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Decision

Matter of: Solers, Inc.
File: B-404032.3; B-404032.4
Date: April 6, 2011

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Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the awardee's proposal improperly took exception to the solicitation requirement to propose a fixed price.
2. Protest challenging the evaluation of the offerors' past performance is sustained where the record does not permit a meaningful review of whether the agency's evaluation was reasonable.
3. Protest challenging the evaluation of offerors' technical proposals is sustained where the record does not demonstrate that agency reasonably evaluated the qualifications of the awardee's proposed personnel.

DECISION

Solers, Inc., of Arlington, Virginia, protests the issuance of a task order to Booz Allen Hamilton, Inc. (BAH), of McLean, Virginia, by the Department of Defense, Defense Information Systems Agency (DISA) under request for quotations (RFQ) No. DIAMZ03204 for support of the DISA Program Executive Office--Mission Assurance and Network Operations Cross Domain Solutions. Solers argues that DISA improperly issued the task order to BAH because the awardee's proposal took exception to the RFQ requirement to propose a fixed price. The protester also

argues that the agency's evaluation of the offerors' past performance and technical approaches was flawed.¹

We sustain the protest.

BACKGROUND

DISA is responsible for providing a consolidated cross domain solution for the Department of Defense. RFQ, Performance Work Statement (PWS), at 1. Cross domain solutions involve services that permit the transfer of information between secure domains/networks. The RFQ sought proposals to provide cross domain solutions, planning and program management, and development and integration support for DISA in meeting its cross domain obligations. Solers was the incumbent for the prior task order for these requirements.

The RFQ was issued on July 14, 2010, and was amended on August 25. The competition was limited to offerors who hold GSA FSS contracts. The RFQ anticipated issuance of a fixed-price task order for a 1-year base period with four 1-year options. RFQ at 1. Offerors were advised that they would be evaluated on the basis of price, and the following non-price factors: (1) technical approach, (2) management approach, (3) past performance confidence, and (4) past performance relevancy. The technical factor was more important than the management factor, and these two factors were, combined, more important than the two past performance factors. For purposes of award, the non-price factors were "significantly more important" than price. RFQ, Evaluation Plan, at 1.

As relevant here, the RFQ advised that the agency estimated that the task order would require the contractor to provide 21.55 full-time equivalent employees (FTEs). Id. Offerors were required to submit technical and price proposals that demonstrated their ability to meet the requirements of the PWS. For the past performance evaluation, offerors were required to complete a form by listing three past performance references.

On September 13, DISA selected Solers' proposal for award. BAH filed a protest with our Office on September 24, arguing that the agency had not conducted meaningful discussions and failed to consider a potential organizational conflict of interest concerning Solers. On September 28, DISA advised our Office that it would

¹ Although the solicitation anticipated award of a task order under a vendor's General Services Administration (GSA) Federal Supply Schedule (FSS) contract, the solicitation stated that it sought "proposals" and that term is used repeatedly throughout the solicitation and the procurement record. For the sake of consistency, we refer to the firms as "offerors" and their submissions as "proposals" throughout this decision.

take corrective action in response to BAH’s protest. Based on the agency’s notice, we dismissed the protest on September 29.

DISA’s corrective action consisted of reopening discussions with the offerors, requesting and evaluating revised proposals, and making a new award decision. The agency’s reevaluation of the offerors’ proposals was as follows:²

	SOLERS	BAH
Technical	Blue/Low Risk	Green/Moderate Risk
Management	Blue/Low Risk	Blue/Low Risk
Past Performance Confidence	Satisfactory	Substantial
Past Performance Relevancy	Relevant	Very Relevant
Price/Cost	\$27,419,622.57	\$24,586,719.75

Agency Report (AR), Tab L, Selection Recommendation Document (SRD), at 1.

The contracting officer (CO) served as the source selection authority for the procurement. The CO found that “[a]lthough the Solers proposal was rated technically superior to BAH’s proposal, the identified strengths do not warrant payment of an approximate 12% higher price.” AR, Tab M, Selection Decision, at 9. The CO concluded that BAH should be selected for award based on the following rationale: “Based on the technical sufficiency of the [BAH] proposal, the superior past performance, and the lower cost, the Government recommends awarding the contract to [BAH].” Id.

DISA notified Solers of the award on December 29, and provided a summary of the evaluation ratings and the offerors’ prices. This protest followed.

EXCEPTION TO FIXED PRICE REQUIREMENT

Solers argues that BAH’s price proposal improperly took exception to the RFQ requirement to propose a fixed price. We agree.

