

Decision

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Matter of: Epsilon, Inc.

File: B-419278; B-419278.2

Date: February 2, 2021

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DIGEST

1. Protest challenging the agency's post-protest explanations for weaknesses found during the agency's evaluation is denied where the explanations are credible and consistent with the contemporaneous evaluation record.
 2. Protest challenging the agency's different evaluation treatment of the awardee's and protester's proposals is denied where the unequal treatment is reasonably explained by differences in the offerors' proposals.
 3. Protest challenging errors in the agency's past performance evaluation is denied where the protester was not competitively prejudiced as a result of the errors.
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DECISION

Epsilon, Inc., a small business located in Weaverville, North Carolina, protests the issuance of a task order to Teracore, a small business located in Woodstock, Georgia, under request for proposals (RFP) No. 8048, issued by the Department of the Treasury, Internal Revenue Service (IRS) for enterprise Federal Information Security Management Act (FISMA) compliance security and support services. The protester challenges various aspects of the agency's technical and past performance evaluation, and argues that Teracore failed to notify IRS about the unavailability of one of its key personnel. In addition, the protester contends that the agency conducted a flawed best-value tradeoff determination.

We deny the protest.

BACKGROUND

On June 12, 2019, IRS issued the RFP to holders of the General Services Administration's VETS 2 governmentwide acquisition contract seeking cybersecurity services in support of the agency's performance of assessments and risk analyses for National Institute of Standards and Technology (NIST)-, FISMA-, Office of Management and Budget-, Treasury-, and Internal Revenue Manual-compliant security controls. The solicitation contemplated the issuance of a hybrid fixed-price/labor-hour task order with a base year and four option years. The RFP stated that the acquisition would be conducted under Federal Acquisition Regulation (FAR) 16.505, and that, "therefore, the contracting techniques under FAR part 15.3 do not apply." Agency Report (AR), Tab D.2.1., RFP at 1.

The RFP provided for a best-value tradeoff and anticipated the evaluation of four factors, in descending order of importance: staffing/management, technical approach, past performance and price. *Id.* at 6. The non-price factors, when combined, were more important than price. *Id.*

For the evaluation of the staffing/management approach, the agency would evaluate the offeror's approach to managing the project schedule, costs, deliverables, and personnel. *Id.* The solicitation required each offeror to address its approach to staffing the project and managing the resources assigned to the task order in support of the performance work statement (PWS). *Id.*

For the technical approach factor, each offeror was to present a technical approach that demonstrated a clear understanding of the work to be performed and the offeror's ability to successfully execute its approach. *Id.* at 7.

For the evaluation of past performance, the agency would evaluate offerors' relevant and recent corporate past performance managing contracts similar in size, scope and complexity to that contemplated by the solicitation. *Id.* at 8. The evaluation of past performance would be based on information contained in the past performance information retrieval system (PPIRS). Relevant experience was defined as experience where the offeror has "been confronted with the kinds of challenges and risks contemplated by the solicitation." *Id.* Recent past performance was defined as experience performed within the past three years. *Id.*

Both Epsilon and Teracore timely submitted proposals in response to the RFP. The agency evaluated the two proposals as follows:

	Epsilon	Teracore
Staffing/Management Approach	Good	Excellent
Technical Approach	Acceptable	Excellent
Past Performance	Acceptable	Good
Price	\$33,789,672	\$35,577,515

AR, Tab H, Source Selection Decision Document (SSDD) at 4-5.

The source selection authority (SSA) found that while Epsilon’s proposal was lower priced, the technical advantages of Teracore’s proposal outweighed that price premium and therefore Teracore’s proposal represented the best value to the IRS. *Id.* at 17.

