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Decision

Matter of: The Whiting-Turner Contracting Company

File: B-422278

Date: March 26, 2024

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DIGEST

Protest that the agency unreasonably evaluated the protester's past performance is denied where the record shows that the agency's evaluation was conducted in accordance with the terms of the solicitation and applicable procurement laws and regulations.

DECISION

The Whiting-Turner Contracting Company, of Baltimore, Maryland, protests its exclusion from the competition for award under request for proposals (RFP) No. N6247323R1012, issued by the Department of the Navy, Naval Facilities Engineering Systems Command, for construction services. The protester asserts that the agency unreasonably evaluated its past performance.

We deny the protest.

BACKGROUND

The agency issued the RFP on May 30, 2023, for a multiple-award, indefinite-delivery, indefinite-quantity contract, pursuant to Federal Acquisition Regulation (FAR) part 15, for construction, repair, and renovation services at various government installations in California, Arizona, Nevada, Utah, Colorado, and New Mexico. Agency Report (AR), Exh. 2, RFP at 1.

Award was to be made to eight or more offerors whose proposals provided the best value to the government, based on the two-phase design-build evaluation process

described in FAR subpart 36.3. *Id.* at 9. In phase one, proposals were evaluated considering four non-price factors: technical approach, experience, past performance, and safety. *Id.* at 13. Phase one determined which offerors were the most highly qualified, and those offerors were asked to submit proposals for phase two, during which the remaining two non-price factors and price would be evaluated. *Id.* at 12.

As relevant here, in evaluating proposals under the past performance factor, the agency was to consider the recency, relevancy, source, context, and general trends in performance arising from the projects submitted by offerors under the experience factor.¹ *Id.* at 11. Past projects were recent if they had been performed within five years prior to the RFP's issuance date, and relevant if they were similar in service/support effort, complexity, dollar value, contract type, and other comparable attributes. *Id.* Offerors were required to submit final contractor performance assessment reporting system (CPARS) evaluations for each project or, if a final CPARS was unavailable, then offerors were required to submit past performance questionnaires (PPQs) for each project. *Id.* at 18. The agency also reserved the right to obtain additional past performance information, such as a full report of all CPARS evaluations for a particular offeror. *Id.* The RFP advised that offerors were permitted to address any adverse past performance information. *Id.* at 19. Past performance was evaluated using an adjectival rating scheme of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, and no confidence. *Id.* at 11, 19.

The agency received proposals from 16 offerors by the submission due date, including one from Whiting-Turner. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 5; AR, Exh. 7, Technical Evaluation Team (TET) Report at 1. On August 11, the TET began evaluating proposals. COS/MOL at 6. Whiting-Turner's proposal included five construction projects and five design projects, and the TET determined that all of them were recent and relevant. AR, Exh. 7, TET Report at 9-10. Of the five construction projects, three had exceptional and mostly exceptional ratings and the other two had mostly satisfactory ratings. *Id.* at 9. Of the five design projects, three had very good ratings, one had a satisfactory rating, and one project was not considered because its PPQ was filled out by a member of the offeror's team, which disqualified it from consideration. *Id.* at 9-10.

On August 24, while evaluations were being conducted, the contract specialist obtained a CPARS report of the construction projects previously performed by Whiting-Turner and provided it to the TET members the same day. AR, Exh. 9, Contract Specialist Declaration at 1.

The TET noted that the majority of ratings in Whiting-Turner's CPARS report were positive. AR, Exh. 7, TET Report at 10. However, one project, titled New Engineering

¹ Under the experience factor, offerors were to submit a maximum of five relevant construction projects demonstrating their experience in construction, and a maximum of five relevant design projects demonstrating their experience in design related to construction. RFP at 14-16.

& Analytical Center, Winchester Engineering Analytical Center (WEAC), stood out as the only one that received three marginal ratings and had an overall negative recommendation; that is, the assessing official did not recommend Whiting-Turner for future work. AR, Exh. 9, Contract Specialist Declaration, attach. A, Whiting-Turner CPARS Report. On August 24, the contract specialist downloaded the final CPARS evaluation for the WEAC project, which noted at the top of the evaluation "Contractor Comment Pending Government Review," but the report did not include or detail the comments. AR, Exh. 9, Contract Specialist Declaration, attach. B, WEAC CPARS Evaluation at 1. This project was not one of the projects Whiting-Turner submitted with its proposal and its proposal did not address it. AR, Exh. 8, Whiting-Turner Phase One Proposal at 40-119.

