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Decision

Matter of: Tech Systems, Inc.

File: B-421838.3; B-421838.4

Date: June 4, 2024

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DIGEST

1. Protest challenging the agency's past performance evaluation is denied where the record shows that the agency evaluation was reasonable and consistent with the terms of the solicitation.
 2. Where agency did not conclude that awardee's indirect cost rates were unrealistically low, agency was not required to consider if there was performance risk associated with those rates.
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DECISION

Tech Systems, Inc. (TSI), a small business of Tysons, Virginia, protests the issuance of a task order to Westech International, Inc. (Westech), a small business of Albuquerque, New Mexico, under request for proposals (RFP) No. W519TC-23-R-0018, issued by the Department of the Army, Army Materiel Command, for logistics support services at Schofield Barracks, Hawaii (SBHI). The protester contends that the agency's evaluation of the awardee's proposal and the source selection decision were unreasonable.

We deny the protest.

BACKGROUND

The agency issued the RFP on June 1, 2023, for the purpose of awarding a “follow-on” contract for logistics support, consisting primarily of maintenance, supply, and transportation services, at the SBHI installation. Agency Report (AR), Tab 3, Conformed RFP at 1-2.¹ The solicitation, which was issued to holders of the Army’s Enhanced Acquisition Global Logistics Enterprise (EAGLE II) basic ordering agreement (BOA), contemplates the issuance of a task order to a small business holding an EAGLE II BOA. The RFP includes both cost-plus-fixed-fee and fixed-price line items and contemplates performance for a 1-year base period and four 1-year option periods. Conformed RFP at 2. The solicitation provides for the evaluation of proposals under technical, past performance, and price factors, with award to be made to the responsible offeror with the lowest-priced, technically acceptable proposal receiving a substantial confidence rating for past performance. *Id.* at 2, 63.

Technical proposals would be evaluated as either acceptable or unacceptable; no tradeoff analysis would be conducted and proposals exceeding the evaluation criteria would not be given extra credit. *Id.* at 63. Under the technical factor, the Army would evaluate offerors’ staffing and management plans, organizational diagrams, and staffing and labor mixes. *Id.* at 64-65. Only technically acceptable offerors would be evaluated under the past performance factor. *Id.* at 63.

For past performance, the Army would consider the past performance references provided in the proposal, as well as information from other sources.² *Id.* at 50. The RFP provided that the agency would evaluate the past performance of the offeror and any proposed subcontractor expected to perform 20 percent or more of the total value of proposed labor and fee.³ *Id.* at 65; AR, Tab 8, RFP attach. 5, tab 2, column F. Based on the offeror’s demonstrated record of recent and relevant performance, the agency would assign a performance confidence rating reflecting the degree of confidence that the agency has in the offeror’s ability to successfully complete the solicitation requirements. *Id.* at 65. Recent performance was defined as work completed within three years prior to the solicitation closing date, and relevant performance was defined as work similar in scope and magnitude of effort and

¹ Citations to the record use the Adobe PDF or Microsoft Word pagination of documents or the relevant worksheet tab and cell number for Microsoft Excel documents produced in the agency report. The solicitation includes 49 attachments and 12 exhibits and was amended six times. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2-3. All references to the solicitation are to the conformed version provided in the agency report.

² The solicitation did not require offerors to submit past performance references. *Id.*

³ Subcontractor, as used in the past performance factor, means subcontractors expected to perform 20 percent or more of the total estimated dollar value of the offeror’s proposal. *Id.* at 50.

complexity to this RFP. *Id.* at 66. To be considered relevant with regard to scope, the RFP required the reference to have demonstrated similar experience to the performance work statement (PWS) requirements in at least one of the solicitation's functional areas--maintenance, supply, or transportation. *Id.* With regard to magnitude of effort and complexity, the RFP advised that the reference's annual average dollar value must meet or exceed the minimum level specified in the RFP. *Id.* Considering all the recent and relevant past performance information for the offeror and subcontractor, the agency would assign one of the following ratings: substantial, satisfactory, limited, no, and unknown (neutral) confidence.⁴ *Id.* at 66-67.