² The agency used the following ratings for the technical and management factors: blue, green, yellow, and red, with risk ratings of low, moderate, high, and unacceptable; for past performance confidence, the agency used the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence; and for past performance relevancy, the agency used the following ratings: very relevant, relevant, somewhat relevant, and not relevant. AR, Tab 29, Best Value Recommendation, at 3.

The requirement to propose fixed prices is a material term or condition of a solicitation requiring such pricing. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2-3. Where a solicitation requests proposals on a fixed-price basis, a price offer that is conditional and not firm cannot be considered for award. Id.; SunEdison, LLC, B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168 at 5 (protest sustained where the awardee conditioned its fixed price on the successful completion of a financial transaction between the awardee and a third party).

Here, the RFQ required offerors to submit proposals on a fixed-price basis. RFQ at 3. Offerors were also required to provide pricing information regarding the basis for their fixed price, including fully-loaded labor hourly rates for personnel, and information concerning the offeror's GSA schedule labor rates. Id. The contractor was to be paid fixed monthly payments based on a delivery schedule set forth in the solicitation. Id. Additionally, as relevant here, the PWS stated that the agency would provide space for contractor personnel at the government worksite as follows:

Place of Performance. The contractor shall perform the majority of work for this contract at its own facilities. The government may provide space for up to seven (7) personnel to perform work under other tasks at its office space currently located at 5600 Columbia Pike, Falls Church, VA. In early 2011, the government's office space will relocate to Fort Meade, Maryland.

RFQ, PWS § 9.1.

With regard to the place of performance requirement, BAH stated it "will comply with all items in PWS Section 9.0 and 9.1." AR, Tab J, BAH Revised Proposal, vol. 1, at 25.

In its cost proposal, BAH stated that its price was based on labor rates in its GSA schedule 70 contract. AR, Tab J, BAH Revised Proposal, vol. 2, at 8. The awardee further explained that its price "includes both Contractor and Government site rates." Id. BAH explained that the government site rates were provided at a lower rate as compared to the contractor-site rates, and that their use "presents a significant discount or savings, to the Government, in excess of \$[deleted] over the life of the contract." Id. BAH explained that it was able to offer the discount for the following reasons:

Government site rates are offered when the Government provides suitable work facilities and related equipment (e.g.: telephone, copier, parking, furniture desktop computer, and other standard equipment and office supplies) for a period of no less than [deleted] work days at a Government site. [BAH] maintains the lower overhead rates on

which the Government site labor prices are based as these [sic]³ or similar facilities are provided on a continuing basis throughout the task period and as long as sufficient tasking is provided to perform assignments on a full-time basis at these work sites.

Id. (emphasis added). BAH also stated, however, that in the event the conditions for the government-site work spaces set forth in its proposal did not occur, different rates could be applied:

Additionally, Booz Allen understands that a number of our engineering and development staff will spend the majority of their time working out of Government lab spaces and as such we are offering Government site rates on those staff members which represent[s] a significant discount of over \$[deleted] to the Government. In the event that these conditions are not met, contractor site rates may need to be applied.

Id. (emphasis added).

In addition to the language above, Solers notes that BAH's price proposal reflects [deleted] labor hours for the base year and each option year of performance. AR, Tab J, BAH Proposal, vol. 2, attach. A, at 17-19. For the base period, the protester calculates that BAH proposed [deleted] hours at government site rates; based on BAH's calculation of [deleted] hours of labor per year per FTE, this translates to [deleted] FTEs at the government-site rates, out of the [deleted] FTEs proposed. Protester's Supp. Protest at 4-5, citing AR, Tab J, BAH Proposal, vol. 2, attach. A, at 22-35. For the 4 option years, Solers contends that BAH used government-site rates for [deleted] of the total [deleted] FTEs proposed. Id., citing AR, Tab J, BAH Proposal, vol. 2, attach. A, at 36-111. Solers contends that because these assumptions were built into BAH's price, and because the RFQ stated that the government would provide space at the government site for no more than seven

³ We note that this sentence appears to contain a typographical error, as a logical reading, consistent with the end of the sentence, would read "Booz Allen maintains the lower overhead rates on which the Government site labor prices are based as [long as] these or similar facilities are provided on a continuing basis throughout the task period and as long as sufficient tasking is provided to perform assignments on a full-time basis at these work sites." AR, Tab J, BAH Revised Proposal, vol. 2, at 8 (emphasis added). Such a reading would be consistent with the view that BAH sought to condition its fixed price on the availability of government-site space for its employees. In light of the other evidence in the record, however, we need not make this assumption in order to conclude that BAH took exception to the solicitation requirement to propose a fixed price.

personnel, BAH's price contained an exception to the fixed price that could result in BAH seeking a price high than it offered.⁴

DISA and BAH contend that the language in the awardee's proposal was not an exception to the fixed-price requirement, and was instead merely a suggestion that BAH might request an adjustment to its fixed price in the future. The agency argues that BAH proposed a fixed price, and that regardless of what BAH stated concerning its calculation of its fixed price, the awardee was required to perform for that price. SAR at 13.

