submit with their quotations, and how the agency would evaluate that information.

Kauffman also contends that CMS’s assessment of a second significant weakness to its quotation for failing to outline a plan to independently track and deploy continued education units (CEUs) was unreasonable, as it was based on the agency’s misunderstanding of its quotation. Protest at 17-18. The protester further argues that, with respect to the assessment of this significant weakness, the agency unreasonably failed to evaluate vendors’ quotations on an equal basis, where the agency did not assess Octane’s quotation with the same significant weakness, despite the awardee’s failure “to detail its proposed mechanism for collecting data required to provide CEUs.” Comments & Supp. Protest at 29.

CMS responds that the protester’s quotation failed to establish a plan “of how they will independently track and deploy CEUs, and instead plann[ed] to have [DELETED] in the tracking and deploying of CEUs.” MOL at 10. The agency contends that this failure merited a significant weakness because it increased the risk of unsuccessful performance, because the agency “[DELETED] to get a CEU system up and running.” *Id.* With respect to the protester’s allegation that the agency failed to evaluate quotations on an equal basis, the agency maintains that vendors were not required to establish the mechanism for collecting data relating to CEUs at the time of quotation submission. Supp. MOL at 7. The agency argues that Kauffman’s decision to address this SOW requirement put the agency “on notice” that the protester would not be able to deploy the mechanism without [DELETED]. *Id.*

We have consistently found that it is a fundamental principle of government procurement that competition must be conducted on an equal basis; that is, the contracting agency must treat all offerors equally, and even-handedly evaluate proposals and quotations against common requirements and evaluation criteria. *Microsoft Corp.*, B-420004, B-420004.2, Oct. 29, 2021, 2022 CPD ¶ 155 at 17. One of the factors we will consider in assessing the reasonableness of the agency’s findings is

whether the agency was even-handed in its assessments--that is, whether it gave offerors similar credit for similar strengths in their proposals (or quotations), and, along the same lines, whether it was consistent in its attribution of weaknesses to the proposals. *A/NS, Inc.*, B-400760.4, B-400760.5, Jan. 19, 2010, 2010 CPD ¶ 32 at 5. Here, we find that the agency did not evaluate the quotations on an equal basis where it assessed a significant weakness to Kauffman's quotation for failing to outline a plan to track and deploy CEUs, while not assessing a similar significant weakness to Octane's quotation where that quotation also did not address tracking and deploying CEUs.

As stated above, the RFQ advised that vendors' approaches should "indicate a technical understanding of, and capability for performing all aspects of the SOW," and that CMS would evaluate each submission for its demonstration of an understanding of the SOW. RFQ at 4. Under SOW section 3.5, special requirements, vendors were required to "[e]stablish online registration for the trainings that includes CEUs; [d]evelop, distribute and collect evaluation for the effectiveness of each training and [] compile the results of the evaluation; [and] [p]rovide a mechanism of collecting data required to provide CEU (tests/quizzes)." *Id.* at 17.

Kauffman addressed SOW section 3.5 in its technical volume, proposing in part to have its project director "[DELETED] to identify and establish the most appropriate system to track and deploy CEUs, including by [DELETED]." AR, Tab 3.1, Kauffman Technical Volume at 15. The protester argues, and the agency does not dispute, that Octane's quotation did not include any discussion of how it would track and deploy CEUs. See AR, Tab 4.1, Octane Technical Volume at 18-19; Comments & Supp. Protest at 30-31, Supp. MOL at 7.

In its evaluation of quotations, CMS documented its assessment of a significant weakness to Kauffman's quotation because the protester did "not outline a plan of how they will track and deploy CEUs for training participants." AR, Tab 7.1, Order Decision Memorandum at 5. The agency explained this was significant because "having participants obtain CEUs after the trainings is one of the most important elements of this contract[.]" and "[t]he main purpose of the trainings is for participants to be able to obtain CEUs to maintain professional certifications." *Id.*

Notably, with respect to Octane's quotation, CMS did not assess any weaknesses associated with SOW section 3.5 and a plan to track and deploy CEUs. See AR, Tab 5.1, Technical Evaluation Report at 5-7. In response to a question contained in the evaluation report inquiring whether the awardee's "proposed approach provide[s] sufficient detail in the [quotation] to indicate a technical understanding of, and capability for, performing all aspects of the SOW," the agency indicated "Y[es]." *Id.* at 7.

