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Decision

Matter of: ProSecure LLC

File: B-418397; B-418397.2

Date: April 15, 2020

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DIGEST

Protest challenging various aspects of the evaluation of offerors' past performance proposals is denied where, despite the manner in which the agency compared the magnitude of past performance references, there is no basis to conclude that the agency's evaluation was unreasonable or that the protester was prejudiced by the evaluation.

DECISION

ProSecure LLC, a small business¹ of Fairfax, Virginia, protests the award of a contract to CDA, Inc., doing business as MaxSent (MaxSent), a small business of Annapolis, Maryland, under request for proposals (RFP) No. 70RFPW19RWA000003, issued by the Department of Homeland Security, Federal Protective Service (FPS), for armed protective security officer services throughout Alaska. ProSecure challenges the agency's evaluation of proposals under the past performance and management approach factors, and alleges that the agency evaluated offers disparately.

We deny the protest.

BACKGROUND

¹ ProSecure is a small business mentor-protégé joint venture between Meritus Solutions Group, LLC (Meritus, the small business), and its Small Business Administration-approved mentor, American Eagle Protection Services Corporation (AEPS). Protest, att. 1, Decl. of Chief Executive Officer of Meritus ¶ 3; see 13 C.F.R. §§ 125.9(a), (b), (d). The ProSecure joint venture was approved by the Small Business Administration (SBA) on May 1, 2019. Agency Report (AR), exh. 5, ProSecure's Technical Proposal at xiii.

The agency issued the RFP on March 14, 2019, as a small business set-aside, anticipating award of a fixed-price indefinite-quantity contract for a base year and four 1-year option periods, on a best-value tradeoff basis. AR, exh. 2, RFP at 1-2, 11; Contracting Officer's Statement (COS) ¶ 2. Offerors were advised that proposals would be evaluated under three factors: relevant past performance; management approach; and price. RFP at 441. The relevant past performance factor was more important than the management approach factor, and the non-price factors, when combined, were more important than price. *Id.*

Of particular importance here, the relevant past performance evaluation factor was to assess the scope, magnitude, and complexity of the identified contract references performed within the preceding three years, either individually or in the aggregate, at the agency's discretion. *Id.* at 443. Each offeror could submit up to three past performance references, but for offerors that proposed a teaming arrangement, as defined in Federal Acquisition Regulation (FAR) subpart 9.6, the RFP permitted the submission of three additional references for partners and subcontractors. *Id.* at 444. In evaluating past performance, the RFP stated that FPS would "consider the quality of the [c]ontractor's relevant past performance." *Id.* at 443. Further, it provided that, "[i]n determining the rating for the past performance evaluation factor, the Government [would] give greater consideration to the contracts which the Government feels are most relevant to the RFP." *Id.* at 441-42.

The RFP included an attachment, entitled "Past Project Form," which instructed the offerors to provide detailed information for each past performance reference identified in the proposal, including the dollar value of each project, "number of posts manned," and "number of productive protective security officer hours per year."² RFP at 318.

The agency received 10 proposals by the closing date of May 29, 2019, including those from ProSecure and MaxSent. COS ¶ 4. FPS used a Technical Evaluation Team (TET) to review the technical proposals of the six lowest-priced offerors first, including proposals from ProSecure and MaxSent, and prepare a technical evaluation report summarizing the evaluation of each offer. COS ¶ 9.

To determine the relevancy of past performance, the TET identified benchmarks that would guide its evaluation process for scope, magnitude, and complexity of past performance references. AR, exh. 7, Technical Evaluation Report (TER) at 9.

² The Past Project Form provides no definition of "productive" protective security officer hours; the only instruction for completing that part of the form advises offerors to "[i]nsert the number of productive protective security officers hours under the contract on an annual basis." RFP at 319.

To be considered relevant in terms of magnitude, the TET established a threshold of 138,000 annual hours on past projects.³ *Id.*; COS ¶ 15.