Concerning cost/price, the agency would evaluate whether offerors' costs/prices were reasonable and realistic in accordance with Federal Acquisition Regulation (FAR) section 15.404-1, Proposal Analysis Techniques. *Id.* at 67. The RFP advised that a cost realism analysis would be performed on the cost-reimbursable contract line item numbers (CLINs) only and included detailed instructions regarding the cost elements to be included in cost/price proposals. *Id.* at 54-59, 67. In this regard, the RFP required offerors to propose direct labor rates and indirect rates that included indirect costs associated with overhead, general and administrative expenses (G&A), and fringe benefits. *Id.* at 54-59. The RFP indicated that the agency would evaluate the proposed cost elements to determine: "whether the estimated proposed cost elements are realistic for the work to be performed; whether the proposed cost elements reflect a clear understanding of the requirements; and whether the proposed cost elements are consistent with the unique methods of performance described in the [t]echnical [p]roposal." *Id.* at 67. The RFP provided that the agency would determine a probable cost for each proposal that might differ from the proposed cost and should reflect the agency's best estimate of the cost resulting from the offeror's actual performance of the task order. *Id.*

Offerors were also warned not to propose unrealistically low costs. *Id.* Specifically, the RFP stated as follows:

Offerors are cautioned that the Government has concerns with the potential for post-award performance problems related to the cost CLINS if Offerors propose unrealistically low costs. Therefore, the Government reserves the option of rejecting a proposal if, in the exercise of its judgment, it determines that an Offeror's cost CLINS are unrealistically low, regardless of technical merit and/or evaluated costs. The magnitude of any necessary and appropriate Probable Cost adjustments may be taken into consideration. For example, if as a result of the Cost Realism analysis it becomes clear to the Government that any necessary upward Probable Cost adjustments are so substantial that they present an

⁴ The only past performance rating relevant to this protest is substantial confidence, which the RFP defined as the agency's "high expectation that the [o]fferor will successfully perform the required effort" based on its recent and relevant performance record. Conformed RFP at 66.

unacceptable risk (notwithstanding an assessed rating of acceptable under the technical factor), the proposal may be rejected and not further considered for award. Therefore, failure of the Offeror to establish the credibility of its proposed cost CLINS may result in a Probable Cost adjustment being made to the costs proposed, and/or the proposal being rejected as unrealistically low and not further considered for award.

Id.

Offerors were further warned that if their proposed indirect rates were not fully supported by a narrative explanation, the agency would cap the indirect rates at the levels proposed “for evaluation purposes and for the life of the requirements task order.” *Id.*

The Army received proposals from three offerors; only the proposals from TSI and Westech passed the agency’s compliance review and were evaluated. COS/MOL at 6. The agency assigned both proposals a technical rating of acceptable and a past performance rating of substantial confidence. *Id.* at 7. The cost/price evaluation of TSI’s and Westech’s proposals was as follows:

Offeror	Total Proposed Cost/Price	Most Probable Cost Adjustment⁵	Total Evaluated Cost/Price
Westech	\$87,861,922	\$3,514,477	\$91,376,399
TSI	\$104,700,388	\$0	\$104,700,388

AR, Tab 125, Source Selection Decision Document (SSDD) at 5.

The evaluators recommended capping Westech’s overhead rates because Westech did not provide historical data in its proposal. AR, Tab 123, Westech Cost Realism Evaluation at 8. Westech developed new indirect rates specifically for this proposal because Westech anticipated that the increased staffing for the task order would have a significant impact on its overhead rates and Westech submitted the revised rates in the proposal. AR, Tab 98, Westech Proposal Vol. 4, Cost/Price Proposal Assumptions at 5. The evaluators noted that “[s]ince there was no historical data provided the analyst has no reference that the proposed rates are accurate, thus these rates are not fully supported.” AR, Tab 123, Westech Cost Realism Evaluation at 8. The evaluators also recommended capping Westech’s G&A rates because the proposed rates and budgetary rates were significantly lower than Westech’s historical rates, and Westech

⁵ As provided in the solicitation, the agency would perform a cost realism analysis to determine the Army’s “best estimate of the cost of any contract that is likely to result from the [o]fferor’s proposal.” Conformed RFP at 67. The agency determined that Westech failed to include Hawaii’s general excise tax as a direct cost in its proposal and therefore, the agency calculated an upward adjustment to account for this omission. AR, Tab 123, Westech Cost Realism Evaluation at 17.

did not provide data supporting its explanation that budgetary rates were based on expected additional contracts, including this task order, being added to the G&A pool. *Id.* at 9.