Based on our review of the record, we find that the RFQ required vendors to submit and the agency to evaluate a plan to track and deploy CEUs. In addition, we also find that Octane did not submit such a plan. Here, CMS assigned a significant weakness to the protester's plan, but did not assign a significant weakness or deficiency to Octane's

quotation for its failure to submit a plan. Accordingly, we conclude that CMS failed to evaluate Kauffman's and Octane's quotations on an equal basis.

In this regard, the agency significantly downgraded the protester's quotation for failing to outline a plan to track and deploy CEUs, and justified the assessment of the significant weakness by explaining how important CEUs are to performance of the contract at issue here. Indeed, the agency stressed that "the main purpose" of the trainings to be provided under this contract is for participants to be able to obtain CEUs. AR, Tab 7.1, Order Decision Memorandum at 5. The assignment of a significant weakness to Kauffman's quotation for its failure to outline a plan for tracking and deploying CEUs in part contributed to the protester being found ineligible for further consideration for award.

At the same time, the record demonstrates that Octane did not address this SOW requirement in its quotation and the agency did not make a similar observation or finding with respect to the awardee's quotation. The agency instead makes the *post-hoc* argument that Octane's failure to address this requirement was not a significant weakness because the RFQ's schedule of deliverables stated that vendors had to establish a mechanism to award CEUs within 60 days of award, and therefore did not need to address this in the quotation. However, the RFQ required vendors to provide as part of their quotations a technical understanding of and capability for performing all aspects of the SOW, and section 3.5 of the SOW required vendors to establish online registrations for trainings that included CEUs and to provide a mechanism to collect data regarding CEUs. RFQ at 4, 17. Thus, the timing for delivery of the actual CEU tracking mechanism did not negate the fact that the RFQ also required vendors to address in their quotations how they would establish this mechanism.

Accordingly, on this record, we find it unreasonable for the agency to conclude that the approach contained in the protester's quotation merited a significant weakness for its failure to meet the SOW's requirements, while essentially ignoring the awardee's failure to respond to the same requirement in its quotation.⁵ The agency emphasized the high degree of importance associated with tracking and managing CEUs in its rebuke of the protester's quotation under this factor, but failed to treat the awardee in an even-handed manner where the awardee did not discuss a plan with respect to CEUs. We therefore sustain the protest on this basis.

⁵ Because we find the agency failed to evaluate quotations on an equal basis, we need not reach the merits of the question of whether the agency's rationale for awarding the significant weakness was unreasonable. Consistent with our recommendation, if the agency elects to reevaluate quotations, it should consider how it intends to evaluate vendors' approaches in this regard, and then make an even-handed assessment of quotations.

Personnel Factor

Kauffman argues that CMS's evaluation of the vendors' quotations under the personnel factor was also unreasonable. With respect to Octane's quotation, the protester argues that the awardee's quotation failed to respond to solicitation requirements under this factor. Comments & Supp. Protest at 33-34. In this regard, the protester contends that the awardee's quotation failed to demonstrate how personnel would be integrated organizationally and failed to explain the responsibilities of proposed personnel or how their time would be allocated under the contract, as required by the terms of the solicitation. *Id.* at 33.

CMS generally argues that its evaluation of quotations under the personnel factor was reasonable. MOL at 14; Supp. MOL at 7-8. However, the agency did not specifically respond to the protester's argument that the awardee failed to address certain solicitation requirements with respect to proposed personnel. Supp. MOL at 8.

Under the personnel factor, the RFQ required vendors' quotations to demonstrate "how all personnel employed under this contract will be integrated organizationally, their proposed responsibilities, and the percentage of time under the contract." RFQ at 5. The RFQ also provided that "the government will evaluate each [vendor's] proposed staffing levels and skill mix to assess competency, appropriate time dedication and relevancy of experiences to this particular body of work as required in the SOW." *Id.* at 10.

