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Decision

Matter of: IntegriGuard, LLC d/b/a HMS Federal--Protest and Reconsideration

File: B-407691.3; B-407691.4

Date: September 30, 2013

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DIGEST

1. Protest challenging agency's cost realism evaluation of awardee's proposal is denied where record shows that the agency's evaluation was both comprehensive and reasonable; protester's disagreement with the agency's conclusions does not provide a basis for our Office to sustain the protest.

2. Protest challenging agency's evaluation of protester's past performance is denied where record shows that, even if protester were correct in its assertion, the agency's actions were not prejudicial to the protester.

3. Protest that agency provided protester inadequate discussions is denied where protester has not explained or alleged that it would have changed its proposal in response to the discussions it thought should have been provided.

DECISION

IntegriGuard, LLC d/b/a HMS Federal, of Omaha, Nebraska, protests the award of a contract to GHI Medicare, of New York, New York, under request for proposals (RFP) No. RFP-CMS-2011-0048, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to establish a centralized coordination of benefits and Medicare secondary payer recovery

operation. HMS primarily argues that CMS misevaluated proposals and failed to engage in adequate discussions.

We deny the protest.

BACKGROUND

The RFP contemplates the award, on a “best value” basis, of a cost-plus-award-fee contract for a base year and up to four 1-year option periods to perform coordination of benefits and Medicare secondary payer recovery services. The contractor will be responsible for providing CMS with services relating to determining the insurance benefits or assets available to Medicare recipients; determining whether Medicare or another insurance asset is the primary or secondary payer; and recovering payments erroneously made where Medicare is not the primary payer. Agency Legal Memorandum, July 26, 2013, at 3-6.

Proposals were to be evaluated under cost and the following non-cost factors, listed in descending order of importance: technical approach, management approach, past performance, corporate characteristics and experience, transition planning, and subcontracting/teaming.¹ RFP at 126-127. The non-cost evaluation factors, when combined, were significantly more important than cost. Id. at 118. Cost proposals were to be evaluated for reasonableness and realism. Id. at 127.

The agency received proposals from HMS and GHI in March 2012. CMS evaluated the proposals, engaged in discussions, and obtained and evaluated final proposal revisions (FPR). CMS made award to HMS on September 27. GHI filed a protest with our Office challenging the award decision. Prior to submitting an agency report, CMS advised our Office that it intended to take corrective action by reopening discussions, obtaining and evaluating revised proposals, and making a new source selection decision. Based on this corrective action, we dismissed GHI’s protest as academic on November 13.

The agency engaged in discussions with the offerors, and solicited and obtained revised FPRs in March 2013. The final evaluation results were as follows:

¹ Proposals were to be assigned adjectival/risk level ratings under each non-cost factor (except the subcontracting/teaming factor, rated on a pass/fail basis) of excellent/very low, good/low, acceptable/moderate, marginal/high, or unacceptable/very high. RFP at 118-119, 126.

Evaluation Factor	GHI	HMS
Technical Approach	Good	Acceptable
Management Approach	Good	Acceptable
Past Performance	Acceptable	Good
Corporate Characteristics/Experience	Good	Good
Transition Planning	Excellent	Acceptable
Subcontracting/Teaming	Pass	Pass
Proposed Cost	\$319,285,351	\$307,526,613
Evaluated Cost	\$320,695,677	\$307,520,805

Agency Report (AR), exh. 14.A, Source Selection Decision Document, at 3, 6.

CMS made award to GHI as the offeror whose proposal represented the best value to the government. Briefly, the source selection official (SSA) found that the superiority of GHI’s proposal under the two most heavily-weighted factors (technical approach and management approach) provided the primary basis for selecting GHI at its higher evaluated cost. Id. at 18-20. She also found that GHI’s superiority under the corporate characteristics and transition planning factors merited the cost premium associated with its proposal. Id. Finally, although she recognized that GHI’s past performance evaluation reflected some risk associated with award to the firm, she concluded that the comparative merit of its proposal under the technical approach and management approach factors served to minimize the risk of poor performance. Id.

