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Decision

Matter of: Savannah River Technology & Remediation, LLC; Fluor Westinghouse Liquid Waste Services, LLC

File: B-415637; B-415637.2; B-415637.3; B-415637.4; B-415637.5; B-415637.6; B-415637.7

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DIGEST

Protest challenging agency's evaluation of awardee's proposal is sustained where record shows that agency did not reasonably evaluate the viability of the awardee's technical approach, as required by the terms of the solicitation.

DECISION

Savannah River Technology & Remediation, LLC, (SRTR) of Aiken, South Carolina, and Fluor Westinghouse Liquid Waste Services, LLC (FW), of Greenville, South Carolina, protest the award of a contract to Savannah River EcoManagement, LLC (SRE), of Lynchburg, Virginia, under request for proposals (RFP) No. DE-SOL-0008913, issued by the Department of Energy (DOE) to process and stabilize liquid radioactive nuclear waste at the agency's Savannah River Site (SRS) in western South Carolina. The protesters argue that the agency miscalculated proposals and made an unreasonable source selection decision.

We sustain SRTR's protest and deny FW's protest.

BACKGROUND¹

The SRS is a DOE facility currently dedicated to processing and storing radioactive nuclear waste, as well as development and deployment of technologies to improve the environment and treat nuclear and hazardous wastes. As is pertinent to the current acquisition, there are approximately 36 million gallons of highly radioactive nuclear waste in some 43 underground storage tanks at the SRS. The RFP² here seeks to award a contract for the processing of this waste to convert it into more stable forms, and to close some of the underground storage tanks. More specifically, the RFP divides the SRS's liquid waste (LW) system into four broad operational subsystems that must be operated and maintained by the successful offeror: (1) waste storage, retrieval, sludge pretreatment, salt batch preparation, and closure of underground storage tanks; (2) salt waste treatment in-processing facilities; (3) high activity waste treatment by vitrification in the defense waste processing facility (DWPF); and (4) stabilization of low-level liquid waste in the saltstone production facility (SPF) with permanent disposition as a grout- or cement-like end product in saltstone disposal units (SDUs).³ RFP at 20-21.

¹ The agency prepared separate reports for each protest. Those reports, when combined, included exhibits divided among folders lettered A through J. Each protester received documents responsive to its protest, but did not necessarily receive all of the documents provided to the other protester (for example, each protester received copies of the SRE proposal found in folder "F," but did not receive copies of the other protester's proposal). All of the documents provided to both protesters bear a common nomenclature (for example, both protesters received a copy of the agency source selection document in folder "D" labeled exhibit "D"). In some instances, the exhibits are identical (for example, folder "A" for each report includes identical copies of the RFP and amendments), and in other instances, the versions of a common exhibit differ (for example, each protester received different versions of the source selection decision that was partially redacted to exclude information relating to the other protester). Even where different versions of a document were provided to the protesters, the agency nonetheless maintained a common pagination for the common document. Citations to the agency report in this decision are to the "combined" agency report provided to our Office, unless otherwise noted.

² The agency issued the original RFP, along with five amendments. References to the RFP are to agency report (AR) exh. A.1, the original RFP, unless otherwise specified.

³ The SRS has a facility currently in operation known as the actinide removal process/modular caustic side solvent extraction unit (ARP/MCU). The RFP identifies another facility known as the salt waste processing facility (SWPF) that currently is under construction; when complete, operation of the SWPF also will be the responsibility of the eventual awardee. At both facilities, the eventual awardee will be required to input what is referred to as a salt waste feed stream. The output at both facilities will be "high activity" (that is, more radioactive) waste to be stabilized through production of a borosilicate glass compound that is placed into high-level waste

(continued...)

The RFP contemplates the award, on a best-value tradeoff basis, of a predominately cost-reimbursement-type contract for a base period of 7 years, and an option period of 3 years.⁴ RFP at 80-81. The agency was to evaluate proposals considering cost and several non-cost evaluation factors. The evaluation factors considered: technical approach, key personnel and organization, past performance, experience, and total evaluated cost/fee. RFP at 407. Technical approach was deemed significantly more important than key personnel and organization, and past performance, both separately and in combination. Id. Key personnel and organization, and past performance were deemed equal in importance. Id. Experience was deemed significantly less important than key personnel and organization, and past performance, both separately and combined. Id. Finally, the non-cost evaluation factors combined were deemed significantly more important than total evaluated cost/fee. Id.