Octane's submission under the personnel factor included the names of personnel proposed to work under the contract. AR, Tab 4.1, Octane Technical Proposal at 21. The quotation identified relevant skills for each person and provided brief descriptions of their backgrounds and experience. *Id.* at 21-23. Notably, the awardee's quotation did not describe how personnel would be integrated organizationally, nor did it identify the proposed responsibilities for the proposed personnel or their "percentage of time under the contract." RFQ at 5.

In evaluating Octane's quotation, CMS's contemporaneous technical evaluation form indicates "Y[es]," in response to the question "[d]oes the proposed staffing levels have the appropriate amount of time dedication and have the relevant experience to sufficiently perform the requirements in the SOW." AR, Tab 5.1, Technical Evaluation Report at 10. CMS further explained that the "[p]ercentage of time and relevant experience for each employee indicated in the [quotation] are appropriate to meet and exceed the requirements of the SOW." *Id.* Overall, the agency assigned Octane's quotation a rating of excellent under the personnel factor. AR, Tab 7.1, Order Decision Memorandum at 4.

We find CMS's evaluation of Octane's quotation in this regard to be unreasonable and inconsistent with the terms of the solicitation. As noted above, the RFQ instructed vendors to describe how personnel would be integrated organizationally and to identify the percentage of time that proposed personnel would work under the contract. RFQ

at 5. The parties do not dispute that the awardee's quotation did not describe how its proposed personnel would be integrated organizationally, identify their proposed responsibilities under the contract, or provide the percentage of time to work on the contract. See AR, Tab 4.1, Octane Technical Proposal at 21. In contrast, Kauffman's quotation identified for each proposed person this required information. For example, Kauffman's quotation stated that its proposed project director would perform roughly [DELETED] percent of the proposed time on the contract and included a graphic indicating how the director fits within the proposed internal organization. AR, Tab 3.1, Kauffman Technical Volume at 17-18. The protester argues that "[w]ith no explanation of proposed responsibilities and level of effort in Octane's quote, the [a]gency had no basis to 'evaluate each offeror's proposed staffing levels and skill mix to assess competency, appropriate time dedication and relevancy of experiences to this particular body of work,' as the RFQ required." Comments & Supp. Protest at 34. The agency, however, did not respond to the protester's argument that it was unreasonable for the agency to conclude the awardee met the requirements of the solicitation in this regard. See Supp. MOL at 7-8.

Without any explanation from the agency, we find it unreasonable and unsupported by the record for the agency to have concluded that the "percentage of time . . . for each employee indicated in [Octane's quotation] are appropriate to meet and exceed the requirements of the SOW." AR, Tab 5.1, Technical Evaluation Report at 10. Given Octane's failure to address this solicitation requirement, we also find it unreasonable for the agency to have assigned a rating of excellent to the awardee's quotation under this factor.⁶ We therefore sustain the protest on this basis.

Management Plan Factor

Kauffman argues that CMS's evaluation of Octane's quotation under the management plan factor was also unreasonable. In this regard, the protester contends that the awardee's quotation failed to describe how proprietary and confidential data would be protected as required by the solicitation. Comments & Supp. Protest at 35. The protester further argues that the agency's evaluation concluding that Octane met this requirement was therefore unreasonable. *Id.* The protester maintains that the awardee should have been assessed a weakness for this flaw in its quotation, and when combined with the awardee's lack of assessed strengths, should have resulted in a rating of unacceptable under the management plan factor. *Id.*

CMS argues that its evaluation of quotations under the management plan factor was reasonable. MOL at 15; Supp. MOL at 8. The agency maintains that its evaluation documentation relating to Octane's quotation contained a "clerical error" with respect to

⁶ We note that the agency's assignment of a rating of excellent to the protester's quotation under this factor was also erroneous for another reason. The RFQ provided that only quotations containing at least one strength could merit a rating of good or excellent; the protester's quotation was not assessed any strengths under this factor. RFQ at 9-10.

whether the awardee described procedures for the protection of proprietary and confidential data. Supp. MOL at 8. The agency explains this error had “no bearing” on its rating of Octane’s management plan or the overall award decision. The agency also argues that because both the protester and awardee received ratings of excellent under this factor, despite neither having any assessed strengths, the “offerors were treated equally” and the error was of no consequence. *Id.*