With the exception of an upward adjustment to Westech's proposed cost/price for failing to include Hawaii's general excise tax as a direct cost in its proposal, the Army determined that both offerors proposed realistic costs and submitted fair and reasonable pricing. COS/MOL at 8.

The Army determined Westech's proposal complied with the RFP requirements, had the lowest total evaluated price of technically acceptable proposals having past performance ratings of substantial confidence, and selected Westech for the task order. AR, Tab 125, SSDD at 6. The agency notified TSI that it was not the successful offeror, provided TSI with a redacted SSDD, and answered TSI's debriefing questions. COS/MOL at 8-9; AR, Tab 129, TSI Debriefing. On December 19, 2023, TSI filed a protest with our Office. Our Office subsequently dismissed the protest after the agency represented that it was taking corrective action by reexamining its evaluation of Westech's proposal; re-evaluating proposals, if necessary; and making a new award decision. *Tech Sys., Inc.*, B-421838.2, Jan. 18, 2024 (unpublished decision).

The Army reviewed its evaluation of Westech's proposal and concluded that the original evaluation reports were accurate. AR, Tab 135, Contracting Officer Memo. for the Record on Corrective Action at 1-2. For each evaluation report, the agency drafted supplemental findings; these documents and the contracting officer's memorandum on the corrective action were forwarded to the source selection authority (SSA) for review. *Id.* at 2. The SSA drafted an addendum to the initial SSDD concurring with the evaluators' original findings and reaffirming the decision to issue the task order to Westech. AR, Tab 136, SSDD Addendum at 2. On February 15, 2024, the Army notified TSI that it had completed the corrective action, provided TSI with the agency's findings, and informed TSI that it was an unsuccessful offeror. AR, Tab 138, Notice of Unsuccessful Offeror, Feb. 15, 2024. This protest followed.

DISCUSSION

In its protest, TSI raises several challenges to the Army's past performance and cost evaluations. TSI alleges that the agency's past performance evaluation was flawed because the Army improperly credited Westech for past performance in a manner that did not comport with the solicitation's guidelines and unreasonably concluded that Westech's contract references were similar in scope to the instant task order. Comments & Supp. Protest at 9-15. The protester argues further that the agency's cost realism evaluation was unreasonable because the Army failed to consider whether Westech's proposed cost was too low and because the agency failed to consider, as required by the solicitation, the performance risk associated with capping Westech's unsupported indirect rates. Comments & Supp. Protest at 25-32; Supp. Comments at 8-14.

As explained below, we deny the protest. Although our decision does not address every argument TSI has raised, we have reviewed each of them and find that none provides a basis on which to sustain the protest.

Past Performance

TSI contends that the agency, contrary to the terms of the solicitation, gave Westech's proposal credit for two contracts that neither Westech nor its significant subcontractor performed and were instead performed by separate joint ventures. More specifically, one of the contracts was performed by a joint venture of which Westech was a member, and the other was performed by a joint venture of which Westech's significant subcontractor, Systems Application & Technologies, Inc. (SA-Tech), was a member. Comments & Supp. Protest at 8-11; Supp. Comments at 4-7. In addition, the protester argues that the agency improperly concluded that Westech's contract references were similar in scope to the task order. *Id.* at 11-15. The agency contends its evaluation was reasonable and consistent with the solicitation's evaluation criteria. Supp. COS/MOL at 20-24. The record demonstrates that the agency's past performance evaluation was unobjectionable.