Taking into account the projects submitted by Whiting-Turner and the CPARS report obtained by the agency, the agency assigned Whiting-Turner's proposal two strengths and one weakness. AR, Exh. 7, TET Report at 11. The agency assigned Whiting-Turner's proposal one strength for three of its construction projects that received ratings of exceptional or mostly exceptional and assigned another strength for three of the design projects that received ratings of very good. *Id.* The agency assigned Whiting-Turner's proposal a weakness considering the three ratings of marginal Whiting-Turner received for its performance on the WEAC project and because the assessing official stated that she would not recommend Whiting-Turner for future work. *Id.* The TET noted that the majority of positive CPARS evaluations in both the CPARS report and those submitted in the proposal did not indicate that there was a trend of poor performance. *Id.* at 10. The TET determined that the agency had a reasonable expectation that Whiting-Turner would successfully perform the contract and that its proposal merited a rating of satisfactory confidence under the past performance factor. *Id.* The agency concluded its evaluation of Whiting-Turner's past performance on August 30. COS/MOL at 10-11; AR, Exh. 10, TET Member Declaration at 1.

On September 21, without notice to the agency, the assessing official modified the WEAC CPARS evaluation to reduce the number of marginal ratings from three to two and to change the overall recommendation to a positive one for Whiting-Turner. Protest, exh. 6, Updated WEAC CPARS Evaluation at 6. On October 4, the reviewing official for the WEAC CPARS evaluation approved the modifications. *Id.*

On October 16, the TET concluded evaluations of all proposals and presented its findings to the source selection evaluation board (SSEB) in accordance with the source selection plan. COS/MOL at 7. The SSEB ultimately concurred with the TET's findings and presented its findings to the source selection advisory council (SSAC). AR, Exh. 11, SSEB Report at 5. The SSAC compiled all ratings for all proposals and determined which proposals were the most highly rated. AR, Exh. 12, SSAC Report at 3. Whiting-Turner's proposal was not among those that were the most highly rated and it was not recommended for phase two. *Id.* at 3-4; COS/MOL at 8.

On December 4, the agency notified the protester that it was not selected to proceed to phase two. COS/MOL at 8. The protester requested and received a debriefing, which

provided all of the ratings its proposal received. *Id.* Whiting-Turner's proposal received the highest ratings possible under all factors except the past performance factor. This protest followed.

DISCUSSION

The protester argues that the agency unreasonably assigned its proposal a weakness under the past performance factor for several reasons. We have reviewed the record and find no basis to sustain the protest. We note at the outset that an agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *AB Int'l Servs., LLC*, B-419727.3, Mar. 21, 2023, 2023 CPD ¶ 79 at 6. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *Id.*

The protester first asserts that the agency unreasonably assigned a weakness to its proposal on the basis of the WEAC CPARS evaluation because it was marked "Contractor Comment Pending Government Review," and the agency was required to consider Whiting-Turner's comments on the evaluation and check to see if the evaluation was updated as a result of the comments. Protest at 6; Comments at 2; AR, Exh. 9, Contract Specialist Declaration, attach. B, WEAC CPARS Evaluation at 1.

The agency responds that the original WEAC CPARS evaluation did not contain Whiting-Turner's comments or detail them at all, and therefore the agency was not required to consider them. COS/MOL at 10-11; Agency's Resp. to Comments at 1-2. The agency argues further that once it had obtained the CPARS report and reviewed it during evaluations, it had no obligation to go back to check and see if the WEAC CPARS evaluation or any other individual CPARS evaluations had been changed since the report was issued. *Id.* The protester concedes that the WEAC CPARS evaluation did not contain or detail its comments, but nevertheless insists that since the evaluation noted that its comments were under review, the agency should have known the ratings were disputed and should have checked to see if the evaluation had been updated. Resp. to Agency's Resp. to Comments at 2.

