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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Dalma Tech² Company

File: B-411015

Date: April 22, 2015

Kevin W. Cushing, for the protester.

William E. Hughes III, Esq., Whyte Hirschboeck Dudek S.C., for SupplyCore, Inc., the intervenor.

Maj. Michael G. King, Department of the Air Force, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's proposal as technically acceptable is denied where the agency's evaluation was reasonable and consistent with the terms of the solicitation.

2. Protest challenging the agency's evaluation of the awardee's past performance is denied where the evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Dalma Tech² Company (DTC), of Riyadh, Saudi Arabia, protests the award of a foreign military sales contract to SupplyCore, Inc., of Rockford, Illinois, by the United States Air Force under request for proposals (RFP) No. FA8505-13-R-31138, for F-15 fighter jet transportation support services (TSS) for the Royal Saudi Air Force (RSAF). DTC challenges the agency's determination that SupplyCore's proposal was technically acceptable, and the agency's evaluation of DTC's past performance.¹

¹ Our Office, in a separate decision, sustained the protests of two other disappointed offerors challenging the agency's award to SupplyCore under the RFP. See Al Raha Grp. for Technical Servs., Inc.; Logistics Mgmt. Int'l, Inc., B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ ____.

We deny the protest.²

BACKGROUND

The RFP sought proposals for comprehensive fleet management of various special-purpose vehicles and trailers to support base stand-ups and continued RSAF operation of F-15s. RFP, Performance Work Statement (PWS), at 3. The contractor will provide all transportation and support services required to source, procure, track, warehouse, and deliver assets needed within the Kingdom of Saudi Arabia to support RSAF F-15 operations. Id. The RFP contemplated the award of a single, indefinite-delivery, indefinite-quantity contract, with a 12-month basic ordering period and four, 12-month option ordering periods. RFP at 3.

For purposes of award, the Air Force was to evaluate proposals under the following factors: technical; past performance; and cost/price. Id. at 143.³ The technical factor included two subfactors: (1) integrated processes and management, and (2) In-Kingdom operations.⁴ Id. Relevant to the issues in this protest, the In-Kingdom operations subfactor required offerors to submit an In-Kingdom Execution Plan that sufficiently demonstrated: (1) the offeror's knowledge and understanding of In-Kingdom laws, customs, licenses required (to include a copy of an actual Saudi business license), and employment terms (in accordance with PWS ¶¶ 4.9, 4.10); and (2) the offeror's ability to fulfill local purchase requirements (in accordance with PWS ¶ 4.6). Id. at 144. Paragraph 4.9 of the PWS, in relevant part, requires the contractor to "have a Saudi business license or maintain a sponsorship/teaming effort with a Saudi company," and to "establish and maintain an operating location at Dhahran, Saudi Arabia." RFP, PWS, at 6.

With regard to past performance, the Air Force was to assess an offeror's ability to successfully accomplish the proposed effort based on the offeror's demonstrated

² Our Office did not issue a protective order in connection with this protest because DTC elected not to retain counsel who could be admitted to a protective order. A redacted version of the agency report was furnished to the protester and intervenor. Consequently, our discussion regarding the agency's evaluation of offerors' proposals is general in nature because information in those evaluations and the source selection decision reference materials that may be proprietary to the offerors.

³ The vast majority of contract line item numbers (CLIN) are firm-fixed price. See RFP at 3-102. Although the RFP stated that "cost/price" would be evaluated, the cost-reimbursable CLINs for In-Kingdom local purchases and travel were not included in the total evaluated price (TEP). Id. at 152.

⁴ "In-Kingdom" means within the Kingdom of Saudi Arabia.

present and past work record. RFP at 145. The RFP advised offerors that the Air Force would evaluate the relevance of each past performance reference. Id. In addition to comparing the scope and magnitude of effort and complexities relative to those required by the RFP, the Air Force was to evaluate whether the past performance reference demonstrated the following experience: (1) foreign military sales or direct commercial sales material procurement; (2) procurement negotiations; (3) electronic asset visibility tracking and reporting; (4) subcontractor management; (5) international teaming agreements and/or international operations management; (6) packing, handling, shipping, and transportation management; and (7) quality assurance management. Id. The RFP stated that the relevance rating for each reference would be based on the scope, magnitude and complexity of the effort, and whether the reference demonstrated experience in the seven enumerated areas of experience, as follows:

	Very Relevant	Relevant	Somewhat Relevant	Not Relevant
Scope & Magnitude / Complexity of Effort	Essentially the same	Similar	Some	Little or none
Specific Experience	7 of 7	5-6 of 7	2-4 of 7	N/A

Id. at 145-46.

