

## Decision

**Matter of:** Sungrim Engineering & Construction Company, Ltd.

**File:** B-419067.3

**Date:** August 6, 2021

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Sang Chin An, for the protester.

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### DIGEST

Significant weaknesses that should have been identified and disclosed during an agency's initial evaluation, but were not, must be disclosed after they are identified by the agency's subsequent evaluation. As such, discussions, conducted by the agency as part of its corrective action following a prior protest, were not meaningful where the agency did not disclose an evaluated flaw the agency first identified in its reevaluation of the protester's unchanged proposal.

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### DECISION

Sungrim Engineering & Construction Company, Ltd., of Busan, Korea, protests the award of a contract to Yibon Construction Co., Ltd., of Seoul, Korea, pursuant to request for proposals (RFP) No. W912UM-20-R-0002, issued by the Department of the Army, Corps of Engineers, to provide paving and related construction services at airfields in South Korea. Sungrim primarily asserts that the agency's evaluation of its technical proposal was unreasonable and that the agency failed to conduct meaningful discussions.

We sustain the protest.

## BACKGROUND

In March 2020, the agency issued the solicitation, seeking proposals for award of an indefinite-delivery indefinite-quantity job order contract (JOC).<sup>1</sup> The solicitation provided for award on the basis of a best-value tradeoff between the following evaluation factors, listed in descending order of importance: management plan to execute multiple projects and sample project;<sup>2</sup> past performance;<sup>3</sup> and price.<sup>4</sup> Agency Report (AR), Tab 1, RFP at 20.

On or before the April 17, 2020 closing date, proposals were submitted by 10 offerors, including Sunclim and Yibon. In evaluating these proposals, the agency excluded several proposals from consideration, including Yibon's, on the basis that they failed to comply with the solicitation requirements.

In evaluating Sunclim's proposal under the most important factor, management plan, the agency identified multiple strengths and no weaknesses, and assigned it the highest rating, outstanding. AR, Tab 6, First Source Selection Decision Document (SSDD) at 2-4. In August 2020, the agency selected Sunclim's proposal for award. In determining that the proposal offered the best value to the government, the agency stated:

Sunclim's Factor 1 Management Plan proposal demonstrated its good understanding of . . . the specific tasks to be completed under JOC task orders. . . . The level of detail in Sunclim's Factor 1 Management Plan proposal pertaining to JOC task order work scheduling elements

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<sup>1</sup> The agency states that a JOC is "based on a Unit Price Book, which provides preset prices" for individual tasks contemplated by the solicitation's scope of work. Memorandum of Law (MOL) at 1 n.1.

<sup>2</sup> Each offeror was required to describe its approach to meeting various solicitation requirements; the agency refers to an offeror's response to this portion of the solicitation as its technical proposal. With regard to evaluation under this factor, the agency assigned adjectival ratings of outstanding, good, acceptable, marginal, or unacceptable.

<sup>3</sup> Offerors were advised that, in evaluating past performance, the agency would assign confidence ratings of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. RFP at 22-23.

<sup>4</sup> With regard to price, offerors were required to propose a co-efficient factor covering indirect costs (such as overhead) and profit that would be applied to the preset task prices; this proposed factor formed the basis for the agency's comparison of offerors' proposed prices. RFP at 3-4; MOL at 2 n.2.

demonstrated good ability to successfully manage progress under a JOC task order and prepare and submit progress payments.

*Id.* at 4.

Thereafter, Yibon filed a protest with our Office, challenging the agency's exclusion of its proposal from the competition.<sup>5</sup> In response to Yibon's protest, the agency decided to take corrective action on the basis that the solicitation's instructions "might be confusing." MOL at 5. Specifically, the agency stated that it would suspend performance of the contract awarded to Sunclim, revise the terms of the solicitation, request revised proposals from all offerors, and make a new source selection decision. *Id.*

On November 3, 2020, the agency issued a solicitation amendment that clarified the solicitation requirements, expanded the page limit on technical proposals, and requested revised submissions from all initial offerors. With the amendment, the agency sent discussion questions to the various offerors, identifying evaluated weaknesses in their proposals.<sup>6</sup> However, since the agency's evaluation of Sunclim's initial proposal did not disclose any weaknesses, the agency's discussion letter to Sunclim did not identify any aspect of the proposal that it could "strengthen." On or before the November 16, 2020 closing date, revised proposals were submitted by eight offerors, including Yibon and Sunclim; Sunclim's revised proposal was not materially changed from its initial proposal. See Protest, attach. H, Sunclim Technical proposal, April 17, 2020; attach F, Sunclim Technical Proposal, Nov. 16, 2020.

In evaluating Sunclim's revised proposal under the most important factor, management plan, a new Source Selection Evaluation Board (SSEB) again identified multiple strengths, but also assessed a weakness. Specifically, the SSEB concluded that Sunclim's proposal did not provide sufficient details regarding closeout activities, as-built drawings, and completion of task orders.<sup>7</sup> AR, Tab 9, SSEB Report at 17. Due

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<sup>5</sup> Yibon's proposal was excluded for failing to comply with the solicitation instructions regarding information that was required to be included in its 30-page technical proposal. In its protest, Yibon stated that it was "impossible to include [certain required information in its page-limited technical proposal]" adding that it "placed [the required information] in [its] Price Proposal which had no page limit." MOL at 5.

<sup>6</sup> The agency inadvertently sent its discussion questions for one of the initially-excluded offerors to Sunclim. These discussion questions identified an aspect of that other offeror's proposal that the agency characterized as a weakness and stated: "you may submit additional information to strengthen [the proposal]." Protest, attach. I, Discussion Questions at 2.

<sup>7</sup> The source selection decision and the SSEB report are inconsistent regarding which part of Sunclim's proposal supports the evaluated weakness for a lack of detail. Specifically, the SSEB report states that the lack of detail related to Sunclim's quality

to this evaluated weakness, the SSEB assigned a rating of good, in place of the rating of outstanding that had been assigned to the initial proposal.

In evaluating Yibon's revised proposal under the management plan factor, the agency identified several strengths and no weaknesses, and assigned a rating of outstanding; additionally, Yibon's price coefficient was lower than Sungrim's.<sup>8</sup> AR, Tab 9, SSEB Report at 20-21; Tab 10, Second SSDD at 5. Based on this evaluation record, the agency selected Yibon's proposal for award. Sungrim's protest followed.

## DISCUSSION

Sungrim challenges the agency's evaluation of its revised proposal; notes that the technical proposal it submitted following the agency's corrective action was not materially changed from its initial technical proposal; and maintains that the agency failed to conduct meaningful discussions with Sungrim prior to submission of its revised proposal.<sup>9</sup>

In responding to Sungrim's assertion that the agency failed to conduct meaningful discussions, the agency acknowledges that the evaluated weakness in Sungrim's revised proposal under the most important factor, management plan, "resulted in Sungrim's [management plan] rating declining from Outstanding to Good." MOL at 11. Nonetheless, the agency asserts that "the Agency could not have identified this weakness to Sungrim in the November 3, 2020 discussion letter because it did not exist in the record," adding that "[t]he [initial] SSEB had not identified any significant weaknesses or deficiencies and thus had no discussion items to offer [to Sungrim]." *Id.*

When conducting discussions with offerors, those discussions must be meaningful; that is, an agency must point out weaknesses, excesses or deficiencies in a proposal that require correction or amplification in order for the offeror to have a reasonable chance

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control plan; in contrast, the source selection decision states that the lack of detail related to Sungrim's Safety Plan. AR, Tab 9, SSEB Report at 17; Tab 10, Second SSDD at 5.

<sup>8</sup> With regard to the past performance evaluation factor, the agency assigned satisfactory confidence ratings to both proposals.

<sup>9</sup> Sungrim also protests the provisions of the amended solicitation the agency issued in connection with its corrective action, and asserts that the agency evaluators were biased. Sungrim's protest challenging the terms of the solicitation amendment is untimely, since the protest was filed more than 6 months after the solicitation was amended and Sungrim submitted its response to that amended solicitation. See, e.g., *Veterans Evaluation Servs., Inc. et al.*, B-412940.26 *et al.*, Jan. 5, 2017, 2017 CPD ¶ 17 at 11. Additionally, Sungrim has not presented evidence of bias by the agency evaluators; accordingly, its assertion in that regard will not be further considered. See, e.g., *Sygnetics, Inc.*, B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 7 n.3.

for award. See, e.g., *Lockheed Martin Simulation, Training & Support*, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 10-12. At a minimum, the agency must discuss all deficiencies, significant weaknesses and adverse past performance information to which the offeror has not had an opportunity to respond. Federal Acquisition Regulation 15.306(d)(3). In this regard, when an agency seeks revised proposals, its reevaluation may identify flaws in a materially-unchanged proposal that the agency would have been required to discuss with the offeror had the flaws been identified when the proposal was initially evaluated. In that situation, the agency must reopen discussions in order to disclose its concerns, thereby giving all offerors similar opportunities to revise their proposals.<sup>10</sup> *DevTech Sys., Inc.*, B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4-5; see also *Lockheed Martin Simulation, Training & Support, supra*; *Mechanical Contractors, S.A.*, B-277916.2, Mar. 4, 1998, 98-1 CPD ¶ 68 at 4-6; *CitiWest Properties, Inc.*, B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ 3 at 5.

Here, as discussed above, in evaluating Sungrim's initial proposal under the most important factor, management plan, the agency identified multiple strengths and no weaknesses; assigned the highest rating, outstanding, to Sungrim's proposal; and on that basis, selected Sungrim's proposal for award. Further, the record establishes (and the agency does not dispute) that Sungrim's final technical proposal was not materially different from its initial technical proposal.<sup>11</sup> See Protest, attach. H, Sungrim Technical proposal, April 17, 2020; Protest, attach. F, Sungrim Technical Proposal, Nov. 16, 2020.

Nonetheless, in evaluating Sungrim's final proposal, the agency criticized the proposal for providing insufficient details. As discussed above, the agency's initial source selection decision affirmatively stated that "[t]he level of detail in Sungrim's Factor 1 Management Plan proposal pertaining to JOC task order work scheduling elements demonstrated good ability to successfully manage progress under a JOC task order and prepare and submit progress payments." AR, Tab 6, First SSDD, at 4. Nonetheless, the agency's final evaluation of Sungrim's materially-unchanged proposal concluded that the proposal "doesn't provide detail of how it is going to process close out activities, as built drawings, completion of task orders and multiple task orders throughout the locations." AR Tab 9, SSEB Report at 17.

Based on our review of the entire record, we conclude that the agency's ultimate assessment of a flaw in Sungrim's final proposal under the most important evaluation factor was significant in the agency's determination to award the contract to Yibon. First, although the solicitation did not contain a definition for either the term weakness or

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<sup>10</sup> This contrasts with the situation where an offeror introduces an element in a post-discussion revision to its proposal that the agency views as a significant weakness or deficiency. In that situation, the agency is not required to reopen discussions to address the new concern created by the offeror's revisions. See *Ogden Support Servs., Inc.*, B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 7.

<sup>11</sup> In any event, it is beyond dispute that Sungrim's revised proposal did not contain fewer details regarding its management plan than were contained in its initial proposal.

significant weakness, it specifically provided that, in a post-award debriefing, the following information must be disclosed: “The agency’s evaluation of the significant weak or deficient factors in the debriefed offeror’s offer.” RFP at 8. Here, the agency’s debriefing to Sunclim described the evaluated weakness. Protest, attach. C, Written Debriefing, Apr. 23, 2021, at 2. Further, the flaw the agency ultimately identified in Sunclim’s proposal was assessed under the most important evaluation factor, management plan. Finally, nothing in the contemporaneous evaluation record indicates that the agency did not consider this matter to constitute a significant weakness. See *Lockheed Martin Simulation, Training & Support, supra*, at 11. (“[W]hile it is not clear how significant [the evaluated weaknesses] were, given that they played a large part in the best value determination . . . [and] absent some clear showing by the agency that they were not significant . . . [the agency] was obliged to [reopen discussions].”)<sup>12</sup>

On this record, we conclude that the weakness the agency identified in Sunclim’s proposal was significant with regard to the source selection decision and that the agency was obligated to reopen discussions with Sunclim to disclose the newly-identified, preexisting weakness. Accordingly, we conclude the agency failed to conduct meaningful discussions with Sunclim, and we sustain the protest on that basis.

## RECOMMENDATION

We recommend that the agency reopen the procurement and conduct appropriate discussions with all offerors whose proposals are in the competitive range, request revised proposals, and make a new source selection decision.<sup>13</sup> If Sunclim’s proposal is selected, the agency should terminate Yibon’s contract for the convenience of the government and award a contract to Sunclim, if otherwise proper. In addition, we recommend that Sunclim be reimbursed its costs of filing and pursuing this protest. 4 C.F.R. 21.8(d)(1). The protester should submit its certified claim, detailing the costs

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<sup>12</sup> We also note, as discussed above, that the agency’s discussions with at least one other offeror extended to an aspect of the other offeror’s proposal the agency characterized as a weakness, and offered that offeror an opportunity to “submit additional information to strengthen [its proposal].” Protest, attach. I, Discussion Questions at 2.

<sup>13</sup> Because we conclude that the agency failed to conduct meaningful discussions with Sunclim, and recommend that it reopen the procurement to provide Sunclim the benefit of such discussions, our decision does not further address the agency’s evaluation of the proposal Sunclim submitted without the benefit of meaningful discussions. See *Devtech Systems, Inc., supra* at 5 n.4. Further, with regard to competitive prejudice, we will not speculate as to the agency’s ultimate source selection decision following its provision of the required, meaningful discussions. When an agency fails to conduct meaningful discussions, we will resolve any doubts concerning prejudice in favor of the protester. See, e.g., *HomeSafe Alliance, LLC*, B-418266.5, Oct. 21, 2020, 2020 CPD ¶ 350 at 19; *Delfasco, LLC*, B-409514.3, Mar. 2, 2015, 2016 CPD ¶ 192 at 7.

incurred, directly to the contracting officer within 60 days of receiving this decision.  
4 C.F.R. 21.8(f)(1).

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