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Decision

Matter of: Native Energy & Technology, Inc.

File: B-416783; B-416783.2; B-416783.3; B-416783.4

Date: December 13, 2018

John C. Dulske, Esq., and Bryan L. Kost, Esq., Dykema Cox Smith, for the protester. Kenneth B. Weckstein, Esq., and Shlomo D. Katz, Esq., Brown Rudnick LLP, for EMCOR Government Services, the intervenor. Kimberly L. Cohen, Esq., Department of Homeland Security, for the agency. Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of the awardee's technical proposal is sustained where the agency assigned strengths for features that were not included in the awardee's proposal, and were instead features that the agency inferred or assumed the awardee would provide based on its performance of the incumbent contract.
 2. Protest challenging the evaluation of the protester's technical proposal is dismissed where the protester's initial arguments were abandoned in its comments on the agency report and where newly-raised arguments are untimely, and denied where the protester's general arguments do not establish that the evaluation was unreasonable.
 3. Protest challenging the evaluation of the awardee's past performance is denied where the record shows that the agency reasonably considered both the awardee's performance problems as well as the awardee's satisfactory resolution of those problems.
 4. Protest challenging the award decision is denied with regard to the protester's argument that the source selection authority did not personally review the offerors' proposals, but is sustained with regard to the protester's argument that the errors in the evaluation of the awardee's technical proposal render the award decision unreasonable.
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DECISION

Native Energy & Technology, Inc. (NET), of San Antonio, Texas, protests the award of a contract to EMCOR Government Services, of Arlington, Virginia, by the Department of

Homeland Security, United States Customs and Border Protection (CBP), under request for proposals (RFP) No. 70B01C18R00000006, for maintenance and repair services. The protester argues that the agency unreasonably evaluated the offerors' technical proposals, unreasonably evaluated the awardee's past performance, and made an unreasonable award decision.

We sustain the protest in part, deny it in part, and dismiss it in part.

BACKGROUND

CBP issued the solicitation on December 21, 2017, seeking proposals to provide preventive maintenance and repairs of equipment at CBP facilities in the East Texas region. Agency Report (AR), Tab 3, RFP attach. 1, Performance Work Statement (PWS), ¶¶ C.1.2, at 2-3. The RFP anticipates the award of an indefinite-delivery, indefinite-quantity contract with fixed-price line items, for a base period of 1 year and four 1-year options. AR, Tab 3, RFP, at 4. The RFP will require the contractor to provide "labor, supervision, tools, materials, parts, equipment, transportation, licenses, permits, certifications and management necessary . . . for equipment and system maintenance and repairs at government facilities in the East Texas Region." PWS, ¶ C.1.3.1, at 3. EMCOR is the incumbent contractor for these requirements. Contracting Officer's Statement (COS) at 3.

The solicitation advised offerors that proposals would be evaluated based on price and three non-price factors, which were listed in descending order of importance: (1) technical approach, (2) overall management approach and methodology, and (3) past performance. RFP at 54-55. The technical approach factor had two subfactors: (1) overall technical approach, and (2) experience. Id. at 55. The first subfactor was "more important" than the second subfactor. Id. For purposes of award, the non-price factors were, when combined, "significantly more important" than price. Id.

CBP received proposals from nine offerors, including NET and EMCOR, by the closing date of February 8, 2018. AR, Tab 25, Source Selection Decision Memorandum (SSDM), at 1. The agency's technical evaluation team (TET) prepared a consensus evaluation report of offerors' proposals under the non-price factors, and the agency's source selection advisory council (SSAC) prepared an award recommendation document. The agency's evaluations of the protester's and awardee's proposals were as follows:¹

¹ For the technical approach evaluation factor and subfactors and the overall management approach and methodology evaluation factor, the agency assigned one of the following ratings: outstanding, very good, satisfactory, poor, or unacceptable. AR, Tab 25, SSDM, at 4. For the past performance factor, the agency assigned one of the following ratings: high confidence, satisfactory confidence, limited confidence, no confidence, or neutral. Id. at 4-5.

	NET	EMCOR
TECHNICAL APPROACH	VERY GOOD	OUTSTANDING
Overall Technical Approach	Very Good	Outstanding
Experience	Very Good	Very Good
OVERALL MANAGEMENT APPROACH AND METHODOLOGY	VERY GOOD	OUTSTANDING
PAST PERFORMANCE	HIGH CONFIDENCE	HIGH CONFIDENCE
PRICE	\$27,997,304	\$31,189,487

AR, Tab 25, SSDM, at 5.

The contracting officer, who was also the source selection authority (SSA), reviewed the TET evaluation report and the SSAC award recommendation. Id. at 1, 5. The SSAC report identified five strengths in EMCOR’s proposal that represented benefits or advantages as compared to NET’s proposal. See AR, Tab 24, SSAC Award Recommendation, at 13. As discussed in detail below, the contracting officer agreed that the strengths identified in the SSAC award recommendation were discriminators that represented “unique benefits and advantages” for EMCOR’s proposal as compared to NET’s proposal. AR, Tab 25, SSDM, at 14-15. Based on these five discriminators, the contracting officer concluded that EMCOR’s proposal “generated the best overall value to the Government,” and merited award as compared to NET’s lower technically-rated, lower-priced proposal. Id. at 15. The agency awarded the contract to EMCOR on August 14 and notified NET of the award on August 16. COS at 6. The agency provided NET a written debriefing and responses to questions. Id. This protest followed.