After evaluating the recency, relevancy, and quality of an offeror's past performance, the Air Force was to assign a past performance confidence rating, ranging from "substantial confidence" to "no confidence." Id. at 147-48.

The Air Force was to evaluate offerors' proposals under the technical factor, including the two subfactors, for acceptability. Id. at 143. Among the technically acceptable proposals, the Air Force was to make a best value tradeoff considering past performance and cost/price. Id. Past performance was to be significantly more important than cost/price. Id.

The Air Force received seven proposals in response to the RFP, and included six of those proposals in the competitive range for the purpose of holding discussions. Agency Report (AR), Tab 4, Source Selection Decision, at 3-4. As relevant here, after conducting discussions, and obtaining proposal revisions, the agency's final evaluation for DTC and SupplyCore was as follows:

	DTC	SupplyCore
Technical	Acceptable	Acceptable
Past Performance Confidence	Satisfactory	Substantial
Final TEP	\$116,162,636	\$110,571,663

Id. at 112.

The Source Selection Authority determined that SupplyCore's proposal represented the best value to the government and selected the proposal for award. Id. at 113.

DECISION

DTC challenges the Air Force's determination that SupplyCore's proposal was technically acceptable, arguing that SupplyCore failed to meet In-Kingdom licensing and facility requirements. The protester also challenges the agency's evaluation of its past performance as warranting only a "satisfactory confidence" assessment. For the reasons that follow, we find that none of DTC's challenges provides a basis to sustain the protest.

Technical Evaluation

Regarding the In-Kingdom operations subfactor, DTC argues that SupplyCore failed to demonstrate that it is legally entitled to operate in Saudi Arabia, either as an independent, registered legal entity or through an authorized joint venture or teaming arrangement pursuant to Saudi Arabian law. See Protest (Jan. 13, 2015) at 2; DTC Comments (Feb. 21, 2015) at 2. DTC also alleges that SupplyCore will not be able to lease or operate the required facility in Dhahran due to its legal status under Saudi Arabian law or, alternatively, that SupplyCore could not rely upon its Saudi Arabian subcontractor's facility to meet the RFP's requirement. See Protest at 2; DTC Comments at 2-3.

The evaluation of an offeror's proposal is a matter within the agency's discretion. National Gov't Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5. A protester's disagreement with the agency's judgment does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate the proposals, but will instead examine the record to determine whether the agency's judgments are reasonable and consistent with the solicitation's evaluation factors and applicable statutes and regulations. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. For the reasons that follow, we find no basis to sustain DTC's protest challenging the agency's evaluation of SupplyCore's technical proposal.⁵

⁵ As a general matter, many of the protester's underlying allegations are unsupported by substantive evidence or support. For example, the protester alleges that it had discussions with Saudi officials in the Ministry of Commerce and Chamber of Commerce regarding SupplyCore's licensing status, but failed to provide any supporting evidence regarding such conversations, or SupplyCore's actual licensing status. See Protest at 2; Comments at 3. Unsupported allegations
(continued...)

Licensing Requirement

DTC alleges that SupplyCore cannot satisfy the RFP's requirement to present a valid Saudi Arabian business license because SupplyCore is not a registered company or legally affiliated with an agent, distributor, joint venture partner, or teaming partner under Saudi Arabian law. See Protest at 2; Comments at 2.

Ordinarily, a solicitation requirement for a contractor to warrant that it possesses, or will otherwise obtain prior to performance, licenses required to conduct business in a foreign country is a matter concerning a contractor's responsibility. E.g., Pernix-Serka LP, B-407656, B-407656.2, Jan. 18, 2013, 2013 CPD ¶ 70 at 4-5; United Seguranca, Ltda., B-294388, Oct. 21, 2004, 2004 CPD ¶ 207 at 4. In most cases, responsibility is determined based on standards set forth in Federal Acquisition Regulation (FAR) § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. Bid Protest Regulations, 4 C.F.R. § 21.5(c).

