



Decision

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Matter of: Onsite OHS, Inc.

File: B-415987; B-415987.2

Date: April 27, 2018

John R. Tolle, Esq., and H. Todd Whay, Esq., Baker, Cronogue, Tolle & Werfel, LLP, for the protester.

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Douglas J. Becker, Esq., Department of Homeland Security, for the agency.

Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency’s evaluation of proposals under the past performance and technical factors is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation criteria and where any error made by the agency did not prejudice the protester.

2. Protest that awardee’s proposal improperly took exceptions to the solicitation’s requirements is denied where the record shows that the awardee’s assumptions were not exceptions.

DECISION

Onsite OHS, Inc., of Princeton, Indiana, protests the award of a contract to Dentrust Dental International, Inc., of Pipersville, Pennsylvania, under request for proposals (RFP) No. HSCEMD-17-R-00001, issued by the Department of Homeland Security, Immigration and Customs Enforcement (ICE), to obtain medical, psychological, fitness, and drug test services for ICE personnel. The protester contends that the agency unreasonably evaluated proposals.

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside on March 30, 2017, contemplated the award of an indefinite-delivery, indefinite-quantity contract to provide pre-employment and post-employment medical, psychological, fitness, and drug testing services, over a one-year base period and four 1-year option periods. RFP at 2, 119. Award was to be made on a best-value tradeoff basis considering, in descending order of importance, technical, past performance, and price factors. Id. at 473. The non-price factors, when combined, were significantly more important than price. Id. The RFP advised that the agency would perform an integrated assessment of the strengths, weaknesses, and deficiencies of each proposal, together with the pricing proposed, to determine which proposal represented the best value. Id.

The technical factor was divided into three subfactors: management approach, communication plan, and clinic service provider network. Id. at 468-469. The RFP stated that the agency would assign adjectival ratings of excellent, good, acceptable, marginal, or unacceptable for the technical capability factor and no separate ratings for each subfactor. Id. at 470. Under the past performance factor, offerors would receive confidence ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence/neutral. Id. at 472.

The agency received seven proposals in response to the RFP. Agency Report (AR), Tab 3, Contracting Officer's Statement of Facts (COSF), at 1. After performing an initial evaluation, the agency established a competitive range of six offerors, including Onsite and Dentrust. Id. After receiving revised proposals, the technical evaluation team (TET) performed a supplemental evaluation on June 26. Id.

On October 18, the agency issued Amendment 3, which incorporated a revised performance work statement (PWS) into the RFP. Id. at 2. The agency received and reviewed revised proposals submitted in response to Amendment 3, and held a second round of discussions on December 19. Id. In the second discussion letter provided to Onsite, the agency noted that the firm had no significant weaknesses, deficiencies, or adverse past performance in its proposal. Id. Dentrust, however, was presented with adverse past performance information to which it had not previously had an opportunity to respond. Id.

Five offerors responded to the agency's discussion letters. Relevant here, the TET evaluated Onsite's and Dentrust's proposals as follows:

	Technical Approach	Past Performance	Price
Onsite	Good	Substantial Confidence	\$73,326,128
Dentrust	Excellent	Substantial Confidence	\$75,786,334

AR, Tab 5, Source Selection Decision (SSD) at 74.

The contracting officer, acting as the source selection authority (SSA), reviewed the TET's report and conducted an integrated assessment of proposals against the RFP's evaluation criteria. Id. at 80, 81. The SSA concluded that Dentrust's proposal represented the best value to the government. Id. at 77. In particular, the SSA found that Dentrust proposed an excellent technical approach, based in part on eight different strengths identified in Dentrust's proposal, including its network of specialists and its partnership with a drug testing lab network. Id. at 76. In making award, the SSA performed a price/technical tradeoff between Onsite, which had offered the lowest price, and Dentrust, the highest technically-rated offeror. The SSA noted that both firms' proposals received ratings of substantial confidence for past performance, although Onsite "arguably ha[d] better past performance." Id. at 75. The SSA concluded, however, that Dentrust's technically superior proposal justified the 3.36 percent price premium associated with its proposal. Id. at 76. The agency awarded the contract to Dentrust on January 26. AR, Tab 3, COSF at 2. On January 30, the agency provided a written debriefing to Onsite. Id. This protest followed.