On September 24, 2020, the agency issued the task order to Teracore. This protest followed.¹

DISCUSSION

The protester challenges the agency’s evaluation of Epsilon’s and Teracore’s proposals under the non-price factors, as well as the resulting best-value tradeoff decision. For the evaluation of the staffing/management approach factor and the technical approach factor, Epsilon contends that the agency unreasonably and unequally evaluated proposals by assigning undeserved weaknesses to Epsilon’s proposal and crediting Teracore’s proposal, but not Epsilon’s proposal, with strengths that both proposals offered. The protester also argues that Teracore failed to notify the agency of the unavailability of its proposed program manager, when the program manager’s LinkedIn page indicated that he had taken another job. With respect to past performance, the protester argues that the agency unreasonably failed to evaluate the past performance of its subcontractor, which is the incumbent for this requirement. Epsilon further asserts that the agency improperly credited Teracore with past performance that was not recent, and that Teracore’s past performance merited a lower evaluation rating. Finally, the protester contends that IRS’s best-value tradeoff was flawed as a result of these errors.

We have reviewed each argument raised by the protester and, while we do not address every argument, we find no basis to sustain the protest.

¹ Because the value of the task order exceeds \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts established by civilian agencies. 41 U.S.C. § 4106(f)(1)(B).

Staffing/Management Approach

Epsilon challenges four weaknesses assessed in its staffing/management approach. The protester argues that these weaknesses reflect unstated evaluation criteria, ignore proposal information, or lack a rational basis. The protester further contends that the agency's explanations for these weaknesses represent *post hoc* efforts to rewrite the weaknesses that are not supported in the contemporaneous evaluation record.

The evaluation of proposals in a task order competition, including the determination of the relative merits of proposals, is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. *Wyle Labs., Inc.*, B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5.

In reviewing an agency's evaluation, our Office will not limit its review to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations. *Serco, Inc.*, B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. 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 as long as those explanations are credible and consistent with the contemporaneous record. *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, we find the challenged weaknesses to be reasonable; we also find the agency's explanation for the weaknesses to be credible. For example, the protester challenges the following weakness assessed by the agency:

Section b.8 [of Epsilon's proposal], misstates that the Epsilon management team (they are referencing the current incumbent partnering with them) worked to establish and [sic] more streamlined and security focused assessment. This in fact was not the case. It was [Certification Program Office (CPO)] Management that led a couple days of working sessions. While the subcontractor to Epsilon, [DELETED], did participate in the sessions, it was not led or facilitated by them.

AR, Tab G, Technical Evaluation Report at 8. Epsilon argues that its proposal did not say that [DELETED] "led or facilitated" these sessions, and instead only said that it had

worked with IRS and stakeholders to establish a more streamlined and security-focused assessment process.

In response, the contracting officer explains that, while this weakness “could have been better phrased,” the issue being identified was that there was no leadership provided by [DELETED] during this effort. Contracting Officer’s Statement (COS) at 7. This meant the agency had to assume the leadership role “to set up stakeholder working sessions, facilitate ‘white board’ sessions, and ultimately come up with a final FISMA . . . approach/improvements, as the [DELETED] management team/[subject matter experts (SMEs)] were not forthcoming in providing sound recommendations on their own for streamlining processes and reducing timeframes while still maintaining an audit-defensible assessment methodology.” *Id.* The agency noted that since Epsilon was relying on the results of this FISMA effort to demonstrate its management approach and its proposal relied on utilizing these same incumbent resources to staff the requirements, this was considered a weakness. *Id.*

The protester argues that this explanation is a *post hoc* rationalization that is unsupported in the contemporaneous record. We find, however, that the explanation fills in previously unrecorded details and is both credible and consistent with the contemporaneous record. In this respect, Epsilon relied on the incumbent work of its subcontractor to demonstrate its proposed management approach, e.g., by favorably citing the work of the incumbent management team with IRS CPO and stakeholders “to establish a more streamlined and security focused process.” AR, Tab E.1.1., Epsilon Technical Proposal at b-8. The description of the weakness is not inconsistent with the agency’s post-protest explanation that the agency evaluators had concerns with [DELETED] performance during the FISMA effort, particularly in light of Epsilon’s reliance on its subcontractor. We therefore see no reason to discount this explanation.