Here, however, the PWS explicitly required that offerors "include [a] copy of [an] actual Saudi business license" with their In-Kingdom Execution Plans, effectively imposing what amounted to a "definitive responsibility" criterion. RFP at 144. Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. Such criteria, which must be met as a precondition to award, limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate performance, e.g., unusual expertise or specialized facilities. Reyna-Capital Joint Venture, supra, at 2. Where an agency includes a definitive responsibility criterion in a solicitation, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. Western Alternative Corrections, Inc., B-409315, B-409315.2, Mar. 10, 2014, 2014 CPD ¶ 94 at 7; Reyna-Capital Joint Venture, supra, at 2-3.

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fail to satisfy the requirement of our Bid Protest Regulations that a protester provide a sufficiently detailed statement of the legal and factual grounds to state a valid basis for protest. 4 C.F.R. § 21(c)(4), (f); Freedom Scientific, Inc., B-401173.3, May 4, 2010, 2010 CPD ¶ 111 at 5 n.2 (rejecting unsupported allegation from an unidentified source). Thus, we give little or no weight to such allegations.

Based on our review of the record, we find nothing objectionable about the Air Force's determination that SupplyCore met the RFP's licensing requirement. The RFP did not require that the offeror itself have a Saudi Arabian business license. Rather, the RFP specifically contemplated that an offeror could satisfy the licensing requirement by maintaining a sponsorship or teaming effort with a Saudi Arabian company. RFP, PWS, at 6. SupplyCore's proposal states that the awardee's proposed subcontractor, Arwadh Establishment, is a Saudi Arabian company licensed in accordance with applicable Saudi law. AR, Tab 10, SupplyCore Revised Technical Proposal, at 23. SupplyCore's proposal included copies of Arwadh's business licenses. Id. The Air Force found that Arwadh will conduct the In-Kingdom TSS requirements, and the SupplyCore team will utilize Arwadh's stand-alone In-Kingdom Operations department to ensure that the company maintains and adheres to the local laws and customs for Saudi Arabia and to ensure that foreign personnel maintain a legal work status. AR, Tab 5, Final Technical Evaluation Report, at 25. Thus, the agency reasonably concluded that SupplyCore demonstrated compliance with the RFP's licensing requirement through its teaming arrangement with a licensed, Saudi Arabian company. See Advant-EDGE Solutions, Inc., B-400367.2, Nov. 12, 2008, 2008 CPD ¶ 210 at 3 (finding there is generally nothing improper in an offeror's meeting licensing requirements through a subcontractor).⁶

To the extent DTC argues that the teaming agreement between the awardee and its subcontractor is inconsistent with Saudi Arabian law, the protester's argument is misplaced.⁷ Our focus is limited to whether SupplyCore met the eligibility requirements under the terms of the RFP. See Per Aarsleff A/S et al., B-410782 et al., Feb. 18, 2015, 2015 CPD ¶ 86 at 10 n.8. In this regard, the RFP did not require offerors to demonstrate that their proposed teaming approaches were approved under Saudi Arabian law; rather, the RFP required evidence of an "actual Saudi business license," which, as noted above, SupplyCore provided through its subcontractor, Arwadh. RFP at 144. Under these circumstances, we find that the

⁶ DTC also alleged that it was unreasonable for the Air Force to rely on Arwadh's business license because the RFP stated that, with respect to past performance, the agency would not evaluate the present or past performance of any subcontractors. See Comments at 3-4. This limitation, however, applied only to the agency's evaluation of past performance, and did not apply to the agency's evaluation under the technical factor. See RFP at 131, 147.

⁷ Although the protester generally summarizes Saudi Arabian law, it fails to in fact explain how the specific subcontracting relationship between SupplyCore and Arwadh purportedly violates applicable law. See Comments at 3 (arguing that the subcontracting relationship "does not necessarily constitute a legal authority for SupplyCore to do business in Saudi Arabia").

Air Force reasonably found that SupplyCore satisfied the RFP's licensing requirement.