HMS has raised numerous challenges to the conduct of the procurement, a number of which we dismiss on various procedural grounds. We address those challenges first, and then discuss the firm’s principal allegations on the merits.

PROCEDURAL MATTERS

Untimely Allegations

In its initial protest, HMS asserted that CMS improperly reopened discussions to allow GHI an opportunity to revise its cost and technical proposals. According to HMS, the agency’s actions were improper because its proposed price was revealed to GHI at that firm’s debriefing after the first source selection, and GHI’s opportunity to revise its price proposal gave the firm an improper competitive advantage. In response to CMS’s pre-agency report motion, we informed the parties that we considered this allegation untimely because it was not filed within 10 days of HMS being advised of the agency’s original intended corrective action, which included reopening discussions. GAO e-mail, July 8, 2013.

In an attempt to recast this argument in a post-agency report supplemental protest, HMS again asserted that CMS acted improperly in reopening discussions and allowing GHI an opportunity to revise its cost proposal. HMS maintained that

CMS's actions were improper because there were no flaws in GHI's original discussions that provided a reason to reopen discussions, and the second round of discussions was for the sole purpose of affording GHI an opportunity to reduce its proposed cost. As with the initial allegation, we informed the parties that we considered this allegation untimely. GAO e-mail, August 12, 2013.²

Under our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(2) (2013), protests of allegedly improper agency action must be filed within 10 days of when the protester knew, or should have known, of its basis for protest. Here, by e-mail dated November 9, 2012, CMS advised the parties as follows:

To further clarify the Agency's intentions with respect to corrective action for B-407691, Protests of GHI Medicare, I have been advised that the corrective action will include reopening discussions with both offerors, requesting and evaluating revised proposals and making an award decision based on those revised proposals.

Since HMS knew the agency's unequivocal intentions on November 9, it was required to file its protest objecting to its decision to reopen discussions within 10 days of that date. Midwest CATV, B-233105.3, Apr. 4, 1989, 89-1 CPD ¶ 351 at 3, aff'd, Midwest CATV—Recon., B-233105.4, July 20, 1989, 89-2 CPD ¶ 64.

Moreover, HMS did not need to see the contents of the discussions with GHI in order to raise its supplemental allegation. The firm's characterization of its allegation as one grounded in its review of the discussions with GHI notwithstanding, its real concern is that discussions occurred after its cost was revealed to GHI. There was no need for HMS to have seen the discussion questions posed to GHI in order to advance this allegation.³ In view of these considerations, we dismiss these allegations as untimely.⁴

² During the course of this protest, HMS requested reconsideration of our dismissal of this allegation. Based on our discussion below, we deny the request.

³ This conclusion is borne out by the fact that HMS contemporaneously complained that the proposed corrective action would result in bidding inequities for HMS. HMS Counsel's e-mail, Nov. 9, 2012.

⁴ In its August 23 supplemental comments, HMS argued for the first time that CMS improperly engaged in discussions with GHI after the submission of revised FPRs. HMS maintains that this is evidenced by certain e-mail exchanges between a CMS auditor and GHI personnel. This allegation also is untimely. The e-mails relied on by HMS were included in the agency's July 26 report responding to the original protest. If HMS believed they evidenced improper action, it was required to file its allegation within 10 days of July 26. 4 C.F.R. § 21.2(a)(2). It failed to do so.

HMS also alleged for the first time in its comments that an individual with an alleged conflict of interest--based on his employment history--improperly participated in helping the agency prepare the solicitation. During the course of the protest, we advised the parties that this contention was untimely because the record showed that HMS was aware of this individual's employment history when it filed its initial protest, and had been made aware of his participation in drafting the solicitation by virtue of a January 2012 posting by CMS to the Federal Business Opportunities website.