Our decisions have explained that there is no general requirement that an agency continue to seek updated performance information once its past performance evaluation is complete. *Affordable Eng'g Servs.*, B-407180.4 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 334 at 12-13. Here, the agency obtained the WEAC CPARS evaluation on August 24, reviewed it on August 30, and completed its past performance evaluation for Whiting-Turner's proposal on August 30. COS/MOL at 10-11; AR, Exh. 10, TET Member Declaration at 1. The WEAC CPARS evaluation was not officially updated until October 4. Protest, exh. 6, Updated WEAC CPARS Evaluation at 6. While the original WEAC CPARS was marked "Contractor Comment Pending Government Review," it did not contain or detail any of Whiting-Turner's comments. Whiting-Turner has not provided us with any statutory or regulatory authority stating that the agency was

required to check whether the WEAC CPARS evaluation had been updated solely because it was marked “pending.” We also are not persuaded by Whiting-Turner’s argument that the agency should have somehow known that its comments pending review challenged the ratings, when the agency had no way of knowing the content of Whiting-Turner’s comments. Therefore, as the evaluation of Whiting-Turner’s past performance was completed prior to the update, we find nothing objectionable in the agency’s failure to consider the more recent evaluation that was not available to it at the time it performed the past performance evaluation. *Affordable Eng’g Servs., supra*; see *MINACT, Inc.*, B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 7 n.4 (explaining that where the contracting officer used the most recent past performance information in its evaluation, there was no requirement for the contracting officer to seek more up-to-date past performance information prior to the time of source selection).

The protester next asserts that the agency unreasonably “cherry-picked” the CPARS report by choosing to focus on the WEAC CPARS evaluation because it was the only one with three marginal ratings and a negative recommendation, and most of Whiting-Turner’s CPARS evaluations were positive.² Protest at 6. The protester reasons that had the agency not unreasonably focused on the WEAC CPARS evaluation it would have received a higher past performance rating. Comments at 5.

The agency responds that it did not cherry-pick the CPARS report because it considered the entirety of the CPARS report and weighed and considered the trends of the ratings contained in it. COS/MOL at 11-12. The agency also responds that even if it had not assigned a weakness because of the WEAC CPARS evaluation, Whiting-Turner’s proposal still would have received a rating of satisfactory confidence for several reasons: (1) most of Whiting-Turner’s past projects in the CPARS report were rated satisfactory; (2) of the projects Whiting-Turner submitted, three of them were rated satisfactory; and (3) of the three design firms Whiting-Turner proposed, only one had satisfactory past performance ratings. *Id.* at 13. The agency explains that, therefore, while the protester’s past performance was generally positive, it was not uniformly exceptional and did not merit a rating of substantial confidence. *Id.*

We have no basis to question the agency’s judgment here. The record shows that the agency’s evaluation accurately reflects the information contained in the CPARS report and Whiting-Turner’s proposal. Whiting-Turner’s CPARS report contained mostly ratings of satisfactory confidence; by the agency’s count, there were 201 satisfactory ratings, 129 very good ratings, and 46 exceptional ratings, and the protester does not

² To the extent the protester asserts that the agency failed to assign any strengths to its proposal for several CPARS evaluations in the CPARS report that received exceptional ratings (Comments at 6), we dismiss this protest ground as untimely. The protester raised this argument for the first time in its comments, even though it was made aware on December 19 that the agency had not assigned any strengths to its proposal based on the CPARS report. AR, Exh. 14, Debriefing Memorandum. As this argument was raised more than 10 days after the protester was aware of the basis for it, it is untimely and dismissed. 4 C.F.R. § 21.2(a)(2).

dispute the agency's findings. Agency's Resp. to Comments at 5 n.1; AR, Exh. 9, Contract Specialist Declaration, attach. B, CPARS Report. In the evaluation of Whiting-Turner's proposal, the agency assigned one strength for three of its construction projects that were rated exceptional or mostly exceptional and one strength for three of its design projects that were rated very good. AR, Exh. 7, TET Report at 11. The agency also assigned one weakness for the WEAC CPARS evaluation. *Id.* In the TET report, the agency noted that one of the proposed design firms had a rating of satisfactory confidence for its past performance. *Id.* at 10. The agency concluded that Whiting-Turner has a history of successful performance, as demonstrated by the mostly satisfactory confidence ratings in the CPARS report and the six projects with a higher than satisfactory rating, and that one negative CPARS evaluation did not demonstrate a trend of poor performance. *Id.*

Whiting-Turner has not presented any evidence to show that the agency's findings did not accurately reflect the record or that the agency's decision in assigning a rating of satisfactory confidence was unreasonable. As a result, Whiting-Turner's arguments amount to disagreement with the agency's evaluation which does not provide a basis upon which to sustain a protest. *EMTA Insaat Taahhut Ve Ticaret, A.S.*, B-416391, B-416391.4, Aug. 13, 2018, 2018 CPD ¶ 280 at 7.

The protest is denied.

Edda Emmanuelli Perez
General Counsel