In reviewing an agency's evaluation of an offeror's past performance, our Office evaluates only whether the evaluation was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, as determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *TeleCommunication Sys., Inc.*, B-413265, B-413265.2, Sept. 21, 2016, 2016 CPD ¶ 266 at 7. 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 an agency's evaluation, without more, does not demonstrate that those judgments are unreasonable. *Id.*

Joint Venture Contract References

The record reflects that Westech submitted two past performance references for itself, one of which was for work Westech performed as the managing member of a joint venture--Combined Technical Services Joint Venture (CTS). AR, Tab 97, Westech Contract References. In addition, Westech submitted three references for its subcontractor SA-Tech, and one of those references was for work that SA-Tech performed as the managing member of a joint venture--Southwest Range Services, LLC Joint Venture. AR, Tab 110, SA-Tech Contract References. The Army deemed all Westech's and SA-Tech's contract references recent and relevant, and found that Westech warranted a past performance rating of substantial confidence based on the demonstrated quality of the past performance for the referenced contracts. AR, Tab 122, Westech Past Performance Evaluation at 3, 6-7; AR, Tab 133, Westech Past Performance Evaluation Addendum at 1-2.

TSI contends that section L.5.3.1.4(b)(13)(iii) of the solicitation requires offerors relying on past performance as part of a joint venture to include the following information in their proposals:

Provide a justification as to why the contractor can claim the past performance of work in Column B [(the reference contract number)] by explaining how the contractor will draw upon the past performance from the Joint Venture or predecessor company, and shall demonstrate that the resources (e.g. workforce, management, facilities, or other resources) of the Joint Venture or predecessor company will be transferred to the contractor or provided or relied upon for contract performance, such that the Joint Venture or predecessor company will have meaningful involvement in contract performance.

Comments & Supp. Protest at 9 (citing Conformed RFP at 52).

TSI argues that the Army unreasonably credited Westech for the contract performed by the CTS joint venture without giving any consideration to what portion of the work Westech contributed to the joint venture or how Westech would be able to rely upon the resources that CTS used in performing the contract reference. Comments & Supp. Protest at 10-11. The protester argues that Westech did not provide information in its proposal explaining the work Westech performed or demonstrating the resources it provided as a joint venture member that would be used in performing this task order.⁶ *Id.* at 9-10. In TSI's view, the agency's evaluation runs contrary to the terms of the solicitation and the agency is unable to determine that the reference is relevant because there is no basis in Westech's proposal for the agency to conclude that Westech, and not the other joint venture member, performed the work or provided the resources for the contract reference. *Id.* at 9-10. TSI makes these same arguments about the joint venture contract reference submitted for SA-Tech and alleges the Army's evaluation of SA-Tech's joint venture contract reference is also unreasonable. *Id.* at 10.

The agency counters that the solicitation explicitly identified specific criteria for the evaluators to consider in determining if a submitted reference is recent and relevant, which the agency views as an objective criterion. Supp. COS/MOL at 18-19. The agency contends that the evaluators then needed to make reasonable determinations about the offeror's performance history and that the agency reasonably decided that Westech's performance history merited a past performance rating of substantial confidence. *Id.* at 20. In support of its position, the Army refers to the past performance

⁶ The RFP provided that "[t]he Government will assess the contract references provided in the Offeror's task order proposal." Conformed RFP at 65. As relevant here, the RFP instructed offerors submitting past performance references to identify whether the reference was a joint venture; if it was, the offeror submitting the reference was to provide a description of its relationship to the joint venture and a justification "as to why it can claim the experience of the [j]oint [v]enture." *Id.* at 51; AR, Tab 97, Westech Contract References at cell H9.

evaluation report in which the evaluators detailed their analysis of the recency and relevance of each of the five references submitted in Westech's proposal. *Id.* at 22; see also AR, Tab 122, Westech Past Performance Evaluation at 7-15. Specifically, for the joint venture contract reference that the CTS joint venture performed, the evaluators noted that Westech was the managing member of the joint venture and directed its daily operations. AR, Tab 122, Westech Past Performance Evaluation at 9. The evaluators also observed that SA-Tech was the managing partner of the contract reference performed by Southwest Range Services, LLC Joint Venture. *Id.* at 12.

The evaluators also analyzed the contractor performance assessment reporting system (CPARS) information they obtained for the submitted references. *Id.* at 15-23. In connection with the CTS joint venture contract reference, the evaluators considered a CPARS report indicating that Westech provided support that was highly beneficial to the government. *Id.* at 18.

Based upon our review of the record, we find the Army's past performance evaluation reasonable. The RFP's evaluation criteria is silent as to how the agency would evaluate a joint venture contract reference submitted on behalf of one member of the joint venture. As such, giving due deference to the agency's broad discretion to determine whether a particular contract is relevant to the evaluation of past performance, we believe that the Army's evaluation of Westech's contract references was unobjectionable.