DISCUSSION

NET challenges CBP’s award to EMCOR based on four primary arguments: (1) the agency unreasonably evaluated the awardee’s technical proposal, (2) the agency unreasonably evaluated the protester’s technical proposal, (3) the agency unreasonably evaluated the awardee’s past performance, and (4) the award decision was unreasonable. For the reasons discussed below, we sustain the protest based on the first and fourth arguments.²

The evaluation of an offeror’s proposal is a matter within the agency’s discretion. National Gov’t Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5. In reviewing protests challenging an agency’s evaluation of proposals, our Office does not

² NET also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest on grounds other than those specifically identified herein.

reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5. Agencies must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Cubic Applications, Inc., B-411305, B-411305.2, July 9, 2015, 2015 CPD ¶ 218. A protester's disagreement with the agency's judgment in its determination of the relative merits of competing proposals, without more, does not establish that the evaluation was unreasonable. Veterans Evaluation Servs., Inc. et al., B-412940 et al., July 13, 2016, 2016 CPD ¶ 185 at 9-10.

Agencies must adequately document their evaluations, and where an agency fails to do so, it runs the risk that our Office will be unable to determine whether the agency's evaluation was reasonable. IBM Global Bus. Serv.--U.S. Fed., B-409029, B-409029.2, Jan. 27, 2014, 2014 CPD ¶ 43 at 4. Post-protest explanations that, or the other hand, provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of reasonableness of evaluation decisions--provided those explanations are credible and consistent with the contemporaneous record. The S.M. Stoller Corp., B-400937 et al., Mar. 25, 2009, 2009 CPD ¶ 193 at 13. However, where an agency offers an explanation of its evaluation during the heat of the adversarial process that is not borne out by the contemporaneous record, we generally give little or no weight to the later explanation. Solers Inc., B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 11-12; System Eng'g Int'l, Inc., B-402754, July 20, 2010, 2010 CPD ¶ 167 at 5 n.3.

Evaluation of EMCOR's Technical Proposal

NET argues that CBP unreasonably assigned five strengths to EMCOR's proposal that were cited as discriminators in the award decision as the basis for selecting EMCOR's higher-priced proposal for award. Specifically, NET argues that the features described in the strengths are nowhere to be found in EMCOR's technical proposal. The agency contends that it was proper for the agency evaluators to rely on their own knowledge of the awardee's performance of the incumbent contract to assume or infer that the awardee would perform the new contract in the same manner and thereby provide these features. For the reasons discussed below, we conclude that the record does not support the assignment of three of the five strengths cited as discriminators in favor of award to EMCOR.

Agencies must generally evaluate proposals based on material contained therein. See SeaArk Marine, Inc., B-248755, Sept. 21, 1992, 92-2 CPD ¶ 193 at 3; Primetec Inc., B-250018, Dec. 30, 1992, 93-1 CPD ¶ 19 at 5 n.2. We have recognized that an agency's evaluation is not generally limited to the four corners of an offeror's proposal, but may rely, in certain circumstances, upon other extrinsic information of which it is aware. Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 11. For example, agency evaluators may reasonably rely on their

personal knowledge of an offeror's past performance in the evaluation of certain matters, such as past performance, experience, or technical acceptability. See Del-Jen Int'l Corp., B-297960, May 5, 2006, 2006 CPD ¶ 81 at 7 (agency evaluators may reasonably consider personal knowledge of an offeror's past performance); Nuclear Prod. Partners, LLC; Integrated Nuclear Prod. Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112 at 20 (agency evaluators may reasonably consider personal knowledge of an offeror's experience); Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 6 (agency evaluators may reasonably consider personal knowledge regarding the capabilities of identified subcontractors to perform the work).

Although our Office has recognized that agencies may, in some circumstances, augment or supplement their evaluations with evaluators' personal knowledge, our decisions have not found that an agency may assume or infer that an offeror will perform a contract using a specific technical approach that is not included in the offeror's proposal and cite that approach or benefit as a discriminator in favor of award. Additionally, our Office has explained that agencies may not give incumbent contractors favorable evaluations due solely to their incumbency or the agency's assumption that an incumbent contractor will inherently perform the contract in a superior manner to a non-incumbent offeror. See Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD ¶ 146 at 11-12. With these principles in mind, we address three strengths cited as discriminators in the award decision in which we conclude that the agency improperly inferred or assumed were part of EMCOR's technical approach based on the evaluators' personal knowledge of the awardee's performance of the incumbent contract.

First Discriminator – Weekly Preventative Maintenance Forecasts

The PWS requires the contractor to provide preventative maintenance, which “includes the care and servicing . . . for the purpose of maintaining equipment and equipment controls in satisfactory operating condition by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop into major defects.” PWS, ¶ C.1.3.3.3, at 4. The RFP instructed offerors to “describe [their] technical understanding and approach to performing all tasks as delineated in the PWS.” RFP at 52. As relevant to preventative maintenance, offerors were required to “provide a comprehensive preliminary Preventive Maintenance Schedule for the base contract year.” Id. The overall technical approach subfactor of the technical approach evaluation factor stated that an offeror's proposal would be “evaluated on the Offeror's overall proposed technical approach to achieving the objectives of the Performance Work Statement and its demonstrated ability to perform the work.” Id. at 55.

The TET assigned EMCOR's proposal the following strength under the overall technical approach subfactor:

EMCOR Sr. Project Manager will provide a detailed monthly [preventative maintenance (PM)] schedule to the [contracting officer's representative

(COR)]. Their PM schedule provides a weekly forecast that exceeds monthly PWS requirement. The weekly schedule forecast will be effective by allowing EMCOR and CBP to coordinate site access as necessary. PWS, pg. 4 of 48.

AR, Tab 23, TET Report, at 40. This strength was cited in the award decision as one of the five discriminators in favor of award to EMCOR: “1) EMCOR’s proposed use of a detailed monthly [preventative maintenance] schedule which includes weekly forecasting which allows CBP and EMCOR to coordinate site access as necessary.” AR, Tab 25, SSDM, at 14.

NET notes that the strength assigned by the TET to the awardee’s proposal was essentially identical to a comment in the most recent Contractor Performance Assessment Reporting System (CPARS) report for the incumbent contract: “SCHEDULE: Monthly PM Schedule: Senior Project Manager provides a detailed monthly PM schedule to the COR. Their PM schedule provides a weekly forecast that exceeds monthly PWS requirement, and has proven to be effective allowing EMCOR and CBP to coordinate site access as necessary.” AR, Tab 18, EMCOR CPARS Report 2017-18, at 2. Additionally, the TET’s evaluation of EMCOR’s proposal does not cite the proposal itself or where the awardee offered this benefit; rather, it cites the section of the PWS under which the strength is assigned. See AR, Tab 23, TET Report, at 40.

More importantly, the protester notes that EMCOR’s proposal does not state that the awardee’s senior project manager will provide a weekly preventative maintenance forecast. Further, neither the “comprehensive preliminary Preventive Maintenance Schedule” required by the RFP, nor any other part of the awardee’s proposal addresses a weekly preventative maintenance forecast. See RFP at 52; AR, Tab 32, EMCOR Technical Proposal, Factor 1, at 3-5, Appendix A. The protester argues, therefore, that the agency improperly assigned a strength to EMCOR’s proposal based on its performance of the incumbent contract, rather than its proposal in response to the RFP.

CBP acknowledges that EMCOR’s proposal does not propose to provide a weekly preventative maintenance forecast. Supp. Memorandum of Law (MOL), Nov. 26, 2018, at 3; AR, Tab 33, Supp. Decl. of TET Chair, Nov. 26, 2018, at 1. The agency states, however, “[t]he TET was aware through EMCOR’s incumbency that these weekly meetings and coordination result in EMCOR providing weekly forecasts with their PM schedule.” AR, Tab 33, Supp. Decl. of TET Chair, Nov. 26, 2018, at 1. For this reason, CBP contends, it was appropriate for evaluators to rely on their “personal knowledge of how EMCOR implements its PM schedule on the current contract, in assigning this strength.”³ Supp. MOL, Nov. 26, 2018, at 4.

³ The agency also notes that parts of the awardee’s proposal refer to weekly or monthly reports concerning matters other than preventative maintenance: “EMCOR does propose to provide ‘[DELETED]’ that ‘[DELETED]’ and ‘[DELETED].’” AR, Tab 33, Supp. Decl. of TET Chair, Nov. 26, 2018 at 1 (quoting AR, Tab 32, EMCOR Technical
(continued...))

We find that, in the absence of any discussion of this matter in the awardee's proposal, the agency improperly assumed that EMCOR would provide a weekly preventative maintenance forecast. In light of the RFP's direction to offerors to explain their approach to performing the PWS requirements, including a "comprehensive preliminary Preventive Maintenance Schedule," we find no basis for the agency to have assumed that a specific, discrete feature not included in the awardee's proposal would be provided during contract performance. We therefore conclude that the agency improperly assigned a strength to EMCOR's proposal based on this assumption, and that the contracting officer in turn improperly cited this benefit as one of the five discriminators that merited selection of EMCOR's proposal at a higher price as compared to NET's price.

Second and Third Discriminators – Computer Maintenance Management System

The PWS requires the contractor to provide a web-based tracking system/computer maintenance management system (CMMS). PWS, ¶ C.1.5, at 18. The CMMS will be "the primary tool for scheduling, reporting and recording of all maintenance and repair activities," and must "be able to receive, classify, identify, approve, schedule, track, analyze and report all work from inception to completion." Id. Information in the CMMS "shall be current and available to CBP personnel at all times." Id.