DISCUSSION

Onsite's protest first contends that the agency improperly evaluated Dentrust's past performance. Comments and Supp. Protest at 4-11. Onsite additionally alleges that Dentrust's proposal is ineligible for award because it took exception to the fixed-price nature of the contract. Id. at 11-13. Finally, Onsite alleges that the agency unreasonably evaluated technical proposals. Id. at 15-18. We have considered all of Onsite's arguments and, while we do not address all of them below, we find that none provide a basis on which to sustain the protest.¹

¹ In its initial protest, Onsite alleged that its proposal should have received an excellent rating under the technical approach factor and that the agency performed an improper cost/technical tradeoff. Protest at 6-9. In its memorandum of law (MOL), the agency provided a detailed response to these allegations. AR, MOL, at 2-6; 8-11. In its comments on the agency report, Onsite did not respond in any meaningful way to the agency's arguments. Instead, Onsite merely reiterated its previous allegations without providing a substantive response to the arguments advanced by the agency. Comments and Supp. Protest at 14-15; 20. Onsite had additionally alleged that the agency unreasonably and unequally credited a strength to Dentrust's proposal for its technical approach under the communication plan subfactor, while not giving a strength to Onsite which maintains that it proposed similar features. Comments and Supp. Protest at 16-17. In its supplemental agency report, the agency provided a detailed response to these allegations. Supp. AR at 13-16. Onsite, however, again did not provide any response to the agency's arguments in its comments on the supplemental agency report. 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. IntegriGuard, LLC d/b/a/ HMS Fed.--Protest and Recon.,

(continued...)

Past Performance Evaluation of Dentrust

Onsite alleges that in evaluating Dentrust's proposal, the agency improperly discounted Dentrust's adverse past performance. Comments and Supp. Protest at 10; Comments on Supp. AR at 8. Additionally, Onsite argues that because its performance assessment reporting system (CPARS) ratings were superior to Dentrust's, it should have received a higher past performance rating than Dentrust. Comments and Supp. Protest at 10; Comments on Supp. AR at 11.

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 discretion which we will not disturb unless the assessment is unreasonable or inconsistent with the solicitation criteria. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 4; Metropolitan Life Ins. Co., B-412717, B-412717.2, May 13, 2016, 2016 CPD ¶ 132 at 14. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. DynCorp Int'l, LLC, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 14; Falcon Env'tl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. WingGate Travel, Inc., *supra*; Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

Here, the record shows that the agency discovered that Dentrust had adverse past performance arising out of an ICE contract with similar requirements. Specifically, the agency found instances during the performance of this contract where Dentrust may not have adequately identified or discussed [deleted]. AR, Tab 11, Dentrust Discussions, Nov. 17, 2017, at 3.

After being notified during discussions of this adverse past performance, Dentrust submitted a list of clarification questions to the agency. AR, Tab 16, Dentrust Discussion Clarification Letter, at 1-2. In response, the agency provided Dentrust with a spreadsheet cataloging the performance issues that had been identified by the agency. AR, Tab 17, Dentrust Second Discussion Letter and Excel Spreadsheet, at 1. Dentrust then provided a detailed rebuttal to the issues identified. AR, Tab 8, Dentrust Proposal, at 81-96. After reviewing Dentrust's rebuttal, the SSA, as part of his SSD, concluded:

(...continued)

B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5. Thus, we view these aspects of Onsite's protest as abandoned and we will not address them.

Onsite arguably has [sic] better past performance record based on ratings reflected in 6 references and taking into account the performance issues Dentrust had concerning [the other contract]; however, it is the [c]ontracting officer's determination that both offerors are deserving of a [s]ubstantial [c]onfidence rating based on the record. The [c]ontracting [o]fficer particularly notes the substantive rebuttal provided by Dentrust in response to the potentially negative past performance information, Dentrust's continued effort to support proper performance throughout the process, and the government's share of responsibility for performance issues arising under that contract. The impact on Dentrust's performance record under [the other contract] does not warrant downgrading Dentrust's past performance rating from [s]ubstantial [c]onfidence. The [g]overnment has [s]ubstantial [c]onfidence that Dentrust can successfully perform the current requirement.

AR, Tab 5, SSD at 75.

Based on our review of the record, we find nothing unreasonable about the agency's evaluation of Dentrust's past performance. The agency notes that Dentrust submitted three relevant contracts that each rated Dentrust's performance as excellent. AR, Tab 13, Contracting Officer's (CO's) Supp. Statement of Facts, at 2. Additionally, the agency reviewed CPARS data, which indicated that Dentrust had two exceptional ratings, nine very good ratings, and no ratings below satisfactory. Id. at 2-3.

The record further reflects that the agency fully considered the potentially adverse past performance information discussed above. As the SSA notes, in his estimation, "the government was at least equally responsible for the performance issues that arose" during the course of performance of the related contract. Id. at 3. He further states "I attribute the government's multiple failures, neglect, and lack of effective administrative control over the contract and program in general to be as much a part of the problem as any performance issue by Dentrust." Id. As a result, when the SSA considered these findings regarding the adverse past performance, in conjunction with the highly-rated references and CPARS data mentioned above, he concluded that he had a high expectation that Dentrust would successfully perform this requirement. Id. at 4. While Onsite disagrees with the agency's assessment that Dentrust's past performance warranted a rating of substantial confidence, such disagreement, without more, is insufficient to show that the agency's evaluation of Dentrust's past performance was unreasonable or otherwise inconsistent with the RFP's stated evaluation criteria. See Centerra Group, LLC, B-414800, B-414800.2, Sept. 21, 2017, 2017 CPD ¶ 307 at 8-10 (finding the protester's assertion that the agency ignored the awardee's adverse past performance to be nothing more than disagreement with the agency's judgment, where the record showed agency extensively considered the adverse past performance at issue).

Further, with regard to Onsite's assertion that it should have received a higher past performance rating than Dentrust due to its superior CPARS ratings, Comments on Supp. AR at 11, the RFP did not provide that CPARS data would directly correlate to

the confidence rating assigned. Rather, the RFP advised that the agency would perform an integrated assessment of recent and relevant contracts and past performance data to derive a confidence rating. RFP at 471-472. As a result, regardless of whether Onsite had superior CPARS ratings, as long as the agency reasonably had a high expectation that both firms would successfully perform the requirement, it was consistent with the RFP for the agency to assign a rating of substantial confidence to both Onsite and Dentrust.

Moreover, we note that our Office has consistently stated that in the final analysis, ratings, be they numerical, color, or adjectival, are merely a guide to, and not a substitute for, 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. As noted above, the agency explicitly stated that it considered Onsite's past performance to be "arguably" superior to Dentrust's past performance. AR, Tab 5, SSD, at 75. Accordingly, Onsite's preoccupation with its adjectival rating is misguided where, as here, the record shows that the agency looked beyond the adjectival ratings assigned and considered the underlying merits of the respective firms' past performance. See Kollsman, Inc., supra.

Dentrust Proposal Assumptions

Onsite alleges that Dentrust's proposal is ineligible for award because it took exception to the requirements of the RFP. Comments and Supp. Protest at 12. Onsite asserts that Dentrust took exception to the fixed-price nature of the contract by conditioning its pricing under two separate contract line item numbers (CLINs) on assumptions contained in its proposal, effectively limiting Dentrust's risk and costs by shifting them to the agency. Comments and Supp. Protest at 13. For the reasons discussed below, we find no merit to this aspect of Onsite's protest.

A proposal that takes exception to a solicitation's material terms and conditions must be considered unacceptable for award. See, e.g., Kratos Defense & Rocket Support Servs., Inc., B-413143, B-413143.2, Aug. 23, 2016, 2016 CPD ¶ 227 at 5. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. Id. Where a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. Dev Tech. Grp., B-412163, B-412163.5, Jan. 4, 2016, 2016 CPD ¶ 10 at 5; see Advanced Techs. & Labs. Int'l, Inc., B-411658 et al., Sept. 21, 2015, 2015 CPD ¶ 301 at 10. Nonetheless, this Office will not sustain a protest where the record reflects a procuring agency's reasonable determination that the awardee's proposal did not take exception to the solicitation's requirements. See SRA Int'l, Inc.; NTT DATA Servs. Fed. Gov't., Inc., B-413220.4 et al., May 19, 2017, 2017 CPD ¶ 173 at 20-21; Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 11.

With regard to pricing, the RFP required offerors to propose a unit price that was inclusive of all the offeror's direct costs, indirect costs, and profits, as well as costs

associated with providing the services described in the PWS and the offeror's technical proposal. RFP at 473. Offeror's were also required to complete a pricing matrix for the services contemplated by the RFP with fixed prices. Id. at 161.

Onsite argues that Dentrust took exception to the fixed-price nature of the CLIN for performing tuberculosis (TB) skin tests by making its pricing contingent upon a low occurrence of positive test results. Comments and Supp. Protest at 12-13. To support this argument, Onsite quotes the following from Dentrust's proposal: "[i]t is assumed that a positive result will have a [deleted]." Id. at 13 (citing AR, Tab 8, Dentrust's Proposal, at 18). Additionally, Onsite argues that, while the RFP requires that "[r]andom drug testing shall be performed predominantly at Government on-site work places . . .," RFP at 523, Dentrust's proposal excuses it from providing the agency's preferred on-site testing. To support this assertion, Onsite highlights that Dentrust's proposal states that the firm "has assumed a minimum of [deleted] personnel be available for testing to send a [c]ertified [d]rug [c]ollector to test at a government facility." Comments and Supp. Protest at 13 (citing AR, Tab 8, Dentrust's Proposal, at 37).

Contrary to Onsite's assertions, the record is clear that Dentrust's proposal did not take exception to the fixed-price nature of the contract.² The record shows that Dentrust submitted fixed-prices utilizing the RFP's pricing schedule and that no exceptions were included in its price proposal. AR, Tab 8, Dentrust Proposal, at 41. Further, Dentrust's pricing was not made contingent, or conditioned in any way, upon the accuracy of the assumptions discussed above. With regards to the TB test requirement, while Dentrust's proposal assumed [deleted], the firm did not make its pricing contingent on that rate, nor did it excuse Dentrust from performing at its offered fixed-price under this CLIN should there be a higher rate of positive occurrence. Similarly, Dentrust's assumption that there will be a minimum of [deleted] personnel available for testing at the government facility does not excuse Dentrust from honoring its fixed-price rate under this CLIN if there are less than [deleted] personnel available.

Rather, the record shows that these assumptions were included in Dentrust's technical proposal to demonstrate the firm's understanding of the RFP's requirements. The SSA states that he interpreted these assumptions as "informing the [agency] of Dentrust's understanding of the PWS requirements," but that they do not condition the performance of work or proposed pricing. AR, Tab 13, CO's Supp. Statement of Facts, at 6. We also note that Dentrust expressly affirmed that it agreed to all terms,

² In its comments on the supplemental agency report, Onsite argues that "the contemporaneous record does not acknowledge or address the exceptions taken by Dentrust." at 12. The contemporaneous record here is clear that Dentrust's proposal did not take exception to the requirements of the RFP. Accordingly, there was no need for the agency to document such considerations. See BillSmart Solutions, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 at 14 n.19 (noting that our Office does not expect an agency's evaluation report to "prove a negative," and document why an offeror's assumptions were not considered exceptions).

conditions, and provisions included in the solicitation and affirmed that it took no exception or deviations to the terms of the RFP. AR, Tab 8, Dentrust Proposal, at 71. Accordingly, we find no merit to Onsite's allegation that Dentrust's proposal assumptions took exception to material provisions of the RFP.³

Technical Evaluation of Onsite

Onsite alleges the agency unreasonably evaluated its proposal under the clinic service provider network subfactor. Comments and Supp. Protest at 15-16. In this regard, Onsite argues that the agency unreasonably failed to assign its proposal a strength under this subfactor.⁴ Id. For the reasons discussed below, we find that these allegations provide no basis to sustain Onsite's protest.

An agency's evaluation of technical proposals is primarily the responsibility of the contracting agency, since the agency is responsible for defining its needs and identifying the best method of accommodating them. Wyle Labs., Inc., B-311123, Apr. 29, 2008, 2009 CPD ¶ 96 at 5-6. In reviewing protests of an agency's evaluation, our Office does not reevaluate proposals; rather, we review the record to determine if the evaluation was reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. TransAtlantic Lines, LLC, B-411242, B-411242.2, June 23, 2015, 2015 CPD ¶ 204 at 9. Moreover, as noted above, there is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. See Kollsman, Inc., supra. A protester's disagreement with an agency's judgment in evaluating proposals is insufficient to establish that the agency acted unreasonably. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

Under this subfactor, the RFP advised that the agency would evaluate an offeror's existing capability to meet the requirements of the PWS as it relates to the offeror's clinic service provider network. RFP at 90. The RFP provided that the standard for this requirement is met when the offeror's proposal describes its organizational structure in

³ Onsite also alleged that the evaluation of Dentrust's proposal was unreasonable and "prevented a common and equal basis for the submission and evaluation of proposals" because Onsite complied with the RFP and offered fixed prices that were not contingent upon any assumptions. Comments and Supp. Protest at 13-14. As this allegation is premised on Onsite's assertion that Dentrust's proposal improperly took exception to the RFP's requirements, which has no merit, it follows that this allegation also has no merit.

⁴ The RFP defined a "strength" as "[a]n aspect of a proposal that appreciably decrease the risk of unsuccessful contract performance or that represents a significant benefit to the [g]overnment." RFP at 470.

sufficient detail for the agency to understand the offeror's process flow for managing requests, as well as the offeror's network coverage area. Id. at 90. In evaluating Onsite's proposal under this subfactor, the agency found that Onsite proposed a complete clinic service provider network. AR, Tab 5, SSD, at 39. The agency, however, concluded that this proposal feature did not merit a strength because Onsite's proposal did not expressly indicate if it had existing contractual relationships with the clinics identified in its proposal. Id.

Onsite argues it was unreasonable for the agency not to assign the firm a strength under this subfactor due to concern over whether it had existing relationships with its proposed network of clinics. Comments and Supp. Protest at 16. Onsite asserts that "the clear context of the language in the Onsite proposal is that Onsite has existing relationships with the referenced clinics." Id. Additionally, Onsite argues that the RFP did not require offerors to address the contractual status of clinic relationships. Id.

Based on our review of the record, we find nothing unreasonable about the agency's conclusion that Onsite's proposal did not warrant a strength under this subfactor. As noted above, there is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. Kollsman, Inc., supra.

Here, the record shows that the agency fully considered Onsite's clinic network, and found it to be sufficient. AR, Tab 5, SSD, at 39. The solicitation provided that a strength would be assigned only where an offeror's proposal feature either appreciably decreased the risk of unsuccessful contract performance or represented a significant benefit. RFP at 91. Accordingly, there is nothing unreasonable, or inconsistent with the RFP, for the agency to conclude that, while Onsite's network met the solicitation's requirements, its failure to explicitly identify the existing contractual relationships with network providers meant that this feature did not warrant a strength. While Onsite disagrees with the agency's judgements not to find that its network warranted a strength, the protester's disagreement, without more, fails to show that the evaluation was unreasonable or otherwise inconsistent with the RFP, and provides no basis to sustain Onsite's protest. See FreeAlliance.com, LLC, B-414531, June 19, 2017, 2017 CPD ¶ 191 at 5; MSN Services, LLC, B-414900 et al., Oct. 4, 2017, 2017 CPD ¶ 310 at 5.

Evaluation of Dentrust's Proposal and Prejudice

Finally, Onsite alleges the agency unreasonably credited Dentrust's proposal for its perceived ability to meet hiring surges. Comments and Supp. Protest at 17-18. Onsite points out that the hiring surge requirement was removed as part of Amendment 3 to the RFP, and, therefore, it was unreasonable for the agency to assign a strength to this aspect of Dentrust's proposal. Id. The agency concedes that it erroneously assigned a strength to Dentrust's proposal for its perceived ability to meet hiring surges, but argues that Onsite was not prejudiced by this error. Supp. AR at 17-18. We agree with the agency that the erroneous assignment of this strength was not prejudicial to Onsite.

Competitive prejudice is an essential element of every viable protest, and where no prejudice is shown or otherwise evident from the record, we will not sustain a protest, even if the agency's actions arguably were improper. Avaya Gov't Solutions, Inc., B-409037 et al., Jan. 15, 2014, 2014 CPD ¶ 31 at 6; General Dynamics Info. Tech., Inc., B-414387, B-414387.2, May 30, 2017, 2017 CPD ¶ 176 at 8. The record shows that Dentrust's proposal was rated as technically superior to Onsite's. AR, Tab 5, SSD, at 74. In particular, the SSA identified eight different strengths of Dentrust's proposal, including its network of specialists and its partnership with a drug testing lab network, that justified the price premium associated with its proposal. Id. at 76, Table E.1. Notably, the ability to meet hiring surges was not one of the features mentioned by the SSA in his tradeoff decision. Id. As a result, even if Dentrust's proposal did not receive a strength for the ability to meet hiring surges, the record is clear that Dentrust's proposal still would be higher technically rated than Onsite's proposal. Accordingly, removing this strength would not alter the agency's SSD; in fact, the record reflects that this strength was not even a consideration in the SSD. Id. We therefore find that, although the record shows that the agency assigned this strength to Dentrust's proposal in error, the error was not prejudicial to Onsite.

The protest is denied.

Thomas H. Armstrong
General Counsel