We note first that information requirements provided in the instructions portion of a solicitation are not the same as evaluation criteria; rather than establishing minimum evaluation standards, solicitation instructions generally provide guidance to assist offerors or vendors in preparing and organizing proposals or quotations. See *All Phase Envtl., Inc., supra* at 4. The information required by section L of a solicitation does not have to correspond to the evaluation criteria in section M. *Cascade Gen'l, Inc., B-283872*, Jan. 18, 2000, 2000 CPD ¶ 14 at 10.

TSI argues that section L.5.3.1.4(b)(13)(iii) of the RFP's instructions requires Westech to provide information explaining what work it performed as part of the joint venture or what resources from the joint venture Westech will use in performing this contract. However, section L.5.3.1.4(b)(13)(iii), as set forth above in its entirety, does not prescribe how the agency will evaluate past performance.

The RFP required the agency to "asses the degree of confidence it has in the expectation that the [o]fferor will successfully complete the requirements [in accordance with] the contract term based on the [o]fferor's demonstrated record of recent and relevant performance." Conformed RFP at 65. The RFP detailed the requirements for recent and relevant performance and advised that the agency may consider past performance information from other sources in its assessment of performance history. *Id.* In determining the confidence rating, the agency would consider "the depth and breadth of the [o]fferor's" demonstrated recent and relevant experience. *Id.* at 67. With regard to joint venture offerors specifically, the RFP informed offerors that the agency

will evaluate the past performance of the joint venture itself, as well as the past performance of each individual joint venture partner. *Id.* Section L.5.3.1.4(b)(13)(iii), however, required offerors to justify in their proposals how a joint venture contract reference pertained to the work of the offeror or demonstrated how the offeror would rely upon the joint venture's resources. *Id.* at 52.

We do not think section L.5.3.1.4(b)(13)(iii) supports the protester's position that agency's evaluation was unreasonable because Westech did not provide information in its proposal explaining the work Westech performed as a joint venture member or demonstrating the resources of the joint venture that would be used in performing this task order. Westech did not submit the past performance references for CTS Joint Venture or for SA-Tech's Southwest Range Services, LLC Joint Venture to establish either joint venture's involvement in performing the instant task order. Instead, these past performance references were submitted to demonstrate the past performance of managing members Westech and SA-Tech, respectively. The agency considered these references, and Westech's and SA-Tech's roles in its past performance evaluation. Thus, in our view, the protester fails to persuasively explain how the agency's evaluation of Westech's and SA-Tech's joint venture references was inconsistent with the solicitation when the solicitation's evaluation criteria is silent as to how the agency will evaluate joint venture past performance references where the offeror is not a joint venture. Absent clear direction in the solicitation, we have no basis to conclude that the agency's evaluation of Westech's past performance was unreasonable or inconsistent with the terms of the solicitation.

Scope of Contract References

Next, TSI argues that the Army unreasonably determined that Westech's two contract references were relevant because Westech failed to demonstrate that its contracts were similar in scope to the task order. Comments & Supp. Protest at 11-15. In the protester's view, it was unreasonable for the agency to conclude that Westech's references were similar for the supply functional area, which Westech proposed to perform.⁷ *Id.* at 11-13. The protester maintains that the agency's assessment of Westech's past performance record must be reasonable "in its totality" and that it would be unreasonable for the agency to rely on SA-Tech's contract references to assess Westech's ability to perform the supply functions. *Id.* at 14-15. TSI also contends the agency failed to justify its finding of similarity in scope in the evaluation report. *Id.* at 12-13. Based on our review of the record, we have no reason to question the reasonableness of the agency's past performance evaluation.

⁷ Westech proposed to perform 54 percent of the supply tasks area itself; it proposed its subcontractor, SA-Tech, who is also a member of the incumbent team, to perform the remaining 46 percent of the supply tasks, as well as all the maintenance and transportation tasks. AR, Tab 122, Westech Past Performance Evaluation at 3; see also AR, Tab 91, Westech Vol. 2, Staffing & Management Plan at 6-7.