As relevant here, the RFQ instructed vendors to “describe how the organization will organize and manage the project, how the tasks will be sequenced, in what time frames, and what management control and coordination tools will be used to assure the timely and successful conduct” of the order. RFQ at 5. The RFQ further advised that the government would evaluate each vendor’s “demonstrated ability to manage all aspects of the proposed effort,” and further stated that the agency would “evaluate each [vendor’s] management plan to ensure appropriate and sufficient procedures for the protection of proprietary and confidential data and analysis related to this SOW.” *Id.* at 10-11. The contemporaneous record demonstrates that CMS did not assess any strengths to either Kauffman’s or Octane’s quotations but assigned a rating of excellent to both quotations under the management plan factor. AR, Tab 5.1 Technical Evaluation Report at 2, 11-12, 26-27.

In its evaluation of Octane’s management plan, CMS indicated “Y[es]” in response to the question “[d]oes the offeror’s management plan [] ensure appropriate and sufficient procedures for the protection of proprietary and confidential data.” AR, Tab 5.1, Technical Evaluation Report at 12. In the rationale box of the evaluation form, the agency wrote “[n]o description included.” *Id.*

Based on our review of the record, we find the agency’s evaluation of the awardee’s quotation unreasonable. The agency does not contest the protester’s argument that the awardee’s quotation failed to include a description of the procedures in place for the protection of proprietary and confidential data. Nevertheless, the agency improperly credited Octane for meeting this solicitation requirement. Given Octane’s failure to address this requirement, there was no basis for the agency to conclude that the requirement was met.

Moreover, CMS’s argument that this was merely “clerical error” lacks merit. In evaluating, for example, Kauffman’s quotation under the technical approach factor, the agency indicated “N[o]” in response to the question of whether the protester’s quotation was “complete and demonstrate[d] an understanding of the SOW.” AR, Tab 5.1, Technical Evaluation Report at 22. This finding led to the assessment of a significant weakness to the protester’s quotation, and in part led to the protester’s quotation being found ineligible for award. Had the agency reasonably evaluated the awardee’s quotation, it would have indicated that the solicitation requirement in question was not met under this evaluation factor, and there is at least a reasonable possibility that the awardee would have received a weakness and a lower rating. We therefore find this was not merely “clerical error” as the agency suggests. Accordingly, the agency’s evaluation of the awardee’s quotation under the management plan factor was

unreasonable and unsupported by the underlying record.⁷ We therefore sustain the protest on this basis as well.

Past Performance Factor

Kauffman next argues that CMS's evaluation of Octane's quotation under the past performance factor was also unreasonable. In this regard, the protester maintains that the agency improperly assessed a strength to the awardee's quotation because the strength was based on the experience of the awardee's proposed project director, and not the awardee's past performance, as required by the solicitation. Comments & Supp. Protest at 36-37. The protester argues that an evaluation of a vendor's experience is distinct from an evaluation of past performance, and it was therefore improper for the agency to assess a strength on this basis. *Id.* at 37.

CMS generally argues that its evaluation of vendors' past performance was reasonable and consistent with the terms of the solicitation. MOL at 16; Supp. MOL at 9. The agency contends that while its past performance evaluation of the awardee in part discussed the experience of the awardee's proposed project director, "[t]he crux of this strength is that '[t]he [vendor] has a unique perspective on providing support for this solicitation with having knowledge of what has worked in the past and being able to provide solutions on how to improve the overall performance of the contract.'" Supp. MOL at 9. The agency does not respond to the protester's argument that the assessed strength was based on information contained in the technical volume, as opposed to the administrative volume. See *id.*

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *Harmonia Holdings Grp., LLC*, B-417475.3, B-417475.4, Sept. 23, 2019, 2019 CPD ¶ 333 at 17. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. *Conley & Assocs., Inc.*, B-415458.3, B-415458.4, Apr. 26, 2018, 2018 CPD ¶ 161 at 5.

