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Decision

Matter of: Weston-ER Federal Services, LLC

File: B-418509; B-418509.2

Date: June 1, 2020

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DIGEST

Protest challenging the evaluation of proposals under the previous experience and past performance evaluation factors, and the source selection decision, is sustained where the record shows that the evaluation and source selection were inconsistent with the solicitation criteria and treated proposals disparately.

DECISION

Weston-ER Federal Services, LLC (Weston-ER),¹ of West Chester, Pennsylvania, protests the issuance of an indefinite-delivery, indefinite-quantity (IDIQ) contract to APTIM Federal Services, LLC (APTIM), of Alexandria, Virginia, by the Department of the Army, Corps of Engineers (Corps), issued under request for proposals (RFP) No. W9128F19R0060, for rapid, immediate, and emergency response environmental remediation and other mission-related support services. The protester challenges the agency's evaluation of proposals and the source selection decision.

We sustain the protest.

¹ Weston-ER Federal Services, LLC is a joint venture comprised of Weston Solutions, Inc. and Environmental Restoration, LLC (ER). Agency Report (AR), Tab 7, Weston-ER Technical Proposal, Cover Letter at 2.

BACKGROUND

The RFP, issued on July 30, 2019, contemplated award of an IDIQ contract for environmental remediation services and response actions in support of the Corps, Omaha District, and its customers in the contiguous United States (CONUS), the South Atlantic Division area of responsibility (AOR), and the Pacific Ocean Division AOR.² AR, Tab 14, RFP at 1-6. The RFP stated that the agency would issue both fixed-price and cost-reimbursement task orders during the ordering period, consisting of a 3-year base period and 4-year option period, or until the \$80 million contract capacity is expended, whichever occurs first. *Id.* at 6-7.

The RFP included the following technical evaluation factors, listed in descending order of importance: previous experience, organizational structure, resumes of key personnel, past performance, and small business participation plan. RFP at 94. To evaluate cost/price, the RFP required that offerors provide a variety of cost information and propose rates that would be binding for future fixed-price and cost-reimbursement task orders. *Id.* at 103-108. The RFP also required that offerors complete a cost spreadsheet, using their proposed rates, to identify the costs of performing a sample project. *Id.* at 108-109. For purposes of the best-value tradeoff, the total evaluated price was the total proposed cost in the cost spreadsheet for the sample project. *Id.* at 130. All evaluation factors other than price, when combined, were significantly more important than cost or price. *Id.* at 123. Award would be made to the offeror whose proposal was considered by the source selection authority (SSA) to be the best value to the government using a tradeoff selection method. *Id.* at 122.

The agency was to evaluate proposals under the previous experience, organizational structure, resumes of key personnel, and small business participation plan factors by identifying strengths, weaknesses, and/or deficiencies, and assigning the following adjectival ratings: outstanding, good, acceptable, marginal, and unacceptable.³ *Id.* at 123, 126. Under the past performance factor, the agency was to first evaluate for relevance and assign the following ratings: very relevant, relevant, somewhat relevant, and not relevant. *Id.* at 124. The agency would next assess the likelihood that the offeror would successfully perform the RFP's requirements, based on the relevancy of the project and the contractor's performance on the project. *Id.* at 125. In this review, the agency assigned the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence (neutral). *Id.*

² The South Atlantic Division and Pacific Ocean Division AORs include, but are not limited to, Alaska, Hawaii, Puerto Rico, Guam, Japan and the Republic of Korea. RFP at 90.

³ The solicitation defined a weakness as a "flaw in the proposal that increases the risk of unsuccessful contract performance." RFP at 126.

The Corps received four proposals by the August 30 due date, including proposals from Weston-ER and APTIM. Contracting Officer's Statement (COS) at 5. The source selection evaluation board (SSEB) evaluated proposals to identify strengths and weaknesses, and assigned a consensus rating for each factor. AR, Tab 6, SSEB Report at 4-14. The SSA, who also served as the contracting officer, reviewed the SSEB report and performed an independent evaluation of proposals, including in some instances adding and/or removing strengths and weaknesses. COS at 3-4, 6; see *also* AR, Tab 5, Source Selection Decision (SSD) at 6, 11-12. The SSA's final evaluation results were as follows:

	Weston-ER	APTIM
Previous Experience	Acceptable	Good
Organizational Structure	Outstanding	Good
Resumes of Key Personnel	Outstanding	Outstanding
Past Performance (Relevance)	Relevant	Very Relevant
Past Performance (Confidence)	Satisfactory	Satisfactory
Small Business Subcontracting Plan	Acceptable	Acceptable
Price--Sample Project	\$270,167	\$289,157

AR, Tab 5, SSD at 15. On February 5, 2020, the SSA selected APTIM for award. COS at 7. On February 18, Weston-ER was provided with a debriefing. *Id.* This protest followed.