EMCOR proposed to use a customized software system for the CMMS requirement. AR, Tab 32, EMCOR Technical Proposal, Factor 1, at 1, 12. The TET assigned EMCOR's proposal the following two strengths under the overall technical approach subfactor:

2. EMCOR's proposed work control procedures for repairs and task orders is clear and concise. Their utilization of their CMMS ([DELETED]) system provides real-time status of cost and schedule which should allow CBP to efficiently manage the work flow process. All applicable documentation is attached to each work order which will allow CBP to easily audit for start/finish dates, quality control, and supporting cost documentation. In addition, all applicable supporting permits, certifications, test results, and warranties are attached, making them readily available for CBP's reference. The work order procedures exceed performance standards and CBP will benefit from real-time updates for all PM and repair service request which will improve decision-making,

(...continued)

Proposal, Factor 2, at 5). To the extent the agency argues that EMCOR's proposed approach to other meetings implies or suggests that the offeror will also provide weekly preventative maintenance forecasts not otherwise mentioned in its proposal, we do not think that the record supports this inference.

coordination, and communication between CBP and EMCOR. Factor I P.7.

3. EMCOR proposes its technicians use a [DELETED] mobile application to support work order tracking, data collection and quality control functions. This mobile application provides real-time service data. The CMMS is the primary tool for scheduling, reporting and recording of all maintenance and repair activities. CBP will benefit from real-time updates that will enhance reporting, communication and coordination between EMCOR and CBP. Factor 1 P.8.

AR, Tab 23, TET Evaluation, at 40-41.

These strengths were cited by the contracting officer in the award decision as two of the five discriminators in favor of award to EMCOR:

2) EMCOR's clear and concise work control procedures for repairs which includes real-time status of cost and schedule which allows CBP to efficiently manage workflow processes and includes documentation [] that allows CBP to easily audit for start/finish dates, quality control, and supporting cost documentation;

3) EMCOR proposed use of its technicians to use a [DELETED] mobile application to support work order tracking, data collection and quality control functions. This mobile application provides real-time service data, which will increase communication and coordination with CBP;

AR, Tab 25, SSDM, at 14.

NET argues that the second and third discriminators were unreasonably assigned because EMCOR's proposal does not specifically state that "[a]ll applicable documentation is attached to each work order," or that "all applicable supporting permits, certifications, test results, and warranties are attached." AR, Tab 23, TET Evaluation, at 40-41. In this regard, the protester argues that the agency again assumed that the awardee would perform the contract based on an approach not included in its proposal.

CBP argues that the information supporting the strengths assigned to EMCOR's proposal was either "expressly stated" or "reasonably inferred" from its proposal. AR, Tab 33, Supp. Decl. of TET Chairperson, at 2. In support of its position, the agency states that although the awardee's proposal does not specifically state that it will upload all the information in the CMMS, the TET relied on "personal knowledge" of how the contract had been performed and reasonably assumed or inferred that the awardee would perform in the same manner. Id.

Based on our review of the record, we agree with the protester that the awardee's proposal does not specifically state that it will attach information to work orders regarding permits, certifications, test results, and warranties in the manner cited in the award decision. Thus, for the reasons discussed above, we conclude that the agency unreasonably assigned these strengths based on the agency's presumption that the awardee would perform the contract in a manner similar to its performance of the incumbent contract—even though the awardee did not specifically state it would do so in its proposal.

Next, NET argues that EMCOR's proposal for its CMMS mobile application, which was cited as the basis for the third discriminator, failed to include training required by the PWS. See PWS, ¶ C.1.5, at 19. The agency "acknowledges that EMCOR's proposal does not expressly address training of Government personnel" as required by the PWS. Supp. MOL, Nov. 26, 2018, at 10; see also Supp. COS, Nov. 26, 2018, at 1; Supp. Decl. of TET Chairperson, Nov. 26, 2018, at 2. The contracting officer states, however, that he has "personal knowledge of EMCOR's prior and continued training of CBP personnel on CMMS and its capabilities as required by the PWS." Supp. COS, Nov. 26, 2018, at 1. For this reason, the contracting officer states that "even if EMCOR had received a weakness for not expressly addressing training," it would not have affected the award decision. Id. at 1-2.

Here again, we find that the contracting officer's knowledge of the awardee's performance of the incumbent contract does not provide a reasonable basis to conclude that the awardee will provide the required training that it omitted from its proposal. We also find no basis for the agency's assertion that the assignment of a weakness to the awardee's proposal based on its failure to address a mandatory PWS requirement would not have had an effect on the award decision. CBP acknowledges that its evaluation of EMCOR's proposal did not take this matter into consideration and therefore, despite the agency's post-protest reevaluation and characterization of the concern, we conclude that NET was prejudiced by this error in the evaluation. See Solers Inc., supra; System Eng'g Int'l, Inc., supra.

Finally, with regard to the second and third award discriminators, CBP assigned strengths to EMCOR's proposal because it provided benefits based on "real-time" access to information. AR, Tab 25, SSDM, at 14. NET argues that this aspect of the strengths was unreasonable because the awardee's proposal did not state that it will provide "real time" access to cost and schedule information in its [DELETED] CMMS and mobile application, but rather "near real time" access to data. See AR, Tab 32, EMCOR Technical Proposal, Factor 1, at 1, 8-9; Factor 2, at 1, 5. As the protester also notes, the awardee's proposal states that "[n]ear real-time access is dependent on [DELETED]." Id., Factor 1, at 1. Here again, this strength appears to be based on or related to a CPARS report for the incumbent contract: "[EMCOR's] utilization of their CMMS ([DELETED]) system provides real-time status of cost and schedule which allows CBP to efficiently manage the work flow process." AR, Tab 18, EMCOR CPARS Report 2017-18, at 2.