We disagree. We think that a fair reading of BAH's proposal shows that the awardee took exception to the requirement to propose a fixed price. In this regard, as stated above, BAH stated that it had based its price on government-site and contractor-site rates, and that use of the government-site rates permitted the offeror to offer "a significant discount or savings" to the agency. AR, Tab J, BAH Revised Proposal, vol. 2, at 8. With regard to the lower government-site rates, BAH stated that these rates "are offered when the Government provides suitable work facilities and related equipment . . . for a period of no less than ninety (90) continuous work days at a Government site." *Id.* (emphasis added). BAH's proposal also stated that it was able to offer these rates because the offeror experiences lower overhead rates when its personnel are provided space and were working full-time at the government site. *Id.* As noted above, BAH's price proposal was premised on its personnel performing significantly more work at the government site than was contemplated by the solicitation.⁵ Finally, BAH stated, in the event that the conditions set forth in its

⁴ DISA and BAH neither dispute nor concede Solers' calculations regarding the number of FTEs proposed by BAH using government-site rates. See Supp. AR (SAR) at 12 n.5; Intervenor's Supp. Comments at 13. Instead, the agency and intervenor dispute the protester's calculation that the effect of BAH's use of government-site rates resulted in a discount to the government of approximately \$[deleted], rather than the \$[deleted] indicated in BAH's proposal. In light of our conclusion that BAH improperly took exception to the requirement to offer a fixed price, we need not resolve the exact number of FTEs that BAH would seek to place at the government site or the exact amount of savings based on BAH's noncompliance with the solicitation.

⁵ As stated above, the PWS explained that the contractor will be required to "perform the majority of work for this contract at its own facilities," and that the government "may provide space for up to seven (7) personnel." RFQ, PWS § 9.1. The PWS notes that the space for the seven personnel will be provided at the agency's Falls Church, Virginia, offices, and that the government's offices will "relocate to Fort Meade, Maryland." *Id.* The protester argues that the PWS limited the government-provided space to seven FTEs, and neither the agency nor the intervenor disputes this proposition. Regardless of the actual amount of space the government will provide, the PWS clearly states that the "majority" of the work must be performed at the

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price proposal concerning the availability of space at the government site, the higher contractor-rates “may need to be applied.” Id. The collective effect of these statements in BAH’s proposal amount to BAH conditioning its offered price on a greater use of government facilities than contemplated or authorized by the solicitation, such that its offered price was conditional not firm.⁶

On this record, we find that DISA improperly issued the task order to BAH, based on a proposal that took exception to the solicitation requirement to propose a fixed price.⁷ SunEdison, LLC, supra; Marine Pollution Control Corp., supra. Because DISA cannot accept BAH’s proposal that did not offer a fixed price for award, and because Solers, which did offer a fixed price, was the only other offeror who submitted a proposal, we conclude that Solers was prejudiced by DISA’s error, and sustain the protest on this basis.

(...continued)

contractor’s facilities, and the record shows that BAH’s price is conditioned on the agency’s provision of space in a manner consistent with BAH’s assumptions, and that BAH’s prices were based on government-site rates for more than [deleted] percent of its FTEs in the base and each of the option years of the contract.

⁶ At the very least, the collective effect of these statements created an ambiguity as to whether BAH was proposing a fixed price, or whether it had identified conditions which would entitle BAH to an adjustment of its price in the event that the conditions were not met. Such ambiguity rendered BAH’s proposal unacceptable with regard to the requirement to propose a fixed price. In this regard, a proposal or quotation that contains an ambiguity as to whether the offeror will comply with a material requirement of the solicitation renders the proposal unacceptable. Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 at 3; GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 11; see also SOS Int’l, Ltd., B-295533.2, B-295533.3, July 1, 2005, 2005 CPD ¶ 128 at 3 (bid that is ambiguous as to compliance with requirement to offer a fixed price is nonresponsive and must be rejected).