DISCUSSION

Weston-ER challenges multiple aspects of the agency's evaluation and best-value tradeoff decision. Specifically, the protester argues that all of the weaknesses assigned to its proposal under the previous experience, past performance, and small business subcontracting plan factors are unreasonable. The protester additionally argues that the agency applied unstated evaluation criteria and treated offerors unequally. For the reasons discussed below, we sustain the protest.⁴

⁴ While we do not address in detail every argument raised by the protester, we have reviewed each issue and, with the exception of those issues discussed in this decision, do not find any basis to sustain the protest. For example, the protester argues that the agency should have rated it much more highly under the small business participation factor, unreasonably identified as a weakness for Weston-ER having only [DELETED] enforceable commitments from small businesses, and should have assessed a strength for its proposal to exceed the RFP's small business subcontracting goals. Protest at 15; Comments & Supp. Protest at 19-20. We have reviewed each of these arguments and conclude that the protester has not demonstrated that the agency's evaluation was unreasonable or inconsistent with the RFP.

Previous Experience

The protester argues that the SSEB and the SSA were unreasonable and applied unstated evaluation criteria when identifying multiple weaknesses in the firm's proposal, and evaluated offers disparately by failing to identify in APTIM's proposal some of the same weaknesses it assigned to Weston-ER. Protest at 12-14; Comments & Supp. Protest at 16-18. The agency argues that the weaknesses identified in Weston-ER's proposal were reasonably encompassed by the evaluation criteria in the RFP, and the different evaluation conclusions were based on differences in the proposals. Memorandum of Law (MOL) at 1-6; Supp. MOL at 7-8, 11-13.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Continental RPVs*, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. Contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals or responses on that basis. *Fintrac, Inc.*, B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 6. Our Office will sustain a protest that an agency improperly waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was competitively prejudiced by the agency's actions. *The S.M. Stoller Corp.*, B-400937 *et al.*, Mar. 25, 2009, 2009 CPD ¶ 193 at 5-6. Further, where an agency treats offerors unequally by, for example, reading some proposals in an expansive manner and resolving doubt in favor of the offeror, while reading other proposals narrowly and applying a more exacting standard that requires affirmative representations within the four corners of the proposal, we have found such evaluations to involve disparate treatment. *Arctic Slope Mission Servs., LLC*, B-410992.5, B-410992.6, Jan. 8, 2016, 2016 CPD ¶ 39 at 7.

For the previous experience factor the RFP required that offerors identify four projects awarded to and performed by the offeror as a prime contractor. RFP at 96. The RFP defined "project" as follows:

- a. Work performed by the Offeror pursuant to a *single task order* of an [IDIQ] type contract at one site or multiple sites at a single installation or facility,
or
- b. Work performed by the Offeror pursuant to a *single stand-alone (non-IDIQ) contract* at one site or multiple sites within a single installation or facility.

Id. The RFP further stated that work pursued under multiple task orders of an IDIQ type contract or under multiple stand-alone contracts would not be acceptable as projects. AR, Tab 11, RFP amend. 3 at 40.

The RFP stated that "[t]he projects selected should demonstrate diversity in the types of environmental work accomplished by the firm, an ability to mobilize quickly to the project

sites, and the ability to efficiently and effectively manage cost reimbursement projects,” and specifically, that the projects submitted include the following:

- a. Project #1: Hazardous, Toxic and Radioactive Waste (HTRW) project – Rapid Response
This project shall have a contract value equal to or greater than \$500,000 which demonstrates successful outcomes in rapid response actions with commencement of [] on-site remediation efforts within 14 days of contract/task order award.
- b. Project #2: Cost Reimbursement project
This project shall demonstrate contract cost reimbursement experience as described by Federal Acquisition Regulations (FAR) Subpart 16.3. This project must demonstrate experience managing a cost-plus-incentive-fee, cost-plus-award-fee or cost-plus-fixed-fee project. This project shall have a contract value equal to or greater than \$1,000,000.
- c. Projects #3 and #4 Offeror’s choice
Projects #3 and #4 should demonstrate the Offeror’s capability to successfully perform projects of the type described by this solicitation as potential projects under this contract. These may be Cost Reimbursement or Firm Fixed Price projects. These projects shall have a contract value equal to or greater than \$2,000,000.

Id. at 39-40. The RFP required a variety of information about the projects and identified 18 specific categories of information for each project, such as the dates and amounts of each project at award and completion. *Id.* at 40-41. As relevant to the protest allegations, the RFP required that each project identify the “Award Type (Firm Fixed Price, Cost-Reimbursable, other [specify]),” and that the offeror “[d]escribe why this project is relevant, [*i.e.*], explain how the work performed relates to the work anticipated under this solicitation. Common aspects of relevancy include similarity of services/support, complexity, dollar value, contract type, and degree of subcontracting/teaming.” *Id.*

The RFP stated that previous experience was to be examined for breadth and depth, based on its relevance to the RFP’s scope of work. RFP at 126. The RFP identified aspects of a project that may be identified as strengths, for example, when “[a]ll projects were executed as cost reimbursement projects,” and for “[p]rojects which were completed on time and under budget.” *Id.* at 126-127. A deficiency could be assigned to a proposal that failed to identify projects that satisfied the criteria for the HTRW project (project 1) and cost-reimbursement project (project 2), or for identifying a project that otherwise failed to satisfy the definition of a project as defined in the RFP. *Id.* at 127.

For its HTRW project, Weston-ER identified a time-and-materials task order issued by the Environmental Protection Agency (EPA), Region 2, pursuant to its Emergency and Rapid Response Services IDIQ contract. AR, Tab 7, Weston-ER Technical Proposal, Factor 1 at 1. The proposal stated that the task order was awarded on September 15,

2017, in the amount of \$1 million and was completed on April 29, 2018, at a cost of \$11.25 million. *Id.* The proposal further stated that the task order was issued in response to Hurricanes Irma and Maria as follows:

ER was issued [a task order] for emergency response actions [in the Virgin Islands and Puerto Rico] to conduct assessment and remediation of waste, household hazardous waste (HHW), medical waste, and e-waste. ER mobilized to the Emergency Operations Center (EOC) within 72 hours. Within 10 days, an initial assessment team of 2 Response Managers were boots-on-the-ground to begin site remediation. ER mobilized responders, equipment, and supplies in a tiered approach. . . .

Id. The proposal also stated that “[b]y 10 October 2017, a staff of 32 was mobilized with a total of 96 responders dispersed over the three islands by 11 December 2017.” *Id.*; see also *id.* at 2 (“Rapid Deployment to the Project Site (7 days or less): ER mobilized to the [Emergency Operations Center] within 72 hours of [task order] award and mobilized 2 response managers to the islands 10 days after the [task order] award.”).

In its evaluation of Weston-ER’s proposal, the SSEB identified two weaknesses for the HTRW project, and the SSA added a third weakness, as follows:

- Project #1 was awarded 09/15/2017 and the proposal stated, “ER mobilized to the Emergency Operations Center (EOC) within 72 hours. Within 10 days, an initial assessment team of 2 Response Managers were boots-on-the-ground to begin site remediation. ER mobilized responders, equipment, and supplies in a tiered approach based on availability of lodging and ports of call availability. By 10 October 2017, a staff of 32 was mobilized with a total of 96 responders dispersed over the three islands by 11 December 2017.” The Solicitation stated, “rapid response actions (with commencement of on-site remediation efforts within 14 days of contract/task order award).” It is difficult to determine when personnel actually started on-site remediation efforts or whether those remediation efforts actually started within 14 days.
- Work submitted as Project 1 (Hurricane Irma/Maria Response, Virgin Islands and Puerto Rico) included work in both the Virgin Islands and Puerto Rico. The [past performance questionnaire] describes work as occurring on “three islands.” It was not clear whether the project met the RFP requirements for “project” since the definition stated, “a. Work performed by the Offeror pursuant to a single task order of an indefinite delivery/indefinite quantity (IDIQ) type contract at one site or multiple sites at a single installation or facility, or b. Work performed by the Offeror pursuant to a single stand-alone (non-IDIQ) contract at one site or multiple sites within a single installation or facility.”
- Project #1 was awarded at \$1,000,000 with a contract cost at completion of \$11,250,000 on a Time & Materials contract without explanation for the significant cost growth.

AR, Tab 5, SSD at 4 (stating that “The SSA identified the final weakness since the proposal states the project was awarded at \$1M and completed at \$11.25M, a 1025% cost increase, without any explanation of the cost growth.”); see *a/so* Tab 6, SSEB Report at 9-10.

Weston-ER challenges all three weaknesses. Regarding the first weakness, the protester argues that its proposal clearly stated that remediation began within 14 days, and the SSEB’s conclusion that it was “difficult to determine when personnel actually started on site remediation efforts or whether those remediation efforts actually started within 14 days” is unreasonable. Protest at 13-14. The agency argues that the SSEB reasonably concluded that Weston-ER’s statement that “two Response Managers were boots-on-the-ground to begin site remediation” within 10 days did not signal the start of on-site remediation within the meaning of the RFP. MOL at 1-4. In this regard, the agency cites the fact that the RFP’s scope of services distinguished preliminary phase/investigation services from remediation services, and separately listed “most of the anticipated activities” to be performed under each. COS at 8-12; see RFP at 16.