The RFQ instructed vendors to disclose past performance information in a separate administrative volume, and requested information for contracts that had a period of performance end date within the last three years of the date of the solicitation. RFQ at 7. The RFQ advised that the government would "evaluate past performance information provided by each [vendor], considering the [vendor's] successful

⁷ We note that, like its evaluation of quotations under other factors, the agency erroneously assigned both vendors a rating of excellent under the management approach factor. Both quotations received ratings of excellent despite the fact that neither vendor's quotation received a strength under this factor, which was required by the solicitation to receive a rating of excellent.

performance in a variety of projects of a similar magnitude and type (size and technical area) as defined in this SOW.”⁸ *Id.* at 11. The RFQ indicated that the agency would utilize the same adjectival ratings for past performance as were used for the other technical factors. *Id.* at 8-9.

Octane submitted three past performance examples with its administrative volume. AR, Tab 4.3, Octane Administrative Volume at 7. One of the examples included performance on a CMS contract to provide in-person and virtual training to the Indian Health Service, similar to the current requirement.⁹ The record demonstrates the awardee received positive ratings and comments associated with this example, receiving mostly ratings of very good and exceptional. AR, Tab 4.5, Octane Past Performance Questionnaires at 2-5. The agency assessed a strength to the awardee’s quotation mentioning specifically the previous CMS contract. AR, Tab 5.1, Technical Evaluation Report at 13. In assessing the strength, however, the contemporaneous documentation indicates the agency considered only information from a narrative portion of the awardee’s technical volume, as opposed to the administrative volume which contained past performance information. *Id.* Citing the awardee’s technical volume, the agency specifically noted that the awardee’s project director has worked with CMS for 10 years, and that the awardee can “provide solutions that mitigate the challenges while offering innovative ideas to help increase outreach efforts at the training.” *Id.* at 13-14.

Here, we find CMS’s evaluation of Octane’s quotation under the past performance factor to be unreasonable. The solicitation required vendors to submit past performance information in a separate administrative volume, and provided that the agency would evaluate the “past performance information” and consider a vendor’s “successful performance in a variety of projects.” RFQ at 11. The agency assessed a strength based on information contained in the protester’s technical volume, specifically information included under a section addressing the technical approach factor. AR, Tab 5.1, Technical Evaluation Report at 14 (citing to passages from Octane’s technical volume).

On this record, we cannot conclude that the agency evaluated the awardee’s past performance in a manner consistent with the terms of the solicitation, because there is no documentation that the agency considered the awardee’s “past performance

⁸ The RFQ used the FAR definition of “relevant” in the instructions to vendors, explaining that relevant past performance is that which is “similar in size, scope, and complexity to this contract.” RFQ at 7. The evaluation criteria suggested that the agency would evaluate past performance information considering successful performance in projects of a “similar magnitude and type (size and technical area).” *Id.* at 11. This minor inconsistency has no bearing on our analysis here.

⁹ In response to this protest ground, the agency does not refer to the awardee as the “incumbent,” though the record indicates the order cited by the awardee is very similar to the effort at hand. See Supp. MOL at 9; Supp. COS at 7-8.

information” as contained in the administrative volume. It is therefore unclear from the record whether the agency considered the past performance information submitted by the awardee at all in assessing this strength.¹⁰

Our decision in this regard does not necessarily mean that the awardee’s actual past performance did not merit a strength; rather, we find it was unreasonable for the agency to rely on information from Octane’s technical approach--a completely separate volume submission and respective evaluation factor--as the basis for assessing a strength to the awardee’s quotation under the past performance factor. Without this assessed strength, Octane’s quotation (like the protester’s) could not have merited a rating of excellent under the past performance factor according to the solicitation’s evaluation scheme.¹¹ We therefore also sustain the protest on this basis.

Price Evaluation

Kauffman also challenges CMS’s price evaluation of Octane’s quotation and argues that the agency did not document a rational basis for finding the awardee’s pricing to be reasonable. Protest at 44-46; Comments & Supp. Protest at 37. In particular, the protester contends that the agency failed to evaluate discrepancies between the awardee’s proposed pricing and its FSS pricing. *Id.* at 38.