Facility Requirement

Additionally, DTC argues that based on its understanding of SupplyCore's lack of legal capacity to operate within Saudi Arabia, it is ineligible to lease or purchase the operating location in Dhahran required by the RFP. See Protest at 2; Comments at 3. Alternatively, DTC argues that Arwadh's leasing of the requisite facility should not be considered as satisfying the RFP's requirement for two reasons. First, the protester asserts that the PWS "does not afford the flexibility of letting the contractor or subcontractor do the leasing." Comments at 2. Second, based on a discussion with an unidentified Arwadh official, DTC alleges that Arwadh's offices in Saudi Arabia are either closed or unmanned, and all of its operations are conducted out of Dubai, United Arab Emirates. Comments at 3. Thus, DTC effectively argues that because Arwadh's offices in Saudi Arabia are allegedly inactive, SupplyCore failed to demonstrate its compliance with the requirement to maintain and operate a facility in Dhahran.

Here, we find nothing objectionable about the Air Force's determination that SupplyCore met the RFP's requirement regarding the operation of a facility at Dhahran. Even assuming that DTC's interpretation of Saudi Arabian law is correct such that SupplyCore cannot legally lease or purchase property in Saudi Arabia, SupplyCore did not propose to lease or purchase any property. Rather, SupplyCore represented that it will perform its work from its corporate headquarters in Illinois, while Arwadh will utilize its existing facilities located in Saudi Arabia, including its operation location in Dhahran, in the performance of the In-Kingdom TSS. See AR, Tab 10, SupplyCore Revised Technical Proposal, at 25, 28.

We also find that none of DTC's challenges involving SupplyCore's reliance on the use of its subcontractor's facility provides a basis on which to sustain the protest. First, contrary to DTC's argument that reliance on a subcontractor's Dhahran facility was not authorized by the RFP, in the absence of an express prohibition on subcontracting for facilities, we find that there was no basis to downgrade SupplyCore's proposal for relying on Arwadh's facility. See Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 6. Furthermore, even assuming DTC's allegations that Arwadh has currently discontinued operations in Saudi Arabia were substantiated, DTC points to no requirement that an offeror possess or operate a facility at Dhahran prior to award. In this regard, we view compliance with the RFP's requirement to maintain an acceptable facility to simply be a condition of performance that the awardee must meet. As such, whether the awardee complies with the requirement is a matter of contract administration which we will not consider. See General Sales Agency, B-247529.2, Aug. 6, 1992, 92-2 CPD ¶ 80 at 7 (dismissing protest that the awardee's facility failed to comply with municipal fire code prior to award); Volunteers of Am., B-225460, Mar. 10, 1987, 87-1 CPD

¶ 271 at 6 (denying protest that the awardee's facility was required to comply with all applicable zoning ordinances, laws, and codes prior to award).

Therefore, we find that the agency reasonably evaluated SupplyCore's proposal as committing to comply with the RFP's requirement to operate and maintain the required facility at Dhahran.

Past Performance Evaluation

DTC also challenges the evaluation of its past performance, arguing that the Air Force gave undue weight to subcontract management relevancy criterion, thus resulting in DTC receiving a lower overall past performance confidence rating of "satisfactory" confidence. Protest at 3-4; Comments at 3-4.⁸

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. Green Earthworks Constr., Inc., B-410724, B-410724.2, Feb. 2, 2015, 2015 CPD ¶ 68 at 4. A protester's mere disagreement with the agency's judgment is insufficient to establish that an evaluation was improper. Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10. Here, we find that the agency reasonably evaluated DTC's past performance.

As discussed above, the RFP identified seven relevancy criteria that the Air Force would evaluate, and the corresponding relevancy rating that would be assigned to a past performance reference based on the number of relevancy criteria that the reference involved. See RFP at 145-46. The RFP also explicitly provided that a past performance reference demonstrating experience with 5-6 of the seven relevancy criteria would receive a rating of "relevant." RFP at 145-46. Because the Air Force found that DTC's past performance references were largely similar in terms of the scope and magnitude of effort and complexities as required by the RFP, and demonstrated experience with six of the seven relevance criteria it evaluated DTC's references as "relevant", as provided by the RFP. See AR, Tab 6, Final Past Performance Report, at 16-18 (finding no experience with the

