



## Decision

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

**File:** B-417478.5

**Date:** April 28, 2020

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

Tudo N. Pham, Esq., Department of State, for the agency.

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### DIGEST

1. Request for reconsideration is denied where our decision did not contain any factual error because our Office properly reviewed whether the evaluation record was consistent with the solicitation's terms and conditions.
  2. Request for reconsideration is denied because the request does not demonstrate that our decision contained any legal error.
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### DECISION

22nd Century Technologies, Inc., of McLean, Virginia, requests that we reconsider our February 24, 2020, decision denying its protest alleging that the Department of State (DOS) unreasonably issued a task order to KCI-Acuity, LLC, of Leesburg, Virginia, under request for quotations (RFQ) No. 19AQMM19Q0098, for information technology (IT) support services. 22nd Century Technologies argues that our decision contained factual and legal errors with regard to our analysis of the past performance evaluation.

We deny the request for reconsideration.

On July 26, 2019, the DOS issued the solicitation to procure IT support services for the agency's Bureau of Information Resource Management. RFQ, Performance Work Statement (PWS), at 5-6, 9. The competition was limited to firms that were awarded Streamlined Technology Acquisition Resources for Services (STARS) II contracts, which are multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts awarded by the General Services Administration to participants in the Small Business Administration (SBA) 8(a) program to provide information technology services and

service-based solutions. RFQ, Submission Instructions, at 10. The RFQ contemplated the award of a time-and-materials task order to be performed over a 1-year base period and four 1-year option periods. *Id.*

The RFQ advised that award would be made on a best-value tradeoff basis considering the following four factors: management and technical approach; similar experience and past performance; staffing plan and key personnel; and, cost/price. RFQ, Evaluation Criteria and Methodology, at 3. For the similar experience and past performance factor, vendors were instructed to submit at least three past performance contract profiles referencing performance completed by the prime contractor. RFQ, Submission Instructions, at 5-6.

On November 13, 2019, the agency made award to KCI-Acuity. Agency Report (AR), Tab 52, Notice of Unsuccessful Vendor Letter. The agency concluded that KCI-Acuity's quotation represented a better value when compared to 22nd Century Technologies' quotation because KCI-Acuity offered a more advantageous technical quotation, and because 22nd Century's price quotation represented a high risk. AR, Tab 51, Source Selection Decision Document (SSDD), at 27-29.

On November 18, 2019, 22nd Century Technologies filed the underlying protest with our Office. It alleged that the DOS unreasonably evaluated vendors' quotations under the technical and price factors. Protest at 5-38; Protester's Comments and Supp. Protest at 2-15. Relevant to this request for reconsideration, the protester alleged that KCI-Acuity did not submit three past performance contract profiles for the prime contractor, and therefore KCI-Acuity's quotation should have been rejected for failing to comply with a material solicitation requirement. Protester's Comments and Supp. Protest at 2; Protester's Supp. Comments at 3-4.

Our Office denied that allegation. We explained that KCI-Acuity is a joint venture between Kalani Consulting, Inc. and Acuity, Inc., and that KCI-Acuity submitted four past performance contract profiles for Acuity, Inc., and another four profiles for its subcontractors. *22nd Century Techs., Inc.*, B-417483.3, B-417483.4, Feb. 24, 2020, 2020 CPD ¶ 74 at 13. We further explained that the Small Business Act, 15 U.S.C. § 644(q)(1)(C), and SBA regulations, 13 C.F.R. §§ 124.513(f), 125.8(e), direct an agency to consider the past performance information of individual partners when evaluating an offer submitted by a joint venture. *Id.* at 13-14. As a result, we concluded that the agency reasonably evaluated KCI-Acuity's quotation as complying with the solicitation requirement because the firm submitted four past performance contract profiles for one of its members. *Id.* at 15.

In its request for reconsideration, 22nd Century Technologies argues that our conclusion in this regard was in error. 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). Here, we conclude that the protester's request does not warrant reconsideration.