⁷ Additionally, there is no indication in the record that the agency considered this matter in the selection decision. See AR, Tab L, SRD, at 14-15; Tab M, Selection Decision, at 8; Tab M, Cost/Price Evaluation Report, at 1-2. Instead, the agency merely states in its response to the protest, without citation, that the agency did not view the language an exception to the requirement to propose a fixed price. See SAR at 13. Such statements, in the absence of any support in the record, provide no basis to refute the protester’s arguments. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15 (greater weight is accorded to contemporaneous source selection materials rather than judgments made in response to protest contentions).

PAST PERFORMANCE EVALUATION

Next, Solers challenges DISA's evaluation of the offerors' past performance. In particular, the protester argues that its own relevancy and confidence ratings should have been higher, and the awardee's ratings should have been lower. The protester also argues that the record provided by the agency is insufficient to determine whether the evaluation of the offerors' past performance was reasonable. We sustain Solers' protest regarding the insufficiency of the past performance evaluation record.⁸

While, as a general matter, the evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, we will question an agency's evaluation of past performance where it is unreasonable or undocumented. Clean Harbors Envtl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. Although an agency is not required to retain every document generated during its evaluation of proposals, the agency's evaluation must be sufficiently documented to allow our Office to review the merits of a protest. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 10. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

The RFQ stated that the offerors' past performance would be evaluated on the basis of performance confidence and relevancy. RFQ at 4; Evaluation Plan at 3. The RFQ evaluation plan stated that the agency would consider offerors' "[r]ecent and relevant Past Performance performing contracts similar in size, scope and complexity to the work described in the PWS." RFQ, Evaluation Plan, at 1. Offerors were required to submit three past performance references by completing a form

⁸ DISA and BAH both argue that Solers' challenge to the evaluation of its past performance is untimely because the protester received a copy of its prior past performance evaluation during the agency's corrective action in response to BAH's initial protest, but did not revise its proposal or protest its evaluation. On the facts here, we conclude that Solers was not required to file a defensive protest prior to the agency's new award decision. See American Multi Media, Inc.--Recon., B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158 at 3 (when a firm has been notified that the agency is considering taking an action adverse to the firm's interests, but has not made a final determination, the firm need not file a defensive protest, since it may presume that the agency will act properly). In any event, the bases for Solers' protest, that the past performance record is insufficient to determine whether evaluation was reasonable, were first disclosed to Solers in the agency report responding to that firm's protest here, and was timely protested within 10 days of receipt of the report. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2010).

attached to the RFQ. The form required offerors to identify the reference and provide point of contact information; the form did not provide space for offerors to submit any information describing the work or their performance.⁹ RFQ, Past Performance References Encl. The RFQ also advised offerors that “[t]he Government reserves the right to obtain information relative to present and past performance on its own, in addition to that provided by the contractor.” RFQ at 4.

Solers identified the following three references in its proposal: (1) the incumbent task order with DISA for a cross domain web services gateway (CDWSG); (2) a contract with DISA for net-centric enterprise services (NCES); and (3) a contract with the National Reconnaissance Office for advanced science and technology ground requirements (ASTG). AR, Tab K, Solers Revised Proposal, vol. 1, at 26. The agency interviewed the references for the CDWSG and NCES contract, but did not obtain information for the ASTG contract.¹⁰ AR, Tab L, SRD, at 13.

BAH identified the following three references: (1) a contract with DISA for cross domain enterprise service (CDES); (2) a contract with the National Security Administration for distributed service-oriented architecture compatible cross domain service (DSCDS); and (3) a contract with DISA for demilitarized zone engineering support (DMZ). AR, Tab J, BAH Revised Proposal, vol. 1, at 27. The agency interviewed the reference for the CDES contract, but did not obtain information for the DSCDS and DMZ contracts. AR, Tab L, SRD, at 13-14; Decl. of PPT Lead ¶ 4.

⁹ Solers notes that BAH submitted 9 pages of materials in addition to the form provided in the RFQ. See AR, Tab J, BAH Proposal, vol. 1, app. A. DISA states, however, that “[t]he past performance team did not review or consider that additional information in its evaluation.” Decl. of Past Performance Team (PPT) Lead ¶ 3. We note, for the record, that the agency’s responses to the protest are inconsistent with regard to what past performance information offerors were permitted to submit with their proposals. Compare AR at 19 (“In fact, the RFQ did not prohibit Solers from providing a description of its referenced contracts . . . the RFQ did not limit the past performance information to just the attached document”) with DISA Response to GAO Questions at 9 (“The RFQ questions and answers specifically advised offerors to use the past performance reference document only.”)