⁸ DTC initially challenged the Air Force's evaluation of SupplyCore's past performance, but subsequently withdrew its challenge after receipt of the AR. See DTC Comments at 4. In its comments, however, DTC alleged that it would have been unreasonable for the Air Force to have evaluated SupplyCore's past performance based on the past performance references for Arwadh. See DTC Comments at 3-4. But, it is apparent from the record that the Air Force did not consider Arwadh's past performance in the evaluation of SupplyCore's past performance. See AR, Tab 6, Final Past Performance Report, at 87-103.

subcontract management criterion). Where DTC's past performance references were not "highly relevant," but only relevant, we find nothing objectionable in the Air Force not assigning DTC the highest possible past performance confidence rating. See, e.g., UNICCO Gov. Servs., Inc., B-409111 et al., Jan. 23, 2014, 2014 CPD ¶ 55 at 14-15; Bryan Constr., Inc., B-409135, Jan. 14, 2014, 2014 CPD ¶ 51 at 8.

DTC also takes issue with the terms of the solicitation, arguing that use of the subcontract management relevancy criterion was "arbitrary." Protest at 4; Comments at 4-5. In support of its position, DTC asserts that the contractor will be required to manage vendors, as opposed to subcontractors. This challenge to the terms of the RFP, however, is untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based on alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for the receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Therefore, we do not consider this argument.⁹

Finally, DTC argues that the Air Force should have raised the alleged "deficiency" regarding DTC's lack of subcontract management experience during discussions. See Protest at 4. We find that this argument does not provide an adequate basis on which to sustain the protest.

The FAR requires agencies conducting discussions with offerors to address, "[a]t a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). When an agency engages in discussions with an offeror, the discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving an award. FAR § 15.306(d); CDO Techs., Inc.--Recon., B-409686.15, Dec. 12, 2014, 2015 CPD ¶ 56 at 5. Nonetheless, an agency needs not "spoon-feed" an offeror as to each and every item that could be revised to improve an offeror's proposal. L-3 Sys. Co., B-404671.2, B-404671.4, Apr. 8, 2011, 2011 CPD ¶ 93 at 15.

First, even assuming that the protester's lack of subcontract management experience was a matter that was required to be addressed in discussions, we find that DTC had adequate notice regarding the agency's evaluation in this regard. Specifically, the RFP established that subcontract management experience was one of the seven enumerated areas of experience to be evaluated as part of the relevancy evaluation for each past performance reference. RFP at 144. In fact,

⁹ For the same reasons, we do not consider DTC's challenge that the agency should have evaluated the offerors' experience with In-Kingdom operations under the past performance factor. See Comments at 4.

DTC's proposal appeared to acknowledge that the protester did not have experience in this area. For each of its four past performance references, DTC stated that "[d]uring the contract, [DTC] did not have an opportunity to subcontract defined work." AR, Tab 11, DTC Past Performance Proposal, at 4, 10, 16, and 23. Moreover, the RFP notified offerors that a past performance reference that did not demonstrate experience with all seven of the enumerated areas of experience could not receive a "very relevant" assessment. Id. at 144-45. Prior to the submission of final proposal revisions, the Air Force notified DTC that all four of its references were evaluated as only "relevant," meaning they included similar scope and magnitude of effort and complexity as required by the RFP's effort, and/or met five or six of the seven enumerated experience areas. AR, Tab 12, Request for Final Proposal Revisions, at 1. Given the RFP's enumerated evaluation criteria, DTC's acknowledgment that its past performance references did not include subcontract management experience, and the Air Force's notification that DTC's submitted references were evaluated as only being relevant, DTC had sufficient notice of the basis for the agency's past performance relevance evaluation.

Second, DTC has failed to demonstrate any competitive prejudice. Competitive 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. Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7. The protester here does not state that, had the agency raised the issue in discussions, it could have substituted past performance references demonstrating subcontract management experience or otherwise would have modified its proposal in any way. Phacil Inc., B-406628, July 5, 2012, 2012 CPD ¶ 202 at 6; Archer Western Contractors, Ltd., B-403227, B-403227.2, Oct. 1, 2010, 2010 CPD ¶ 262 at 6.

We deny the protest.

Susan A. Poling
General Counsel