As part of the relevance assessment, the RFP provided that the agency would consider the similarity of the scope of work performed under the referenced contract. Conformed RFP at 66. According to the RFP, in order for a reference to be deemed similar in scope, a reference had to demonstrate that it involved experience that was similar to at least one of the PWS functional areas of maintenance, supply, and transportation. *Id.* In this regard, the PWS identified discrete tasks for each of the functional areas. There were six tasks for maintenance, eight tasks for supply, and eight task for transportation. AR, Tab 71, RFP amend. 5, PWS at 41-69.

As relevant here, the agency evaluated the two contract references Westech submitted for itself and determined that both references demonstrated the performance of work that was similar in scope to the task order. AR, Tab 122, Westech Past Performance Evaluation at 7-10. Specifically, for Westech reference contract No. W91151-21-D-0003, which included tasks in the areas of maintenance, supply, and transportation. The agency found that the maintenance work performed under this contract was similar to all six tasks required by the PWS; the supply work was similar to four of the eight tasks required by the PWS; and the transportation work was similar to only one of the eight tasks required by the PWS. *Id.* at 8. Based on this comparison, the evaluators concluded that the contract was similar in scope to the instant effort for the maintenance and supply functional areas but not the transportation functional area. Overall, where the reference demonstrated performance of work that was similar to at least one of the PWS required areas of performance (maintenance, supply, or transportation), the agency evaluators concluded the contract was relevant for the past performance evaluation. *Id.*

Similarly, Westech reference contract No. W91151-13-D-0005 (the contract performed by the CTS joint venture of which Westech was the managing member) reflected performance of maintenance, supply, and transportation functional areas and the Army found the contract required work similar to the PWS's maintenance and supply functional areas but not the PWS's transportation requirements. *Id.* at 9-10. In this connection, the agency concluded that the contract's maintenance work required the performance of tasks that were similar to all of the PWS's six maintenance tasks and the supply work was similar to four of the PWS's eight required supply tasks. The Army, however, determined that the contract demonstrated performance of only one of the PWS's required eight transportation tasks, and thus decided that the reference was not similar to the PWS's transportation requirements. Again, because the referenced contract demonstrated performance of work that was similar to at least one of the PWS required functional areas, the agency concluded that Westech reference contract No. W91151-13-D-0005 was also relevant for the past performance evaluation.

TSI argues that Westech's two references are not relevant because the agency has not explained how four of eight supply tasks is considered similar. Comments & Supp. Protest at 13. TSI also argues that the four tasks in which Westech demonstrated similar experience are not tasks that Westech is proposed to perform for this task order. *Id.*

The record demonstrates that the agency's evaluation conclusions were unobjectionable. As explained above, for a contract to be considered similar in scope, the RFP required the reference to demonstrate similar experience in one of the three functional areas.⁸ The contracts discussed above were found to demonstrate experience with two of the three functional areas. Furthermore, nothing in the RFP requires that the functional area in which similar experience is demonstrated align with the functional area in which performance is proposed. Westech demonstrated similar scope in the maintenance functional areas for both its contract references. That was all that was required for purposes of satisfying the scope prong of the relevance determination for both references. Accordingly, we find no basis on which to sustain the protest.

In sum, we find that the Army's treatment of Westech's joint venture past performance references was not contrary to the terms of the RFP and that the Army reasonably determined that Westech's two references for itself were similar in scope to the effort here. As a result, we deny TSI's challenges to the agency's past performance evaluation.

Cost Realism

TSI also challenges the Army's cost evaluation of Westech's proposal. The protester argues that when the agency capped the indirect rates of Westech and its subcontractor SA-Tech as required by the solicitation because the rates were unsupported, the agency was required to assess the performance risk presented by the capped rates, which, according to the protester, were unrealistically low. Comments & Supp. Protest at 24-32. The protester argues that the agency's failure to consider these unrealistically low capped rates was contrary to the solicitation terms, which expressly stated that the agency would perform a cost realism evaluation and admonished offerors not to submit unrealistically low costs. *Id.* at 25-26, 30-32. In support of this allegation, the protester highlights the fact that the indirect rates that Westech proposed for itself and SA-Tech were below historical rates and infers that rates below historical rates are unrealistically low. *Id.* at 26-29. Because the Army imposed caps on Westech's and SA-Tech's indirect rates at rates below historical rates, the protester alleges that Westech will be operating at a loss under the task order and the agency failed to properly consider this performance risk in issuing the task order to Westech. *Id.* at 27-30.