Abandoned Issues⁵

HMS made a number of assertions in its original protest that it subsequently abandoned. In this connection, where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3; see also Israeli Aircraft Indus., Ltd.--TAMAM Div., B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7 (where protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the originally-raised allegation abandoned). We discuss a few examples of HMS's abandoned protest allegations below.⁶

In its original protest, HMS argued that CMS failed to adhere to the RFP's weighting scheme for various evaluation subfactors, resulting in erroneous ratings for its proposal. HMS also contended that CMS improperly assigned weaknesses to its proposal for failing to adequately address its implementation of software tools, as well as its set-up of the infrastructure for a call center. HMS Protest at 14-16, 18-20. CMS provided detailed responses to these allegations, and HMS made no further mention of them in its comments filed in response to the agency's initial report. We find that HMS abandoned these aspects of its protest.

⁵ In addition to abandoning a number of issues, HMS expressly withdrew an allegation that GHI had an improper organizational conflict of interest by virtue of certain activities of its parent corporation. HMS Comments, August 5, 2013, at 5.

⁶ In addition to the issues discussed below, we find that HMS abandoned its allegations that the agency did not consider the risk associated with GHI's substantial cost reduction between its first and second FPRs, and also that the agency failed to consider the relative technical equality of the two firms' proposals in making its award decision.

In its original protest, HMS also asserted that CMS improperly failed to provide it discussion questions relating to two weaknesses, one concerning its transition planning, and one concerning a combined call center. HMS Protest at 10-11. In related allegations, HMS also initially maintained that these weaknesses were inconsistent with its proposal and other evaluation findings. Id. CMS provided a detailed response to these allegations, and HMS made no further mention of them in its comments. We find that HMS abandoned these aspects of its protest.

Finally, in its original protest, HMS alleged that the TEP chairman had an improper conflict of interest due to a prior employment relationship with a former subcontractor to GHI that should have precluded him from participating in proposal evaluation. HMS Protest at 36. CMS provided a detailed response to this allegation, and HMS made no further mention of it in its comments.⁷ We find that HMS abandoned this aspect of its protest.

DISCUSSION

HMS challenges the evaluation of proposals in numerous areas, and also maintains that CMS engaged in unequal discussions with it and GHI. We have considered all of the protester's allegations and find no merit to any of them. We discuss HMS's principal allegations below.

Cost Evaluation

HMS raises several challenges to CMS's evaluation of GHI's cost proposal. According to HMS, the cost realism evaluation failed adequately to take cognizance of several considerations that, according to HMS, would raise GHI's evaluated cost.

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. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to

⁷ In its comments on the initial agency report, HMS included a footnote that referred to this aspect of its original protest. HMS Comments, August 5, 2013, at 2 n.2. However, this footnote describes HMS's supplemental protest allegation relating to the individual's participation in drafting the RFP, not his role as an evaluator. In a subsequent filing, HMS insists that this footnote demonstrated it had not abandoned this aspect of its protest. HMS Supplemental Comments, August 23, 2013, at 2, n.2. However, this passing reference in the footnote simply restates the original assertion, without rebutting CMS's detailed response. We conclude that HMS abandoned the contention. Israeli Aircraft Indus., Ltd.--TAMAM Div., supra., at 6-7.

determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). When conducting a cost realism analysis, agencies are required to consider the realism of a firm's proposed costs in light of its unique technical approach. Metro Mach., Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 6. An agency's cost realism evaluation need not achieve scientific certainty; rather, the analysis must provide a reasonable measure of confidence that the proposed costs are reasonable and realistic. L-3 Sys. Co., B-404671.2, B-404671.4, Apr. 8, 2011, 2011 CPD ¶ 93 at 10.

