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Decision

Matter of: Cotton & Company, LLP

File: B-418380.4

Date: March 10, 2021

Thomas O. Crist, Esq., Benesch Friedlander Coplan & Aronoff, LLP, for the protester. Craig A. Holman, Esq., and Thomas Petit, Esq., Arnold & Porter Kaye Scholer LLP, for Ernst & Young LLP, the intervenor.

James A. Vatne, Esq., Amber M. Hufft, Esq., Ian Rothfuss, Esq., and Jessica M. Sitron, Esq., National Aeronautics and Space Administration, for the agency.

Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated vendors' past performance is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Cotton & Company, LLP (Cotton), of Alexandria, Virginia, protests the issuance of a task order to Ernst & Young LLC, of New York, New York, under request for quotations (RFQ) No. 80HQTR19Q0006, issued by the National Aeronautics and Space Administration (NASA), for the NASA Annual Financial Statement Audit (NAFSA). Cotton challenges the agency's evaluation of quotations and the source selection decision.

We deny the protest.

BACKGROUND

On July 18, 2019, NASA issued the RFQ under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. The RFQ was issued to vendors holding a contract under the General Services Administration's, Federal Supply Schedule Number 00CORP, PSS, entitled Professional Services Schedule; Financial and Business Solutions, SIN (special item number) 520-7, Financial & Performance Audits. Agency

Report (AR), Tab 1, RFQ at 5.¹ The purpose of the solicitation is to obtain an independent full-scope audit of the agency's annual financial statements, performed in accordance with generally accepted government auditing standards (*i.e.*, GAO's Government Auditing Standards) and Office of Management and Budget audit requirements, using statement of work-specified American Institute of Certified Public Accountants (AICPA) procedures. *Id.* at 42.

The solicitation contemplated the award of a fixed-price task order for a base period of 1-year and four 1-year option periods on a best-value tradeoff basis, considering the following evaluation factors: technical, past performance, and price. *Id.* at 5, 7, 107.

Under the RFQ, the agency would first evaluate the technical factor on a pass/fail basis, and then would evaluate quotations which received a technical rating of pass under the past performance and price factors. *Id.* The solicitation stated that the price factor was less important than past performance, and that a quotation with the lowest price may not be selected if award to a higher-priced vendor with more competitive past performance was determined to be most advantageous to the government.² *Id.* The solicitation also established that the agency would evaluate the quotations in accordance with FAR subpart 8.4. *Id.* at 101.

Of relevance to this protest, regarding past performance, the RFQ instructed vendors to provide certain specified information for no more than five of their most relevant contracts. *Id.* at 103. The solicitation stated that if a contract reference was deemed recent (*i.e.*, ongoing or completed within prior five years), and met the minimum average annual cost/fee incurred of at least \$1,000,000, the agency would then consider the contract reference's degree of relevance based on content and performance. *Id.* at 108. Specifically, the RFQ provided that the content relevance evaluation would primarily focus on the following:

The content relevance evaluation will primarily focus on the following specific areas of relevance: (1) audit of government owned, contractor-held property, (2) audit of environmental liability estimates, (3) use, knowledge, and understanding of the SAP [systems, applications and products] financial system, and (4) advanced knowledge of computer networking, including widely used protocols, firewall design, network and host-based intrusion detection system (IDS) deployment, and secure domain name system (DNS) implementation.

Id. at 108-109. The solicitation stated that the performance aspects of the relevance evaluation would be based primarily on customer satisfaction and contractor data in meeting technical, schedule, cost, and management requirements and the vendor's

¹ The citations to the agency record throughout this document use the Bates-stamped page numbering provided by the agency.

² The RFQ provided that past performance would receive one of the following level of confidence ratings, encompassing a performance component and a relevance component: very high, high, moderate, low, very low, or neutral. *Id.* at 109-111.

peer review report rating and quality control monitoring report. *Id.* at 109. In this regard, the solicitation also provided that the agency would consider the vendor's explanation concerning any problem it encountered on any of the identified projects, as well as any subsequent corrective actions taken. *Id.* at 109.

On August 19, timely quotations were received from three vendors, including Cotton and Ernst & Young. AR, Tab 11, Presentation to Source Selection Authority (SSA) at 579. NASA originally awarded the NAFSA order to Cotton on December 19. *Id.* at 584. Another vendor and Ernst & Young separately protested the award on December 30.³ NASA notified our Office of its intent to take voluntary corrective action by reevaluating vendors' quotations and making a new award decision. Agency Corrective Action Notice (B-418380). As a result, our Office dismissed the protests as academic. *CliftonLarsonAllen, LLP; Ernst & Young, LLP, B-418380, B-418380.2, Jan. 31, 2020 (unpublished decision).*

On September 22, 2020, the agency selected Ernst & Young for award, and Cotton filed a timely protest on October 2 with our Office. AR, Tab 11, Presentation to SSA at 584. The agency again notified our Office that it would voluntarily undertake corrective action by reevaluating vendors' past performance and making a new source selection decision and award. Agency Corrective Action Notice (B-418380.3). As a result, on October 23, our Office dismissed Cotton's initial protest as academic. *Cotton & Company, LLP, B-418380.3, Oct. 23, 2020 (unpublished decision).*

Following the second corrective action, the agency evaluated the quotations of Ernst & Young and Cotton, as follows:

	Technical Approach	Past Performance	Price (incl. options and travel)
Cotton	Pass	High	\$12,554,338
Ernst & Young	Pass	High	\$12,727,893

AR, Tab 11, Presentation to SSA at 587.

As relevant here, Cotton provided six past performance references, two of which did not meet the relevance criteria. *Id.* at 626. The agency determined that Cotton's experience had overall high performance and was overall very highly relevant, as the firm has experience from at least one contract in each of the specific areas of relevance and had performed a full scope federal financial statement audit. *Id.* at 626-628. Based on these findings, the agency assigned the firm a level of confidence rating of high. *Id.*

Pertinent to this protest, Ernst & Young provided five past performance references, two of which involved non-federal clients. *Id.* at 644. Evaluating all five references, the agency determined that Ernst & Young's experience had overall high performance and was overall very highly relevant, as the firm demonstrated relevant experience in each

³ As the third vendor is not relevant to this protest, that firm is not further discussed in the decision.

of the four specific areas of relevance across the references. *Id.* at 645. Additionally, the agency noted that Ernst & Young's contract with the Navy was individually considered very highly relevant in the type and complexity of services as this single contract covered each of the four specific areas of relevance. *Id.* Also, two of Ernst & Young's references involving contracts with publicly traded companies were deemed individually less relevant than contracts with federal agencies that follow federal accounting standards. *Id.* Based on these results, the agency assigned Ernst & Young a confidence rating of high. *Id.* at 644.

Based upon a comparative assessment of quotations, the agency concluded that Ernst & Young's quotation represented the best value to the government and made award to that firm. AR, Tab 12, Award Notification at 672-674. In reaching this conclusion, the agency explained that Ernst & Young's demonstrated ability to successfully perform all aspects of the NAFSA requirement under one contract warranted paying the small price premium associated with Ernst & Young's proposal. *Id.* at 674. This protest to our Office followed.

DISCUSSION

Cotton contends that NASA's evaluation of its quotation under the past performance factor was unreasonable and inconsistent with the RFQ's evaluation criteria. Protest at 6-9. In addition, Cotton argues that the agency unreasonably failed to consider numerous publicly available news articles concerning Ernst & Young's negative past performance and questionable business practices. *Id.* at 10-12. As discussed below, we find the agency's past performance evaluation and source selection decision unobjectionable.⁴

Where, as here, an agency issues an RFQ under FAR subpart 8.4 and conducts a competition, see FAR 8.405-2, we will review the record to ensure that the agency's

⁴ Although we do not specifically address all of the protester's arguments in this decision, we have fully considered them and find no basis on which to sustain the protest. For example, Cotton contends that the agency unreasonably evaluated its quotation by failing to give it credit for a contractor performance assessment report (CPAR) regarding the USTRANSCOM contract, which showed that its performance improved over the re-evaluation period. Protest at 9-10.

The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; a vendor's disagreement with an agency's evaluation judgments, by itself, does not demonstrate that those judgments are unreasonable. See *Burchick Constr. Co., Inc.*, B-417310.3, Jan. 27, 2020, 2020 CPD ¶ 60 at 4. Here, the record shows that the agency did not ignore the CPAR in question; rather, the record confirms that the agency considered this CPAR during its evaluation of Cotton's past performance. AR, Tab 11, Presentation to SSA at 631, 639; COS at 14. Despite Cotton's general disagreement as to the weight the agency gave this CPAR, we find no basis to disturb the agency's evaluation in this regard.

evaluation is reasonable and consistent with the terms of the solicitation. *OPTIMUS Corp.*, B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. In reviewing an agency's technical evaluation of vendor submissions under an RFQ, we will not reevaluate quotations; rather we will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement statutes and regulations. *American Recycling Sys., Inc.*, B-292500, Aug. 18, 2003, 2003 CPD ¶ 143 at 4. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *DEI Consulting*, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2. As described above, Cotton has raised various concerns with regard to the agency's past performance evaluation; we discuss them each in turn.

First, the protester notes that while its price and past performance rating were virtually equal with Ernst & Young's, the agency made award to Ernst & Young purportedly because the awardee performed a contract that encompassed all of the four key areas of relevance. Protest at 6. In this regard, the protester argues that giving credit to Ernst & Young for this aspect of its past performance constitutes the application of an unstated evaluation criterion. Cotton further contends that it performed contracts that included all four of the key areas of relevance, albeit not in one contract. In support, Cotton explains that it performed a contract auditing information systems more complex than NAFSA, which involved three of the areas of relevance. *Id.* at 8. In the alternative, Cotton also argues that even if performing all four areas of relevance in one contract was an evaluation criterion, it is not a logical discriminator among evenly rated proposals. *Id.* at 7.

The agency responds that the RFQ required that it assess the complexity of the vendors' past performance based "primarily" on the four areas of relevance. Contracting Officer Statement (COS) at 4 (quoting RFQ at 108). In this regard, the RFQ required vendors to provide specific information for each contract, and stated that the agency would "determine the degree of relevance--*i.e.*, level of pertinence--of *the contract*," based on the number of areas of relevance that the particular contract involved. RFQ at 108 (*italics added*). Thus, according to the agency, it reasonably considered the particular relevance of one of the awardee's individual contract references, rather than focusing exclusively on Ernst & Young's aggregate past performance, given the language of the RFQ. Memorandum of Law at 9.

Agencies may properly evaluate a quotation based on considerations not expressly stated in the RFQ where those considerations are reasonably and logically encompassed within the stated evaluation criteria and where there is a clear nexus between the stated and unstated criteria. *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340 at 18. In addition, we note that agencies need not disclose evaluation standards or guidelines for rating quotation features as more desirable or less desirable since agencies are not required to inform vendors of their specific rating methodology. *Open System Science of Virginia, Inc.*, B-410572, B-410572.2, Jan. 15, 2015, 2015 CPD ¶ 37 at 8.

Here, based upon our review of the record, we find that the agency's evaluation of Ernst & Young's past performance was reasonable and consistent with the solicitation.

As stated above, the awardee submitted five past performance reference contracts that were considered both recent and minimally relevant in size. The record also shows the agency determined that one of those contracts with the Navy was highly relevant in the type and complexity of services as it covered each of the four specific areas of relevance. AR, Tab 11, Presentation to SSA at 653-654. Even though RFQ did not specifically inform vendors that the agency would evaluate one contract that encompassed all four of the relevant areas as highly relevant, we find no basis to sustain Cotton's challenge here.

In this regard, we find the agency's consideration of whether one past performance reference covered all of the indicia of relevance to be logically encompassed within the RFQ provisions that provided that relevancy would be determined by the number of areas of relevancy that each contract covered. See *A-P-T Research, Inc.*, B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 4 (finding that agency's consideration of relevancy of individual past performance references was not inconsistent with terms of solicitation, particularly where the solicitation's evaluation criteria used the phrase "the contract," which "reasonably refers to each contract reference in the singular, rather than the totality of the contracts."). Furthermore, other than claiming that the agency applied unstated evaluation criteria, the protester has failed to provide a basis to question the reasonableness of the agency's evaluation of this past performance reference. Accordingly, this protest ground is denied.

Second, Cotton argues that the agency unreasonably failed to consider numerous publicly available news articles concerning Ernst & Young's poor past performance and questionable business practices. Protest at 10-12. For example, the protest states that the agency failed to consider past Public Company Accounting Oversight Board's (PCAOB) investigations of Ernst & Young demonstrating audit failure rates as high as fifty percent. *Id.* at 10. While Cotton acknowledges that this information relates to the awardee's non-federal audits, and that NAFSA is not subject to PCAOB inspection, the protester contends that Ernst & Young itself claimed its non-federal audits were relevant by identifying two non-Federal past performance examples. *Id.* at 12.

In response, the agency contends that news articles concerning vendors is not a type of information that the RFQ required the agency to evaluate, nor would the agency necessarily have been aware of these various news articles. COS at 29. The agency notes as well that the RFQ instructs vendors to provide "a copy of the firm's latest peer review report," and that Ernst & Young submitted a copy of its AICPA peer review report, which was less than one year old. RFQ at 103; AR, Tab 8, Correspondence with Ernst & Young at 418-420.

Further, during the development of the record, the contracting officer represented that the agency was not aware of the negative information when the agency evaluated Ernst & Young's past performance. COS at 29. Cotton replies that the agency should

have been aware of these articles and PCAOB reports because they were publicly available. Protest at 10-11. We find no merit to Cotton's contentions.