The agency responds that it did not find Westech's and SA-Tech's proposed indirect rates unrealistic. Supp. COS/MOL at 37-39. The Army explains that the indirect rates were capped based on the recommendation of the price evaluators in accordance with the solicitation evaluation criteria because Westech and SA-Tech provided no

⁸ As discussed above, the agency assessed relevance based on magnitude and complexity, as well as scope. The protester has not challenged the reasonableness of the agency's findings on magnitude and complexity.

supporting historical data for their indirect rates.⁹ *Id.*; see also AR, Tab 123, Westech Cost Realism Evaluation at 8, 10, 13-15.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.305(a)(1); 15.404-1(d); *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 6. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. *ERC, Inc.*, B-404721, B-404721.2, Apr. 19, 2011, 2011 CPD ¶ 94 at 4. An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information available to the agency as of the time of its evaluation. *Id.* Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. *Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8.

We also note that as a general matter, the contractor bears the risk of cost overruns for a particular category or type of work in a cost-reimbursement contract when the contractor agrees to a cap or ceiling on its reimbursement for that category or type of work. *MCT JV*, B-311245.2, B-311245.4, May 16, 2008, 2008 CPD ¶ 121 at 12. The Army asserts that it regularly caps rates in cost-reimbursement contracts, especially when the rates proposed are lower than historical rates. Supp. COS/MOL at 38. Indeed, the current task order, which TSI is performing, includes capped rates. *Id.* While the protester contends that Westech will be performing at a loss because the proposed rates are capped below the historical rates, a firm, in its business judgment, may submit an offer that does not include any profit, or may be below-cost, or may be

⁹ The agency initially argued that TSI's challenge regarding the agency's imposition of capped indirect rates in its cost realism evaluation was an untimely challenge to the terms of the solicitation and that imposition of capped rates for billing purposes was a contract administration issue, which GAO does not generally review. Supp. COS/MOL at 30-31. TSI responded that the agency misunderstands TSI's protest, which challenges the Army's failure to comply with the terms of the solicitation and evaluate performance risk associated with the Army's imposition of rate caps. Supp. Comments at 4-5. TSI also responded that this protest ground did not raise a contract administration issue and maintained that performance risk is reasonably encompassed by and related to the evaluation criteria and therefore, TSI has raised a valid protest ground. *Id.* at 6-8. We agree with the protester. In our view, the agency's mischaracterization of the protester's arguments does not warrant dismissal of the protest ground.

an attempted buy-in; in this regard, below-cost pricing is not prohibited.¹⁰ See *All Phase Envtl., Inc.*, B-292919.2 *et al.*, Feb. 4, 2004, 2004 CPD ¶ 62 at 8.

Based upon our review of the record, we find the Army's cost realism analysis reasonable. The record shows that the evaluators did not find that Westech proposed unrealistically low rates. Instead, the evaluators recommended capping the indirect rates because no supporting data was included in the proposal. AR, Tab 123, Westech Cost Realism Evaluation at 8, 10, 13-15. For example, in connection with Westech's overhead rates, the evaluators compared the budgetary data provided and the proposed rates and noted that the proposed rates were the same as the budgetary rates. *Id.* at 8. Westech submitted no historical rate data for its overhead rates because the rates were developed specifically for this task order and therefore, the evaluators recommended capping the rates in accordance with the solicitation terms. *Id.*

Similarly, for Westech's G&A rates, the evaluators observed there was a significant decrease between the proposed and budgetary rates, and the historical rates. *Id.* at 10. The evaluators also noted that while Westech indicated that its budgetary rates were estimated based on additional program revenue for itself and its subcontractor, "Westech did not provide supporting data for the decrease in rates based on this statement." *Id.* Thus, in accordance with the solicitation, the evaluators recommended capping the unsupported rates. *Id.* The evaluators performed the same analysis for SA-Tech's proposed overhead and G&A rates, made similar findings, and also recommended capping SA-Tech's unsupported rates. *Id.* at 13-15. The record shows the Army's decision to impose caps on the indirect rates in Westech's proposal, was unrelated to any finding that the indirect rates were unrealistically low.