The protester also argues that the agency unequally evaluated proposals under the staffing/management approach factor by applying a more lenient standard when evaluating Teracore’s proposal. In this respect, the protester notes that Teracore was given a “minor weakness” for a substantive omission in its proposal, while Epsilon received a weakness for having two typographical errors in its proposal. See AR, Tab G, Technical Evaluation Report at 3, 8-9. With respect to Teracore’s proposal, the agency labeled a failure to mention assessors within Teracore’s approach to one of the PWS subtasks a “minor weakness” because IRS was able to determine, based on a table in another section, that these assessors would be supporting Teracore’s approach. AR, Tab G, Technical Evaluation Report at 3. For Epsilon, the agency found a weakness in its management/staffing approach based on an incorrect acronym appearing on the cover page and another typographical error caused by a computer-generated technical error. *Id.* at 8-9.

Where a protester alleges that an evaluation is the product of unequal treatment, the protester must show that the difference in the evaluation result was, in fact, the result of unequal treatment, rather than differences in the offerors’ proposals. *DataSource, Inc.*, B-412468.9, Apr. 14, 2017, 2017 CPD ¶ 122 at 4.

Here, we find that the agency evaluated proposals equally and that the agency's concern with Epsilon's proposal was the result of errors that were different from the lack of clarity found in Teracore's proposal. In this respect, for Epsilon's proposal, the agency explains that the typographical errors, particularly the error prominently found on the proposal title page, created a concern about the protester's adherence to quality control. COS at 7. Quality control was an important aspect of the instant requirement, with the PWS requiring work product that is "accurate, grammatically, technically, and in accordance with approved templates."² AR, Tab D.2.2, PWS at 68. In contrast, for Teracore's proposal, the concern was due to a lack of clarity about a staffing issue, *i.e.*, whether Teracore proposed to staff assessors for the relevant PWS subtask. This concern over the lack of clarity was then resolved--in a way that the agency's concern regarding Epsilon's failure to correct typographical errors could not--by review of a separate proposal section. We find then, that differences in the two proposals reasonably explain the agency's different treatment of the two offerors.

The protester also argues that Teracore failed to notify the agency when one of Teracore's proposed key personnel, its program manager, became unavailable. In support of this contention, the protester provided the program manager's LinkedIn profile, which lists the program manager in another role from "Jan 2020-Present," *i.e.*, after Teracore submitted its proposal for this requirement in July 2019. Comments & Supp. Protest, exh. 1, LinkedIn Profile at 1. Epsilon contends that, in accordance with prior decisions of our Office, the unavailability of TeraCore's program manager triggered a duty on the part of Teracore to notify the agency of the unavailability. Supp. Comments at 11-12 (*citing Greenleaf Constr. Co., Inc.*, B-293105.18 *et al.*, Jan. 17, 2006, 2006 CPD ¶ 19 at 10). The agency then would have either excluded Teracore's proposal from the competition or opened discussions. Supp. Comments at 12.

The record does not support the protester's assertion that Teracore's proposed program manager became unavailable after Teracore submitted its proposal. In response to this protest ground, the agency provided a sworn declaration from a technical evaluation panel member stating that the Teracore program manager attended a post-award meeting with the agency and had been introduced in an email as the program manager, thus evidencing his availability to perform on the contract. See Technical Evaluator Decl. at 1. In addition, Teracore provided a sworn declaration from a company vice president stating that the company's program manager was available to begin working on the contract at the time the contract was awarded in September 2020 and remains available to work on the contract. See Teracore Supp. Comments, exh. A, Teracore

² While the protester notes that the two typographical errors would not run afoul of the acceptable quality levels set forth in the PWS, we find nothing unreasonable about the agency assigning a weakness here, where the errors reflected poor quality control on the part of Epsilon. We also note that these errors were not included in the technical evaluation panel's weighing of Epsilon's strengths and weaknesses, and were not cited as a discriminator by the agency in its best-value tradeoff. See AR, Tab G, Technical Evaluation Report at 9; AR, Tab H, SSDD at 16-17.

Vice President Decl. at 1. While Epsilon speculates that the program manager was unavailable, at some previous point, and then became re-available, the protester's sole support for this theory, the LinkedIn page, does not establish the validity of its conjecture.