On this record, we find that the weakness is unreasonable. As noted, the Weston-ER proposal stated: “Within 10 days, an initial assessment team of 2 Response Managers were boots-on-the-ground to begin site remediation.” AR, Tab 7, Weston-ER Technical Proposal, Factor 1 at 1. Despite this statement, the agency argues that “it is not reasonable to assume that a contractor would direct that two managers initiate and perform actual remediation efforts themselves, particularly in light of Weston-ER’s further clarification that it sent a larger, complete staff at a later date.” MOL at 3. However, the agency provides no other support for this argument, and does not otherwise sufficiently justify its rejection of Weston-ER’s statement that remediation began within 10 days.

In particular, the agency does not explain why it is not possible that either or both of the managers could “initiate and perform actual remediation efforts themselves,” especially given the nature and circumstances of the project. As noted, the RFP required that the HTRW project demonstrate “successful outcomes in rapid response actions with commencement of [] on-site remediation efforts within 14 days of contract/task order award.” RFP amend. 3 at 39. The RFP does not include a definition for what the agency considers to be the “commencement of [] on-site remediation efforts.”

The solicitation states, under the scope of work, that the contractor will provide labor, materials, equipment and services to investigate and/or remediate various sites. RFP at 15. The solicitation identifies “most of the anticipated activities,” but not all, for the preliminary phase/investigation and remediation services requirements that are to be performed. *Id.* at 16. There is some overlap between the activities listed in each category of services. For example, both scopes of work include a variety of survey services. *Id.* With respect to surveying, the Weston-ER proposal stated: “During the assessment phase, surveying and mapping of hazards were documented by GPS coordinates for later remediation/removal.” AR, Tab 7, Weston-ER Technical Proposal,

Factor 1 at 1. The agency does not explain why this statement, in conjunction with the proposal's prior statement that "an initial assessment team of 2 Response Managers were boots-on-the-ground to begin site remediation," does not constitute the "commencement of [] on-site remediation efforts," or why these activities would not reasonably be performed by two response managers. Because the agency has provided an insufficient basis for its rejection of the proposal's specific representation that remediation began within the 14-day period, we find the weakness to be unreasonable.

The protester next challenges the weakness that it was not clear whether work in response to Hurricanes Irma and Maria met the RFP's definition of project. Weston-ER argues that this weakness is unreasonable because its proposal clearly explained the project was performed "pursuant to a single task order" on behalf of EPA Region 2 in Puerto Rico and the Virgin Islands. Protest at 14. Weston-ER additionally argues that the evaluation is disparate, and APTIM should have received a similar weakness because one of its projects was performed on four different ships and at two different shipyards. Comments & Supp. Protest at 16-18.

Pertinent to this allegation, the APTIM proposal identified as one of its projects a cost-plus-fixed-fee task order issued by the Corps, Omaha District, to perform "radiological surveys and decontamination of four U.S. Navy ships (USS Cowpens, USS Preble, USS Chancellorsville, and USS Essex) to restore their operational readiness for a time-sensitive deployment." AR, Tab 9, APTIM Technical Proposal, Factor 1 at 7 (explaining that the ships became contaminated from exposure to the Fukushima Dai-Ichi nuclear reactor incident plume while providing humanitarian support in response to the 2011 earthquake and tsunami in Japan). The proposal states that "[w]ork was performed while the ships were pier-side at the Naval Base San Diego and while in dry-dock at the BAE Shipyard in San Diego." *Id.* As noted, the RFP definition of "project" required that the work be performed "at one site or multiple sites at a single installation or facility." RFP at 96.

The agency argues that the SSEB reasonably concluded that Weston-ER's HTRW project did not comply with the definition of "project" as stated in the RFP because although it was performed under a single task order award, the work was executed on different islands, and was therefore not performed on a single installation or facility. MOL at 4-5. The agency further argues that APTIM's ship decontamination project does not present the same weakness because the BAE shipyard where the work was performed and the Naval Base shipyard were contiguous sites and both are part of the Naval Base San Diego Complex; therefore, the work was performed at a single installation or facility. Supp. COS at 8-9; Supp. MOL at 11-12.

The protester argues that the agency's *post hoc* assertion that the BAE shipyard and San Diego Naval Base were contiguous sites and part of the same complex is untrue, citing to a webpage in which BAE states that it leases its shipyard from the Port of San

Diego and is located north of Naval Base San Diego.⁵ Supp. Comments at 2 (citing to BAE's website). The protester argues that the BAE shipyard is a separate facility with a separate owner, and cannot satisfy the definition of project. *Id.* Weston-ER further argues that the Corps cannot credibly explain why Weston-ER's performance of remediation over several islands increases the risk of unsuccessful contract performance, or why it is more risky than APTIM's performance of a project on four ships at two separate locations. *Id.* at 3.

Where an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, we give little weight to the later explanation. *E.g.*, *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 10; *Solers Inc.*, B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 11-12. Here, there is nothing in the contemporaneous record to indicate that the SSEB or SSA ever contemplated whether APTIM's ship decontamination project satisfied the RFP's definition of project. Rather, the agency evaluated APTIM's proposal in a more expansive manner, while applying a more exacting standard to Weston-ER's proposal. See *Artic Slope Mission Servs., LLC*, *supra* at 7.

Based on our review, we find the agency's assertion that APTIM's ship decontamination project complies with the RFP's definition of project is plainly contradicted by publicly available information about the BAE shipyard and APTIM's proposal.⁶ The agency does not explain how the four Navy ships at two shipyards qualify as "one site or multiple sites within a single installation or facility," and the record shows that the BAE shipyard and Naval Base San Diego, even if in much closer proximity to each other than the Virgin Islands and Puerto Rico, do not constitute "a single installation or facility." Although it would seem that the work performed under these projects demonstrates experience in environmental work that the agency would find desirable, neither Weston-

⁵ The website states as follows: "Conveniently located in one of the U.S. Navy's mega-ports, the shipyard encompasses 20 acres of property and over 16.6 acres of water area on San Diego Bay. The shipyard property is leased from the Port of San Diego and is located north of Naval Base San Diego, nearby the San Diego-Coronado Bridge." See <https://www.baesystems.com/en-us/product/san-diego-ship-repair> (last visited May 6, 2020).

⁶ The intervenor argues that the BAE shipyard is part of the Naval Base San Diego site and cites to the Military Multimodal Access Strategy briefing book as support. Intervenor Supp. Comments at 2; *id.* at 2 n.2. However, according to that document, the Naval Base San Diego is part of the San Diego Working Waterfront, and the Working Waterfront includes BAE Systems San Diego Ship Repair. Military Multimodal Access Strategy, https://www.sandag.org/uploads/committeeid/committeeid_104_25029.pdf (last visited May 18, 2020). Further, the document states that BAE is a commercial shipyard located along the San Diego waterfront that contracts with the Navy to support the construction and repair of ships. *Id.*

ER's HTRW project nor APTIM's ship decontamination project satisfy the RFP's definition of project, and the agency treated offerors disparately by identifying this weakness only in Weston-ER's proposal.⁷

The protester additionally challenges the weakness identified by the SSA that Weston-ER did not explain the cost growth from \$1 million to \$11.25 million on its HTRW project. Weston-ER argues that the weakness is unreasonable and applies an unstated evaluation criterion because, although the solicitation required detailed information on proposed projects, there was no requirement that offerors explain cost growth under a project. Protest at 14. Weston-ER further argues that the evaluation is disparate because the SSA did not identify cost growth as a weakness for any of APTIM's four projects, all of which experienced cost growth. Comments & Supp. Protest at 17-18. The agency argues that APTIM, unlike Weston-ER, explained in its proposal that the cost growth for its projects resulted from the addition of work scope. Supp. COS at 9; Supp. MOL at 12-13.

Here, in its proposal, APTIM indicated "(Scope Added)" immediately following its disclosure of the final contract cost at completion for all four of its projects, all of which exceeded the contract award amount. AR, Tab 9, APTIM Technical Proposal, Factor 1, at 1 (HTRW project: awarded at \$149,498 with a final cost at completion of \$1,047,679), at 3 (cost-reimbursement project: awarded at \$8,049,147 with a final cost at completion of \$11,892,883), at 5 (project 3: awarded at \$1,073,909 with a final cost at completion of \$2,702,058), at 7 (project 4: awarded at \$744,000 with a final cost at completion of \$5,153,127). No additional explanation of the scope added notation is provided in the remaining narrative of each project. See *id.* at 1-8.

In contrast, the Weston-ER proposal indicated that with the exception of its HTRW project, the contract cost at completion was less than the contract award amount. AR, Tab 7, Weston-ER Technical Proposal, Factor 1 at 1 (HTRW project: awarded at \$1,000,000 with a final cost at completion of \$11,250,000), at 3 (cost-reimbursement project: awarded at \$3,369,286 with a final cost at completion of \$1,428,130), at 5 (project 3: awarded at \$6,917,053 with a final cost at completion of \$5,960,012), at 7 (project 4: awarded at \$10,861,260 with a final cost at completion of \$7,932,184). For all of its projects, including the HTRW project, Weston-ER indicated in a section titled "Applicable Section M Strengths" that the "Project was Completed On Time and Under Budget" with additional narrative explanation. *Id.* at 2, 4, 6, and 8. Weston-ER's proposal specifically stated that its HTRW project "was completed within the field duration and budget proposed." *Id.* at 2.

⁷ As noted, the RFP identified aspects of proposals that could be identified as strengths, weaknesses, and deficiencies, including that "[d]eficiencies will be given for. . . [s]ubmitting as a project anything which fails to meet the definition of 'project' as defined by Section L." RFP at 127. The fact that the agency identified only a weakness for Weston-ER's HTRW project rather than a deficiency here does not completely mitigate this error in the evaluation.

On this record, we find the assessment of a weakness is based on an unstated evaluation criterion, is unreasonable, and treats the offerors disparately. Of all the categories of information required by the RFP to be submitted for each project, none required that the offeror explain any difference between the contract award amount and the final contract cost at completion. See RFP at 97. While we recognize that cost growth may be a legitimate concern, we find unreasonable and disparate the agency's simultaneous conclusions that APTIM's statement of two words--“(Scope Added)”-- was sufficient to explain the cost growth on all four of its projects, and yet “the significant cost growth” on Weston-ER's HTRW project presented a weakness despite the proposal's statement that the project was completed within the proposed budget.

In sum, we agree with the protester that the three weaknesses identified by the SSEB and SSA under the previous experience factor are unreasonable, and result from disparate treatment and the application of unstated evaluation criteria. Accordingly, we sustain the protest on these bases.

Past Performance

The protester also challenges the evaluation of proposals under the past performance factor. Specifically, Weston-ER argues that the agency irrationally elevated the importance of contract type in the evaluation when it assigned a weakness to the proposal based on the agency's conclusion that Weston-ER's HTRW project was “less relevant” because it was a time-and-materials task order. Protest at 15. The protester also argues that despite making reasonable corrections to the SSEB's evaluation--by deleting a weakness assessed to Weston-ER's proposal, and deleting a strength assessed to APTIM's proposal--the SSA unreasonably concluded that APTIM's proposal merited a higher rating and was more advantageous under this factor. Comments & Supp. Protest at 19, 22.

The agency argues that it reasonably applied the stated evaluation criteria, and properly considered contract type when concluding that Weston-ER's HTRW project presented a weakness in the proposal because a time-and-materials task order was less relevant to this effort. COS at 16-18; MOL at 6-10. The agency additionally argues that the SSA reasonably concluded that APTIM's proposal was more advantageous because it submitted more relevant projects and disclosed fewer violations than Weston-ER's proposal. Supp. COS at 2-4, 7-8; Supp. MOL at 3-4.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. *Computer Scis. Corp. et al.*, B-408694.7 *et al.*, Nov. 3, 2014, 2014 CPD ¶ 331 at 12. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. See *OSI Collection Servs., Inc.*, B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme. *Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 22.

Here, the RFP required that offerors submit past performance information for each project submitted under the previous experience factor. RFP amend. 3 at 44. In addition, the RFP required that offerors disclose information regarding default terminations within the past three years, environmental notices of violation (NOVs) within the past three years, and a list of Occupational Safety and Health Administration (OSHA) violations within the past five years, if any. *Id.* at 45.

The evaluation of past performance included two aspects: relevancy and confidence. RFP at 124. Specifically, the RFP stated as follows:

Relevancy, as it pertains to past performance information, is a measure of the extent of similarity between the service/support effort, complexity, dollar value, contract type, and subcontract/teaming or other comparable attributes of past performance examples and the source RFP requirements; and a measure of the likelihood that the past performance is an indicator of future performance.

* * * * *

The second aspect of the past performance evaluation is to establish a level of Government confidence based on the relevancy of the project and the contractor's performance on the project. Performance Confidence Assessment is an evaluation of the likelihood (or Government's confidence) that the offeror will successfully perform the RFP's requirements; the evaluation is based [on] past performance information.

Past performance information in conjunction with the performance relevancy rating will be reviewed and evaluated to determine the quality and usefulness as it applies to the performance confidence assessment. . . .

Id. at 124-125. The RFP advised that the past performance evaluation would result in an assessment of the offeror's probability of meeting the solicitation's requirements. RFP at 128. The RFP further stated that the agency would "focus on areas covered in the requirements of this [request for] proposal including records of conforming to contract requirements, standards of workmanship, adherence to contract schedules, history of reasonable and cooperative behavior with regulators and other stakeholders, and commitment to customer satisfaction for projects presented by the Offeror." *Id.* The RFP stated that weaknesses could be identified for one or more NOVs within the past three years, OSHA violations within the past five years, and for less than satisfactory ratings in one or more areas on past performance evaluations. *Id.* at 129.

The SSA's final assessment of Weston-ER's past performance resulted in ratings of relevant/satisfactory confidence, based on the following strength and two weaknesses:

Strengths:

- Ratings were generally Very Good, with some Exceptional ratings.