CMS contends that its price reasonableness analysis was reasonable and consistent with the terms of the solicitation. Supp. MOL at 11. In response to the protester’s argument, the agency acknowledges that although there is a discrepancy between one of the awardee’s proposed labor rates and the rates contained in its FSS contract, this discrepancy was “a simple clarification” and did not have any bearing on the award decision. *Id.* at 10-11.

As relevant to the ordering procedures utilized in this procurement, our Office has explained that while discounts to FSS prices are permissible, a vendor may not propose prices higher than their FSS prices, as the higher prices have not been determined to

¹⁰ The agency does make *post-hoc* arguments in response to the protest, citing to information contained in the awardee’s administrative volume. But it remains unclear, and at the very least is undocumented, whether the administrative volume was considered in the agency’s contemporaneous documentation.

¹¹ Kauffman also argues that at least two of Octane’s past performance examples should not have been considered “relevant” under the terms of the solicitation, because the examples were not of the same magnitude and type as the current procurement. Comments & Supp. Protest at 36. Because we cannot conclude from this record whether the agency considered any information in the awardee’s administrative volume, there is no basis for us to conclude that the agency reasonably considered the awardee’s other past performance examples to be relevant or similar in magnitude and type. In its reevaluation of quotations, the agency should also properly document its evaluation of these aspects of Octane’s past performance.

be fair and reasonable by the General Services Administration (GSA) and are therefore not FSS prices. *Perot Sys. Gov't Servs., Inc.*, B-402138, Jan. 21, 2010, 2010 CPD ¶ 64 at 3. Accordingly, issuing an order based on non-FSS pricing under an FSS acquisition would be improper. *Id.*

The RFQ advised vendors that the labor rates provided “shall be in accordance with the GSA schedule under which this effort will be performed,” and instructed vendors to attach copies of their GSA price lists for verification purposes. RFQ at 6. The solicitation provided that in accordance with FAR section 8.405-2, the agency was seeking price reductions from the schedule prices. *Id.* Finally, the RFQ advised that the agency would evaluate “each [vendor’s] proposed cost to ensure that it is fair and reasonable against the requirement.” *Id.* at 11.

Octane included with its business volume labor pricing for [DELETED] proposed personnel, including an hourly labor rate, number of hours, and total pricing for each person broken out by task.¹² AR, Tab 4.2, Octane Business Volume at 1. One of the awardee’s proposed labor categories, the Events Coordinator, had a proposed labor rate of [DELETED], as compared to a rate of \$85.00 for the same labor category in its GSA contract. See AR, Tab 4.2, Octane Business Volume; AR, Tab 4.4, Octane GSA Schedule at 9.

CMS’s evaluation determined that the awardee did not discount its labor rates from the GSA contract. AR, Tab 6.2, Business Evaluation Panel at 3. The agency’s contract specialist found Octane’s proposed labor rates “fair, reasonable, and realistic as proposed and in line with” Octane’s GSA contract. *Id.* at 4. The contacting officer agreed with these findings, stating that the awardee’s pricing was “fair and reasonable and most advantageous to [the] government.” AR, Tab 7.1, Order Decision Memorandum at 7.

We find the agency’s determination that the awardee’s pricing was fair and reasonable to be flawed. In this regard, the contract specialist’s conclusion that the awardee’s pricing was “in line with” its GSA contract is contradicted by the record, where the Events Coordinator labor category proposed rate was over [DELETED] greater than the GSA contract rate. As the awardee proposed prices that were higher than its FSS prices, it would not be proper to issue the order to that vendor.¹³ See *Perot Sys. Gov’t*

¹² As previously mentioned, the agency did not meaningfully evaluate Kauffman’s business volume, because the technical evaluation resulted in the protester being found ineligible for further consideration from award. AR, Tab 6.2, Business Evaluation Panel at 2.

¹³ Separate from the discrepancy between the awardee’s proposed pricing and its GSA contract pricing, the agency makes inconsistent representations concerning how it determined the awardee’s pricing to be fair and reasonable under the requirements of this statement of work. In this regard, the agency initially represents that in evaluating proposed pricing pursuant to the solicitation, “the [c]ontract [s]pecialist compared the
(continued...)