The agency was to evaluate proposed costs for realism, reasonableness, and completeness. RFP at 406. In evaluating realism, the RFP stated that the agency would perform a cost realism evaluation to arrive at a most probable cost figure for each proposal. Id. The RFP further stated that the agency would perform a technical analysis of proposed costs that it would consider in connection with its evaluation of proposals under the non-cost evaluation factors, as well as its cost evaluation. Id. The RFP provided that the agency would calculate what it terms a “total evaluated price” for each proposal that included (1) the most probable cost figure arrived at by the agency in its cost realism evaluation, (2) the total available award fee proposed, (3) the total target

(...continued)

canisters to be stored on-site in designated glass waste storage buildings, and “low-activity” (that is, less radioactive) waste that is stabilized through production of “saltstone,” which essentially is a grout- or cement-like end product with the low-activity waste embedded in it to be stored in saltstone disposal units. See RFP at 20-22. In addition to the high-activity waste generated at the ARP/MCU and SWPF, the eventual awardee also will be responsible for delivering a sludge waste stream to be treated at the DWPF. RFP at 22. The awardee also will be responsible for operating and maintaining a facility known as the effluent treatment facility where aqueous waste streams from the LW system, as well as other SRS site operations, are to be processed into forms suitable for release to a permitted outfall or disposal at the saltstone facility. Id.

⁴ The RFP includes a cost-reimbursement (without fee) contract line item for transition activities, along with cost-plus-award-fee contract line items for the bulk of the requirements. The RFP also identifies two indefinite-delivery, indefinite-quantity (IDIQ) line items that are to be performed either on a cost-plus-award-fee basis, or a fixed-price basis, depending on the terms of task or delivery orders issued under those contract line items. RFP at 14-15. The RFP included “plug” numbers for these latter contract line items totaling \$112,000,000.

activity performance based incentive fee proposed,⁵ and (4) the maximum amount for the IDIQ contract line items specified in the RFP (\$112,000,000).

In response to the solicitation, the agency received three proposals, from SRTR, FW and SRE. After evaluating initial proposals, engaging in discussions, and soliciting, obtaining, and evaluating final proposal revisions, the agency assigned the following ratings and established the following total evaluated price amounts for each proposal:⁶

	SRTR	FW	SRE
Technical Approach	Outstanding	Outstanding	Outstanding
Key Personnel & Organization	Outstanding	Good	Good
Past Performance	High Level Confidence	High Level Confidence	High Level Confidence
Experience	Outstanding	Good	Good
Total Evaluated Cost ⁷	\$5,995,069,458	\$5,546,645,251	\$4,772,714,548

AR, exh. D, Source Selection Decision Document (SSDD) at 5. On the basis of these evaluation results, the agency made award to SRE, finding that its proposal represented the best value to the government. After being advised of the agency’s selection decision and requesting and receiving debriefings, SRTR and FW filed the instant protests.

PROTESTS

Both protesters challenge the agency’s technical and cost evaluations. We have considered all of the protesters’ allegations and sustain SRTR’s protest for the reasons

⁵ The RFP contemplates the award of performance-based incentive fees to the eventual awardee based on its success in meeting specified performance objectives. RFP, Attach. J-14, Performance Evaluation Management Plan.

⁶ In evaluating proposals, the agency assigned significant strengths, strengths, weaknesses, significant weaknesses and deficiencies, as it deemed appropriate. AR, exh. B, Source Selection Plan, at 30. The agency assigned adjectival ratings of outstanding, good, satisfactory, marginal, or unsatisfactory for the technical approach, key employee and organization, and experience factors. *Id.* at 31. For past performance, the agency evaluated the offerors’ past performance examples for relevance and degree of favorability, and assigned adjectival confidence ratings of substantial confidence, high level confidence, satisfactory confidence, limited confidence, no confidence or unknown (neutral) confidence. *Id.* at 32-34.

⁷ As noted, the RFP used the term “total evaluated price.” Nonetheless, because this is predominately a cost-reimbursement type contract, these amounts effectively refer to total evaluated cost.

outlined below. We deny SRTR's remaining allegations, and also deny FW's protest. We discuss the protesters' principal allegations below. We note at the outset that, in reviewing protests relating to an agency's evaluation of proposals, our Office does not independently evaluate proposals or substitute our judgment for that of the agency; rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. L3 Unidyne, Inc., B-414902 et al., Oct. 16, 2017, 2017 CPD ¶ 317 at 3. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. Id.