HMS argues that CMS considered dated information in connection with its evaluation of GHI's proposed direct labor rates. According to HMS, the record shows that GHI's proposal included payroll data from December 2011 to substantiate or support its proposed direct labor rates. HMS contends that CMS's reliance on this data was flawed, because it resulted in CMS not noticing that there were labor categories for which GHI reduced its proposed direct labor rates. We have no basis to object to the realism evaluation of GHI's direct labor rates.⁸

First, the record shows that CMS relied on not just the payroll data in GHI's proposal, but also on direct labor rates currently paid on comparable contracts for similar labor categories, and data from reliable aggregators of nationwide rates of compensation data. AR, exh. 10.c.2, GHI Cost Analysis, at 2-5. In addition, while GHI's proposal demonstrates that there were instances where it proposed lower compensation for certain labor categories in its second FPR compared to its first FPR, it also showed many instances where GHI's proposed direct labor rates were comparable from one FPR to the next, or represented increases over the rates previously proposed. Id. At all events, the record shows that the changes to GHI's direct labor rates, both increases and decreases, are overwhelmingly modest between its first and second FPRs, and do not, in and of themselves, demonstrate that CMS's evaluation of GHI's direct labor rates was inherently unreasonable.

Second, the record shows that HMS included virtually identical payroll data in its proposal to support its proposed direct rates. In this connection, approximately 75

⁸ In a related allegation, HMS suggests that CMS should have rejected the GHI proposal for failing to include updated payroll data. HMS takes this position based on language in RFP amendment No. 11, which called for revised (post-corrective action) proposals and stated: "The Offeror's proposed labor rates shall be supported with payroll information, letters of intent or salary survey information." RFP, Amendment No. 11, Attach. 2, at 112. However, nothing in this language requires the payroll information to be from any particular timeframe and, as discussed below, both offerors submitted payroll data that was similarly dated. HMS also suggests that GHI did not include any payroll data with its final revised proposal. This contention is incorrect; the record includes, as a part of GHI's second FPR, a submission that contains its payroll data. AR, exh. 7.C.3.46.

percent of the payroll records submitted by HMS in support of its direct rates are dated either during December 2011, or January 2012. AR, exh. 6.C, HMS Vol. I Proposal, Clean, Tab D.9, attach., at 1, 17-18, 33, 35, 36-41. The record also shows that, in many instances, HMS submitted letters of intent to demonstrate that it has the commitment of individuals not currently employed by HMS or one of its subcontractors. However, many of these letters are not executed by the individuals in question and, therefore, do not serve to substantiate HMS's proposed direct rates. Id. at 19-21, 23-33, 42, 47. Simply stated, we do not understand--and HMS has not explained--how CMS's realism evaluation of GHI's direct rates could be unreasonable if it was based on data largely comparable to the data presented by HMS, and relied on by CMS in its realism evaluation of the HMS proposal.

Finally, HMS has not presented any evidence to demonstrate that GHI's proposed direct labor rates are unrealistically low. HMS's only showing is that, in several instances, the direct labor rates proposed by GHI were adjusted downward in its second FPR. This showing, without more, does not provide a basis for our Office to question this aspect of the agency's cost evaluation.

HMS next argues that CMS failed to consider the fact that GHI's direct labor costs in its second FPR were lower than those in its first FPR, which, according to the protester, should have negatively impacted GHI's indirect rates. HMS contends that CMS unreasonably relied on historical information relating to GHI's indirect rates to conclude that its proposed indirect rates are realistic because the historical indirect rates failed to take into consideration GHI's current proposal of significantly less direct labor costs. We find no merit to this aspect of HMS's protest.

The RFP instructed offerors that have an accounting system approved by the government, such as GHI, to submit a rate history for direct and indirect rates for the last two fiscal years. RFP at 109. Consistent with these instructions, GHI included in its proposal the firm's approved indirect rates for 2009, 2010 and 2011, as well as its provisional indirect rates for 2012. AR, exh. 7.C.3, GHI Proposal, vol. 1, attach. 3, at 9.

The record also shows that, unrelated to the evaluation performed in connection with this procurement, a CMS auditor was engaged in establishing GHI's provisional indirect rates for 2013. Declaration of CMS Cost/Price Auditor, at 1. CMS explains that provisional indirect rates are established for all firms that do a significant amount of cost reimbursement business with CMS. These reviews are performed independent of any specific contract, because they take into consideration the total planned activity of the company for the upcoming fiscal year, and not just a single contract such as the current requirement. Id.