In its review of ProSecure's proposal, the TET observed that ProSecure is a new joint venture entity (approved by the SBA on May 1, 2019) that did not have, and thus could not identify, any relevant past performance references for the joint venture itself. AR, exh. 7, TER at 30. In addition, the TET noted that ProSecure did not identify any relevant past performance references for Meritus, the small business serving as the joint venture's managing partner.⁴ The agency also could not locate any Contractor Performance Assessment Rating (CPAR) references or any past history reports for Meritus. *Id.*

The TET was able, however, to review three past performance references submitted by ProSecure for AEPS, the joint venture's other entity. The TET concluded that these references involved contracts that were relevant or partially relevant in terms of scope, magnitude, and complexity, as all three of them reflected the performance of armed protective security officer services, and two of them met the magnitude threshold of 138,000 annual performed hours. *Id.* at 27-29. Similarly, the TET found that several of the additional CPARs references it reviewed for AEPS were either relevant or partially relevant. *Id.* at 29-30. Notwithstanding these conclusions, the TET determined that when "only one partner [in a joint venture] has experience" pertinent to the current requirement, the risk increases; accordingly, it assigned the joint venture a rating of "acceptable" for the relevant past performance factor. *Id.* at 30.

In contrast, the TET evaluated the past performance references identified by MaxSent as "highly acceptable," finding them relevant or partially relevant to the current requirement, and noting that MaxSent was a well-performing incumbent. *Id.* at 18-20. The TET also noted that when viewed in the aggregate, the magnitude of all three past performance examples comprised 815,040 productive annual hours, and significantly exceeded the magnitude of the current requirement of 138,000 annual hours. *Id.* at 19. Additionally, the TET found all three of MaxSent's projects relevant in terms of complexity. *Id.*

³ In addition, the TET established the benchmark for scope as involving guard services. For complexity, the TET reviewed whether an offeror: (a) provided armed guard services; (b) performed security services similar to the Statement of Work in the solicitation, including the specific protective security officer qualifications and training requirements; type of permit, licensure and certification requirements in the performance of the effort; and typical duties required; and (c) whether services were provided in a geographic dispersion of locations, statewide or larger. AR, exh. 7, TER at 9-10.

⁴ According to ProSecure's technical proposal, Meritus was the managing partner of the joint venture and was responsible for the performance of the requirement. AR, exh. 5, ProSecure's Technical Proposal at ix. AEPS, on the other hand, was to provide administrative and contract support to the joint venture. *Id.* at x.

The source selection authority (SSA) reviewed the evaluation record and prepared a decision memorandum to document the business judgments and tradeoffs made in selecting the awardee. AR, exh. 11, Source Selection Decision Memorandum (SSD) at 2. The SSA identified the adjectival ratings, technical rankings and prices for the protester’s and the awardee’s proposals as follows:

	ProSecure	MaxSent
Past Performance	Acceptable	Highly Acceptable
Management Approach	Acceptable	Highly Acceptable
Total Evaluated Price	\$43,696,400	\$45,826,775
Rank	2	1

Id.

The SSA noted that MaxSent was the only offeror that received a rating of highly acceptable under both non-price evaluation factors. *Id.* at 2. Because MaxSent’s price was 4.87 percent higher than ProSecure’s, which was ranked as the second-best offer under the technical evaluation factors, the SSA compared the merits of the ProSecure and MaxSent proposals in detail. *Id.* at 3-6.

The SSA observed that both offerors had identified “highly relevant” examples of past performance, but ultimately determined that MaxSent had “more individually relevant projects” and a “larger magnitude” of past performance references combined, in addition to being an incumbent on the current “most directly relevant” requirement, in Alaska. *Id.* at 3-4. In contrast, while the past performance references identified by ProSecure for AEPS (the mentor company in the ProSecure joint venture) were considered relevant, the SSA concluded that the lack of relevant past performance for the joint venture’s managing partner, Meritus, combined with the lack of any past performance for the new joint venture itself, presented a performance risk. *Id.* at 4.

Following her comparison of the evaluations under the management approach factor, for which ProSecure and MaxSent were rated “acceptable” and “highly acceptable,” respectively, the SSA concluded that MaxSent’s technically superior proposal presented “significantly lower performance risk” that justified paying the associated price premium of \$2.13 million. *Id.* at 6. Based on these conclusions, the SSA selected MaxSent’s proposal for award. *Id.*

FPS provided a debriefing to ProSecure on January 2, 2020, and this protest followed.

DISCUSSION

ProSecure contends that the agency's evaluation of both its own past performance and that of MaxSent was unreasonable and represented disparate treatment.⁵ Specifically, the protester argues that ProSecure and MaxSent each submitted a different type of data to describe the magnitude of its past performance references, and the agency failed to recognize that it was comparing differing information in evaluating past performance proposals. Comments & Supp. Protest at 23-26. ProSecure also contends that it was unreasonable for the agency to assign an increased risk to its proposal for failure to submit any past performance project for its managing partner, Meritus. In the protester's view, this assessed risk was unreasonable because the RFP did not require or even encourage that both joint venture partners demonstrate relevant past performance. Protest at 7-8. For the reasons discussed below, we conclude that the agency's evaluation was not unreasonable; and even if we were to agree with the protester, none of its arguments individually or collectively demonstrate that the protester was competitively prejudiced by the alleged errors in the agency's evaluation. We therefore find no basis to sustain the protest.

Evaluation of the Magnitude of Past Performance References

ProSecure argues that the agency unreasonably compared differing sets of data when it evaluated the magnitude of the offerors' past performance, which resulted in ProSecure and MaxSent not being evaluated on a common basis. Comments & Supp. Protest at 23-26. Specifically, the protester contends that the questionnaire included in the RFP that required offerors to provide "productive protective security officer hours" on past performance projects was unclear and resulted in offerors providing information that was not comparable.⁶ *Id.* at 24-26. ProSecure explains that its response was based on the actual protective security officer hours that were performed under its referenced contracts, while MaxSent provided the maximum number of annual hours that the government could order under its referenced contracts.⁷ *Id.*

⁵ ProSecure also raises other contentions, including that the agency's evaluation of both offerors' management approach proposals was improper. We have reviewed all of the protester's other allegations, including this one, and even though not discussed here, we find no basis upon which to sustain the protest.

⁶ While ProSecure asserts that the RFP contained a latent ambiguity, we need not resolve this issue because we conclude below that the agency's evaluation of the past performance proposals was not unreasonable.

⁷ ProSecure asserts such an unequal assessment led FPS to conclude that one of ProSecure's past projects did not meet the magnitude threshold of 138,000 annual hours and that, on the whole, MaxSent had a greater magnitude of past performance projects. Comments & Supp. Protest at 25.

The agency argues that its evaluation was not unfair or disparate because there were several other pertinent criteria that the agency considered in order to conduct a meaningful and equal comparison of the past performance proposals, including the scope and complexity of past performance references. Memorandum of Law (MOL) at 8-9. FPS contends on this basis that, even if the numbers of productive annual hours on past contracts were not compared on a common basis, the magnitude was only part of the overall evaluation of a project's relevancy, and as such, has only some bearing on the overall conclusion regarding relevancy. *Id.*

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *Richen Mgmt., LLC*, B-409697, July 11, 2014, 2014 CPD ¶ 211 at 4. In conducting a past performance evaluation, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated fairly, reasonably, and in accordance with the solicitation's evaluation scheme. *Halbert Constr. Co., Inc.*, B-413213, Sept. 8, 2016, 2016 CPD ¶ 254 at 8; *Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc.*, B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 5. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings. *American Env'tl. Servs., Inc.*, B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5.

Here, attachment 3 to the RFP, Past Project Form, asked offerors to provide the "number of productive protective security officer hours per year" for each of their past performance references. RFP at 318. The term "productive" was not defined anywhere in the solicitation. The record indicates that the "productive" contract hours identified by ProSecure represented the actual performed contract hours on its three past performance references. In contrast, MaxSent's hours represented the maximum number of hours that FPS could order annually under its referenced contract. AR, exh. 5, ProSecure's Technical Proposal at i-vi; Comments & Supp. Protest, exh. F (SF 1449 for MaxSent's project 1) and exh. G (SF 1449 for MaxSent's project 3).

The agency does not expressly dispute that MaxSent's maximum productive hours and ProSecure's performed productive hours were based on differing types of data, or that the agency relied on the number of hours identified by offerors in evaluating the past performance proposals.⁸ Supp. MOL at 5-10. FPS contends, however, that in addition to the number of hours identified by offerors, the TET also reviewed Past Performance Questionnaires (PPQs), CPARs, and other information known to the agency to determine the annual productive hours, along with other details regarding

⁸ See, e.g., AR, exh. 7, TER at 67 (the TET comments that "in comparison [to ProSecure,] MaxSent demonstrates more experience in relation to the number of productive hours *performed*")(emphasis added).

relevant past performance. Mar. 30, 2020, Decl. of Contracting Officer ¶ 8. FPS also points out that the difference between the maximum and the actual performed annual hours is usually very small, approximately “1 or 2 percent or less.” *Id.* at 6.

Our review of the record, including the CPAR for MaxSent’s project 1 and PPQs for its projects 2 and 3, confirms the agency’s assertion in this regard. *Compare* AR, exh. 9, at 1; AR, exh. 22 at 1, 5; *with* AR, exh. 23 at 5, 8, 11; AR, exh.7, TER at 18 (annual performed contract hours either identical or nearly identical to the hours identified by MaxSent in its proposal and subsequently listed in the agency’s evaluation records). As such, notwithstanding a small discrepancy in the number of actual productive annual hours in the evaluation record, it appears that the agency reasonably assessed the magnitude of offerors’ past performance references.⁹ The record also demonstrates that the agency considered multiple other aspects of each offeror’s referenced projects to determine the relevancy and quality of past performance efforts, and used multiple criteria to assess the past performance proposals. Specifically, the agency assessed the scope and complexity of past performance by considering the number of posts where performance took place on previous projects, or the remoteness of the posts, among other things. Mar. 30, 2020, Decl. of Contracting Officer ¶ 8.

Hence, although we agree with ProSecure that FPS may not have recognized the difference in the metrics used by the protester and the awardee in describing their respective past performance, the record here does not support a finding that the agency’s overall assessment of MaxSent’s past performance as superior to ProSecure’s was unreasonable.

Moreover, we will not sustain a protest unless it is clearly shown that the protester was competitively prejudiced by the procurement error. *See Intelsat General Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30, at 19-20 (competitive prejudice is an essential element of a viable protest). Here, we conclude that the protester has not shown a reasonable possibility of prejudice. Specifically, notwithstanding ProSecure’s small price advantage, given the RFP’s evaluation scheme, including the additional criteria for evaluation of past performance that the agency considered when assessing the offerors’ ratings, *e.g.* the scope and complexity of past projects; and given the fact that neither the joint venture itself, nor the small business managing partner could demonstrate past performance; the fact that MaxSent performed well as an incumbent, and was also technically superior under the management approach factor, we find that the record does not support the conclusion that ProSecure’s

⁹ Although the TET assessed the magnitude of past projects by reviewing only projects above the threshold of 138,000 annual contract hours, we note that the total dollar value of the past projects identified by MaxSent also was larger than those identified by ProSecure. *Compare* AR, exh. 9, CPAR for MaxSent at 1; AR, exh. 22, PPQ for MaxSent at 1, 5 *with* AR, exh. 5, ProSecure’s Technical Proposal at i-vi. Specifically, the total value for MaxSent’s project 1 was \$32 million; for project 2, \$119 million; and for project 3, almost \$43 million. The total value for ProSecure’s project 1 was \$35 million; for project 2, \$64 million; and for project 3, \$38 million. *Id.*

competitive position was prejudiced by the agency's approach to the evaluation of the magnitude of past performance. Put differently, we see no basis to conclude that if the agency had noticed, and resolved contemporaneously, the differing approaches to completing the solicitation's Past Project Form, these two offerors would have received the same past performance rating, or that the tradeoff decision would be different.

Assignment of Increased Risk

The protester also contends that the agency unreasonably assessed an increased level of risk based on ProSecure's failure to submit any past performance references for Meritus, the joint venture's managing partner. Protest at 7-8. ProSecure claims that the agency assigned it an unfavorable rating--a *de facto* weakness--in violation of FAR 15.305(a)(2)(iv), which prohibits assigning an unfavorable rating for lack of available or relevant past performance. *Id.*

We disagree. As the agency correctly points out, ProSecure's past performance proposal received a rating of "acceptable"; as such, it cannot be characterized as an unfavorable rating. MOL at 4.

As noted above, the evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings. *American Env'tl. Servs., Inc., supra*. We find nothing unreasonable in the agency's conclusion that lack of past performance references for the entity that is responsible--as the joint venture's managing partner entity--for the performance of the current requirement presents an increased risk of nonperformance.

The protest is denied.

Thomas H. Armstrong
General Counsel