Preliminary Matters

Untimely Allegations

As an initial matter, we note that several of the protesters' allegations are untimely. First, SRTR argues that the agency evaluated past performance and experience in a manner that was inconsistent with the terms of the solicitation. By way of background, the record shows that all of the offerors here are what could be described as "single purpose" limited liability corporations (LLCs), that is, entities created for the specific purpose of competing for the current requirement. In addition, the predecessor incumbent contractor for this requirement, Savannah River Remediation, LLC (SRR), also can be described as a single purpose LLC, created for purposes of competing for, and performing, the predecessor contract.

The record shows that SRTR and SRE are each comprised of some--but not all--of the incumbent teaming members that make up SRR. SRTR essentially argues that SRE was given full credit for performing the entire predecessor contracts it referenced (including the predecessor contract at issue here) even though the companies from the predecessor contracts that are part of the SRE team performed only a small portion of the work as part of the SRR team. In support of its position, SRTR points to the terms of RFP attachment L-3, which specifically required offerors to identify the percentage of the work on the predecessor contract that was performed by the teaming member.

We dismiss this aspect of SRTR's protest as untimely. The record shows that in discussion letters sent to all three offerors the agency provided identical information relating to how the agency intended to evaluate past performance and experience where the offeror--as well as the predecessor organization--was an LLC. All three offerors were advised as follows:

If an offeror indicated that its experience in performing a Government contract or commercial contract was as part of an LLC and performed or was responsible for performing the entire contract, the SEB [source evaluation board] accepted such explanation of the offeror and evaluated/attributed the experience to the offeror or team member (LLC member). If an offeror indicated on the Attachment L-3 that it had

responsibility for discrete aspects of the work under a referenced contract as a member of the LLC, the SEB also considered such as identified by the offeror, including other aspects of the work that were performed by the LLC. When the Government has a prime contract with a stand-alone LLC entity to perform the contract, the LLC operates under corporate governance principles with responsibility for full performance of the contract and each member as part of the LLC also has responsibility/experience for performance of the contract. In accordance with Section M.4(d), the SEB evaluated the offeror's LLC members that provided referenced contracts performed by an LLC of which they were a member to have the experience and performance of the LLC as a whole. If the offeror identified discrete scopes of work to be performed by its LLC member, the SEB evaluated the experience provided for the discrete scope as well as experience overall for the performance of the PWS [performance work statement], which includes management of the scope of work. Based on this information, offerors are advised that they may revise their submittal accordingly.

SRTR AR, exhs. C.3.2., Discussion Letter to SRE, at 7-8; C.3.3., Discussion Letter to SRTR, at 8-9 (emphasis supplied). The record therefore shows that the agency advised all offerors--including SRTR--that it intended to credit each member of a predecessor LLC with performance of the entire contract where the offeror represented that its team member performed the entire contract, and also provided firms with an opportunity to revise their proposals in light of that advice. To the extent SRTR thought this was improper, it was required to protest before the deadline for submitting proposal revisions in the wake of the agency's discussion letter. See *Armorworks Enters. LLC*, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 4-7. Since SRTR did not raise this allegation within that timeframe, we dismiss it as untimely.

Second, a number of the protesters' challenges to the agency's evaluation are untimely. In this connection, the agency provided early document production to both protesters. Both protesters filed timely supplemental protests based on a review of that information. However, both protesters also raised additional, new, challenges to the agency's evaluation of technical proposals for the first time in their respective comments.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) require protests to be filed no later than within 10 days of when a protester knows, or should know of a basis for protest. Where a protester files a broad initial allegation and later supplements that broad allegation with allegations that amount to specific examples of the initial, general, challenge, these specific examples must independently satisfy our timeliness requirements where such examples involve different factual circumstances that require a separate explanation or defense from the agency; this is because our regulations do not contemplate the piecemeal presentation of protest arguments. *Vigor Shipyards, Inc.*, B-409635, June 5, 2014, 2014 CPD ¶ 170 at 5.