After proposals were submitted, but before award, the auditor issued a letter that established GHI's provisional 2013 indirect rates. AR, exh. 10.D.1. Of significance, the record shows that the auditor considered whether award of the current contract

would impact GHI's indirect rates. She concluded that, because GHI was the incumbent on the two predecessor contracts under which some of the solicited requirements were being performed, award of the current contract would not materially impact her overall calculation of GHI's indirect rates for 2013. Declaration of CMS Cost/Price Auditor, at 2. After the auditor issued her letter establishing GHI's 2013 provisional indirect rates, CMS used those rates to adjust GHI's proposed costs for the current requirement. Contracting Officer's (CO) Supplemental Statement at 8.

After HMS filed its protest, the auditor gave further consideration to the question raised by HMS, namely, whether a change to GHI's direct labor for the subject contract could, or should, have impacted the agency's calculation of GHI's 2013 provisional indirect rates. She concluded that it should not, stating:

After receipt of Protester's Comments, we reviewed whether an adjustment to GHI's indirect rates would be warranted. While we determined we could easily adjust the base data to exactly align with the proposed direct labor dollars; we were unable to determine the associated impact to the pool costs, since that information was not available now or at the time the proposal was evaluated. Consequently, we could not determine an accurate impact, if any, to the indirect rates proposed.

Declaration of CMS Cost/Price Auditor, at 3. In other words, since the provisional indirect rates are based on an estimate of a cost pool comprised of yet-to-be-established indirect costs from all of GHI's contracts with CMS, not just the contract being awarded here, CMS could not assess the precise impact--if any--that a reduction in GHI's direct labor costs for this contract alone might have on its estimated indirect cost pools overall. We see nothing unreasonable in this conclusion.

Finally, we note that, more fundamentally, there was nothing inherently improper in CMS using GHI's provisional 2013 indirect rates to assess the realism of its proposed indirect costs. Simply stated, those provisional rates, which take into consideration all of GHI's business with CMS, and not just this contract, provide a reasonable measurement of GHI's anticipated indirect costs. HMS's protest allegation--that the cost realism evaluation did not consider the reduction in GHI's direct labor costs for this contract in assessing the realism of GHI's indirect rates--amounts to no more than speculation regarding the considered judgment of CMS's auditor in establishing GHI's 2013 provisional indirect rates. Absent evidence or explanation of its position in light of CMS's reasoned assessment, we have no basis to object to its conclusion that it was appropriate to use the 2013 provisional indirect rates in evaluating the realism of GHI's indirect rates. We therefore deny this aspect of HMS's protest.

Finally, HMS argues that CMS failed to consider GHI's proposed level of effort in conducting its cost realism evaluation. According to HMS, GHI's second FPR included a reduction in costs compared to its first FPR, and a significant element of that cost reduction was attributable to a reduction in its proposed number of full time equivalent (FTE) personnel. HMS maintains that the agency's cost evaluation never considered whether GHI could still perform the requirement based on its proposed technical approach, but using fewer FTEs than it had proposed earlier.

We find no merit to this aspect of HMS's protest. While the protester is correct that GHI reduced its proposed level of effort in its second FPR, the record shows that GHI provided an explanation for this reduction that CMS considered and found reasonable in evaluating its proposal for realism.

In evaluating GHI's first FPR, CMS found that its proposed level of effort was in many instances unnecessarily high in light of its technical approach and the RFP's requirements. Consequently, the agency made reductions in GHI's proposed level of effort during its original cost realism evaluation. AR, exh. 10.B.1, GHI Business Evaluation Panel (BEP) Report, at 2, 5, 6, 7. In implementing its corrective action, and in light of its original conclusions regarding GHI's proposed level of effort, CMS engaged in discussions with GHI concerning its proposed level of effort. See AR, exh. 4.B.2. In response to those discussions, GHI lowered its proposed level of effort and explained that it was able to do so by aligning its proposal more closely with the requirements of the current solicitation, as opposed to making assumptions based on its understanding of requirements it performed under predecessor contracts. AR, exh. 7.C.3.1.02, at 14; exh. 7.C.3.1.09.

In evaluating GHI's second FPR, the record shows that CMS did not make downward adjustments to GHI's proposed level of effort, concluding that it was now appropriately aligned with the current requirements. AR, exh. 10.C.1, Evaluation of GHI's Revised Business Proposal.

The record also includes a narrative explanation for CMS's evaluation conclusions concerning GHI's proposed level of effort in the form of a contemporaneous e-mail sent from the BEP chairman to the contracting officer (CO). This email responded to the CO's inquiry regarding how GHI was able to achieve its cost reduction from its first to its second FPR. Among other things, the BEP chairman made the following finding:

The proposal submission prior to the 3/14/13 proposal [the first FPR], included personnel resources that were not necessary or applicable to [the current requirement]. These resources were vestiges of the [predecessor contracts] and were not appropriate for the [current requirement]. This was also noted by the TEP on the prior proposals and resulted in adjustments that were made to those proposals. Additionally, GHI Medicare further consolidated some of their

operational sites. The revised proposal reduced the number of call center and recovery processing sites by one each, which reduced repetitive overhead positions. Like . . . the change to Management Bonus Compensation, this further enhanced their proposal as the TEP had raised concern[s] about managing many operational sites. GHI also implemented a standardized span of control (i.e. manager to employee ratio) to be used at the call center and recovery sites, eliminating unnecessary management positions.

E-mail from the BEP Chairman to the CO, June 3, 2013, at 2.

The BEP Chairman further observed as follows:

Prior submissions from GHI included assumptions for escalating workloads over each year, however the [current requirement statement of work] did not state that there were expected annual increases in the workload. This aspect was previously noted by the TEP and resulted in adjustments made by CMS to their prior submissions. Additionally, GHI Medicare prior proposal submissions appear to have been driven on current staffing and workloads of [the predecessor contracts]. The [second FPR] used the assumptions and workloads put forth in the [current requirement's statement of work] as the basis of their estimates, versus their legacy contracts.

Id.

The BEP Chairman concluded this e-mail by stating that GHI adequately documented the changes made from its first FPR to its second FPR, and that it was evident that the firm made a concerted effort to ensure it could achieve its proposed cost savings without lowering the technical quality of the proposal. Id. at 3.

In addition to these specific findings regarding GHI's proposal, the record also shows that the CO questioned the BEP chairman concerning what appeared to be a large disparity between the level of effort proposed by GHI versus the level of effort proposed by HMS. In response to that inquiry, the BEP chairman outlined several significant elements that largely explained the differences between the proposals, based on differences in the offerors' technical approaches. Among other things, he noted that almost half of the difference in their respective proposed levels of effort was attributable to the fact that HMS proposed significantly more hours during the base year of the contract. He explained that this difference was due to the fact that HMS was not the incumbent contractor and would have to expend significant hours in transitioning to full performance of the contract. In contrast, GHI, as the incumbent, already was in place and would not require a similar effort. E-mail from the BEP Chairman to the CO, May 17, 2013, at 1.

The BEP chairman went on to explain that, after accounting for this large difference in level of effort, the remaining difference between the proposals in terms of level of effort for the remainder of the contract was only 4.62 percent (with HMS proposing the slightly higher level of effort). He stated that there were several other features of the offerors' proposed technical approaches that explained this variance. E-mail from the BEP Chairman to the CO, May 17, 2013, at 1. For example, he noted that the mailroom/scanning task was one area where the proposals varied, with the GHI proposal reflecting approximately 36,000 hours less annually than that proposed by HMS. He explained that GHI's proposed cost in this area was not based on labor hours, but, rather, on fixed prices per piece. Id. at 1-2. He also pointed out that, if the proposals in this area were compared based on proposed cost, they were largely similar, even though the offerors proposed different technical approaches. Id.

HMS has not challenged the evaluation of GHI's proposed level of effort for any particular performance element of the RFP, but only generally avers that CMS failed to consider the difference in the level of effort proposed by GHI in its first, versus its second, FPR. As the above discussion illustrates, however, the record shows that CMS did give careful consideration to the differences in the level of effort proposed in GHI's FPRs, and adequately analyzed, and accounted for, those differences. HMS's generalized argument amounts to no more than disagreement with the evaluation conclusions which does not provide a basis for our Office to object to the agency's evaluation. We therefore deny this aspect of HMS's protest.