In response to the protest, the TET chairperson states that the agency was “aware that EMCOR was proposing ‘near real-time’ access to the status of cost and schedule matters and that this access would be dependent on [DELETED].” AR, Tab 33, Supp. Decl. of TET Chairperson, at 1. The TET chairperson states, however, that “[t]he TET found no substantive difference in ‘real time’ versus ‘near real-time.’” Id.

A dictionary definition of real time is “the actual time during which something takes place.” See Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/real%20time> (last visited, Dec. 7, 2018). Thus, a proposed approach to provide “near real-time” access to data must be something other than “real time.” Although the agency states that it was aware that the awardee used a different term in its proposal (near real-time) than was cited in the strength and award discriminator (real-time), the agency does not explain why the different terms were used or why the agency believed that there was no difference between the two.⁴ In light of the other concerns regarding the evaluation of the awardee’s proposal addressed above, we recommend that the agency review this matter as part of the corrective action recommended below.

In sum, we conclude that three of the five strengths cited by the agency as discriminators in favor of award to EMCOR are not supported by the record and do not have a reasonable basis. We therefore sustain the protest on this basis.

Evaluation of NET’s Technical Proposal

Next, NET argues that CBP unreasonably evaluated its technical proposal. Specifically, the protester argues that the agency unreasonably failed to assign strengths to its proposal, and also treated the offerors unequally in the evaluation of their proposals. For the reasons discussed below, we conclude that the protester’s comments on the agency report abandoned the challenges raised in its initial protest, and that other challenges subsequently raised either lack merit or are untimely.

NET’s first supplemental protest, which was filed prior to CBP’s filing of the agency report, challenged the agency’s evaluation of the protester’s proposal under the technical approach and overall management approach and methodology factors. Supp. Protest, Sept. 13, 2018, at 6-18. The protester identified five strengths it believed should have been assigned to its proposal. Id. at 10-11.

The agency’s report on the protest addressed each of the protester’s arguments in detail. See MOL, Oct. 9, 2018, at 19-25; AR, Tab 2, Decl. of TET Chairperson, Oct. 9,

⁴ For example, the agency’s response to the protest concerning the uploading of information to the awardee’s CMMS cites an area of EMCOR’s proposal which suggests that real-time access might be conditioned on the awardee’s approach to uploading information: “EMCOR’s proposal . . . states: ‘[a]ll information uploaded within [DELETED]; warranty information for new equipment within [DELETED].’” Supp. MOL, Nov. 26, 2018, at 7 (quoting AR, Tab 32, EMCOR Technical Proposal, Factor 2, at 15).

2018, at 11-14. The protester's comments on the agency report did not specifically address CBP's response in the agency report with regard to the five strengths the protester believes should have been assigned. See Protester's Comments, Oct. 19, 2018, at 16-18. Instead, the protester argued, generally, that the agency failed to apply the definition of a "strength" in an equal manner. Id. at 17. To the extent the protester believed that the agency report failed to adequately explain why its proposal was not credited with the five strengths identified in the first supplemental protest, the protester's comments did not specifically respond to the report. We therefore conclude that the protester's arguments in its first supplemental protest were abandoned.⁵ Bid Protest Regulations, 4 C.F.R. § 21.3(i)(3) ("GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.").

With regard to NET's argument that CBP evaluated the offerors' proposals based on the application of different definitions of a strength, this argument was timely raised in the protester's comments on the agency report. The agency's source selection plan defined a strength as follows: "[A] significant, outstanding, or exceptional aspect of the Offeror's proposal that is expected to positively impact contract performance and (1) exceed the PWS standard, (2) provide a useful capability that is included in the performance work statement, or (3) is inherent in the Offeror's proposal." AR, Tab 9, Source Selection Plan, at 15. The protester argues that the agency's evaluation of EMCOR's proposal departed from these evaluation criteria because the agency assigned strengths to the awardee's proposal for features that exceeded the PWS standards and provided "benefits" to the agency, but did not find that the features would have a "positive impact on contract performance." See Protester's Comments, Oct. 19, 2018, at 17. The protester argues that this relaxed standard resulted in improperly-assigned strengths for the awardee's proposal; alternatively, the protester argues that application of the relaxed standard should have resulted in the assignment of strengths to its own proposal. See id.