An agency is not required to hunt down and investigate any and all negative news articles concerning vendors when conducting past performance evaluations. See *Torres-Advanced Enterprise Solutions, LLC*, B-412755.2, June 7, 2016, 2016 CPD ¶ 167 at 19. While we have recognized that, in certain limited circumstances, an agency has an obligation to consider information bearing on a vendor's past performance when the record supports a conclusion that the agency was aware of the information and should have considered it, this is not one of those situations. See, e.g., *Affordable Eng'g. Servs., Inc.*, B-407180.4 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 334 at 13. Here, none of the contracts in question were identified by Ernst & Young in its proposal, and none of them involved performance for the same procuring agency as the instant procurement. As a result, there is no evidence to suggest that the agency knew or should have known of this information.

Second, we note that while Cotton provided numerous articles and PCAOB reports with its present protest (Protest, B-418380.4, exhs. K-U), most of this information was not included in Cotton's previous October 2, 2020 protest, despite the fact that most of this information pre-dated its previous protest by several months and even years.⁵ Protest, B-418380.3, at 8 n.2. In this regard, the protester's initial protest included a footnote that mentioned Ernst & Young's past performance referenced in a Wall Street Journal article, and included no legal theory as to why the agency should consider this matter. *Id.*; exh. H, *Wall Street Journal* article (Feb. 6, 2020). In Cotton's present protest, the argument has blossomed into a distinct protest ground with additional evidence and a stated legal theory. Compare *Id.* with Protest, B-418380.4, at 10-12. As discussed above, this argument is not only unpersuasive, it is untimely. Each of the articles and information discussed here could also have been included in Cotton's initial protest, hence, the protester has provided a piecemeal presentation of evidence that we view as untimely.⁶ See *Leader Communications Inc.*, B-417152.2, B-417152.3, June 26, 2019,

⁵ The one article that post-dated the first protest was Tab O, "String of Firms That Imploded Have Something in Common: Ernst & Young Audited Them," *Wall Street Journal* (Oct. 16, 2020). This article concerns Ernst & Young's work with many private firms throughout the world. Here, there has been no showing that the agency evaluators were aware or should have been aware of this article. Accordingly, we have no basis to conclude that the agency should have considered this information in its evaluation of Ernst & Young's past performance. See *Carthage Area Hospital, Inc.*, B-402345, Mar. 16, 2010, 2010 CPD ¶ 90 at 7.

⁶ Regarding the single article that was referenced in a footnote in Cotton's previous protest (Protest, B-418380.3 at 8 n.2; exh. H, "Ernst & Young Won a Multimillion Dollar Audit Spot. Investigators Want to Know Why," *Wall Street Journal* (Feb. 6, 2020), we find that this article involved dissimilar work, performed for a private firm. We see no basis to conclude that the agency was aware of, or had a duty to track down and investigate this negative story concerning unrelated work. See *TriWest Healthcare Alliance Corp.*, B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191 at 25.

2019 CPD ¶ 241 at 6 (specific legal arguments missing from earlier general challenges constitutes piecemeal presentation of arguments, and is prohibited); *Loyal Source Government Services, LLC*, B-407791.5, Apr. 9, 2014, 2014 CPD ¶ 127 at 4 (protest challenging the agency's failure to evaluate offerors' compensation plans was dismissed as untimely where the protester could have and should have raised the protest grounds during a prior protest).

Finally, Cotton challenges the agency's source selection decision, arguing that the best-value tradeoff rationale is incorrect because it is based on an unreasonable past performance evaluation, as discussed above. Source selection officials have broad discretion to determine the manner and extent to which they will make use of evaluation results, and must use their own judgment to determine what the underlying differences between quotations might mean to successful performance of the contract. See *ERC, Inc.*, B-407297, B-407297.2, Nov. 19, 2012, 2012 CPD ¶ 321 at 10.

Since we have found the protester's underlying challenges to the agency's past performance evaluation to be without merit, we find no basis to question the reasonableness of the agency's conclusion that Ernst & Young's slightly higher-priced quotation represented the best value to the government, a determination which was based on Ernst and Young's demonstrated ability to successfully perform all aspects of the NAFSA requirement under one contract. See AR, Tab 12, Award Notification at 672-674. We also note that this procurement is conducted pursuant to FAR subpart 8.4, and that FAR section 8.405-2(e) designates minimum documentation requirements. See also *USGC Inc.*, B-400184.2 *et al.*, Dec. 24, 2008, 2009 CPD ¶ 9 at 8-9. In this case, the record reflects that the agency met the minimum documentation requirements set forth in FAR section 8.405-2(e), and looked beyond the adjectival ratings and documented head-to-head comparisons between the two quotations.

The protest is denied.

Thomas H. Armstrong
General Counsel