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Decision

Matter of: Leumas Residential, LLC

File: B-418635

Date: July 14, 2020

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Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of the protester's proposal as technically unacceptable is sustained where the evaluation was unreasonable and inadequately documented.

DECISION

Leumas Residential, LLC, of Fredericksburg, Virginia, protests the award of a contract to DSA, LLC, of Gadsden, Alabama, under request for proposals (RFP) No. N40080-19-R-2506, issued by the Department of the Navy, for grounds maintenance services at various naval facilities. The protester challenges the agency's evaluation of its proposal as technically unacceptable.

We sustain the protest.

BACKGROUND

The RFP was issued on October 17, 2019, as a competitive 8(a) set-aside,¹ under Federal Acquisition Regulation (FAR) part 15, for grounds maintenance services for

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to

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various Navy facilities in Virginia and Maryland. Agency Report (AR), Tab 2, RFP at 11.² The RFP contemplated the award of a fixed-price indefinite-delivery, indefinite-quantity contract for a one-year base period and four 1-year options periods. *Id.* Award was to be made on a lowest-price, technically acceptable (LPTA) basis considering the following three non-price factors and price: technical approach/management; safety; and past performance.³ *Id.* at 78. Price would be evaluated for completeness and reasonableness. *Id.*

The agency received three proposals, including those from Leumas and DSA, which were evaluated by a source selection evaluation board (SSEB) as follows:⁴

	Leumas	DSA
Overall Technical Rating	Unacceptable	Acceptable
Technical Approach/Management	Unacceptable	Acceptable
Safety	Unacceptable	Acceptable
Past Performance	Acceptable	Acceptable
Price	\$12,969,032	\$15,221,962

AR, Tab 7, SSEB Report at 3; Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 12.

The contracting officer, who served as the source selection authority (SSA) for this procurement, reviewed and concurred with the SSEB’s findings. AR, Tab 9, Source Selection Decision Document at 1. As a result, the SSA found that DSA’s lowest-

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arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

² The RFP was amended 11 times. Citations to the RFP are to the final version of the solicitation, as amended. All citations to the record are to the consecutive numbering of the pages in the Adobe PDF format of the documents provided by the agency.

³ In an LPTA source selection process, all non-price factors are evaluated for acceptability (*e.g.*, acceptable or unacceptable), and among offerors determined to be technically acceptable in all regards, award is made on the basis of the lowest evaluated price. FAR 15.101-2.

⁴ An acceptable rating was defined as, “Proposal meets the minimum requirements of the solicitation.” An unacceptable rating was defined as, “Proposal does not meet the minimum requirements of the solicitation.” AR, Tab 4, Source Selection Plan (SSP) at 21.

priced, technically acceptable proposal, with a price considered fair and reasonable, represented the best value to the government and selected it for award. *Id.* at 1-2.

Leumas was notified of DSA's selection on March 19, 2020. After requesting and receiving a debriefing, Leumas filed this timely protest.

DISCUSSION

Leumas challenges the agency's evaluation of its proposal as technically unacceptable. Specifically, Leumas challenges the agency's assessment of significant weaknesses and deficiencies under the technical approach/management factor and the safety factor, which resulted in the agency's finding that Leumas was unacceptable under both factors. Since we found that none of the arguments made by the Navy reasonably support its conclusion that this proposal was unacceptable, we sustain the protest. Our conclusions about each of the Navy's arguments are set forth below.

While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. *NavQSys, LLC*, B-417028.3, Mar. 27, 2019, 2019 CPD ¶ 130 at 3. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Navistar Def., LLC, BAE Sys., Tactical Vehicle Sys. LP*, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

Technical Approach/Management Factor

In order to assess proposals under the technical approach/management evaluation factor, the solicitation instructed offerors to submit a narrative response that clearly demonstrated their "understanding of an approach to accomplishing the complexity and magnitude of service requirements set forth in the performance objectives and standards of the Performance Work Statement." RFP at 66. The solicitation specifically required offerors to discuss the following five specific elements: phase-in transition plan; workforce management; key personnel; environmental and security; and pest control and grounds maintenance. *Id.* at 66-67. In evaluating Leumas's proposal, the agency assessed three deficiencies and three significant weaknesses and assigned an unacceptable rating under this factor. AR, Tab 6, Technical Evaluation Board (TEB) Report at 5; AR, Tab 7, SSEB Report at 4.

Assessed Deficiencies

We have fully reviewed and considered the record of this protest, including the additional information provided by the agency at the request of our Office. As discussed below, based on our review, the contemporaneous record does not provide support for

the agency's concerns that formed the basis for the deficiencies assessed to Leumas's proposal under the technical approach/management factor.⁵

Compliance with Subcontracting Limitation Clause

First, Leumas challenges the agency's assessment of a deficiency for allegedly violating the limitation on subcontracting clause at FAR 52.219-14. In this regard, the protester argues that its proposal did not take exception to the clause and that the agency unreasonably concluded that its teaming partner/subcontractor would be incurring more than 50 percent of the cost of personnel for this work.⁶ Protest at 10-16; Comments at 8-9. The agency explains that the subcontracting/teaming agreement between Leumas and ProDyn required ProDyn to perform more than 50 percent of the scope of work. The Navy contends that the proposal, on its face, led the agency to conclude that Leumas's proposal failed to comply with FAR clause 52.219-14, rendering Leumas's proposal unacceptable. COS/MOL at 23.

With regard to the limitation on subcontracting, FAR clause 52.219-14(c)(1) provides that "at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. *Geiler/Schrudde & Zimmerman*, B-412219 *et al.*, Jan. 7, 2016, 2016 CPD ¶ 16 at 7. Neither issue is one that our Office generally reviews. See 4 C.F.R. § 21.5(a), (c). However, as our Office has consistently explained, where a proposal, on its face, should lead an agency to conclude that an offeror has not agreed to comply with the subcontracting limitation, the matter concerns the proposal's acceptability. *Geiler/Schrudde & Zimmerman*, *supra* at 7-8. This is because the limitation on subcontracting is a material term of the solicitation, and a proposal that fails to conform to a material term or condition of a solicitation is unacceptable and may not form the basis for an award. *Id.* at 8. An offeror, however, need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. *Express Med. Transporters, Inc.*, B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. Rather, such compliance is presumed unless specifically negated by other language in the proposal. *Id.*

⁵ A deficiency was defined as a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level. AR, Tab 4, SSP at 21.

⁶ The solicitation allowed offerors to submit proposals as part of a teaming arrangement defined under FAR subpart 9.6. RFP at 65-66. Leumas submitted its proposal as part of a teaming arrangement with ProDyn LLC, where ProDyn would serve as a subcontractor to Leumas. Protest at 9.

Here, we find the agency's conclusions that Leumas took exception to the limitation on subcontracting clause to be unreasonable. The text that the agency cites as indicative of Leumas taking exception to the limitation on subcontracting clause states as follows:

Award of Work as Condition Precedent

[If Leumas is awarded the contract], ProDyn, LLC and Leumas Residential agree to draft a separate and exclusive subcontractor agreement related to [Naval Support Activity] South Potomac Dahlgren, VA, Pumpkin Neck Annex, VA, Indian Head, MD, Stump Neck, MD and [U.S. Naval Research Laboratory] Satellite Location contract that provides ProDyn, LLC will perform the mowing, tree maintenance, and landscape maintenance at a minimum.⁷

AR, Tab 5a, Leumas Subcontracting/Teaming Agreement at 1.

In its legal memorandum, the agency asserts that, based on the quoted language, “[t]he work to be performed by the subcontractor, ProDyn, LLC constitutes more than 50% of the scope of work.” COS/MOL at 23. There is, however, nothing in the contemporaneous evaluation record that indicates how the agency concluded that Leumas took exception to the requirement that “at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.” See AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4; FAR clause 52.219-14(c)(1). Instead, the record provides only the following conclusory finding: “The subcontractor, ProDyn, LLC, is going to be gaining more than 50 percent of the work requirement. This is in violation of FAR 52.219-14. The TEB considers this a deficiency.” *Id.*

Because the agency report was, in our view, conclusory and did not adequately respond to the challenges raised by the protester, our Office requested additional information from the agency.⁸ GAO Request for Information (RFI), June 16, at 2. In particular, we asked how the agency reached its conclusion that Leumas's proposed approach of using ProDyn to perform “mowing, tree maintenance, landscape management at a minimum” would constitute more than 50 percent of the personnel cost in this effort. *Id.* (referencing COS/MOL at 23; AR, Tab 7, SSEB Report at 4; AR, Tab 5a, Leumas Subcontracting/Teaming Agreement at 1).

⁷ The locations identified in the subcontracting agreement reflect those locations listed in the solicitation to be serviced. See RFP at 11.

⁸ Moreover, in its agency report, the Navy did not produce any records regarding the protester's price proposal or the agency's price analysis that may have provided any support to its conclusion that the protester's subcontractor would be incurring more than 50 percent of the cost of personnel for this work.

The agency responds that the scope of work included “grass cutting, trimming, edging, weed control, fertilization, irrigation, shrub, hedge, plants and tree maintenance, plant bed maintenance, weeding, weed control, mulching and vegetation/debris removal” and that the agency assessed a deficiency because Leumas’s proposal, viewed in its entirety, stated that its subcontractor would “perform more than 50 percent of the work requirement.” Agency Resp. to GAO RFI, June 18, at 7. With its response, the agency produced additional documents that the agency contends “validates” its view that Leumas took exception to FAR clause 52.219-14. *Id.*, attach. 1, Letters of Commitment at 1-2. The agency points to language in these letters indicating that Leumas would primarily focus its efforts as part of its teaming arrangement on “accounts payable, human resources, payroll, government partnership, union relations, and accounting,” while ProDyn would focus on “operations, quality control, and safety.” *Id.*; Agency Resp. to GAO RFI, June 18, at 7.

On this record, we cannot find the agency’s conclusions to be reasonable or properly documented. The language that the agency relies upon in the subcontractor/teaming arrangement does not, on its face, indicate that Leumas did not intend to comply with the requirement that at least 50 percent of the cost of contract performance incurred for personnel would be expended by Leumas. Rather, the language above merely reflects the intent of Leumas and ProDyn to enter into a subcontracting agreement in the future if Leumas was awarded a contract. Further, the agency has not explained how it determined that the agreement’s language of “mowing, tree maintenance, and landscape maintenance at a minimum” indicated that Leumas intended on subcontracting more than 50 percent of the effort, let alone 50 percent of the cost of contract performance incurred for personnel. AR, Tab 5a, Leumas Subcontracting/Teaming Agreement at 1.

As we have stated, an offeror need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Such compliance is presumed unless specifically negated by other language in the proposal. *Express Med. Transporters, Inc., supra* at 6. Here, we see no support in the language of the proposal, or in the evaluation record, for the agency’s conclusion that Leumas took exception to the requirement that at least 50 percent of the cost of contract performance incurred for personnel had to be incurred by Leumas.

Quality Control Manager/Site Safety and Health Officer Location

Leumas next challenges the agency’s assessment of a deficiency based on the agency’s conclusion that the “color-coding” in the organizational chart provided in Leumas’s proposal indicates that the two individuals proposed as the quality control manager (QCM) and site safety/health officer (SSHO) would not be on-site, as required by the RFP. Protest at 10; Comments at 10. Specifically, Leumas argues the agency drew unreasonable conclusions from the proposal’s organizational chart because the proposal: (1) provided all the information required by the RFP; (2) did not state that the QCM/SSHOs would not be on-site; and (3) identified its proposed QCM/SSHOs by the

location over which they had responsibility. *Id.* The protester also notes that the RFP did not require offerors to affirmatively state that the QCM/SSHO would be on-site.

The agency responds that because the proposal did not explain the color-coding scheme in the organizational chart, the agency reasonably concluded that one color was used to represent on-site personnel (laborers and project managers), and the other color was used to represent corporate management (corporate staff). COS/MOL at 24. The agency further states that because the QCM/SSHO was color-coded the same color as the corporate staff, the agency reasonably concluded that those individuals would not be on-site as required by the solicitation. *Id.* at 24. As before, the contemporaneous evaluation record, however, is devoid of any documentation of this assessment but for the following conclusory statement: “Based on the color-coding of Leumas’ Organizational chart, the QCM/SSHO will not be on site as required by the RFP. The TEB considers this to be a deficiency.” AR, Tab 6, TEB Report at 5; AR, Tab 7 SSEB Report at 4.

In order to assess proposals under the key personnel element under the technical approach/management factor, the solicitation instructed offerors to provide “[j]ob descriptions, names, titles, qualifications, responsibilities, and authority level of key corporate and on-site personnel (e.g., project manager, quality control manager, and site safety/health officer) proposed for this contract.” RFP at 66-67. In order to assess proposals under the workforce management element of the technical approach/management factor, offerors were to provide, among other things, diagrams showing the proposed organization. *Id.* at 66.

The Navy supports its conclusion by pointing to language in Leumas’s proposal stating that part of the protester’s effort to maintain a strong relationship between corporate and on-site personnel would include “[c]orporate monthly visits at a minimum.” Agency Resp. to GAO RFI, June 18, at 9 (citing AR, Tab 5, Leumas Technical Proposal at 8). In addition, the Navy contends that because the QCM/SSHOs were “color coded with what the SSEB considered to [be] corporate management,” there were no specific references to QCM/SSHO personnel being on-site as required by the solicitation. *Id.*; AR, Tab 5, Leumas Technical Proposal at 7. The agency also points to statements in the proposal that Leumas’s project managers and assistant project managers will “remain full-time employees all year” and that they “will be onsite throughout the non-growing season.” Agency Resp. to GAO RFI, June 18, at 9; AR, Tab 5, Leumas Technical Proposal at 6. The Navy explains that since Leumas did not provide similar details with regard to its QCM/SSHO, it concluded that the QCM/SSHO personnel would not be on-site. Agency Resp. to GAO RFI, June 18, at 9.

On this record, we cannot find the agency’s conclusion to be reasonable. There is no dispute that the solicitation required the QCM/SSHOs to be on-site. AR, Tab 2, RFP, annex 020000, management and administration at 10-11. On the other hand, the protester correctly notes that the solicitation did not require the offeror to provide any affirmative statement that the QCM/SSHOs be on-site. In addition, nothing in Leumas’s proposal stated that the QCM/SSHOs would not be on-site. To the extent that the

agency made “inferences” on these subjects, these inferences are not supported by the contemporaneous evaluation record.

Knowledge of Virginia Department of the Environment Requirements

Leumas argues that, in assessing a deficiency to the protester’s proposal for failing to demonstrate its knowledge of the Virginia Department of the Environment (VDE) requirements, the agency used an unstated evaluation factor. In this regard, Leumas contends that the solicitation instructed offerors to explain how they would ensure compliance with the VDE requirement--not provide a demonstration of current knowledge of VDE requirements, as the agency argues. Protest at 10-12; Comments at 11-12.

The agency maintains that it reasonably assessed a deficiency because the proposal failed to demonstrate that Leumas’s personnel currently possessed knowledge of the VDE requirements. COS/MOL at 25. As support for its position, the agency argues that Leumas’s proposal did not indicate that the company “currently has a non-supervisory certified pesticide applicator,” and that hiring “an untrained and unlicensed contractor exponentially increases the risk of unsuccessful performance and puts the [a]gency at high risk of environmental mismanagement with long-lasting legal and environmental effects.” *Id.* As a result, the agency argues that it reasonably assessed the deficiency “as these concerns appreciably increase[] the risks of unsuccessful performance.” *Id.* Again, these arguments by the agency are provided in lieu of any contemporaneously documented evaluation in the record. As before, the entirety of the agency’s evaluation of this issue is encapsulated in the following finding by the evaluators: “The proposal also does not indicate a knowledge of Virginia Department of the Environment (VDE) requirements. The TEB considers this to be a deficiency.” AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4.

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. *Sterling Med. Corp.*, B-412407, B-412407.2, Feb. 3, 2016, 2016 CPD ¶ 73 at 11; *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. *Raytheon Co.*, B-404998, July 25, 2011, 2011 CPD ¶ 232 at 15-16.

As discussed earlier, the solicitation instructed offerors to address five identified elements under the technical approach/management factor. One of these elements involved pest control and grounds maintenance. RFP at 66-67. Relevant here, offerors were asked “How will you ensure landscaping maintenance and plans meet Virginia Department of the Environment (VDE) regulations?” *Id.* at 67.

Leumas’s proposal addressed this question by identifying the various areas regulated by VDE that would affect the contract, and the proposal explained that its operation

manager and project managers would familiarize themselves with the regulations and train the employees in recognizing the areas of the contract that may be regulated by the VDE. AR, Tab 5, Leumas Technical Proposal at 35-36. Leumas further explained that it is the responsibility of the project managers, site health and safety managers, and the lead certified pesticide applicator to ensure all landscaping maintenance and plans meet the VDE regulations. *Id.* at 36.

While the agency may have had concerns regarding the feasibility of Leumas's approach or the firm's capability to meet this requirement, the record contains no contemporaneous documentation of this consideration. Instead, the record only shows that the agency assessed a deficiency because Leumas's proposal did not demonstrate current knowledge of VDE requirements, which the agency asserts--but cannot demonstrate--was a requirement of the solicitation.

We also find the agency's responses to the protest allegations, as well as the additional briefing requested from the agency, to be unpersuasive. For example, our Office specifically requested that the agency explain why the referenced portions of Leumas's proposal did not adequately address its procedure to ensure compliance with VDE regulations. In response, the agency simply argues that Leumas's proposal failed to provide a method or procedure. Agency Resp. to GAO RFI, June 18, at 10. We also asked the agency to explain the basis for its conclusion that Leumas's key personnel and employees were not currently familiar with VDE requirements. In response, the agency argues that because the statement in the proposal used the future tense of a verb ("will familiarize"), this indicated a lack of present familiarization. *Id.* at 10.

Finally, we asked the agency why it considered Leumas's proposed personnel to be "untrained and unlicensed," as asserted in its memorandum of law. See COS/MOL at 17, 25. According to the agency, Leumas's proposal did not indicate that it has a non-supervisory certified pesticide applicator; yet our review indicates the proposal expressly references licensed pesticide applicators. In its response, the agency states that:

The non-corporate pesticide applicator is listed as the "Lead Herbicide Applicator" but not listed as being dedicated to a specific site. Leumas'[s] submission indicates that this person will be traveling between sites. As a result, when the Lead [H]erbicide Applicator is at one site, the work is not going to be performed or a non-certified person will be applying herbicide/pesticide at the other site.

Agency Resp. to GAO RFI, June 18, at 11. Contrary to the agency's assertion, not only did Leumas's proposal state that it would employ "two full-time Maryland and Virginia-licensed Pesticide Applicators who will work in close conjunction with the [Project Managers], [Assistant Project Managers], Environmental Manager, Operations Manager, and the SSHOs/QCMs," the proposal also stated that the president and one of the QCM/SSHOs were licensed pesticide applicators in the States of Maryland and Virginia and can serve as interim applicators should any employment issues arise. AR,

Tab 5, Leumas's Technical Proposal at 22. Leumas's proposal also stated that the company "employs multiple other licensed individuals at nearby job site locations" and that the pesticide applicators would also regularly attend refresher training. *Id.*

On this record, we cannot find the agency's evaluation to be reasonable. We agree with the protester that the solicitation did not instruct offerors to demonstrate their knowledge of the VDE requirements.⁹ Here, the solicitation instructed offerors to explain how they would ensure landscaping maintenance and plans met the VDE regulations. In response, Leumas's proposal stated that it would ensure compliance through training.

In our view, the agency's contemporaneous evaluation conclusions and arguments made during the course of the protest are not supported by, and are inconsistent with, the contemporaneous record documents including Leumas's proposal.

Assessed Significant Weaknesses

Leumas also challenges the three significant weaknesses the agency assessed to the protester's proposal under the technical approach/management factor.¹⁰ Protest at 8-9; Comments at 4-8. The agency responds that for each significant weakness, Leumas's proposal failed to meet the minimum requirements of the solicitation. COS/MOL at 17-20.

Phase-in Transition Plan

Leumas contends that the agency improperly assessed its proposal a significant weakness under the phase-in transition plan element for failing to include "actions and responsibilities [of] non-supervisory personnel." Protest at 7-8; Comments at 4-6. The agency responds that it interpreted the language in Leumas's phase-in proposal to mean that all of Leumas's employees were currently untrained and that they would be trained during the phase-in period. COS/MOL at 17. The agency further argues that given that the solicitation only provided for a 30-day transition period, the fact that employees were untrained and possibly not ready to meet mission requirements, warranted the SSEB's assessment of a significant weakness. *Id.* at 17-18.

⁹ While the solicitation contained proposal submission instructions for each factor, it did not inform offerors how the proposal would be evaluated under each factor. Instead, the detailed information on how the proposals would be evaluated was only found in the source selection plan (SSP), which was not made available to offerors. Relevant here, the SSP stated that for the technical approach/management factor, "[t]he standard has been met when the offeror's proposed approach demonstrates an acceptable understanding of the performance objectives and standards. The proposal provides a feasible technical/management approach with the capability to at least meet solicitation performance objectives and standards." AR, Tab 4, SSP at 24.

¹⁰ A significant weakness was defined as a flaw that appreciably increases the risk of unsuccessful contract performance. AR, Tab 4, SSP at 21.

For the phase-in transition plan element, the solicitation provided only the following instruction: “Describe what you will do to ‘start-up’ for performance of this contract. The phase in transition period is 30 days as per Section L of the solicitation of the RFP. Include a schedule of key events; personnel actions and responsibilities regarding employees at all levels.” RFP at 66.

The agency found that for this element, Leumas provided an adequate schedule of key events, but that Leumas’s phase-in plan did not “include actions and responsibilities [of] non-supervisory personnel.” AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4. The TEB found this to be a significant weakness. *Id.*

Leumas’s proposal provided a narrative, describing a phase-in transition plan, and a chart with columns detailing (1) key events and actions, (2) personnel responsible for each event and action, and (3) a time frame for the listed event and action. AR, Tab 5, Leumas’s Technical Proposal at 1-5. Leumas also indicated that during phase-in, “all employees will be trained in accordance with the rules, regulations, and schedules of Leumas-ProDyn.” *Id.* at 1. Based on our review, Leumas’s transition plan appears to meet the minimum requirements of the solicitation. Only after the protest was filed, does the agency assert, for the first time, that it assessed the proposal a significant weakness because the proposal’s statement that all employees would be trained during the phase-in period indicated that Leumas’s employees were “untrained and possibly not ready to meet the mission requirements.” COS/MOL at 18. Here, as with the assessed deficiencies, the record includes no support for the agency’s now-articulated concern regarding Leumas’s alleged untrained workforce. On this record, we cannot find the agency’s conclusion to be reasonable or adequately documented.

Lack of Corporate Oversight

Leumas also challenges the agency’s assessment of a significant weakness under the workforce management element because, according to the Navy, there appeared to be “no direct corporate oversight of on-site project managers indicating a lack of corporate control and accountability over site-specific issues.” AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4. Leumas challenges this finding, arguing that the solicitation did not require the contractor to have “direct corporate oversight of on-site project managers” as the agency contends. Protest at 8-9; Comments at 6-7.

In response, the Navy relies on the following solicitation instruction as the basis for its assessment of the significant weakness: “Describe the lines of management authority, supervision, span of control and accountability, including the relationship between overall management (corporate and on-site), administration, and subcontractors. Provide diagrams showing the proposed organization and workforce project management plan.” RFP at 66.

Because the evaluation record provided no other explanation or elaboration for the assessment of this significant weakness, and the agency report was, in our view, conclusory and did not adequately respond to the concerns raised by the protester, our

Office again requested additional information from the agency. In response, the agency, for the first time, made the following argument: because Leumas's proposal indicated that it would "empower [its] project managers with the authority to act on behalf of the company to commit resources," the agency was concerned that Leumas's corporate management was delegating all site authority to the on-site supervisor and enabling the site supervisor to manage the overall performance of the contract. Agency's Resp. to GAO RFI, June 18, at 4. In this regard, the agency explains that because Leumas's proposal failed to define what "empowering our project managers" meant, the "the SSEB could not infer that such empowerment met the minimum standards required under the solicitation." *Id.*

While the agency reasonably might have found that the extent of Leumas's proposed delegation of authority to its project managers was a flaw that appreciably increased the risk of unsuccessful contract performance, there is nothing in the contemporaneous evaluation record to suggest that this concern was the basis for the agency's assessment of the significant weakness. Instead, the record shows only that the agency found that Leumas's proposal failed to provide direct corporate oversight which was considered to be a significant weakness. AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4. The rationale provided in response to GAO's inquiry is found nowhere in the evaluation record, and instead only surfaces as an argument made by the agency after the submission of the agency report and in the heat of the adversarial process. On this record, we cannot find the agency's conclusion to be reasonable or adequately documented.

Lack of Work Plan for Pest Control

The agency also assessed the Leumas proposal a significant weakness for failing to include a contractor work plan (CWP) for pest control. AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4. Leumas challenges this finding, arguing that it provided a detailed work plan in its proposal. Protest at 9; Comments at 8 (citing AR, Tab 5, Leumas Technical Proposal at 22-25). The agency responds that while Leumas's proposal "gave a lengthy description of pest services," it failed to "explain how it would follow the principles of Integrated Pest Management (IPM) and reflect current industry practices." COS/MOL at 20.

Again, because of the concerns regarding the adequacy of the agency's responses to the protest allegations, our Office requested additional information from the agency, including the following question: "Did the agency consider Tab 5, Leumas Technical Proposal at 22-26 to be a CWP?" GAO RFI, June 16, at 2. The agency affirmatively states "Yes." Agency Resp. to GAO RFI, June 18, at 5. Nonetheless, the agency also argues that Leumas's proposal "failed to meet the minimum standard," and that "Leumas'[s] proposal provides a long narrative about having certified pest control employees, but the SSEB determined that by simply having a licensed pest control applicator does not constitute a comprehensive work plan." *Id.* The agency further argues that Leumas's proposal "fell short of meeting the minimum standard," because the solicitation "required offerors to provide the actual IPM for evaluation purposes." *Id.*

Finally, the Navy asserts that Leumas's proposal "does not address the principles of an IPM, but rather 'will develop' the IPM," and was, thus, assessed a significant weakness. *Id.* at 5-6.

Relevant here, the solicitation instructed offerors to provide a CWP for pest control and explain how the CWP would follow the principles of IPM and reflect current industry practices. RFP at 67. As before, the entirety of the agency's evaluation regarding this issue was contained in the following conclusion: "The Contractor[']s Work Plan for pest control is not included in the proposal. The TEB considers this to be a significant weakness." AR, Tab 6, TEB Report at 5; AR, Tab 7, SSEB Report at 4.

As stated previously, while the agency reasonably might have raised concerns regarding how Leumas proposed to follow the principles of IPM (and reflect current industry practices), that is not the concern reflected in the evaluation record. Rather, the evaluation record simply states that Leumas's work plan for pest control was not included in its proposal, and that this omission warranted the assessment of a significant weakness. *Id.* The agency, however, now acknowledges that Leumas's proposal did include a CWP for pest control. Agency Resp. to GAO RFI, June 18, at 5. In doing so, the agency appears to have abandoned the rationale stated in its contemporaneous evaluation, and shifted its arguments. As the protester observes, the Navy is effectively "putting words into the mouth of the SSEB . . . that are entirely absent from and contradicted by the contemporaneous record." Protester's Response to GAO RFI, June 22, at 9. On this record, we cannot find the agency's conclusion to be reasonable or adequately documented.

Safety Factor

Under the safety evaluation factor, the Navy assessed a deficiency to the Leumas proposal for purportedly providing data for only one year out of the three years required by the RFP.¹¹ AR, Tab 6, TEB Report at 5-6; AR, Tab 7, SSEB Report at 5. Leumas argues the assessed deficiency was unreasonable because its proposal included safety data for all three years. Protest at 12-13; Protester's Comments at 13-14. Specifically, Leumas asserts that for 2016 and 2017 it provided rates that had the numerical value of "0" because "Leumas in 2016 and 2017 had no annual losses in insurance claims against its policy premiums; had no OSHA Days Away from Work, Restricted Duty, or Job Transfer occurrences; and had no recordable OSHA cases." Protest at 13; Protester's Comments at 14; Protester's Resp. to GAO RFI, June 22, at 18. The agency responds that because Leumas provided the numerical rates of "0" for two calendar years, it was required under the solicitation to affirmatively state that its rate was "0" and provide an explanation. COS/MOL at 14, 26; Agency Resp. to GAO RFI, June 12, at 1-2.

¹¹ The required safety data were the contractor's experience modification rate (EMR); Occupational Safety and Health Administration (OSHA) days away from work, restricted duty, or job transfer (DART) rate; and total recordable case (TRC) rate. RFP at 67.

The record shows that the solicitation included a form for offerors to submit safety data (EMR, OSHA DAR, and TRC rates) for the three previous calendar years (2016 - 2018). RFP at 75. Relevant here, the solicitation instructed offerors that had no EMR rate, or equivalent, or could not submit an OSHA DART rate and TRC rate, for any year, to affirmatively state so and provide an explanation. *Id.* at 67-68. This information was to be provided in block 4 of the safety data form. *Id.* at 75.

Leumas's proposal included completed safety data forms for Leumas and its proposed subcontractor. AR, Tab 5, Leumas Technical Proposal at 37-38. For 2016 and 2017, Leumas's proposal indicated that its EMR, DART, and TRC rates were "0.00."¹² AR, Tab 5, Leumas Technical Proposal at 37. Leumas did not provide any information in block 4 of the safety data form. *Id.* Leumas's proposal contained no representations or statements that it could not provide an EMR, OSHA DART, or TRC rate or explanation as to what the numerical values of "0" represented. *Id.*

Because the agency's response did not fully address this issue, our Office requested additional information about this issue from the agency on two occasions. In particular, we first asked if it was possible for an offeror to have a numerical rate of "0" for the safety data and why the agency considered the submission of a rate of "0" as the equivalent of a "non-submission." GAO RFI, June 11, at 1. In response, the agency explains that it was possible to have rates of "0," but that it was unclear from Leumas's proposal whether the rate was actually "0" or if Leumas did not have any safety data for that year. Agency Resp. to GAO RFI, June 12, at 1. The agency also reiterates that the solicitation required Leumas to provide an explanation as to why its rates for the two calendar years were "0." *Id.* at 1-2.

In response to our subsequent request that the Navy provide a more fulsome explanation for its conclusion that Leumas only provided safety data for one year, the agency asserts, for the first time, that information provided in Leumas's past performance proposal indicated that Leumas did not have a record of performing grounds maintenance work prior to 2018.¹³ As such, according to the agency, Leumas should have provided an EMR rate of "1" (not "0").¹⁴ Agency Resp. to GAO RFI, June 18, at 11. In that context, the Navy argues that it was reasonable to consider the submission of a rate of "0" as equivalent to not having submitted any information. *Id.*

¹² For reference, Leumas provided the following values for its EMR, OSHA DART, and TRC rates, respectively, for 2018: "1.00," "2.49," and "2.49." AR, Tab 5, Leumas Technical Proposal at 37.

¹³ Leumas disputes the Navy's assertion as factually inaccurate, because "Leumas was formed in 2003 and its [North American Industry Classification System] codes include landscaping services and other related work." Protester's Resp. to GAO RFI, June 22, at 18.

¹⁴ The rationale of why the agency believes Leumas's EMR rate should have been a "1" instead of a "0" is not relevant to this discussion.

We find the agency's conclusions here unreasonable. There is nothing in the solicitation requiring an offeror that had a rate of "0" for any of its safety data to provide additional explanation as to why it received such rate. The solicitation required an affirmative statement and explanation only if the offeror had *no* safety data for any particular year. RFP at 67-68. Here, the agency concedes that the number "0" is a rate responsive to the solicitation. Agency Resp. to GAO RFI, June 12, at 1-2. Furthermore, the contemporaneous record provides no indication that the basis for the agency's assessed deficiency was because the agency believed that Leumas should have provided an EMR rate of "1." Agency Resp. to GAO RFI, June 12, at 11. We also see no reasonable basis for the Navy's conclusion that Leumas submitted safety data for only one year (out of three). On this record, we cannot find the agency's evaluation to be reasonable or adequately documented.

Competitive Prejudice

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17.

Here, but for the above discussed errors, the agency might have assigned an "acceptable" rating for the technical approach/management and safety factors, and concluded that Leumas's technical proposal was "acceptable" overall. Given that Leumas's proposal offered a lower price than DSA's, the agency might have concluded that Leumas submitted the lowest-priced, technically acceptable proposal. Accordingly, we conclude that Leumas has established the requisite competitive prejudice to prevail in its protest.

RECOMMENDATION

We recommend that the agency reevaluate Leumas's technical proposal in accordance with the solicitation and our decision; adequately document its evaluation findings; and make a new source selection decision. In the event Leumas's proposal is determined to be technically acceptable and offers the lowest-price to the government, we recommend that the award to DSA be terminated for the convenience of the government, and that the award be made to Leumas. Additionally, we recommend that Leumas be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Leumas should submit its claim for costs, detailing and certifying the time expended and the costs incurred with 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