Servs., Inc., supra at 3. Moreover, we reject the agency's argument that this was a "simple clarification" as the awardee would need to revise its pricing with respect to this labor category in order to make it eligible for award. The record also does not reflect that the agency attempted to clarify this with the awardee and instead made award despite the proposed labor rate being higher than the GSA contract rate. We therefore sustain the protest on this basis as well.¹⁴

Prejudice

Competitive prejudice is an element of every viable protest. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *AT&T Mobility LLC*, B-420494, May 10, 2022, 2022 CPD ¶ 115 at 12. Here, the RFQ stated that award would be made to the highest technically rated vendor with fair and reasonable pricing. RFQ at 9. As explained above, the agency's determination that the protester was ineligible for further consideration for award because of two significant weaknesses in its quotation was unreasonable. Because the agency determined Kauffman was ineligible for award, the agency never evaluated whether Kauffman's proposed price was fair and reasonable. Had the agency correctly evaluated the

quotes to the [independent government cost estimate (IGCE)]." COS at 17. In a later filing, however, the agency represents "fair and reasonable competition drove [vendors] to bid at a competitive price and the IGCE was no longer a valid tool in determining the reasonableness of the received business submission." Supp. COS at 10. While our Office has stated that a procurement conducted pursuant to FAR subpart 8.4 does not require the same sort of formal evaluation as a FAR part 15 procurement, the agency's determination of fair and reasonable pricing should be consistently applied and explained. The agency should give this consideration as part of any reevaluation of quotations.

¹⁴ Because we sustain Kauffman's challenges to the agency's evaluation of quotations, we do not address its remaining challenges to the agency's resulting best-value decision, as these conclusions may change following the reevaluation of quotations. In this regard, although not raised by the parties, it appears that the solicitation's basis for award is not clear. On the one hand, the RFQ indicates that award will be made to "the highest technically rated [vendor(s)] that also demonstrate fair and reasonable pricing," which does not contemplate a tradeoff between price and the non-price factors, yet the RFQ also provides that tradeoff decisions would be made to the extent necessary and established that price was relatively less important than the non-price factors. RFQ at 9-11. Under an FSS procurement, like this procurement, however, we have explained that determining best value to the government using the highest technically rated, fair and reasonable price methodology is not a permissible basis for making award. See *Noble Supply & Logistics, Inc.*, B-418141, Jan. 16, 2020, 2020 CPD ¶ 32. This is a matter the agency may wish to consider addressing as part of its corrective action.

protester's quotation and not assessed these significant weaknesses, Kauffman's quotation would have been eligible for award, its proposed price would have been evaluated, and it may have been found to be the best value to the government. Accordingly, Kauffman was prejudiced by these errors.

Further, given the additional errors identified above relating to the agency's evaluation of quotations under the other non-price factors, there is at least a possibility that Octane, Kauffman, or both vendors could have been assessed fewer strengths, or weaknesses or significant weaknesses, and therefore received lower ratings than the ratings of excellent they actually received under the respective evaluation factors. Had the agency not made these errors, we cannot say whether the agency still would have found that Octane's quotation was the best value to the government. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See *XPO Logistics Worldwide Gov't Servs., LLC*, B-412628.6, B-412628.7, Mar. 14, 2017, 2017 CPD ¶ 88 at 15.

RECOMMENDATION

As explained above, we conclude that the solicitation contained a latent ambiguity with respect to the submission and evaluation requirements under the technical approach factor. Furthermore, CMS failed to evaluate vendors' quotation on an equal basis, unreasonably evaluated vendors' quotations under each of the non-price factors, and unreasonably evaluated Octane's quotation under the price factor. We further conclude that Kauffman was competitively prejudiced by these evaluation errors. Given the existence of a latent ambiguity concerning what information vendors were required to submit with their quotations, we recommend that the agency revise the solicitation to at a minimum clarify its requirements under the technical approach factor and allow vendors to submit revised quotations. The agency should then reevaluate quotations under each of the evaluation factors in a manner consistent with our decision and make a new best-value decision. Finally, we recommend that Kauffman be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Kauffman should submit its certified claim for such costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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General Counsel