¹⁰ The record is not clear as to whether the agency attempted to contact the ASTG reference. In this regard, the Declaration of the Past Performance Team (PPT) Lead states that “[f]or both BAH and Solers we attempted to contact at least two of the listed [points of contact]; however, despite numerous attempts some of the references did not return our telephone calls which is why only one phone interview is listed for BAH.” Decl. of PPT Lead ¶ 5.

DISA states that its evaluation of the offerors' past performance confidence and relevancy was performed by the PPT based on four sources of information: (1) a questionnaire prepared for the past performance references identified in the offerors' proposals, and interviews conducted by the evaluators with the references¹¹; (2) information obtained from the past performance information retrieval system (PPIRS)¹²; (3) personal knowledge of the evaluators; and (4) information from the offeror's technical proposals relevant to their past performance. As discussed below, we agree with the protester that the record provided by the agency is inadequate to determine whether the evaluations under both past performance factors were reasonable.

Past Performance Confidence

For the past performance confidence factor, DISA concluded that Solers' proposal merited a satisfactory confidence rating, and BAH merited a substantial confidence rating. The agency states that for this factor, the agency considered the reference interviews, PPIRS data, and the personal knowledge of the evaluators.¹³

With regard to the evaluation of the past performance references identified in the offerors' proposals, DISA concedes that it cannot produce copies of the questionnaires used during the interviews of the references, nor does it have any record of the interviews conducted with the references.¹⁴ SAR at 28; AR, Tab L,

¹¹ DISA explains that although the SRD states that the agency considered both "[t]he questionnaire and phone interview," AR, Tab L, SRD, at 13 (emphasis added), none of the past performance references completed a written questionnaire. Decl. of PPT Lead ¶ 4. Instead, the agency states that the questionnaire was used by the evaluators in their interviews of the references. Id.; DISA Response to GAO Questions at 5. This explanation appears consistent with the contemporaneous record.

¹² PPIRS is a web-enabled, government-wide application that collects quantifiable delivery and quality past performance information. Federal Acquisition Regulation § 42.1503.

¹³ DISA also implies that it may have considered offerors' technical proposals in the evaluation of this factor, but the record does not indicate that such a review occurred, or what the agency may have considered. See DISA Response to GAO Questions at 8 ("The [PPT], as it did with Solers, also reviewed BAH's technical proposal which includes some information about these efforts.")

¹⁴ In response to the protests, the PPT Lead provided a declaration which explained as follows:

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Cover Memorandum, at 1; Email from DISA to GAO and Protester (Jan. 27, 2011). Instead, the agency contends that the evaluation summary in the SRD reflects the information provided by the references to the evaluators. SAR at 27-28.

The SRD, however, merely lists conclusions by the evaluators concerning each offeror's past performance. See AR, Tab L, SRD, at 13-14. The record does not meaningfully document information provided by the past performance references, such as the questions asked and answers received, or what strengths or weaknesses were associated with particular past performance references. In the absence of this information, we are unable to determine whether the evaluation conclusions made by the evaluators are supported by the information provided by the references.

With regard to the PPIRS records, the record is unclear as to how DISA used this data. For Solers, the agency reviewed the PPIRS record for the incumbent CDWSG task order,¹⁵ and records for two contracts other than those identified by Solers in its proposal. Id.; DISA Response to GAO Questions at 9. For BAH, the agency reviewed PPIRS records for three contracts other than those identified by BAH in its proposal. AR, Tab L, SRD, at 13-14.

In its response to the protest, DISA states that the PPIRS data were used "to validate the information that was provided in the interviews and to also assist in the assignment of the overall relevance and confidence ratings." DISA Response to GAO Questions at 9. In a contemporaneous addendum to the SRD, the record includes a

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To the best of my recollection the questionnaire included questions along the following lines:

- a. What is the size and scope of the Project?
- b. Can you explain the work done by the vendor very briefly?
- c. How effectively does the vendor communicate to the customer?
- d. Are you satisfied with the work the vendor has done?
- e. Would you recommend the vendor for any future efforts in your organization?
- f. What is your overall opinion about the quality of work that the vendor has done?

Decl. of PPT Lead ¶ 4.

¹⁵ Solers notes that DISA appears to have reviewed a PPIRS record for a task order performed by the protester as the "incumbent contract," when in fact the PPIRS record was for a different task order that pertained to requirements that were different from the incumbent task order. Protester's Comments at 20 n.19; see AR at 2; SAR at 2.

number of statements prepared in connection with the initial award evaluation and signed by the PPT members, which state, “I conclude that our past performance evaluation about [Solers or BAH] matches with the [PPIRS] assessment.” AR, Tab L, SRD Addendum, attach. 1, PPT Members’ Statements.

To the extent that the agency states that the PPIRS data was used for the purpose of the substantive evaluation of the offerors’ past performance, the record provides no support for this proposition. The SRD does not discuss how the PPIRS information was used for Solers; instead, the substantive conclusions regarding the protester’s performance relate solely to the undocumented interviews. See AR, Tab L, SRD, at 13. For BAH, the SRD states that “[t]he questionnaire and phone interview has identified that BAH has excellent past performance,” and that “[t]he PPIRS data validate these findings.” Id. at 14. Moreover, the record does not document which PPIRS records or what aspects of the contract performance records were considered by the evaluators or found to support and/or validate the ratings.

With regard to the evaluators’ personal knowledge, DISA contends that although the agency received information concerning only one of BAH’s references, the PPT utilized the personal knowledge of its members concerning the other two references. SAR at 30; DISA Response to GAO Questions at 8-9. The agency concedes, however, that the contemporaneous record does not discuss or otherwise document the personal knowledge used by evaluators in assessing the offerors’ past performance. DISA Response to GAO Questions at 9.

Past Performance Relevancy

With regard to the past performance relevancy ratings, DISA states that its evaluation of the offerors considered the reference interviews, the personal knowledge of the evaluators, and the offerors’ technical proposals.¹⁶ The agency found that Solers’ past performance was “relevant” based on the following assessment:

The past performance citations provided by SOLERS involved much of the magnitude of effort and complexities this solicitation required. Certain projects are not related cross domain [sic] such as [NCES] Messaging and ASTG and hence the lower rating.

AR, Tab L, SRD, at 13. For BAH, the agency found that the awardee’s past performance was “very relevant” based on the following assessment:

¹⁶ DISA suggests that the PPIRS references were also used to evaluate the relevancy of both offerors’ past performance. DISA Response to GAO Questions at 9. The discussion of the relevancy evaluations in the SRD, however, makes no mention of this data. See AR, Tab L, SRD, at 13-14.

The past performance citations provided by BAH, were for efforts that involved essentially the same magnitude of effort and complexities this solicitation requires and hence relevancy rating of Very Relevant.

Id. at 14.

As to Solers' rating, DISA now concedes that the NCES and ASTG contracts were, in fact, related to cross domain requirements. DISA Response to GAO Questions at 7-8. The agency contends, however, that while the SRD states that the two contracts "are not related [to] cross domain . . . and hence the lower rating," the lower rating was not in fact based on a finding that the two contracts were not related to cross domain requirements. Id.; see AR, Tab L, SRD, at 13. Instead, the agency contends that Solers' relevancy rating was based on the agency's review of the overall requirements of the PWS. DISA Response to GAO Questions at 7-8. Specifically, DISA contends that Solers' rating was based on the agency's view that the requirements of the NCES and ASTG contracts were not of the same magnitude and complexity as the requirements of the PWS. Id.

We think that DISA's response to the protest is flatly contradicted by the contemporaneous record. In this regard, the record does not reflect that the agency considered the overall relevance of the work; instead, the evaluation specifically stated that the two contracts "are not related [to] cross domain . . . and hence the lower rating."¹⁷ AR, Tab L, SRD, at 13. To the extent that the agency now contends that it actually meant that the NCES and ASTG contracts did relate to cross domain requirements and that the relevancy rating was based on a different assessment, this post hoc argument does not demonstrate that the agency's evaluation was reasonable. See Boeing Sikorsky Aircraft Support, supra.

With regard to the evaluation of BAH's past performance relevancy, the contemporaneous record does not discuss which of BAH's past performance references were deemed relevant, or what aspects of those references were considered to involve the same effort as required by the RFQ. In response to the protest, the agency states that it relied on the personal knowledge of the evaluators in concluding that BAH's past performance merited a "substantial confidence rating." DISA Response to GAO Questions at 8-9. As discussed above, however, there is no discussion in the contemporaneous record concerning the use of personal knowledge by the evaluators or what that knowledge concerned.

¹⁷ Additionally, DISA's initial response to the protest argued that "Solers knew during the corrective action that it had received less than the highest past performance ratings because the Agency determined that its NCSE Messaging and ASTG projects 'are not cross domain related.'" AR at 18.

Finally, the agency contends that the evaluators reviewed the offerors' technical proposals to determine the relevancy of their past performance, thus providing a basis to make judgments concerning past performance references for which there was no interview or PPIRS data. DISA Response to GAO Questions at 7-9. Nothing in the record supports this contention.¹⁸ Instead, this argument was first raised by the agency in response to questions posed by our Office concerning the adequacy of the record. Our Office accords greater weight to contemporaneous source selection materials and documents and little weight to arguments raised by counsel that are not supported by the contemporaneous record. See Haworth, Inc., B-297077, B-297077.2, Nov. 23, 2005, 2005 CPD ¶ 215 at 8; Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 10.

Past Performance Conclusion

In sum, we think that the record here is inadequate for our Office to determine whether DISA's evaluation of the offerors' past performance confidence and relevancy was reasonable. In this regard, the contemporaneous record does not document the information upon which the evaluators appeared to have relied in making the judgments, and the agency's response to the protest relies on numerous assertions, which are either unsupported or contradicted by the contemporaneous record. On this record, we sustain the protest.

EVALUATION OF BAH'S PROPOSED PERSONNEL

Next, Solers contends that DISA's evaluation of BAH's proposal under the technical and management factors was unreasonable because the agency relied on an incorrect understanding of the number of engineers proposed by BAH. Here too, the record supports Solers' contentions.

As discussed above, the RFQ advised offerors that the agency estimated that 21.55 FTEs would be required to perform the PWS requirements. RFQ, Evaluation Plan, at 1. As relevant here, RFQ PWS sections 6.3, Development and Integration, and 6.4, Other Technical and Engineering Support, required the offeror to provide "technical and engineering support."

In the evaluation for the initial award that was made to Solers, the agency rated BAH's proposal as yellow/moderate risk for the management factor, and red/high risk for the technical factor. AR at 5. With regard to the technical factor, the agency

¹⁸ In fact, the agency's response to an argument by the protester implies that it did not consider the offerors' technical proposals in the past performance evaluation as follows: "[Solers'] reference to strengths in its technical evaluation to bolster its arguments about its past performance evaluation are ridiculous, as Solers is well aware the evaluations are separate." SAR at 37.

identified a weakness for BAH's proposal based on its proposed staffing plan, as follows:

BAH's proposal demonstrates a team structure with [deleted] FTEs, including [deleted] engineers, to support all engineering activities that [were] listed under section[s] 6.3 and 6.4 in the PWS. The government questions BAH's ability to meet the increasing and variable demands of the program with this labor mix.

AR, Tab L, SRD, at 8.

With regard to the management subfactor, the agency identified a deficiency in BAH's proposed staffing plan because although "the original RFQ published the Government's estimate of 21.5 FTEs necessary to support" the PWS, BAH proposed only [deleted] FTEs. AR, Tab L, SRD, at 12. As relevant here, the agency also found the following with regard to the number of engineers proposed by BAH:

The staffing plan [is] also weak in its proposal regarding the number of engineers: [BAH] proposes [deleted] engineers and [deleted] to address task areas where the Government currently requires a minimum of 8 to 10 engineers to meet the needs.

Id.

As part of DISA's corrective action in response to BAH's protest of the initial award to Solers, the agency requested that BAH address the concerns regarding its staffing plan. BAH's revised proposal increased its overall number of FTEs to [deleted], and stated that "[t]he engineering staff will be [deleted] FTEs." AR, Tab J, BAH Revised Proposal, vol. 1, at 14. BAH also stated in an appendix to its technical/management proposal that it was proposing a "Total of [deleted] Engineers." Id., vol. 1, app. C-3.

DISA's evaluation of BAH's revised proposal concluded that the offeror had addressed the weakness in its technical proposal, which merited an increase in its rating from yellow/moderate risk to green/moderate risk. AR, Tab L, SRD, at 9. Specifically, DISA found as follows: "BAH's revised staffing plan demonstrates a team structure with [deleted] FTEs, including [deleted] engineers, to support all engineering activities listed under Sections 6.3 and 6.4 in the PWS." Id.

With regard to the management subfactor, DISA's revised evaluation found that BAH addressed the concerns regarding its staffing plan, which merited an increased rating from red/high risk to blue/low risk. Specifically, the agency found that "BAH's revised proposal provides a staffing plan with [deleted] FTEs, with [deleted] engineers, which meets the requirements of the PWS." Id. at 12.

Solers contends that although DISA found that BAH had proposed [deleted] engineers, the BAH's proposal reflects that the labor categories associated with its

proposed personnel show that the awardee did not in fact propose [deleted] engineers.