NET's argument does not cite any specific examples of alleged errors in the agency's evaluation, and instead generally characterizes the agency's evaluation as relying on differing definitions for each offeror. See id. In the absence of specific examples, we find no basis to conclude that the agency's evaluation was unreasonable. In any event, we do not find that the protester's arguments that the agency merely found "benefits" in the awardee's proposed technical approach was inconsistent with the agency's

⁵ NET stated in various filings that it did not intend to waive or abandon any of its protest arguments. See, e.g., Protester's Comments, Oct. 19, 2018, at 1 ("With the filing of Protester's Comments to the Agency Report, NET does not waiver or abandon any of the protest issues set forth in these protests."). As our Office has explained, however, merely referencing or restating a protest basis without substantively responding to an agency's detailed rebuttal amounts to abandonment of the protest basis. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

definition of a strength, or that the evaluation reflected unequal treatment of the offerors.⁶

In addition to the arguments discussed above, the protester raises several untimely arguments. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their basis. 4 C.F.R. § 21.2(a)(2); Dynamic Sec. Concepts, Inc., B-416013, B-416013.2, May 15, 2018, 2018 CPD ¶ 186 at 5. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements. Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 11 n.7. Additionally, our regulations do not contemplate the piecemeal presentation or development of protest issues; where a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed to adequately review the matter, these later issues will not be considered. CapRock Gov't Solutions, Inc. et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24.

Our Office granted CBP permission to respond to the protester's comments on the agency report; the agency filed its response on October 24. On October 30, the protester filed comments on the agency's response, which included new arguments regarding the evaluation of its technical proposal. Protester's Comments, Oct. 30, 2018, at 2-7. Specifically, the protester argued for the first time that the agency treated the offerors unequally because the five strengths cited in the award decision as discriminators in favor of award to EMCOR were also present in NET's proposal. Id. CPB requested that our Office dismiss these new arguments as untimely, and we provided the protester an opportunity to respond. Agency Request for Dismissal, Oct. 31, 2018, at 1-3; Protester's Response to Request for Dismissal, Nov. 5, 2018, at 2-4.

On November 5, our Office advised the parties that these new arguments were untimely because they were not filed within 10 days of when the protester knew or should have known of their basis. Electronic Protest Docket System Entry No. 42. Our conclusion was based on the fact that the protester was provided the award decision on October 9 as part of the agency report, but did not argue that its proposal should have been credited with the same discriminators that were identified by the SSA in the award decision until October 30. See 4 C.F.R. § 21.2(a)(2); CapRock Gov't Solutions, Inc.,

⁶ Additionally, the protester's arguments concerning the definition of a strength concern the source selection plan, rather than the solicitation--which did not define the term strength. As our Office has explained, an agency's source selection plan is an internal guide that does not give rights to offerors; it is the RFP's evaluation scheme, not internal agency documents such as source selection plans, to which an agency is required to adhere in evaluating proposals. Meadowgate Techs., LLC, B-405989, B-405989.3, Jan. 17, 2012, 2012 CPD ¶ 27 at 6 n.7.

et al., supra. In sum, we find no basis to sustain any of the protester's arguments concerning the evaluation of its proposal.⁷

Evaluation of EMCOR's Past Performance

Next, NET argues that CBP unreasonably evaluated EMCOR's past performance. Specifically, the protester argues that the agency did not reasonably consider what the protester contends were performance problems cited in the awardee's past performance references, and that the agency therefore could not have assigned the highest possible rating to the protester's proposal under the past performance factor. For the reasons discussed below, we find no basis to sustain the protest.

The RFP required offerors to identify up to three past performance examples that were similar in size, scope and complexity to the work described in the PWS. RFP at 54-55. The agency was to evaluate the "currency and relevancy" of the references to assess the offerors' "ability to perform the contract successfully." Id. at 55.

EMCOR submitted three past performance references: (1) the incumbent contract, (2) a contract with the Department of the Army at Fort Huachuca for equipment operations and maintenance services in Arizona, and (3) a contract with CPB for preventative maintenance for facilities in Arizona. AR, Tab 14, EMCOR Past Performance Proposal, at 1. The agency reviewed CPARS reports for the two CBP contracts, a past performance interview questionnaire for an Army contract reference that did not have a CPARS report, and also considered the personal knowledge of TET members and the contracting officer regarding the awardee's performance of the incumbent contract. AR, Tab 23, TET Report, at 43-44.

The TET's evaluation of the awardee's past performance for the incumbent contract and the second CBP contract found that both were current and relevant, and cited "very good" and "satisfactory" ratings for the awardee's performance which "demonstrates EMCOR's ability to perform the anticipated contract successfully." Id. at 43-44. For the Army contract, CBP also found that the reference was current and relevant with regard to the size and scope of the work, with limited relevance regarding the complexity of the work. Id. at 44. The agency found that an interview questionnaire reflected "a satisfactory impression" of the awardee's performance, which "demonstrates EMCOR's ability to perform the anticipated contract successfully." Id.

⁷ In addition, NET's supplemental comments on November 16 and December 3 argue that the agency treated the offerors unequally by failing to assign the protester's proposal the same strengths as those in the five award discriminators. Protester's Comments, Nov. 16, 2018, at 21-22; Protester's Comments, Dec. 3, 2018, at 7-14. As with the other issues discussed above, these arguments are untimely because they were not raised within 10 days of when the agency filed its report on the protest and the protester was made aware of those discriminators. See 4 C.F.R. § 21.2(a)(2).

The award decision repeated the findings of the TET, and assessed “high confidence” ratings for both offerors’ past performance. AR, Tab 25, SSDM, at 10-13. The contracting officer noted, however, that “[NET’s] Past Performance appears to be superior [to EMCOR’s], as all three references are considered relevant in terms of their size, scope, and complexity.” Id. at 13.