First, 22nd Century Technologies points out that KCI-Acuity referred to itself as the prime contractor in its quotation, as opposed to the joint venture members, and that the agency referred to KCI-Acuity as the prime contractor in its supplemental report. Req. for Recon. At 4. Thus, the protester asserts that our decision contained a factual error when we explained that the agency interpreted “prime contractor” as referring to the members because the agency never argued that “prime contractor” was subject to multiple interpretations. *Id.* at 4-5 (*citing* Supp. Memorandum of Law (MOL) at 3, 6, 7).

We deny this challenge because our decision does not contain a factual error. Our review is not bound by the parties’ arguments; rather, as noted in our decision, we review an agency’s evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. *22nd Century Techs., Inc., supra* at 4; *see also AlliedBarton Security Servs., LLC, B-299978 et al., Oct. 9, 2007, 2007 CPD ¶ 186* at 4-5 (our Office reviews the record, and all contemporaneous evidence including parties’ arguments, to determine whether the evaluation judgment was consistent with the evaluation criteria and applicable statutes and regulations). Thus, even assuming that the agency did not dispute that KCI-Acuity qualified as the “prime contractor” as that term was used in the solicitation, our analysis would nevertheless focus on whether the actual evaluation was reasonable in light of the RFQ’s criteria and would not be framed or restricted by the parties’ arguments.

In this regard, the record shows that the agency considered KCI-Acuity’s past performance contract profiles as meeting the solicitation’s criteria because the agency evaluated the firm’s referenced profiles and assigned the firm ratings of “very relevant” and “substantial confidence” for the similar experience and past performance factors. See AR, Tab 36, Technical Evaluation Report, at 4, 6-7; *see also* AR, Tab 51, Source Selection Decision Document, at 13-14 (showing that the agency considered the past performance information of the joint venture partner as demonstrating quality experience and meeting solicitation requirements). Thus, our decision did not contain any factual error because we correctly examined whether the agency’s interpretation (*i.e.*, application of the solicitation’s terms and conditions in this manner) was reasonable. Accordingly, we deny this request for reconsideration.

Second, 22nd Century Technologies argues that our decision contained a legal error. Specifically, the protester argues that our decision relied on 15 U.S.C. § 644(q)(1)(C), even though that statute is inapplicable to this acquisition. We deny this challenge because, while our decision cited that statute, we explained that the SBA regulations (*i.e.*, 13 C.F.R. §§ 125.8(e), 124.513(f)) showed that the agency reasonably credited KCI-Acuity with the past performance of one of its members. *22nd Century Techs., Inc., supra* at 15 (“We think the agency’s evaluation was reasonable, in light of the express requirements of the *SBA regulations* to consider the performance records of individual small business joint venture partners, and the SBA’s intent in promulgating them.”) (emphasis added). We also explained that the implementing regulations apply to task order procurements. *Id.* at 14. Furthermore, we note that the protester did not argue that the implementing regulations were inapplicable to this acquisition. Req. for Recon.

at 4. Accordingly, we deny this request for reconsideration because it does not show that our decision contained any legal error.

In any event, we do not think that the protester was prejudiced by any failure of the agency to enforce a material term of the solicitation. Even if 22nd Century's original protest allegation was correct (*i.e.*, that the agency unreasonably did not require KCI-Acuity to submit at least one past performance profile for its prime contractor because that term was a material solicitation requirement), we would not have a basis to sustain the objection. Our Office has explained that an agency may waive or relax a material solicitation requirement when the award will meet the agency's actual needs without prejudice to the other offerors. *Lockheed Martin Corp.*, B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14. Unfair competitive prejudice from a waiver or relaxation of the terms and conditions of the RFP for one offeror exists where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. *Id.*

Here, we would have no basis to conclude that 22nd Century Technologies was prejudiced because it never alleged that it would have altered its proposal. The protester did not allege that, had it known the agency would permit joint ventures to satisfy the solicitation requirement through the past performance information of its members, then it would have entered into a joint venture with another firm in order to submit a more competitive quotation. See Protester's Comments and Supp. Protest at 2-6; Protester's Supp. Comments at 2-4; Req. for Recon. at 4-5; *cf. Platinum Business Corp.*, B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 4 (protester was not prejudiced by agency's relaxing of a material solicitation requirement where it did not specify how it would have changed its proposal). Accordingly, we deny the request for reconsideration.

The request for reconsideration is denied.

Thomas H. Armstrong  
General Counsel