Past Performance

In its original protest and comments, HMS argued that CMS engaged in disparate treatment in evaluating past performance because it allegedly failed to consider the outstanding past performance of one of its subcontractors, while ignoring the substandard past performance of one of GHI's subcontractors. HMS asserted that it should have received a higher past performance rating, and that GHI should have received a lower past performance rating.

In its response, CMS argued that it reasonably did not consider the past performance of HMS's subcontractor because the available information relating to that firm showed that its past performance was not relevant. With respect to the GHI subcontractor, CMS demonstrated that HMS's allegation was factually incorrect because it actually had reviewed that firm's past performance and factored it into its technical evaluation report and source selection decision.

In its supplemental comments responding to CMS's position outlined above, HMS continued to challenge CMS's exclusion of its subcontractor's past performance information, but made no further mention of the evaluation of GHI's subcontractor's past performance.

We conclude that, even if CMS erred in failing to consider the past performance of HMS's subcontractor, its actions were not prejudicial to HMS. In this regard, prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. ITT Corp.-Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 7.

The record shows that HMS was rated superior to GHI in the area of past performance, receiving a good rating compared to GHI's acceptable rating. The SSA explicitly recognized HMS's superiority and comparative strength in this area, and agreed with the technical evaluators regarding their ratings for the two proposals. AR, exh. 14A, Source Selection Decision, at 14-15.

Nonetheless, the SSA also made clear that these considerations did not ultimately form the underlying basis for distinguishing between the proposals for award purposes. First, she identified the superiority of GHI's proposal under the two most heavily-weighted evaluation factors, technical approach and management approach, as providing the central basis for her source selection decision:

The merit of GHI's proposal relative to the most heavily-weighted evaluation factor served as the primary basis for this determination as explained further below; however, my considerations also included that GHI's proposal was consistently good relative to all evaluation factors with the exception [of] past performance which is the third-highest-weighted factor.

Id. at 19. The source selection decision then goes on in some detail describing the specific features of the higher-rated GHI proposal that formed the basis of the SSA's conclusion that the GHI proposal was, in fact, superior. Id. at 19-20.

The SSA then described her consideration of GHI's lower rated past performance:

While the past performance information for GHI indicates potential risks; the merit of GHI's proposal relative to two most heavily-weighted evaluation factors, Technical Approach and Management Approach are anticipated to minimize the risk of poor performance and enhance GHI's ability to perform the contract successfully.

Id. at 20.

As demonstrated above, while the SSA recognized HMS's superior past performance, this consideration did not ultimately factor in as a discriminator for award purposes. Thus, even if CMS had considered the past performance information relating to HMS's subcontractor, and even if this had resulted in a higher past performance rating for HMS, there is no basis for our Office to conclude on this

record that this would have affected the source selection decision. We therefore deny this aspect of HMS's protest.

Discussions

Finally, HMS alleges that CMS engaged in unequal discussions with it and GHI. According to the protester, there were several weaknesses identified to the firm during its 2012 debriefing that were never mentioned during the 2013 discussions. In contrast, HMS maintains that the discussions afforded to GHI in 2013 were comprehensive, and included all weaknesses identified during GHI's 2012 debriefing.

Despite HMS's claims that it did not receive comprehensive discussions in 2013 that reiterated certain weaknesses identified to the firm during its 2012 debriefing, the protester has not alleged or explained what it would have done had it been advised of these alleged weaknesses. As a result, even if we agreed with HMS, since the firm has never detailed how it would have changed its proposal had it been afforded the discussions at issue, it has not established competitive prejudice. Unispec Enters., Inc., B-407937, B-407937.2, Apr. 16, 2013, 2013 CPD ¶ 104 at 12.

The protest is denied.

Susan A. Poling
General Counsel