In the final analysis, the agency determined Westech's cost/price proposal to be "realistic for the work to be performed." AR, Tab 123, Westech Cost Realism Evaluation at 18. The agency further concluded that Westech's cost/price proposal reflected a clear understanding of the requirements and that the proposed cost elements were consistent with the methods of performance described in the technical proposal. *Id.*; see also AR, Tab 125, SSDD at 5 (SSA's concurrence with the price evaluators that Westech's cost/price proposal is "fair and reasonable and the costs realistic for the work being performed."); AR, Tab 134, Westech Cost Realism Evaluation Addendum at 2 (concurring with the original evaluation that Westech's total evaluated price and cost elements are realistic); AR, Tab 136, SSDD Addendum at 2 (confirming the original evaluation and stating that "[r]elooking at the evaluation gives credence to the Total Evaluated Price and the realism analysis").

Moreover, in response to the protest, the Army states that Westech's "proposed rates are not unrealistic." Supp. COS/MOL at 37. The agency explains that its evaluators

¹⁰ We recognize that concerns about below-cost pricing usually arise with fixed-priced cost elements; however, in essence, the agency here has converted cost-reimbursement elements into fixed-price elements by capping the rates.

frequently recommend capping rates that are lower than actual historical rates or when there is a lack of historical data. *Id.* at 38-39. The agency further explains that Westech's proposal, including SA-Tech's rate information, forecasts increasing its G&A cost pools and allocation bases as a result of being selected for this task order. *Id.* at 39-40, 42-43. In this connection, the agency asserts that the proposed budgetary data was consistent with Westech's historical data. *Id.* at 40-43. In addition, the agency observes that the trend analysis of Westech's G&A rates shows a reasonable expectation for the cost pools and allocation bases to increase over the life of the task order. *Id.* at 43. The Army contends its cost analysis was thorough and consistent with the solicitation. *Id.* at 44-45.

Under the circumstances here, we are unpersuaded that the agency was required to consider performance risk in its evaluation of Westech's indirect rates. Although the Army recommended capping Westech's indirect rates because they were unsupported in accordance with the solicitation, the Army did not find that Westech's rates were unrealistically low, and therefore, the Army was not required to consider the risk of unrealistically low rates in the context of its evaluation of proposals and source selection decision process. As noted previously, the RFP expressly cautioned offerors against submitting unrealistically low costs and indicated that the agency would consider the risk to performance if proposed costs were evaluated as unrealistically low, which could result in upward cost adjustment or the proposal's removal from the competition. Conformed RFP at 67. We find it unobjectionable that the agency did not consider performance risk in its evaluation because the solicitation does not require the analysis where the agency did not find Westech's rates unrealistically low. *Compare Derivative, LLC*, B-420687.3, B-420687.4, May 12, 2023, 2023 CPD ¶ 119 at 9 (finding an agency may always consider risk intrinsic to the stated evaluation factors even when performance risk is not specifically listed in the solicitation as an evaluation factor).

The protester contends that our decision *MCT JV*, *supra*, directs a different result; however, the facts in *MCT JV* are distinguishable.¹¹ In *MCT JV*, the agency found that the awardee had capped its indirect rates at levels significantly below its costs but did not consider risk to performance posed by the awardee's low rates. *Id.* at 12-13. The protester argued the solicitation required the agency to consider performance risk because the solicitation warned offerors not to submit unrealistically low costs. *Id.* at 12. GAO sustained the protest because the agency's failure to consider performance risk was inconsistent with the solicitation terms where the agency concluded the rates were significantly below its costs. *Id.* at 13.

Here, in contrast, the agency did not consider Westech's capped rates unrealistically low but imposed caps on Westech's proposed rates because its proposal did not provide historical data supporting them. AR, Tab 123, Westech Cost Realism Evaluation at 8, 10, 13-15. On this record, where the solicitation does not otherwise

¹¹ We agree with the protester it is immaterial whether the agency or Westech capped the rates and we do not find that the specific manner in which the rates are capped is a distinguishing factor here.

require a performance risk assessment, and the agency did not find Westech's capped rates unrealistically low, we find the agency's cost realism evaluation reasonable and we find no basis to sustain the protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel