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Decision

Matter of: Syneren Technologies Corporation

File: B-418541.2; B-418541.3

Date: September 25, 2020

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Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency misevaluated proposals and made an unreasonable source selection decision is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Syneren Technologies Corporation, a woman-owned small business (WOSB) of Arlington, Virginia, challenges the issuance of a task order to Dowless & Associates, Inc., a WOSB of Arlington, Virginia, by the Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (NWS), under request for quotations (RFQ) No. 1305M220QNWWG0040, issued under the Federal Supply Schedule (FSS) for engineering services. The protester argues that the agency erred in its evaluation of quotations in several respects.

We deny the protest.

BACKGROUND

On December 17, 2019, the agency issued the RFQ to WOSBs holding contracts under the Professional Services FSS Category No. 871 4, Professional Engineering Services. Agency Report (AR), Tab 1, RFQ at 1-2. The solicitation contemplated the award of a single time-and-materials task order on the basis of a best-value tradeoff between price

and non-price factors. *Id.* at 4. The solicitation provided for the evaluation of quotations under three evaluation factors, listed in descending order of importance: (1) technical approach; (2) past performance; and (3) price. *Id.*

Relevant to this protest, the procurement represents a follow-on effort related to an existing task order, but the scope of work for this procurement is significantly narrower than the scope of work under the incumbent task order. Supp. Memorandum of Law (MOL) at 2-4. For the challenged procurement, the agency modified its procurement strategy to separate several requirements currently provided under the existing task order into different contract vehicles. MOL at 19. Specifically, the prior task order provided support for the agency's upper-air observing systems (UAOS), automated surface observing systems (ASOS), and Cooperative Observer Program (COOP), among other things, but the challenged task order only provides support for UAOS. Supp. MOL at 2-4.

To fulfill the UAOS requirements, the RFQ required vendors to propose 5 positions with specific skillsets at 1880 hours per year. RFQ at 24-25. With the incumbent contract ending, the RFQ emphasized the need for vendors to recruit and retain incumbent personnel, indicating that incumbent capture was a government priority. *Id.* at 26. The RFQ also required vendors to address the following areas in their technical approach: (1) incumbent capture methodology; (2) phase-in strategy and approach to performing the work without disrupting or compromising effective and efficient operations; (3) the overall approach to ensure timely and accurate reporting; and (4) any risks associated with the approach and proposed mitigation methods, along with the proposed objective criteria that can be used to determine if each milestone has been achieved. *Id.* at 3

On January 10, 2020, the agency received two quotations in response to the RFQ, one from the protester and one from the intervenor. MOL at 4. The agency evaluated the quotations as follows:

	Syneren	Dowless
Technical Approach	Acceptable	Good
Past Performance	Outstanding	Acceptable
Price	\$3,458,275.60	\$3,053,376.85

AR, Tab 9, Best-Value Determination at 2.

On the basis of this evaluation, the agency concluded that Dowless represented the best value to the government because, while Syneren had superior past performance, Dowless offered a technically superior quotation at a significantly lower price. *Id.* at 7. On June 12 the agency made award to Dowless. MOL at 11. This protest followed.

DISCUSSION

The protester challenges the agency's evaluation of quotations and the best-value tradeoff decision. Protest at 6-12. Specifically, the protester alleges that the agency

erred in assigning its quotation one significant weakness and three weaknesses, and in assigning the awardee's quotation a significant strength. *Id.*; Protester's Comments and Supp. Protest at 12-16. Furthermore, the protester argues that the agency evaluated the quotations unequally by evaluating similar aspects of the quotations differently.¹ *Id.* We address these arguments in turn.

Protester's Significant Weakness

The protester alleges that the agency erred in assigning its quotation a significant weakness for proposing to use a subject matter expert (SME) IV position as a team lead while splitting that position between two part-time staff. Protest at 6-7. Specifically, the protester argues that the solicitation did not require vendors to propose a single point of contact, and that, in any case, the two individuals are satisfactorily performing the same role under the incumbent contract. *Id.* Accordingly, the protester suggests that the agency's assignment of a significant weakness is unreasonable. *Id.*

Relatedly, the protester also notes that the awardee received no similar weakness even though it proposed to hire incumbent staff to perform the role in question. Protester's Comments and Supp. Protest at 5-6. While the awardee did not specifically propose to split the SME IV position into two part-time positions, the protester contends that the awardee's plan to retain the incumbent staff would either lead to the same result or require the awardee take on additional risk by hiring non-incumbent staff. *Id.* In this respect the protester contends the evaluation was unequal. *Id.*

In response, the agency argues that the solicitation called for a single full-time SME IV position, and did not permit or otherwise address the question of using multiple part-time staff to fill the position. MOL at 13-14. Moreover, the description of the position emphasized management and reporting experience, and the protester's quotation identified the SME IV position as its team lead. *Id.* Accordingly, the agency contends it was reasonable to conclude that the assignment of a leadership role to two different people could pose a risk to unity of effort. *Id.* Moreover, the agency notes that, while the protester argues these two individuals are performing this function under the incumbent task order, the descriptions of the professional experience of these individuals in the protester's quotation do not support that claim. Supp. MOL at 9-10. Specifically, one of the individuals proposed for the SME IV position does not appear to have specific experience supporting UAOS programs, but rather appears to have primarily supported other programs. *Id.* Finally, the agency argues that the individuals proposed by the protester are not the only personnel performing work under the

¹ Additionally, the protester raises certain other collateral arguments. For example, the protester contends that, because of alleged flaws in the evaluation, the best-value tradeoff was likewise flawed. Protester's Comments and Supp. Protest at 15. Because we find the protester's evaluation arguments to be without merit, as discussed below, this argument is also without merit. While we do not address all of the protester's arguments in this decision, we have considered them and conclude that they do not provide a basis for sustaining the protest.

incumbent task order, and other incumbent personnel may also be suitable to perform this role under the new task order. *Id.*

Where an agency issues a solicitation to vendors holding FSS contracts, and conducts a competition among FSS vendors, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. *Spectrum Comm, Inc.*, B-412395.2, Mar. 4, 2016, 2016 CPD ¶ 82 at 8. When the procurement is conducted pursuant to Federal Acquisition Regulation (FAR) subpart 8.4 and requires vendors to respond to a statement of work, the record must document the evaluation and selection as provided in FAR 8.405-2(f), including the rationale for any tradeoffs made in the selection. *Id.* Where a protester challenges the evaluation as unfairly utilizing unstated evaluation criteria, our Office will assess whether the solicitation reasonably informs vendors of the basis for the evaluation. *Raytheon Co.*, B-403110.3, Apr. 26, 2011, 2011 CPD ¶ 96 at 5. In that regard, procuring agencies are not required to list as stated evaluation criteria every area that may be taken into account; rather, it is sufficient that the areas considered in the evaluation be reasonably related to or encompassed by the stated criteria. *Id.*

In this case, the agency acted reasonably in assigning a significant weakness to the protester, but not to the awardee. While the RFQ did not specifically address the possibility of using two part-time staff to fill the SME IV position, the solicitation clearly requested a single full-time position. RFQ at 24. Accordingly, we cannot conclude that assigning a significant weakness for proposing two part-time staff to fill one position represents an unstated evaluation criterion. Furthermore, the agency's judgment that splitting a leadership role across two part-time staff may jeopardize unity of effort and posed a risk to the performance of the task order is entirely reasonable. See AR, Tab 9, Best Value Determination at 6.

Furthermore, the agency's failure to assign a similar weakness to the awardee does not represent unequal treatment because the two quotations were not substantially similar in this respect. It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Rockwell Elec. Commerce Corp.*, B-286201 *et al.*, Dec. 14, 2000, 2001 CPD ¶ 65 at 5. However, when a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the quotations. *IndraSoft, Inc.*, B-414026, B-414026.2, Jan. 23, 2017, 2017 CPD ¶ 30 at 10; *Paragon Sys., Inc.; SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9. Accordingly, to prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Office Design Group v. United States*, 951 F.3d 1366, 1372 (Fed. Cir. 2020); *Battelle Memorial Inst.*, B-418047.3, B-418047.4, May 18, 2020, 2020 CPD ¶ 176 at 5.

The protester is incorrect that the awardee's plan to retain the incumbent staff would necessarily require the awardee to either duplicate the protester's proposed staffing

configuration or hire non-incumbent staff and thereby incur greater risk. While the awardee proposed to capture incumbent staff as part of its technical proposal, the awardee did not specify any particular individual or individuals to fill the SME IV role. Rather, the awardee's transition approach specifically contemplated that it would work with the agency to identify appropriate incumbent personnel after award. AR, Tab 5, Dowless Technical Proposal at 10. As part of that process, the awardee could, for example, select one of the two staff the protester proposed for the SME IV position on a full-time basis, or potentially hire other qualified staff working on the incumbent task order. See Supp MOL at 9-10. In short, the quotations were not meaningfully the same in this respect, and the protester's arguments are not consistent with the record.

Protester's Other Weaknesses

The protester also challenges the agency's assignment of three other weaknesses.² Protest at 7-9. First, the protester alleges that it was irrational for the agency to assign a weakness for the protester's proposed one-day transition period when all staff were already in place and performing the requirement. *Id.* at 8. Second, the protester argues that the agency's conclusion that the protester's salary escalation posed a cost control risk was unreasonable in the context of a time-and-materials contract. *Id.* at 7-8. Finally, the protester contends that the agency erred by assigning a weakness to Syneren's quotation for failing to clearly outline a methodology for mitigating risk, because Syneren's quotation adequately addressed its risk mitigation strategy. *Id.* at 8-9.

Transition Schedule

With respect to the transition schedule, the evaluators assigned the protester's quotation a weakness because the protester proposed a transition schedule of one day. AR, Tab 7, TET Consensus Report at 15. Specifically, the agency was concerned that such an abbreviated transition schedule provided no "margin of error" and represented a risk that the protester was overestimating its ability to transition individuals proposed given their current duties under the incumbent task order. *Id.* The agency also noted that this represents a risk the protester did not fully understand the requirements of the current task order. *Id.*

In response, the protester argues that a one-day transition was entirely reasonable because the UAOS requirements of the current task order are substantially the same as

² The agency also assigned the protester's quotation a fourth weakness, which the protester does not contest. See AR, Tab 7, Technical Evaluation Team (TET) Consensus Report at 15. Specifically, the protester's quotation referred to carrying out activities related to engineering and logistics for ASOS and COOP programs, which were part of the scope of the previous task order, but were not part of the scope of the current procurement. *Id.* The agency assigned a weakness because this suggested the protester may not fully understand the specific requirements of the current procurement. *Id.*

the relevant portions of the previous task order, and it proposed the staff currently performing the UAOS requirements. Protester's Comments and Supp. Protest at 2, 6. According to the protester, because the staff in question are already credentialed, working on site, and performing the relevant work there was effectively no need for any transition period. *Id.*

The agency agrees that the current task order's scope is similar to the scope of the UAOS portion of the prior task order, but explains that the requirements related to several other programs supported under the prior task order are not within the scope of this task order. Supp. MOL at 10-11. While some of the individuals proposed by the protester in response to this task order may have performed the UAOS portions of the previous task order, the protester's quotation indicates that several of the individuals it proposed were performing significant work related to other programs not included in the scope of the current task order. *Id.* The agency indicates that the weakness represented a concern that the protester may be underestimating the work required to transition these individuals from supporting the other programs to only supporting UAOS. *Id.*

In reviewing a protest against an agency's evaluation, our Office will not substitute our judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *U.S. Textiles, Inc.*, B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. Here, the protester's quotation supports the agency's view that these staff are currently supporting multiple programs, and that some of the staff appear to currently have significant responsibilities related to programs outside the scope of the challenged task order. AR, Tab 4, Protester's Technical Proposal at 6-8. The agency's concern that these staff may need more than one day to transition from their current responsibilities to more narrowly focused responsibilities is not unreasonable and is clearly documented in the contemporaneous record. See AR, Tab 7, TET Consensus Report at 15. The protester, in effect, simply disagrees with the agency's evaluative judgment, and a protester's disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. *Fiserv NCSI, Inc.*, B-293005, Jan. 15, 2004, 2004 CPD ¶ 59 at 9.