Here, the record shows that SRTR raised a challenge to the agency's evaluation of the SRE proposal relating to that firm's offer to [deleted] in connection with processing salt

waste.⁸ This allegation is based on the contents of the SRE proposal that was provided to SRTR on November 17, 2017. However, SRTR did not advance this argument until it filed its comments responding to the agency report on December 18, more than 10 days after the information forming the basis for this argument was known to SRTR. We therefore dismiss this aspect of SRTR's protest as untimely.

As for FW, many of its allegations were presented for the first time in its comments responding to the agency report, notwithstanding that the agency also provided it with all of the documents necessary for FW to have known its bases for protest earlier. With respect to the agency's evaluation of technical proposals, FW specifically argued for the first time in its comments that the agency improperly failed to evaluate the SRE proposal as risky for proposing to process salt waste at [deleted] (molarity) than had previously been done; that the agency failed to find that SRE's transition approach was high risk; and that the agency failed to evaluate as risky SRE's proposal to [deleted]. All of these allegations are based on the contents of the SRE proposal which the agency provided to FW more than 10 days before it filed its comments. We find these allegations untimely.

FW also alleged for the first time in its comments that the agency failed to evaluate significant portions of the SRE proposal. The basis of this allegation are statements in the agency's technical evaluation board report and source selection decision that, where the agency did not find a strength or weakness in a proposal aspect or element, the agency did not specifically discuss every element contained in a proposal. In a similar vein, FW alleged for the first time in its comments that the agency's source selection official did not meaningfully discuss risk. Because FW had these materials more than 10 days before it filed these allegations, we find them untimely.

FW argued for the first time in its comments that the agency improperly ignored or downplayed safety and security issues in evaluating SRE's past performance. FW identified four specific instances that it maintained the agency overlooked or downplayed. FW Comments at 31-40. These incidents are all identified in the agency materials produced more than 10 days before FW filed its comments. We therefore find these contentions untimely.

Finally, FW argued for the first time in its comments that a number of the agency's cost evaluation actions were improper or unreasonable. FW argued that the agency: unreasonably relied on an audit report prepared by a private concern; failed to evaluate the realism of SRE's labor rates that were not included in the RFP's list of labor rates; unreasonably failed to meaningfully evaluate the realism of SRE's costs associated with performance of a large number of performance work statement requirements where

⁸ SRTR's supplemental protest made passing reference to SRE's [deleted] but did not raise any specific concern relating to that approach until it filed its comments, at which point SRTR argued that [deleted] would necessitate moving the [deleted] around within the LW system in a manner that SRTR characterized as risky.

SRE's costs and FW's costs differed significantly; and failed to evaluate the realism of SRE's labor rate distribution among lower versus higher rate positions. All of these allegations are based on information provided to FW more than 10 days before it filed its comments. We therefore find these contentions untimely as well.

Abandoned Issues

FW also raised several allegations (either in its initial protest or supplemental protests) that it abandoned when it filed its comments. Like SRTR, FW argued that the agency improperly gave undue credit to minority members of predecessor LLCs in its evaluation of past performance, as discussed above. FW also argued that the agency's source selection official had been improperly influenced by senior DOE management during his source selection decision process, and that the agency: improperly failed to adequately credit it with the past performance of one of its subcontractors when performing its evaluation; assigned a lower adjectival rating to its past performance than it should have; and failed to perform a "technology readiness assessment" of the SRE proposal that FW maintained was required by the RFP.

The agency provided detailed responses to all of these allegations in its report responding to the protest and supplemental protests filed by FW. In its comments, FW makes no further mention of these issues. We therefore find that these issues have been abandoned by FW. Batelco Telecomms. Co. B.S.C., B-412783 et al., May 31, 2016, 2016 CPS ¶ 155 at 4 n.5.

Failure to State a Basis for Protest

Finally, FW raised an issue that we conclude fails to state a basis for protest. FW argued that the agency failed to perform a lifecycle cost analysis of the SRE proposal, and that such an analysis was required under the terms of the RFP. However, FW based this argument entirely on the provisions of the solicitation's performance work statement, rather than the RFP's proposal evaluation provisions. The requirements identified by FW are performance requirements and compliance with them is a matter of contract administration not subject to our review. Lowe Campbell Ewald, B-411614, B-411614.2, Sept. 11, 2015, 2015 CPD ¶ 296 at 9 n.13. We therefore dismiss this aspect of FW's protest.