Weaknesses:

- Project 1, “Hurricane Irma/Maria Response, Virgin Islands and Puerto Rico” was identified as a Time and Materials project, but Time and Materials task orders will not be awarded under this contract, making this project less relevant.
- [Weston-ER] received one OSHA violation in 2016 and two Environmental [NOVs] (one in August 2010 and one in December 2018).[⁸]

AR, Tab 5, SSD at 6 (indicating that the SSA deleted an additional weakness identified by the SSEB, but did not change the overall ratings). The SSA’s final assessment of APTIM’s past performance resulted in ratings of very relevant/satisfactory confidence, based on the following two strengths and weakness:

Strengths:

- All projects submitted by the Offeror were considered very relevant since the projects were Rapid Response actions and were Cost Reimbursement.
- [Offeror] has demonstrated an ability to complete work on-time, under-budget, and exceed objectives. On Project #1, the contractor received positive feedback for completing a difficult project. The comments by the evaluator stated the project was “done well” and “completed on-time.” On Project #4, Task Order 10, the evaluator commented on the overall quality, schedule management, cost control, and management. The evaluator was also impressed with regulatory management, safety (exceptional), and the “great field crew.”

Weaknesses:

- The Offeror had one reportable accident in 2019 in which an employee was taken to the hospital for an injury sustained when he overturned the back-hoe he was operating.

⁸ Weston-ER disclosed an August 2010 environmental NOV in its proposal. See AR, Tab 7, Weston-ER Technical Proposal, Factor 4 at 1. We note, however, that this August 2010 violation falls outside of the period of evaluation stated in the RFP. See RFP amend. 3 at 45 (“The Offeror shall also provide a list of any environmentally-reportable incident violations and any environmental [NOVs] received by any member of the Offeror’s team that may have occurred in the past three (3) years, or so state there were none.”); RFP at 129 (stating a weakness could be identified for “any environmental [NOVs within] the last three (3) years (from date proposals are due)”). Here, the proposal due date was August 30, 2019. COS at 5.

Id. at 11-12 (indicating that the SSA deleted an additional strength identified by the SSEB, but did not change the overall ratings). The SSA concluded that “APTIM was slightly better in this factor because it has completed very relevant projects,” and specifically stated that “Weston-ER provided mostly relevant projects although the [time-and-materials project] was not as relevant.”⁹ *Id.* at 23. The SSA also stated that Weston-ER had an OSHA violation and two environmental NOV’s. *Id.*

As an initial matter, we recognize that our prior conclusion--sustaining a challenge to the evaluation as disparate regarding the application of the RFP’s definition of project under the previous experience factor--necessarily has a corresponding impact on the past performance factor. Nevertheless, and independent of these conclusions, we agree with the protester that the agency departed from the solicitation’s evaluation scheme in its past performance evaluation.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the bases for their evaluation conclusions. *Intercon Assocs., Inc.*, B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. While agencies properly may apply evaluation considerations that are not expressly outlined in the RFP if those considerations are reasonably and logically encompassed within the stated evaluation criteria, there must be a clear nexus between the stated and unstated criteria. *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340 at 18.

Generally, an agency’s evaluation under an experience factor is distinct from its evaluation of an offeror’s past performance. *Commercial Window Shield*, B-400154, July 2, 2008, 2008 CPD ¶ 134 at 3. Specifically, as is the case here, the former focuses on the degree to which an offeror has actually performed similar work, whereas the latter focuses on the quality of the work. See *id.* Where a solicitation calls for the evaluation of experience and past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation’s evaluation criteria and procurement statutes and regulations. *Amyx, Inc.*, B-410623, B-410623.2, Jan. 16, 2015, 2015 CPD ¶ 45 at 14.

As noted, the RFP required that offerors submit past performance information for the same projects submitted under the previous experience factor. RFP amend. 3 at 44. Under the previous experience factor, the RFP required that offerors submit a cost-reimbursement project, and that projects 3 and 4 were the offerors’ choice of cost-reimbursement or fixed-price projects, but did not specify a particular contract type for the HTRW project. *Id.* at 39-40. The RFP stated that previous experience would be

⁹ Regarding relevancy, the RFP defined very relevant as “[p]resent/past performance effort involved essentially the same scope and magnitude of effort and complexities this solicitation requires.” RFP at 124. The RFP defined relevant as “[p]resent/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires.” *Id.*

evaluated for its breadth and depth based on its relevancy to the scope of work, and that a strength may be given for all projects being executed as cost-reimbursement projects. RFP at 126. In contrast, the RFP stated that the past performance evaluation would assess the probability of meeting the solicitation requirements, and that weaknesses could be identified for one or more NOVs within the past three years, OSHA violations within the past five years, and for less than satisfactory ratings in one or more areas on past performance evaluations. *Id.* at 129.

Here, based on the RFP's evaluation criteria, although the agency may have considered the HTRW project less relevant, the agency has not explained, and the record does not support, a conclusion that a less relevant project presents a past performance weakness simply because the project was performed on a time-and-materials basis. Further, the record does not demonstrate that the agency had concerns about the actual quality of the protester's performance on the referenced project.¹⁰

The agency argues that "[i]t is only logical that in a solicitation that advises that only firm fixed price or cost-reimbursable task orders will be issued, any offeror who relies upon some other contracting type raises questions about its ability to perform contract requirements." MOL at 10. We disagree. The offeror was permitted to submit any type of contract--including a time-and-materials type contract--for the HTRW project. Under the past performance factor, the RFP required that the offeror submit and the agency assess past performance evaluations for the projects submitted, and information regarding default terminations and environmental and OSHA violations. The agency has failed to explain why the time-and-materials contract type, by itself, increases the risk of unsuccessful contract performance or how performance of a time-and-materials contract is a weakness similar to those identified in the RFP. Accordingly, we also sustain the protest on this basis.