Cost Control

The protester also challenges the agency's assignment of a weakness because the agency concluded that the protester's intention to provide an annual escalation in its rates represented a cost control risk to the agency. Protest at 7-8. The protester notes that this weakness is facially irrational in the context of this time-and-materials task order because the labor rates are fixed and the agency is bound only to pay the agreed-upon rates. *Id.* Additionally, the protester contends the agency's conclusion that it could not assess how the protester would manage and control the costs of these rate increases was also irrational because the protester's rates, including a 2 percent annual escalation, were explicitly outlined in its price quotation. *Id.*

Even assuming for the sake of argument the protester is correct that the agency erred in assigning this weakness, it is not clear that the protester was prejudiced by this error. Competitive prejudice is an essential element to every viable protest, and where an agency's improper actions did not affect the protester's chances of receiving award, there is no basis for sustaining the protest. See, e.g., *American Cybernetic Corp.*, B-310551.2, Feb. 1, 2008, 2008 CPD ¶ 40 at 2-3.

First, the TET assigned a similar weakness for cost control to the awardee, notwithstanding that the awardee also explicitly set out its proposed rates in its price quotation. See AR, Tab 7, TET Consensus Report at 7. Therefore, if the agency erred in this regard, it erred equally with regard to both vendors. Second, and more significantly, in the best-value determination the source selection authority (SSA) addressed most of the weaknesses assessed by the TET, but made no reference to either of the cost control weaknesses. See AR, Tab 9, Best-Value Determination *generally*. The absence of any discussion of the cost control weaknesses in the best-value determination strongly suggests that the SSA did not adopt the allegedly erroneous weaknesses, and that the weaknesses did not form part of the award decision. For these reasons, even if the agency erred, we do not believe that the protester has demonstrated competitive prejudice and this protest ground is denied. See *Applied Bus. Mgmt. Solutions Inc., LLC*, B-405724, Dec. 15, 2011, 2012 CPD ¶ 14 at 9; *Joint Mgmt. & Tech. Servs.*, B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7.

Risk Mitigation

The protester also contends that the agency erred by assigning a weakness to its quotation for failing to clearly outline a methodology for mitigating risk because the protester's quotation adequately addressed its risk mitigation strategy. Protest at 8-9. Specifically, the protester points to several portions of its quotation where it identified possible risks, such as staff retention and risks related to knowledge transfer and credentialing. *Id.* Furthermore, the protester notes that its quotation provided significant information addressing those risks, for example, explaining that it already employed all the necessary staff, that those staff were already in place and credentialed, and that it had a 98 percent retention rate. *Id.* Accordingly, the protester argues that the agency unfairly ignored relevant information in its quotation. *Id.*

In response, the agency maintains that it did not ignore the information the protester discusses because the protester's incumbent capture strategy and retention rate formed the basis for strengths assigned to the protester's quotation. See AR, Tab 7, TET Consensus Report at 14. Rather, the agency argues that the weakness resulted because Syneren's own proposal outlined a five-step risk management methodology, but did not appear to actually apply that methodology to the risks it identified. MOL at 20-21. The protester argues that its proposal provided clear explanations of its approach to mitigating risk, and that the agency's argument amounts to an impermissible *post hoc* explanation, not supported by the contemporaneous record. We do not agree on either count.

In reviewing an agency's evaluation, we do not limit our consideration to contemporaneously documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *The S.M. Stoller Corp.*, B-400937 *et al.*, Mar. 25, 2009, 2009 CPD ¶ 193 at 13. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 12.

As a preliminary matter, we do not agree that the agency's arguments represent improper *post hoc* rationalizations. In this case, the agency contemporaneously concluded that the protester's quotation outlines a methodology for risk assessment that appears disconnected from the actual analysis of risks presented in its quotation. See AR, Tab 7, TET Consensus Report at 15. The TET also noted that the protester may be underestimating the risks associated with the transition as a result. *Id.* To the extent the agency's current arguments go beyond the contemporaneous record, they merely provide additional context about the agency's contemporaneous findings. See MOL at 20-21. For example, while the agency now points to specific risks identified in the protester's quotation that do not apply to its quotation or are not meaningfully addressed in its mitigation strategies, this is entirely consistent with the agency's contemporaneous conclusion that the protester's risk analysis was internally inconsistent and appeared to be underestimating the risks associated with the transition. *Id.*

Turning the merits, the agency correctly noted that the protester's quotation identified a five-step risk management methodology, but also noted that the protester's discussion of risks did not appear to employ the methodology described. See AR, Tab 4, Protester's Technical Proposal at 12. Additionally, while the protester identified risks and described mitigation strategies, it was unclear in what way some of the risks related to the protester's quotation or how some of the risks would be remediated by the mitigation strategies. *Id.* For example, the protester's quotation identified the following risk: "potential risk of a new company not treating the incumbent staff fairly which in turn could lead to losing employees." *Id.* Given that the protester is the incumbent, it is unclear how this risk relates to its quotation. Similarly, the protester identifies "Incomplete [government furnished information], [government furnished equipment], knowledge transfer" as a risk facing its transition, but the quotation does not meaningfully explain how that risk applies to the protester's approach or how it would be addressed other than to say it will be "completed on day 1." *Id.* We cannot conclude that the agency's judgment was unreasonable in this respect; the protester simply disagrees with the agency concerning the substance of its evaluation, and this protest ground is denied.

Awardee's Quotation

Finally, the protester alleges that the agency erred by assigning a significant strength to the awardee for its approach to incumbent capture because the agency uncritically accepted the awardee's representation that it intended to provide salary and benefits "as good or better" than the incumbent. Protester's Comments and Supp. Protest at 12-14. Specifically, the protester notes that its quotation provides for a [DELETED] percent pay escalation over the current salary of its incumbent staff, but that the awardee's proposed rates for the five positions were between 3 percent and 20 percent lower. *Id.* Accordingly, the protester contends that it was irrational for the agency to assign a significant strength to the awardee for its proposed incumbent capture strategy, which should instead have merited a weakness because the awardee will be unable to retain incumbent staff. *Id.*

In response, the agency notes that it assigned the significant strength to the awardee for its incumbent capture strategy broadly of which salary was only one component. Supp. MOL at 6-8. Specifically, the TET discussed several aspects of the awardee's approach to incumbent capture including extended discussion of its communication and transition strategies. See AR, Tab 7, TET Consensus Report at 15. Furthermore, as discussed above, the agency argues that the individuals proposed by the protester are not the only personnel performing work under the incumbent task order, and that other incumbent personnel may also be suitable to perform the new task order. Supp. MOL at 8-9. Accordingly, the agency suggests, comparing the proposed rates for the personnel Syneren proposed is not an apples to apples comparison as other incumbent personnel with different rates may be identified as part of the transition. *Id.*

Finally, the agency argues that, because this is a time-and-materials task order with fixed-price fully-burdened labor rates and the solicitation does not provide for a price realism analysis, no assessment of whether the vendor's prices were too low was permitted or required. *Id.* at 7-8. Accordingly, the agency contends that the record is not clear that the awardee will not pay competitive compensation as described in their quotation, and, in any case, the awardee's significant strength was only partly predicated on their representations concerning compensation.

We find that the agency's explanation is consistent with the record, and with applicable law. The significant strength was predicated on several aspects of the awardee's approach to incumbent capture of which compensation was only one. Furthermore, it is not clear that the staff proposed by the protester are the only incumbent staff who could perform the requirements under this task order. More significantly, when, as here, the RFQ contemplates a time-and-materials task order with fixed-price fully-burdened labor rates and does not contemplate a price realism assessment, there is nothing inappropriate about a contractor proposing a price that is below its costs. See *HP Enterprise Servs., LLC*, B-413888.2, *et al.*, June 21, 2017, 2017 CPD ¶ 239 at 5 (*citing Optex Sys., Inc.*, B-408591, Oct. 30, 2013, 2013 CPD ¶ 244 at 5-6). Indeed, as the protester argues in its challenge to the cost control weakness discussed above, the rates that the government pays and the contractor's incurred costs are not coupled

under this task order. Protest at 7. That is to say, even if we view the protester's argument in the most favorable light by assuming that the staff proposed by the protester are the only incumbent staff capable of performing the requirement, the awardee's quoted rates are not necessarily inconsistent with its representation that it will meet or exceed the current salary and benefits for incumbent staff. We cannot conclude that the agency's assignment of a significant strength to the awardee's quotation for its approach to incumbent capture is clearly unreasonable on this record.

The protest is denied.

Thomas H. Armstrong
General Counsel