Evaluation of the SRE Technical Approach

SRTR argues that the agency unreasonably failed to evaluate the viability of SRE's technical approach. Understanding SRTR's allegation requires some background.

As noted, there currently are approximately 36 million gallons (Mgal) of liquid waste material located at SRS. In addition to this liquid waste, there also is a quantity of salt waste in the form of "cake." The liquid waste is too concentrated to process as a stand-alone product and must be diluted through the addition of liquid, and the cake waste also must be diluted with liquid in order to have it at an appropriate concentration for

processing. Thus, although the agency currently has approximately 36 Mgal. of liquid waste on hand, as a practical matter, the successful contractor will be required to dilute that original quantity of liquid waste (thus expanding the quantity), and also “create” an additional quantity through dilution of the cake waste. The RFP identifies minimum processing quantities that must be met in connection with performance: 42 Mgal. of salt waste processing during the base period of the contract and 26 Mgal. of salt waste processing during the option period, but offerors were not precluded from proposing to process more than these minimum quantities. RFP at 24.

In performing the contract, the successful offeror will be required to process the liquid waste through the ARP/MCU and, when it comes on line after construction is complete, the SWPF. Both of these facilities have maximum throughput capacity expressed in Mgal. per year. Accordingly, the only way to increase the total waste processed is to increase the concentration of waste in the liquid so that there are fewer total gallons to process over the life of the contract. Throughout the record, the concentrations of waste are expressed in terms of “molarity” which is an expression of the number of “moles” of solute per liter of solution, moles being a constant scientific measurement. Historically, the incumbent contractor has been processing waste at a concentration of 6.44 moles (6.44M).

For purposes of performing the upcoming contract, the agency has made available what it refers to as the “next-generation solvent” (NGS) which will allow for more efficient processing of waste in the SWPF. For its part, SRTR proposed to process waste using the NGS at the SWPF at a concentration of [deleted]M, which it described in its proposal as possible based on testing and analysis performed by one of its subcontractors. See, e.g. AR, exh. E.2, SRTR Technical Proposal, at 65-66. In contrast, SRE proposed to process waste at [deleted]M. See, e.g. AR, exh. F-2, SRE Technical Proposal, at 48. In practical terms, by proposing to process the waste at a [deleted] (and also proposing to [deleted]⁹) SRE proposed to generate approximately [deleted] Mgal. of liquid waste over the life of the contract, compared to SRTR, which proposed to generate approximately [deleted] Mgal. of liquid waste over the life of the contract.

SRTR argues that SRE’s proposal failed to demonstrate the viability of processing waste at a concentration of [deleted]M; that the agency failed to consider the viability of SRE’s approach in its evaluation of SRE’s proposal; and that SRE’s technical approach may not be viable. In this regard, SRTR points out that, to date, no one has successfully processed waste at a concentration of [deleted]M. SRTR further notes that there is only one study where processing waste [deleted],¹⁰ and the results of that study

⁹ As noted above, SRTR also challenged the viability of SRE’s use of [deleted], but did not raise this allegation in a timely fashion.

¹⁰ The study is a DOE test report known as the “Next Generation Solvent Test Report Including a Higher Concentration Waste Demonstration” and may be found at: <https://goo.gl/3T6i5X> (last visited Feb. 8, 2018).

show that processing waste [deleted] could be dangerous, and could jeopardize the acceptability of the waste stream generated.

Specifically, the study found that, when processing waste at 7.5M, a substance known as Isopar L was carried over to the decontaminated salt solution (DSS). The DSS is used to fabricate the saltstone and the concentration of Isopar L may not exceed 87 milligrams per liter (mg/l) or less. Next Generation Solvent Test Report Including a Higher Concentration Waste Demonstration Report at 44. The test report showed that, when processing waste at 7.5M, the levels of Isopar L were above the 87 mg/l limit. Specifically, the test report found:

The Isopar®L carryover in the SE [strip effluent] remained below the detection limit during the HCWDT [high concentration waste demonstration testing]. However, the carryover in the DSS did not. The first detectable amounts of Isopar®L were seen in the DSS for the first test conducted with 6.4M [Na+] simulant. Each subsequent test resulted in higher levels of carryover into the DSS. A step change increase in the carryover was observed when the simulant concentration was increased to 7.5M [Na+], and Isopar®L carryover continued to climb at a faster rate than with the 6.4M [Na+] simulant. Isopar®L concentrations in the DSS had reached ~90 mg/L at the conclusion of HCWDT.

Id. at ES1-2 (emphasis supplied). In other words, the report states that, when processing waste at a concentration of 7.5M, the DSS included an amount of Isopar L that exceeded the waste acceptance criteria for use of the DSS in fabricating saltstone.¹¹

SRTR argues that the RFP specifically required the agency to consider the viability of the offerors' technical approach. In this connection the RFP provides: "DOE will evaluate the offeror's key technical inputs, assumptions, and justifications used to demonstrate the viability of its technical approach and/or support its technical understanding." RFP at 401. SRTR argues that the agency simply failed to evaluate the considerations noted above at the time it evaluated proposals and maintains that, had it done so, it would have concluded that SRE's technical approach was not viable. SRTR points out that, in support of the viability of processing waste at a concentration of [deleted]M, the SRE proposal relies entirely on the findings of the DOE study noted above. AR, exh. F.2, SRE Technical Proposal, at 113 (Chart Listing SRE's Technical Inputs, Assumptions and Justifications). However, SRTR argues that this study does not demonstrate the viability of SRE's proposed approach, and instead shows that its approach may in fact not be possible.

¹¹ The record shows that the limit set on the concentration of Isopar L in the DSS waste stream exists because higher concentrations of the substance can result in a flammable mixture. Declaration of the Technical Evaluation Board Chairman at 2.

We sustain this aspect of SRTR's protest. As noted, the RFP specifically required the agency to evaluate the viability of the offerors' technical approaches and to consider the offerors' key technical assumptions and justifications. As the foregoing discussion demonstrates, SRE's technical approach relies on processing waste at [deleted] than has ever been demonstrated, either in a laboratory setting or in practice. The agency's evaluation record is devoid of any discussion of this concern, or any conclusion regarding the agency's view of the probability for success of the SRE technical approach.

During the protest, the agency submitted an affidavit executed by the chairman of the technical evaluation board (TEB). In his affidavit, he states that the agency was aware of the report referenced by the protester and quoted above, that the report was reviewed by the chairman and several members of the TEB, and that the agency also sought input from a subject matter expert on this question.¹² TEB Chairman's Affidavit at 1-2. The affidavit goes on to represent that, during discussions with the subject matter expert, it was noted that there were several possible approaches to mitigating levels of Isopar L in the DSS. Id. at 2. He also specifically stated the following with respect to the findings of the test report: "Further, it was noted that there was significant uncertainty in the measurements that were made during the testing and the expected concentrations of Isopar L under SWPF specific conditions could not be predicted based on this single set of tests." Id. (emphasis supplied). Finally, he characterized any potential solution to this problem as a "yet[-]to[-]be[-]fully[-]developed technical improvement that would be required to facilitate the high rates of processing contemplated by the RFP."

We reach several conclusions based on the record before our Office. First, and perhaps most significantly, there is nothing in the contemporaneous record that shows that the agency actually considered this question during its evaluation of proposals. The only evidence in the record is the declaration prepared by the TEB chairman submitted during the course of the protest. In addition, even the evidence tendered--the TEB chairman's affidavit--suggests that there are reasons for concern about the viability of the SRE technical solution. As noted, SRE based its proposal to process waste at [deleted]M entirely on the results of the test report. However, the TEB chairman himself characterizes the test results as significantly uncertain and not a predictor of SRE's possible success in implementing its technical solution. TEB Chairman's Affidavit at 2. He also characterized solution of the Isopar L concentration problem as a "yet-to-be-fully-developed technical improvement." Id. In other words, the TEB chairman himself concludes that the test report--which provides the sole underlying scientific support for SRE's never-before-tried technical approach--provides, at best, uncertain evidence to demonstrate its viability, and that resolution of the Isopar L concentration problem itself

¹² The TEB chairman represents in his affidavit that, although the TEB sought input from a subject matter expert, it did not provide the expert with any information relating to the specific concentrations proposed by any of the offerors. Accordingly, she was unaware of SRE's proposal to process waste at [deleted]M.

is a yet-to-be fully developed technical solution. Moreover, as noted, although the TEB sought the input of a subject matter expert, it did not inform her that SRE proposed to process the waste at [deleted]M; it follows that the TEB did not have the benefit of her views concerning viability of SRE's technical approach.

Finally, we note that SRE's proposed technical solution afforded it a significant competitive advantage, providing--at least in part--a way for it to significantly reduce the overall amount of waste to be processed. As noted, SRE proposed to prepare approximately [deleted] Mgal. of waste for processing, compared to the [deleted] Mgal. to be prepared by SRTR; in effect, SRE obtained a significant competitive advantage because it proposed a technical solution that--only if successful--would enable it to process almost [deleted] percent less waste. Under these circumstances, we conclude that the agency unreasonably failed to evaluate the viability of SRE's proposed technical solution. We therefore sustain this aspect of SRTR's protest.

Remaining Technical and Cost Evaluation Issues

SRTR and FW raise a number of remaining technical and cost issues relating to the agency's evaluation of the SRE proposal. We dismiss these contentions as premature, except as discussed below. As noted, SRE's proposed technical solution afforded it a significant advantage because, assuming its success, it would enable SRE to prepare significantly less waste for processing. In effect, proposing to process at [deleted] amounted to a bedrock element of the SRE solution. It necessarily follows that its proposed technical solution affected the staffing and other resources that SRE proposed to bring to bear in performance of the contract overall. As discussed below, we recommend that the agency, at a minimum, reevaluate proposals in a manner consistent with our findings above, and also give consideration to reopening discussions to afford SRE an opportunity to revise its proposal in a manner that would resolve the concern relating to its plan to process waste at [deleted]. Until the agency is able to reach a firm conclusion about the viability of SRE's proposed approach, there would be no utility in our considering issues that could be rendered either immaterial by a reevaluation, or premature based on a revision to the SRE proposal that may make material changes to SRE's approach. Accordingly, we decline to consider these issues in detail at this time.

Past Performance Evaluation

Both FW and SRTR raise issues relating to the agency's evaluation of past performance. FW alleges that the agency failed to consider a number of performance problems experienced by team members of SRE. In support of this allegation, FW identified a number of instances that it claims should have resulted in the agency downgrading SRE's past performance rating. In its protest, FW identified a number of

instances that it maintained the agency failed to consider.¹³ FW also maintains that the agency unreasonably found its past performance to be relatively equal to SRE's.

We find no merit to this aspect of FW's protest. Where, as here, a solicitation contemplates the evaluation of past performance, the contracting agency has the discretion to determine the relevance and scope of the performance history to be considered, and our Office will not question the agency's judgment unless it is unreasonable or inconsistent with the terms of the solicitation or applicable procurement statutes and regulations. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4; Sam Facility Mgmt., Inc., B-292237, July 22, 2003, 2003 CPD ¶ 147 at 3. A protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was unreasonable. Id. In this case, the protester disagrees with the agency's evaluation but has failed to show that the agency acted unreasonably or inconsistently with the solicitation.

In its protest, FW identified a number of instances it maintains the agency failed to consider in evaluating SRE's past performance. In responding to FW's protest, the agency demonstrated that its past performance evaluation actually did consider all of these instances, along with a number of contracts not identified by FW in its protest. AR, exh. C.1, Proposal Evaluation Report, at 206-258. The agency's evaluation report demonstrates that it gave detailed consideration to both the negative aspects of SRE's past performance, as well as positive aspects of its past performance, and concluded that, on balance, its negative past performance was outweighed by its positive past performance. The record also shows that the agency concluded that FW's past performance was relatively equal to SRE's because, while it was somewhat more favorable, it was less relevant. Although FW disagrees with the agency's conclusions, such disagreement, without more, does not provide our Office a basis to object to the agency's evaluation in this area. We therefore deny this aspect of FW's protest.

SRTR argues that the agency's evaluation under the past performance and experience evaluation criteria was flawed because the agency gave SRE credit for work performed by affiliates of the SRE team members that will have no meaningful participation in performance of the contract. For example, SRTR points out that a contract for which SRE was given credit was performed by an entity known as BWXT Nuclear Operations Group, Inc., but a different BWXT affiliate--BWXT Technical Services Group, Inc.--is a team member of SRE rather than BWXT Nuclear Operations Group, Inc.

The agency concedes SRTR is correct in its assertion, but maintains that the agency's evaluation error was not prejudicial to SRTR because the agency gave SRTR credit for

¹³ As noted above, FW also identified a number of additional instances in its comments that it maintained the agency either failed to consider or give adequate weight to in its past performance evaluation. These challenges to the agency's past performance evaluation are untimely.

contracts that were performed by affiliates that are not part of the SRTR team. Agency Report at 63-68.

We need not consider this issue in any detail in light of the agency's concession. While the agency may be correct in its assertion that SRTR did not suffer competitive prejudice as a result of the agency's evaluation error, there is no reason, in light of our recommendation below, for the agency not to perform a past performance and experience reevaluation that properly considers whether the business elements proposed to perform the instant requirement are the same concerns that performed the past performance and experience examples identified. Perini-Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 (protest sustained where record showed that agency gave awardee evaluation credit for corporate experience of affiliate company that was not proposed to perform the contract).

Key Personnel

FW argues that the agency unreasonably evaluated its proposal under the key personnel and organization factor in general, and also that it misevaluated its engineering and technology manager and its business manager in particular. FW argues that the agency's assignment of adjectival ratings in these areas was inconsistent with the definitions of those ratings.

We find no merit to this aspect of FW's protest. To the extent FW takes issue with the agency's assignment of adjectival ratings, this, alone, does not provide a basis for our Office to object to the agency's evaluation findings. Ratings, be they numeric or adjectival scores, are merely guides to intelligent decision making, and the assignment of one rating versus another is immaterial, provided the agency's evaluation adequately captures the underlying merits of the proposal. Kollsman, Inc., B-413485 et al., Nov. 8, 2016, 2016 CPD ¶ 326 at 9. Here, FW's allegations principally relate to the assignment of adjectival ratings, but FW has not shown that the agency substantively erred in evaluating its proposal under this factor. We therefore have no basis to object to the agency's evaluation for the reasons advanced by FW.¹⁴

SRTR argues that the agency failed to appreciate what it characterizes as the clear superiority of SRTR's proposed key personnel and improperly assigned only a slight advantage to its proposal in this area in comparison to SRE's proposal. The record shows, however, that the agency considered SRTR's proposal superior under the key personnel and organization factor. AR, exh. C.1, TEB Report, at 81, 99-111. In addition, the source selection authority recognized SRTR's superiority under this factor. AR, exh. D, SSDD, at 37. This aspect of SRTR's protest amounts to no more than

¹⁴ FW also claims that the agency failed to adequately appreciate the merits of its proposed business manager. However, FW's objections amount to no more than disagreement with the agency's evaluation which does not provide a basis for our Office to object. GeoNorth LLC, B-411473 et al., Aug. 6, 2015, 2015 CPD ¶ 247 at 7.

disagreement with the agency's evaluation and does not provide a basis for our Office to object to the agency's conclusions. GeoNorth LLC, supra.

Finally, both FW and SRTR protest the agency's evaluation of SRE's engineering and technology manager. Both firms note that the individual in question was the business and technology manager under the predecessor contract, and both claim he was removed from his position because of performance problems. However, the record shows only that this individual was replaced during performance of the prior contract; there is no direct evidence that he was replaced because of performance problems. Under the circumstances, we conclude that, as with the other issues raised concerning the agency's evaluation of proposals under the key personnel and organization factor, this amounts to no more than disagreement with the agency's evaluation conclusions which does not provide our Office a basis to object. GeoNorth LLC, supra.

RECOMMENDATION

For the reasons discussed above, we sustain SRTR's protest. We recommend that, at a minimum, the agency reevaluate proposals in a manner consistent with this decision and make a new source selection decision based on that reevaluation. In the alternative, the agency may conclude that it is in the agency's interest to engage in further discussions with SRE in order to clarify its proposal. In that circumstance, we recommend that the agency engage in discussions with all offerors; solicit, obtain, and evaluate revised proposals; and make a new source selection decision. Finally, we recommend that the agency reimburse SRTR the costs associated with filing and pursuing its protest, including reasonable attorneys' fees.¹⁵ 4 C.F.R. § 21.8(d). SRTR's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

Thomas H. Armstrong
General Counsel

¹⁵ Because we find no merit to FW's protest, we decline to recommend that it be reimbursed the costs associated with filing and pursuing its protest.