



# Decision

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**Matter of:** 22nd Century Technologies, Inc.

**File:** B-416669.5; B-416669.6

**Date:** August 5, 2019

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Scott N. Flesch, Esq., Major Adam Kama, Harry M. Parent, Esq., and Lieutenant Colonel Andrew J. Smith, Department of the Army, for the agency.

Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest alleging that the agency unreasonably failed to assign multiple strengths to protester's proposal is denied where protester fails to demonstrate that the agency's evaluation was unreasonable.
2. Protest challenging the evaluation of proposals is denied where the awardee's superior ratings stemmed from differences in the proposals and not from disparate treatment.

## DECISION

22nd Century Technologies, Inc., of McLean, Virginia, protests the issuance of a task order to LinTech Global, Inc., of Farmington Hills, Michigan, under request for task order proposals (TOPR) No. W91QF4-18-R-0005, by the Department of the Army, for information technology (IT) and support services. The protester challenges various aspects of the agency's evaluation of the technical proposals and the selection decision.

We deny the protest.

## BACKGROUND

The TOPR was issued on May 18, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, via the General Services Administration's (GSA) e-Buy system, to

holders of GSA's 8(a) Streamlined Technology Acquisition Resources for Services II (STARS II) governmentwide acquisition contract, which is a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract established to provide various IT services and service-based solutions. Agency Report (AR), Tab 3, TOPR at 1; Contracting Officer's Statement (COS) at 1. The solicitation contemplated award of a single fixed-price task order with one 12-month base and two 12-month option periods, to provide a full range of IT and support services to systems (hardware and software), infrastructure, maintenance and operation of the academic network for the entire Defense Language Institute Foreign Language Center campus.<sup>1</sup> TOPR at 9, 23; AR, Tab 4, TOPR, attach. 1, PWS, at 1-3.

Award was to be made on a best-value tradeoff basis considering the following evaluation factors: technical response, management and staffing plan, past performance, organizational conflict of interest (OCI) mitigation plan, and price. TOPR at 27. The TOPR advised that the technical response and management and staffing factors were of equal importance, and when combined, were significantly more important than the past performance and OCI mitigation plan factors, which were of equal importance. When combined, the non-price factors were significantly more important than price. Id.

The agency received four proposals by the June 25, 2018 closing date, including those from 22nd Century and LinTech.<sup>2</sup> COS at 1. The agency conducted discussions with 22nd Century and LinTech and requested revised proposals from the two offerors.<sup>3</sup> Id. at 2. On July 30, 22nd Century was notified that award had been made to LinTech. Id. On August 9, 22nd Century filed its first protest with our Office, which was docketed as B-416669. Id. On September 5, the agency advised that in response to the protest, it

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<sup>1</sup> The TOPR explains that the scope of the work would include IT support services, network/cybersecurity; and development operations, and provided a detailed description of 38 tasks required under the task order. TOPR, attach. 1, Performance Work Statement (PWS), at 20-39. For example, these tasks included setup desktop/notebook computers, service deck support, academic network cybersecurity, and systems engineering.

<sup>2</sup> Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors" who submit "quotations" and are "issued" task orders, the record and the parties' briefings primarily use the terms "offerors," "proposals," and "award." For the sake of consistency with the record, we use the agency's nomenclature.

<sup>3</sup> The TOPR specifically stated that because the procurement was conducted pursuant to FAR subpart 16.5, the procedures set forth in FAR subpart 15.3 did not apply. Nevertheless, the agency utilized a similar process to conduct exchanges with and request revised proposals from offerors the agency found to be the most highly rated. Compare TOPR at 27 with AR, Tab 9, Determination to Request Final Revised Proposals and Exchange Notice to 22nd Century.

would take corrective action by reevaluating proposals, opening discussions as necessary, and making a new award decision. Accordingly, we dismissed 22nd Century's protest as academic. 22nd Century Techs., Inc., B-416669, Sept. 10, 2018 (unpublished decision). On November 8, after being notified that award had again been made to LinTech, 22nd Century filed a second protest with our Office that was docketed as B-416669.2. COS at 2. 22nd Century filed a supplemental protest which was docketed as B-416669.3 after the agency report was filed. Id. On December 23, the agency notified our Office that it would again take corrective action in response to the supplemental protest. Specifically, the agency stated that it intended to request revised price proposals, conduct a new technical evaluation, and make a new award decision. We dismissed 22nd Century's protests accordingly. 22nd Century Techs., Inc., B-416669.2, B-416669.3, Dec. 28, 2018 (unpublished decision).

On January 25, 2019, the agency requested revised proposals from both offerors, which were evaluated as follows:

	<b>22nd Century</b>	<b>LinTech</b>
<b>Technical Response</b>	Good	Outstanding
<b>Management and Staffing Plan</b>	Acceptable	Good
<b>Past Performance<sup>4</sup></b>	Satisfactory Confidence	Satisfactory Confidence
<b>OCI Mitigation Plan</b>	Acceptable	Acceptable
<b>Total Evaluated Price</b>	\$21,915,518	\$27,379,498

AR, Tab 18, Task Order Decision Document (TODD) at 7, 12.

The contracting officer, acting as the source selection authority (SSA), performed a comparative assessment of the proposals, conducted a tradeoff analysis, and determined that LinTech's proposal represented the best value to the government. Id. at 13-16. 22nd Century was notified of the agency's decision to award the task order to LinTech on April 24, 2019. COS at 2; AR, Tab 19, Award Notice. After requesting and receiving a debriefing, this protest followed.<sup>5</sup>

<sup>4</sup> The solicitation advised that, for the past performance factor, the agency would assign a single performance confidence assessment rating based on the agency's assessment of the offeror's overall record of recency, relevancy, and quality of performance. TOPR at 29. The available ratings were: satisfactory confidence, neutral confidence, limited confidence, and no confidence. Id. As relevant here, a satisfactory confidence rating was defined as "[c]onfidence [b]ased on the offeror's recent/relevant performance record, the [g]overnment has a reasonable expectation that the offeror will successfully perform the required effort." Id.

<sup>5</sup> This protest is within our jurisdiction to hear protests of task orders valued in excess of \$10 million placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B); Booz Allen Hamilton Eng'g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 6 n.12. The authority under which we exercise our task order jurisdiction is

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## DISCUSSION

22nd Century challenges various aspects of the agency's technical evaluation of proposals and the selection decision. Specifically, the protester argues that the agency overlooked several features of its proposal that warranted strengths and merely assigned an acceptable rating to its proposal under the management and staffing plan factor. Additionally, the protester contends that the agency failed to assess a weakness to LinTech's proposal under the technical response factor, and that the Army treated offerors disparately. In filing and pursuing this protest, 22nd Century has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.<sup>6</sup>

### Management and Staffing Plan

22nd Century argues that the agency overlooked several features of its proposal that warranted strengths and merely assigned an acceptable rating to its proposal under the management and staffing plan factor. In this regard, the protester first argues that the agency failed to assess it a strength for having its incumbent personnel ready to perform on day 1. Protest at 10-11; Protester's Comments and Supp. Protest at 13-15.

The agency explains that a strength was defined as a feature that "enhances the merit of the proposal or increases the probability of successful performance of the contract." COS at 3. The agency further explains that the solicitation provided for a 10-day phase-in period and all offerors were expected to perform services at the beginning of the contract period. Id. As such, the agency did not assess a strength to the proposal

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determined by the agency that awarded the underlying IDIQ task order contract, which in this instance is GSA. Wyle Labs., Inc., B-413989, Dec. 5, 2016 CPD ¶ 345 at 4.

<sup>6</sup> For example, 22nd Century argues that the agency's past performance evaluation was disparate essentially because the agency failed to recognized 22nd Century's own perceived superiority of its past performance based on its incumbency. Protest at 13; Protester's Comments and Supp. Protest at 17-22. However, 22nd Century was assigned the highest possible rating under the solicitation's evaluation scheme and did not challenge LinTech's equally high past performance rating. Even if we were to view the facts in a light most favorable to the protester and agree with all the alleged strengths of its past performance proposal, there is no basis to sustain a protest where the agency has already assigned the highest rating possible for the evaluation factor and the protester did not challenge the awardee's past performance rating. 4 C.F.R. § 21.5(f); Charles F. Day & Assocs., LLC, B-411164, June 2, 2015 CPD ¶ 173 at 5-6 (dismissing challenge to past performance evaluation as failing to state a valid basis of protest where protester had already received the highest possible past performance rating). Accordingly, this argument is dismissed.

because it found that 22nd Century's proposal simply satisfied the requirements of the solicitation. Id.; Memorandum of Law at 7.

In reviewing protests of awards in a task order competition, we do not reevaluate proposals but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria, and applicable procurement laws and regulations. HP Enter. Servs., LLC, B-413888.2 et al., June 21, 2017, 2017 CPD ¶ 239 at 7. The evaluation of proposals in a task order competition, including the determination of the relative merits of proposals, is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Id. An offeror's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. Id.; STG, Inc., B-415580.4, B-415580.5, July 5, 2018, 2018 CPD ¶ 232 at 6 n.7.

The TOPR specified that full contract performance would begin after a 10-business day phase-in period that allowed the contractor to fill key positions and become familiar with the performance requirements, as well as complete required training and security requirements for its personnel. TOPR, attach. 1, PWS, at 3. The TOPR further stated that under the management and staffing plan factor, the offeror's proposal would be evaluated to determine if its proposed staffing plan was reasonable to ensure an adequate level of personnel to perform the work. TOPR at 27.

22nd Century's disagreement with the agency's assigned rating and its belief that its incumbency status entitles it to higher ratings or additional assessed strengths, lack merit and do not provide bases for finding the Army's evaluation unreasonable. FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10. There is no requirement that an incumbent be given extra credit for its status as an incumbent, or that the agency assign or reserve the highest rating for the incumbent offeror. See Modern Techs. Corp. et al., B-278695 et al., Mar. 4, 1998, 98-1 CPD ¶ 81 at 7. In this regard, the protester disagrees with the agency's evaluation, yet fails to explain how the agency's evaluation was inconsistent with the stated evaluation criteria. Furthermore, an agency is not required to document all aspects of its evaluation or explain why a proposal did not receive a strength, weakness, or deficiency for a particular feature. 22nd Century Techs., Inc., B-417336 et al., May 24, 2019, 2019 CPD ¶ 198 at 5; InnovaSystems Int'l, LLC, B-417215, B-417215.2, Apr. 3, 2019, 2019 CPD ¶ 159 at 10. Accordingly, the protester's contention that this aspect of its proposal deserved a strength does not provide a basis to conclude the agency's evaluation was unreasonable. STG, Inc., supra; LOGC2, Inc., B-412700.2, May 13, 2016, 2016 CPD ¶ 131 at 8. On this basis, this protest ground is denied. 22nd Century Techs., Inc., supra; Booz Allen Hamilton, Inc., B-414283, B-414283.2, Apr. 27, 2017, 2017 CPD ¶ 159 at 8.

22nd Century also argues that the agency ignored other strengths in its proposal such as the protester's approach to training its staff through a new training program, establishment of a "[c]enter of [e]xcellence," as well as 22nd Century's "strong

management approach that would be tailored for optimizing service output.” Protest at 12-13; Protester’s Comments and Supp. Protest at 15-17. The agency explains that the features the protester alleges were “overlooked” were in fact considered, however, the agency found that those features did not warrant the assessment of any strengths. COS at 3-4.

Again, the protester does not explain how the agency’s evaluation was inconsistent with the stated evaluation criteria. 22nd Century’s objection reflects its view regarding the merits of its technical solution, but it does not demonstrate an improper evaluation. In this regard, a protester’s disagreement with an agency’s evaluation judgments, standing alone, does not establish that the evaluation was unreasonable. DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 12. This protest ground is denied. LOGC2, Inc., supra.

#### Technical Response

Next, 22nd Century argues that the agency unreasonably failed to assess a weakness to LinTech’s proposal under the technical response factor for its inability to handle lifecycle replacement (LCR) desktops.<sup>7</sup> In this regard, the protester argues that while the evaluators identified an “uncertainty” in LinTech’s proposal regarding its ability to accomplish the task in accordance with the solicitation’s requirements, the SSA unreasonably dismissed this concern. Protester’s Comments and Supp. Protest at 11-12; Protester’s Supp. Comments at 9.

The agency responds that the SSA assessed the concern documented by the evaluators. Specifically, the SSA concluded that while LinTech’s proposal did not repeat the standard and expected frequency set forth in the solicitation, it nonetheless provided a process and tools that would be used to accomplish the task. The agency further notes that 22nd Century, similarly, did not repeat the solicitation’s requirements but rather relied heavily on its experience as the incumbent to demonstrate its ability to fulfill the task. Supp. COS at 4.

LinTech was assessed three strengths, no weaknesses or deficiencies, and an overall outstanding rating for the technical response factor. AR, Tab 31, LinTech Consensus Evaluation. As relevant here, the TEB noted the following uncertainty with regard to LinTech’s proposal:<sup>8</sup>

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<sup>7</sup> As relevant here, the PWS specified the standard and expected frequency for LCR under task 1 (set up desktop/notebook computers). Specifically, the solicitation provided that lifecycle refresh efforts for staff and faculty computers would not typically exceed 10 per week, and for the classroom, up to 400 computers per week. TOPR, attach. 1, PWS, at 20.

<sup>8</sup> The TEB’s evaluation included, in addition to strengths, weaknesses, and deficiencies, observations it categorized as uncertainties or comments. See, e.g., AR, Tab 31, LinTech Consensus Evaluation at 2-3.

- 5.1.5-1.1.1.1: Not sure they can handle the volume of the LCR desktops within the week timeframe.
  - Please provide specific number of systems capable of being reimaged concurrently during LCR process.

Id. at 2. In the SSA's comparative assessment of the proposals and tradeoff decision, she acknowledged that the TEB identified uncertainties in the LinTech proposal based on LinTech's failure to repeat the standard and expected frequency for LCR set forth in the PWS. AR, Tab 18, TODD at 14. The SSA nonetheless found, after reviewing the proposal's narrated understanding of the requirement and approach to completing the task, that the proposed approach and solution would meet the stated requirements of the PWS. Id. at 14-15.

Here, the record shows that although both offerors provided their approaches to the task, neither offeror repeated the standard or expected frequency for LCR under task 1. See AR, Tab 25, LinTech Proposal at 4-6; AR, Tab 27, 22nd Century Proposal at 4-5.<sup>9</sup> While the protester may disagree with the SSA's judgment, on this record, 22nd Century's arguments provide no basis to object to the agency's evaluation. DV United, LLC, *supra*. Accordingly, this protest ground is denied.

#### Disparate Treatment

22nd Century argues the agency's assessment of three strengths to LinTech's proposal was unreasonable and reflected disparate treatment because 22nd Century proposed the same features in its proposal yet the agency did not assess any strengths to the protester's proposal. Protester's Comments and Supp. Protest at 2-10; Protester's Supp. Comments at 2-8.

In conducting procurements, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing offerors. Arc Aspicio, LLC et al., B-412612 et al., Apr. 11, 2016, 2016 CPD ¶ 117 at 13. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their offers evenhandedly against the solicitation's requirements and evaluation criteria. See Sumaria Sys., Inc.; COLSA Corp., B-412961, B-412961.2, July 21, 2016, 2016 CPD ¶ 188 at 10. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from

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<sup>9</sup> The contemporaneous record shows that the agency's evaluation and selection decision were properly based on revised proposals submitted by offerors in response to the agency's January 25, 2019 request for final revised proposals. In its production of the agency report and responses to the protest, however, the agency produced and referenced an earlier version of 22nd Century's technical proposal that is not identical in all aspects to the final revised proposal. This mistake in document production, though, did not affect the agency's evaluation and award decision.

differences between the proposals. Camber Corp., B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 8.

LinTech was assessed three strengths, no weaknesses or deficiencies, and assigned an outstanding rating under the technical response factor.<sup>10</sup> For the management and staffing plan factor, LinTech was assessed one strength, no weaknesses or deficiencies, and assigned a good rating. AR, Tab 18, TODD at 9-10. In the SSA's comparative assessment of the proposals and tradeoff decision, she found that each of these strengths exceeded the PWS requirements, reduced performance risk, and/or added benefit to the government. Id. at 14-15.

22nd Century argues for example, that the agency assessed a strength to LinTech's proposal for leveraging the Ivanti knowledge management system for help desk tickets while ignoring the same feature in the protester's proposal. Protester's Comments and Supp. Protest at 2-4; Protester's Supp. Comments at 2-3. The agency responds that while both offerors' proposals refer to the use of the Ivanti system, LinTech provided a more detailed and effective explanation of how it would leverage the Ivanti system and the benefit to the government, resulting in the assessment of a strength specifically for task 5.7 (service desk support). Supp. COS at 2.

Task 5.7 (service desk support) of the PWS required the contractor to "man" the service desk by logging each service desk call or walk-in request to the service desk in the Ivanti service desk database. TOPR, attach.1, PWS, at 22.

LinTech's proposal was assessed the following strength:

5.7-1.1.1.7: Leveraging knowledge base from Ivanti System collected for questions and systems remediation. The overall thoroughness, structure, and process is detailed to an above expectation level. The leveraging of knowledge base across the Ivanti System and through historical/outside experience will provide shortened or expedited work flows.

AR, Tab 31, LinTech Consensus Evaluation at 1. In the SSA's comparative assessment of the proposals and tradeoff decision, the SSA found that LinTech's proposed approach exceeded the PWS's requirements by implementing a knowledge management system to leverage knowledge articles for each and every closed help desk ticket. AR, Tab 18, TODD at 14. The SSA found that this additional troubleshooting and resolution resource would improve the first contact resolution (FCR) and mean-time to restore (MTTR) rates, which would translate to less down time for government employees. Id.

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<sup>10</sup> The strengths were assessed for LinTech's approach to task 5.5 (device support); task 5.7 (service desk support); and task 5.29 (redundancy and virtualization). See AR, Tab 31, LinTech's Consensus Evaluation at 1.

Based on our review of the record, while the protester may disagree with the SSA's judgment, 22nd Century's arguments provide no basis to object to the agency's evaluation. 22nd Century's own proposal explains that the service desk is the "single point of contact for faculty and students for any IT support." AR, Tab 27, 22nd Century Proposal at 11. LinTech proposed to implement an enterprise-wide knowledge management system and leverage knowledge articles with step-by-step troubleshooting procedures to improve FCR rates and reduce MTTR service. AR, Tab 25, LinTech Proposal at 11-12. In this regard, LinTech proposed to produce [DELETED]. LinTech also proposed to include in its [DELETED] the use of knowledge articles for every closed ticket to continuously improve the knowledge base. Id.

By contrast, 22nd Century's proposed approach to task 5.7 (service desk support) contained no discussion regarding the improvement let alone, maintenance of a knowledge base. AR, Tab 27, 22nd Century Proposal at 11-12. Similarly, while 22nd Century proposed to update the knowledge base for each ticket resolved for learning management and systems (LMS) support task (and not all closed tickets), 22nd Century did not provide step-by-step troubleshooting procedures to improve FCR rates and reduce MTTR service or propose to leverage knowledge articles.<sup>11</sup> Id. at 12-13.

As such, the difference in the assignment of strengths is the result of differences in the offerors' proposals and not disparate treatment. Given the inherently subjective nature of the evaluators' judgments at issue here, we conclude that it was within the agency's discretion to assign a strength to one offeror's proposal and not reach the same conclusion with respect to another offeror's different proposal. UltiSat, Inc., B-416809 et al., Dec. 18, 2018, 2019 CPD ¶ 6 at 9-10. Accordingly, this protest ground is denied.

22nd Century also argues that the agency engaged in disparate treatment by assessing a strength under the management and staffing factor to LinTech's proposal but not the protester's. Specifically, the protester argues that the agency assessed a strength for LinTech's proposal for proposing [DELETED] key personnel with certified information systems professional (CISSP) certifications but did not even acknowledging that 22nd Century proposed [DELETED] key personnel with CISSP certifications. Protester's Comments and Supp. Protest at 8-10; Protester's Supp. Comments at 7.

The agency explains that the solicitation required seven of the ten key personnel proposed to be information assurance technician level III certified. Supp. COS at 3 (citing TOPR, attach. 1, PWS, at 5-6). The agency also explains that, as noted by the protester, the CISSP certification was a significant certification and during the agency's evaluation, the Army did not overlook the fact that 22nd Century only proposed [DELETED] key personnel with CISSP certifications. Id. Rather, the agency concluded

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<sup>11</sup> Under task 5.8 (LMS support), the contractor was to provide support to end-users with learning management systems by responding to LMS service desk support requests by end-users, in accordance with the service level agreement contained in the TOPR. Id.

that with less than half of the proposed key personnel possessing CISSP certifications, 22nd Century's approach did not enhance the merit of its proposal or increase the probability of successful performance. Id. By contrast, the agency found that LinTech proposing over half of its key personnel as CISSP certified enhanced the merit of the LinTech proposal and increased the probability of successful performance. Id. As discussed above, an agency is not required to document all aspects of its evaluation or explain why a proposal did not receive a strength, weakness, or deficiency for a particular feature. InnovaSystems Int'l, LLC, *supra*. For the same reasons just discussed, this protest ground is denied. UltiSat, Inc., *supra* at 9-10.

Finally, the protester contends that the agency's best-value decision was flawed because of the flaws in the underlying evaluation. Protest at 14; Protester's Comments and Supp. Protest at 22; Protester's Supp. Comments at 14. Based on our review of the record, we conclude that the agency's evaluation, and the source selection decision, were reasonable and in accordance with the terms of the solicitation. Here, the record shows that the SSA provided a well-reasoned basis for a tradeoff that identified discriminators between the proposals and justified paying LinTech's higher price. As such, this allegation is also denied. Laboratory Corp. of America, B-414896.3, B-414896.4, July 13, 2018, 2018 CPD ¶ 264 at 12-13 ("Ultimately, since we deny all of the protester's arguments, we are provided no basis to question the agency's best-value tradeoff decision.").

The protest is denied.

Thomas H. Armstrong  
General Counsel