As the protester notes, a chart in the supplemental materials attached to BAH's technical proposal, titled Labor Hours Per Task, identified [deleted] proposed personnel, their roles, and the number of labor hours each individual would be assigned for the PWS tasks. The Labor Hours chart contained a summary of the number of hours proposed for [deleted] personnel, who will perform engineering tasks under PWS sections 6.3 and 6.4, and stated that these hours represented a "[t]otal of [deleted] engineers." The roles identified for [deleted] of these personnel involved a title of "engineer," and [deleted] additional personnel had "[deleted]" roles. AR, Tab J, BAH Revised Proposal, app. C-3.

However, BAH's proposal contains another chart, titled "Knowledge, Skills, Abilities and Subject Matter Expertise," where BAH identified the same [deleted] proposed personnel with details concerning the education, years of experience, the labor category, and the capabilities of each individual. AR, Tab J, BAH Revised Proposal, vol. 1, at 24; see also id., vol. 2, at 3. As noted by the protester, the Labor Hours chart states that [deleted] proposed personnel had a role titled as an "engineer" (with [deleted] additional personnel not titled engineer that were also counted towards the [deleted] engineer total); in contrast, the Knowledge chart lists only [deleted] of those individuals under an engineer labor category. For example, the Labor Hour chart lists an individual with the "role" of "[deleted]," whereas the Knowledge chart lists the same individual as an "[deleted]." Compare AR, Tab J, BAH Revised Proposal, vol. 1, app. C-3 with Tab J, BAH Revised Proposal, vol. 1, at 24.

DISA and BAH do not argue that the [deleted] individuals identified by BAH as "engineers" were necessarily engineers, in terms of formal titles or qualifications. See SAR at 14-18; Intervenor's Supp. Comments at 17. Instead, the agency and intervenor note that the PWS sections 6.3 and 6.4 required offerors to provide "engineering support," rather than a specific number of engineers or personnel with the title and qualifications of an engineer. DISA further contends that although the contemporaneous record addressed the number of engineers proposed by BAH, the agency did not specifically conclude that BAH had proposed individuals who had the title or specific qualifications of an "engineer." SAR at 14-15. Instead, the agency states that it evaluated whether BAH had proposed adequate staff to meet the requirements of the PWS. Id.

However, aside from stating in the SRD that BAH now proposed "[deleted] engineers," the contemporaneous record does not address how the agency determined that BAH met the personnel requirements for PWS sections 6.3 and 6.4.¹⁹

¹⁹ Additionally, DISA's initial evaluation appears to have specifically distinguished between the position of engineers and other positions, such as [deleted]. In the debriefing provided to BAH following the initial award, DISA advised the offeror of
(continued...)

Because the record does not support the agency's post hoc arguments that its evaluation did not depend on whether the proposed personnel had the title of "engineer," we sustain the protest. See Boeing Sikorsky Aircraft Support, supra.²⁰

RECOMMENDATION

Because we find that DISA improperly made award to BAH on the basis of a proposal that took exception to the requirement to offer a fixed price, we recommend that the agency either reopen discussions with the offerors to determine whether the contingency can be eliminated, or terminate the award and, if otherwise appropriate, award the task order to Solers. In the event that DISA reopens discussions with the offerors in order to make a new award selection, we recommend that the agency reevaluate the offerors' past performance and BAH's proposed personnel, conduct appropriate discussions, and adequately document the evaluations and award decision.

We also recommend that Solers be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1). Solers should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

(...continued)

the concern regarding the number of engineers proposed, and that this concern contributed to the weakness under the technical factor and the deficiency under the management factor. AR, Tab A, exh. 9, BAH Debriefing, Sept. 20, 2010, at 1. Specifically, the agency advised BAH that it had proposed "[deleted] engineers and [deleted] to address task areas where the Government currently requires a minimum of 8 to 10 engineers to meet the needs." Id. at 1-2.

²⁰ Solers raises various other issues, none of which provide a basis to sustain the protest. For example, the protester argues that the agency failed to conduct or document a price realism analysis. The RFQ, however, stated that agency "reserves the right" to conduct a price realism analysis. RFQ at 3. Because price realism analyses are not required for fixed-price contracts, and because the RFQ did not expressly state that the agency would conduct such an analysis, we find no obligation for the agency to have done so. See Bering Straits Logistics Servs., LLC, B-403799, B-403799.3, Dec. 15, 2010, 2010 CPD ¶ 9 at 3.