NET argues that CBP’s evaluation of EMCOR’s past performance was unreasonable because it failed to discuss performance problems that were identified in the CPARS reports, particularly for the incumbent contract. In particular, the protester notes that the CPARS report for 2015-16 cited problems with turnaround time for minor repairs, cost control, maintenance of information in EMCOR’s [DELETED] system, small business contracting, and quality control and deficiency reports. AR, Tab 16, EMCOR CPARS Report 2015-16, at 1-3. The report, which was prepared by the contracting officer, assigned a number of marginal ratings for the awardee’s performance. Id. at 2. NET also argues that, even if the agency took into consideration improvements in the awardee’s performance of the incumbent contract reflected in the more recent CPARS reports, the agency’s evaluation was “simply a forecast of future performance based on an expectation of continued improvement following award.” Protester’s Comments, Oct. 19, 2018, at 15.

In response to the protester’s arguments, the agency states that it considered the past performance issues cited in the protest, particularly those regarding the awardee’s performance of the incumbent contract as reflected in the earlier CPARS reports. COS at 3-5; AR, Tab 2, Decl. of TET Chairperson, Oct. 9, 2018, at 6-11. As the agency notes, the awardee’s performance on the incumbent contract improved, such that the final CPARS report for 2017-18 reported that all of the marginal ratings had improved to very good ratings. AR, Tab 18, EMCOR CPARS Report 2015-16, at 1-3.

The COS and the TET Chairperson explain that the agency took into consideration the awardee’s successful resolution of those problems and the overall trend of improvement in its past performance. The contracting officer states the following regarding his consideration of problems identified in EMCOR’s past performance record:

Although EMCOR had certain noted performance issues on the incumbent contract, those issues either had improved or were improving significantly based on EMCOR’s corrective action to render performance in all areas either Satisfactory or Very Good. Thus, in reviewing EMCOR’s confidence rating, I considered not only the problems encountered on the identified contracts but also EMCOR’s associated corrective actions and improvement over the years noted in CPAR, known by me personally or otherwise relayed to me by the COR. Based on all the information available to me at the time, I agreed with the TET that EMCOR’s past performance resulted in High Confidence that the offeror would successfully perform the anticipated effort.

COS at 4; see also AR, Tab 2, Decl. of TET Chairperson, Oct. 9, 2018, at 6-11.

Although the agency's contemporaneous evaluation does not discuss the negative past performance information concerning the awardee's performance reflected in the earlier CPARS reports, we think the agency's explanation that its evaluation focused on the more recent performance and performance trends is consistent with the information contained in those reports. See AR, Tab 16, EMCOR CPARS Report 2015-16, at 1-4; Tab 17, EMCOR CPARS Report 2016-17, at 1-3; EMCOR CPARS Report 2017-18, at 1-3. Here, the agency's response to the protest explains that the agency considered the negative information, but gave more weight to the more recent ratings and the awardee's ability to resolve the earlier performance problems.⁸ COS at 4; see also AR, Tab 2, Decl. of TET Chairperson, Oct. 9, 2018, at 6-11. The record shows that the more recent ratings and resolution of the performance problems were documented in the CPARS reports for the awardee, and are consistent with the agency's response to the protest allegations. For these reasons, we find no basis to conclude that the agency's evaluation failed to consider the negative past performance information. See Del-Jen Int'l Corp., supra, at 8 (protest denied where the agency's response to the protest regarding the evaluation of past performance is supported by and consistent with the contemporaneous record).

To the extent the protester argues that CBP's evaluation was unreasonable because it relied on EMCOR's improved performance trends and its corrective action in response to performance problems to "forecast" the awardee's likely performance, we find no basis to sustain the protest, as forward-looking assessments are the very essence of a past performance evaluation. In this regard, the Federal Acquisition Regulation (FAR) describes a past performance evaluation as follows: "Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered." FAR § 15.305(a)(2). As our Office has explained, the evaluation of past performance, including assessments of relevance and significance of an offeror's performance history, as well as trends in performance and corrective actions in response to performance problems, is a matter of agency discretion which we will not disturb unless those assessments are unreasonable. Wisconsin Physicians Servs. Ins. Corp., B-401068.14, B-401068.15, Jan. 16, 2013, 2013 CPD ¶ 34 at 10. We further note that the RFP's evaluation criteria were consistent with these principles, in that they stated that "[t]he Contractor's relevant Past Performance will be evaluated to assess the extent of its ability to perform the contract successfully," and that the "[s]ource of the information, context of the data, and

⁸ Our conclusions above regarding CBP's evaluation of EMCOR's technical proposal found that the agency improperly assumed, based on its personal knowledge of the awardee's prior performance, that EMCOR would provide benefits not specifically identified in its proposal. Here, in contrast, the evaluator's knowledge of specific facts regarding EMCOR's past performance is properly the subject of the past performance evaluation, and the agency's response to the protest is consistent with the contemporaneous record.

general trends in the Contractor's performance and any associated risk shall be considered." RFP at 55.