¹⁰ The past performance questionnaire (PPQ) submitted for Weston-ER's HTRW project identified the contract type as time-and-materials, and assigned primarily very good and exceptional ratings; in particular, ER was rated as very good for its "[a]bility to meet the terms and conditions within the contractually agreed price(s)." AR, Tab 7, Weston-ER Technical Proposal, Factor 4 at 4. The PPQ further indicated that ER "demonstrated an above average ability to meet their emergency response requirements under extreme circumstances," and "direct supervision and coordination of field personnel was above average," although ER had "some difficulty meeting the transportation and disposal goals for the project." *Id.* at 5.

The PPQ also explained that the difference between the original contract price (\$1 million) and the final contract price (\$11.25 million) was that "[a]dditional scope was added to the task order." *Id.* at 2. In response to the question "How is this project relevant to project of submission?" the PPQ stated that "ER responded to this emergency response task order within 24 hours to provide personnel and conduct risk assessments, conduct hazardous waste assessments and bio-medical waste assessments on three islands." *Id.*

Best-Value Tradeoff

The protester argues that but for the erroneous evaluation, and in light of the seven percent cost advantage that its proposal presents over APTIM's, the agency would have concluded that its proposal presents the best value to the government. Protest at 16-17; Comments & Supp. Protest at 23. We have explained that an agency's best-value determination is flawed when one or more of the underlying evaluations upon which that tradeoff analysis is based are unreasonable, erroneous or improper. *East Coast Utility Contractors, Ltd.*, B-415493, B-415493.2, Jan. 16, 2018, 2018 CPD ¶ 30 at 8; *TeleCommunication Sys., Inc.*, B-408269.2, Dec. 13, 2013, 2013 CPD ¶ 291 at 7. Because we are sustaining Weston-ER's challenges to the evaluation under the previous experience and past performance factors, we also sustain Weston-ER's overall challenge to the best-value tradeoff.¹¹

¹¹ Weston-ER argues that in addition to the technical errors, the best-value determination is flawed because the agency did not fairly weigh Weston-ER's price advantage. Protest at 12, 17. The agency argues that there is no basis for Weston-ER's conclusion that its seven percent price advantage would equate to approximately \$5.6 million over the life of the \$80 million contract because the cost spreadsheet represents only a sample project, not the total contract cost. Supp. COS at 9-10. The record does not support the protester's contention.

Agencies must consider cost to the government in evaluating proposals, 10 U.S.C. § 2305(a)(3)(A)(ii), and while it is up to the agency to decide on the appropriate and reasonable method for evaluating prices, an agency may not use an evaluation method that produces a misleading result. *Labatt Food Serv., LP*, B-408790, Nov. 25, 2013, 2013 CPD ¶ 279 at 3. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one proposal would be more or less costly than another. *Bristol-Myers Squibb Co.*, B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4.

Here, although the cost or price for each task order will be determined during performance as a matter of contract administration, the RFP required that offerors propose binding fully burdened labor rates, binding caps on indirect rates, and maximum profit and fees. RFP amend. 3 at 47-51. The RFP required that these proposed rates and fees be used to complete the cost spreadsheet for the sample project. *Id.* at 53-54. In addition, the RFP stated that the "total evaluated price will be the total cost amount proposed by the Offeror on the Cost Spreadsheet." RFP at 130. Although we sustain the protest on the basis that the best-value tradeoff was flawed, the record shows that the SSA considered the protester's price advantage and recognized that "an award to APTIM does include a small price premium." AR, Tab 5, SSD at 25.

RECOMMENDATION

For the reasons discussed above, we conclude that the agency's evaluation was unreasonable under the previous experience and past performance factors, resulting in a flawed best-value tradeoff decision. Under both factors, the evaluation was inconsistent with the terms of the solicitation, applied unstated evaluation criteria, and treated offerors unequally in the evaluation of their technical proposals.

If the solicitation reflects the agency's actual needs, we recommend that the agency reevaluate the offerors' proposals in a manner consistent with the solicitation that addresses the bases on which we sustained the protest, conduct discussions if necessary, and make a new award decision. On the other hand, because the record indicates that the agency's evaluation may have been based on concerns or criteria that were not adequately defined by or reflected in the solicitation, the agency may want to reconsider its requirements, amend the RFP to reflect the agency's actual needs, obtain and evaluate revised proposals, and make a new award decision. We further recommend that Weston-ER be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel