



## Decision

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

**File:** B-416669.7

**Date:** November 14, 2019

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Daniel J. Strouse, Esq., David S. Cohen, Esq., and John J. O'Brien, Esq., Cordatis LLP, for the requester.

Stephen Hernandez, Esq., and Harry M. Parent, Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for reconsideration of dismissal of one ground of protest is denied where requester has not shown any error of fact or law warranting reversal or modification of the decision.

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### DECISION

22nd Century Technologies, Inc., of McLean, Virginia, asks that we reconsider our decision in 22<sup>nd</sup> Century Techs., Inc., B-416669.5, B-416669.6, August 5, 2019, 2019 CPD ¶ 285, in which we denied 22nd Century's protest of the issuance of a task order to Lin Tech Global, Inc., of Farmington Hills, Michigan, under request for task order proposals (TOPR) No. W91QF4-R-0005, issued by the Department of the Army for information technology (IT) and support services. The requester alleges an error of law with regard to a single issue that was dismissed in our decision, concerning the agency's evaluation of past performance.

We deny the request.

### BACKGROUND

The TOPR, issued on May 18, 2018, contemplated the issuance of a task order 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. As relevant here, the solicitation advised that, for the past performance factor, the agency would assess the offeror’s probability of meeting the solicitation requirements and assign a single performance confidence assessment rating (satisfactory, neutral, limited or no confidence), based on the agency’s assessment of the offeror’s overall record of recency, relevancy, and quality of performance.<sup>1</sup> TOPR at 29. The highest available confidence rating, satisfactory, 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. The TOPR noted that “[a] separate quality assessment rating [was] not require[d].” Id.

22nd Century initially filed a protest challenging various aspects of the Army’s evaluation of offerors’ technical proposals and the selection decision. After 22nd Century filed a supplemental protest, the agency took corrective action, consisting of requesting revised proposals, conducting a new technical evaluation, and making a new award decision. 22nd Century’s and LinTech’s revised proposals were evaluated as follows:

	22nd Century	LinTech
<b>Technical Response</b>	Good	Outstanding
<b>Management and Staffing Plan</b>	Acceptable	Good
<b>Past Performance</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.

After proposals were evaluated, the source selection authority performed a comparative assessment of the revised proposals, conducted a tradeoff analysis, and again determined that LinTech’s proposal represented the best value to the government. Id. at 13-16. On July 30, 22nd Century was notified that award had been made to LinTech.

After being debriefed, 22nd Century filed another protest with our Office, again challenging various aspects of the evaluation and source selection. As relevant here,

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<sup>1</sup> With regard to quality, the TOPR stated that the agency would review all past performance information collected and determine the quality of the offeror’s performance, general trends, and usefulness of the information and incorporate these into the performance confidence assessment. TOPR at 29. The goal of the past performance evaluation was to “assess the offeror’s probability of meeting the solicitation requirements as indicated by that offeror’s record of past performance.”

22<sup>nd</sup> Century argued that the agency treated offerors disparately in its evaluation of past performance because the agency failed to recognize 22nd Century's own perceived superiority of its past performance, based on its incumbency. 22nd Century, B-416669.5, Protest at 13. The protester argued that the agency failed "to assign credit to 22nd Century for having performed with high quality marks on the most recent and relevant contract"; that a reasonable evaluation would have "noted that 22nd Century warranted a higher past performance rating"; and that LinTech and 22nd Century "should not have been assigned equal ratings for past performance." Id. In its comments on the agency report, the protester argued that the agency failed to look beyond the adjectival ratings or to account for any distinctions between the quality of 22nd Century's and LinTech's past performance. In this regard, the protester insisted that the agency failed to consider the quality of any offeror's past performance.

Our decision denying 22nd Century's protest addressed this issue only as an example among several of the protester's arguments that we found did not furnish any basis on which to sustain the protest. 22nd Century, supra, at 4 n.6. Noting that 22nd Century's proposal was already assessed the highest possible rating for this factor under the solicitation's evaluation scheme, and that the protester did not challenge LinTech's past performance rating, we concluded that in this circumstance, consistent with prior decisions of our Office, this aspect of the protest failed to state a valid basis of protest. As a result, we dismissed this argument in 22nd Century's protest, relying on our decision in Charles F. Day & Assocs., LLC, B-411164, June 2, 2015, 2015 CPD ¶ 173 at 5-6, in which we dismissed a challenge to the protester's past performance evaluation as failing to state a valid basis of protest where protester had already received the highest possible past performance rating.

## DISCUSSION

In its request for reconsideration, 22nd Century argues that our decision erred by permitting the agency to rely on adjectival ratings alone; and that the agency failed to consider the quality of offerors' past performance, or to document any assessment of the quality, "as required by the terms of the [s]olicitation." Request for Recon. at 2, 4.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. As discussed below, we find no error in our dismissal of this aspect of 22nd Century's protest.

To the extent 22nd Century's reconsideration request does not simply repeat the protester's arguments, it misconstrues the decision. As explained above, our decision dismissed the allegation in question because we concluded that it failed to state a valid basis of protest; we did not reach the merits or otherwise analyze the reasonableness of

the agency's evaluation judgments. While 22nd Century now alleges an error of law in the decision on the basis that, for example, "GAO explained that the agency's deviation from the Solicitation's requirements--and failure to assess quality--did not prejudice 22nd Century . . .", see Request for Recon. at 4, the decision did not address whether a "deviation" had taken place. Instead, it essentially found that where, as here, a protester complains that its proposal should have been assigned a higher rating than the highest rating available under the terms of the solicitation, it fails to state a valid basis of protest. Rather than demonstrating an error of law, this conclusion is consistent with the terms of this solicitation and established precedent. See CALIBRE Sys., Inc., B-414301.3, Sept. 20, 2017, 2017 CPD ¶ 305 at 9-10 (no valid basis of protest where protester received the highest rating available for past performance and did not provide specific information to challenge the awardee's past performance rating, other than insisting its own incumbency entitled it to a higher rating). 22nd Century has shown no error in the basis on which this ground of protest was dismissed.<sup>2</sup>

While 22<sup>nd</sup> Century is correct in asserting that, in general, reliance on adjectival ratings alone is an insufficient mechanism for evaluating proposals, we disagree that this general rule was violated in this case. Here, the solicitation expressly advised offerors that the highest possible past performance rating--satisfactory--was defined as reflecting "a reasonable expectation that the offeror will successfully perform." TOPR at 29. Given the solicitation's specific language defining the highest possible past performance rating, 22nd Century's assertion that it should have received greater credit than the solicitation contemplated fails to state a valid basis of protest. We find nothing in the solicitation to indicate that a proposal that exceeded the standard by which past performance would be assessed must be given additional credit, whether by rating or evaluation narrative.

All of the other "errors" that the requester now alleges in connection with the agency's evaluation of past performance--such as alleging that the agency failed to consider or document the quality of past performance--are matters our decision did not (and did not

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<sup>2</sup> Moreover, we also note that 22nd Century has neither specifically alleged nor shown that any error in this aspect of our decision would change the outcome of the decision, i.e., that such error would warrant reversal or modification of the decision. Given that LinTech's proposal was evaluated as superior to 22nd Century's proposal under both of the "significantly more important" factors, and that the SSA reasonably identified discriminators between the proposals under those factors that justified paying LinTech's higher price, see TODD at 13-16, we find no basis to conclude that the errors alleged by 22nd Century would, if valid, warrant reversal or modification of our decision. See Sotera Def. Sols., Inc., B-414056.4, Dec. 4, 2017, 2018 CPD ¶ 256 at 4 (where a party requesting reconsideration alleges error that would not affect the outcome of the decision, it does not meet GAO standard for reconsideration).

need to) address, given our dismissal of this protest ground.

The request for reconsideration is denied.

Thomas H. Armstrong  
General Counsel