The record here shows that the agency considered the awardee's past performance record and upward trends in its performance, which demonstrates EMCOR's ability to respond to performance problems. Based on this information, the agency concluded that a "high confidence" rating was merited. AR, Tab 25, SSDM, at 10-13. The protester's disagreement with the agency's judgement regarding the weight to be accorded to trends in the awardee's past performance and its ability to address performance problems does not provide a basis to sustain the protest. See Logistics Mgmt. Int'l, Inc. et al., B-411015.4 et al., Nov. 20, 2015, 2015 CPD ¶ 356 at 21-22 (protester's disagreement with agency's judgement as to the weight and significance given to an offeror's corrective action efforts in response to negative past performance information does not provide a basis to sustain the protest).

Award Decision

Finally, NET argues that the award decision was flawed because the contracting officer, in his role as the SSA, improperly relied on the TET evaluation report and the SSAC award recommendation, and because of the underlying flaws in the evaluation of the awardee's proposal. For the reasons discussed below, we find no basis to conclude that the contracting officer's reliance on the evaluation report and award recommendation was improper. We agree, however, that the award decision was flawed based on the evaluation errors discussed above, and sustain the protest on this basis.

The FAR requires, in the context of a negotiated procurement, that a source selection decision be based on a comparative assessment of proposals against all of the solicitation's source selection criteria. FAR § 15.308. The FAR further states that while an SSA "may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment." Id. Source selection decisions must be documented, and include the rationale and any business judgments and tradeoffs made or relied upon by the SSA. FAR § 15.308.

We have consistently recognized that agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results in making an award decision. See, e.g., U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 15. Our Office has explained that so long as the ultimate selection decision reflects the selection official's independent judgment, agency selection officials may rely on reports and analyses prepared by others. See, e.g., Puglia Eng'g of California, Inc., B-297413 et al., Jan. 20, 2006, 2006 CPD ¶ 33 at 8. The fact that an SSA based his or her decision on the recommendation of the agency evaluators, without performing an independent review of all documentation, such as offerors' proposals, is not sufficient to show that the decision did not represent his own independent judgment. InCadence Strategic Solutions Corp., B-410431.2, Dec. 22, 2014, 2015 CPD ¶ 57 at 5.

Here, NET argues that the contracting officer, in his role as the SSA, did not perform a meaningful, qualitative analysis of the offerors' proposals as required by the FAR. Instead, the protester contends that the SSA's award decision relies on a "mechanical application" of the adjectival ratings and strengths assigned by the TET. Protester's Comments, Oct. 19, 2018, at 20. The agency acknowledges that the contracting officer did not review the offerors' proposals or conduct an independent review of the proposals. See Agency Response to Protester's Comments, Oct. 24, 2018, at 2-4. The record here shows, however, that the contracting officer reviewed and concurred with "the assessments and ratings assigned by the Technical Evaluation Team as well as the recommendations from the Source Selection Advisory Council." AR, Tab 25, SSDM, at 1. The contracting officer also "performed an independent analysis of the information provided in order to accomplish an integrated assessment of the Technical and Price Evaluation Team findings." Id. at 5. The award decision discusses the evaluation of each offeror's proposal, and identifies five discriminators in EMCOR's proposal that the SSA believed merited award notwithstanding NET's lower-proposed price. Id. at 14-15. On this record, we find no basis to conclude that the SSA's reliance on the TET evaluation report and the SSAC award recommendation was unreasonable. See InCadence Strategic Solutions Corp., supra.

Notwithstanding our conclusions about the process by which the contracting officer selected EMCOR's proposal for award, we agree with the protester that the flaws in the evaluation of the awardee's proposal render the award decision unreasonable. The awardee's proposal was assigned higher adjectival ratings as compared to the protester's proposal under the technical approach and the overall management approach and methodology evaluation factors; the agency concluded that NET's past performance record was "superior" to EMCOR's. AR, Tab 25, SSDM, at 5, 13. The awardee's proposed price was approximately \$3.19 million, or 11.4 percent, higher than the protester's proposed price. Id. at 5. Based on his review of the assessments by the TET and SSAC, the contracting officer concluded that the awardee's proposal merited selection at a price premium as compared to the protester's proposed price based on five discriminators. Id. at 14-15. As discussed above, however, we conclude that three of the five strengths that became award discriminators are not supported by the record and do not have a reasonable basis.

Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21. In light of our conclusions regarding three of the five discriminators cited in favor of award to EMCOR, and the fact that protester's proposal was lower-priced than the awardee's and was superior to the awardee's proposal under the past performance factor, we conclude that the protester was prejudiced by the agency's unreasonable evaluation. In this regard, the correction of these errors will require the agency to reevaluate the offerors' proposals and make a new award decision--which could result in the selection of the protester's proposal for award. We therefore sustain the protest.

CONCLUSION AND RECOMMENDATION

In sum, we conclude that CBP's evaluation of EMCOR's proposal was unreasonable. We recommend that the agency reevaluate the awardee's proposal consistent with our decision. If the agency believes that there are benefits associated with the awardee's performance of the incumbent contract that are not included in its proposal, or that deficiencies or weaknesses need to be addressed, we recommend that the agency reopen discussions with offerors and provide an opportunity to submit revised proposals. After completing the revised evaluations, the agency should make a new award decision

We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained part, denied in part, and dismissed in part.

Thomas H. Armstrong
General Counsel