Technical Approach

The protester challenges four weaknesses assessed for its proposed technical approach. The protester contends that these weaknesses overlooked the content of Epsilon's proposal or were based on unreasonable interpretations of the proposal language. The protester also challenges the explanations for these weaknesses provided by the agency as *post hoc* rationalizations unsupported in the contemporaneous record.

Based on our review, we find the challenged weaknesses to be reasonable and the explanations provided by the agency to be credible. For example, the protester challenges a weakness assessed as follows:

Failed to comprehend the complexity associated with the solicitation requirements, as the technical approach provided did not address all the tasks associated with the requirements, *i.e.*, the Evidence Mitigation stage indicated in the PWS Sub-Task 7 was missing.

AR, Tab G, Technical Evaluation Report at 10. Epsilon argues that its proposal addressed this stage, and specifically mentioned "performing evidence mitigation" as a step included during [DELETED]. AR, Tab E.1.1., Epsilon Technical Proposal at b-12.

The agency responds to this argument by noting that the single conclusory sentence cited by the protester was insufficient for IRS to conclude that Epsilon would adequately perform this task. Based on our review of Epsilon's proposal, we find this assessment to be reasonable. While the protester challenges this explanation as a *post hoc* rationalization, we find that the explanation is credible and fills in details missing from the evaluation record. The agency's explanation--that it did not find that Epsilon's conclusory reference to "performing evidence mitigation" adequately addressed the requirement, Memorandum of Law at 11--is not inconsistent with the language of the weakness in the technical evaluation report. That report found that Epsilon had failed to address the requirement, leaving the agency without confidence that Epsilon comprehended the complexity of the requirements. See AR, Tab G, Technical Evaluation Report at 10. While the protester contends that this description can only be read as stating that Epsilon failed to make any mention whatsoever of the requirement, we disagree and do not find this is the only reasonable interpretation of the language quoted above. Accordingly, we find the assessment of this weakness to be reasonable.

The protester also argues that the agency unequally evaluated Epsilon's and Teracore's proposed technical approaches. In this respect, the protester points to two strengths found in Teracore's proposal, one for including a knowledge transfer plan and one for

noting a NIST Special Publication (SP) 800-53 rev. 5 release during the base year of the contract and discussing what would be needed for effective implementation. Epsilon argues that its proposal should have been assigned comparable strengths since it also addressed the NIST SP 800-53 rev. 5 release and since its transition plan, which relied on teaming with the incumbent, would offer the same “smooth, efficient transition” benefits as Teracore’s transition plan. Comments & Supp. Protest at 18.

In our view, the difference in the agency’s assignment of strengths under this evaluation factor can be reasonably explained by differences in the offerors’ proposals. In this respect, for the NIST SP 800-53 rev. 5 release, the agency explained that Teracore’s proposal included a fuller explanation of the steps to be addressed. See, e.g., AR, Tab E.2.1., Teracore Technical Proposal at 28. In contrast, Epsilon’s proposal was briefer and, while highlighting “Team Epsilon’s” experience and capabilities, stated that Epsilon would address any issues that arose in the future. AR, Tab E.1.1., Epsilon Technical Proposal at b-11, b-15.

With respect to the transition, the two offerors proposed vastly different plans. Teracore proposed a detailed knowledge transfer plan, which included a “robust data gathering process and Knowledge Transfer Playbook”; Teracore’s proposal also included a 31-page draft transition plan that set forth a detailed explanation of the management and processes involved in the transition plan. AR, Tab G, Technical Evaluation Report at 4; see also AR, Tab E.2.1., Teracore Technical Proposal at 25-26 & attach. A. In contrast, Epsilon relied on teaming with the incumbent, but did not provide the same level of detail and explanation. See AR, Tab E.1.1., Epsilon Technical Proposal at b-6-7.

While the protester argues that the agency’s explanations are *post hoc*, we find the explanations to be consistent with the evaluation record and credible in light of the very different approaches proposed by the two offerors. Accordingly, we conclude that the protester has not met its burden to show that the difference in the evaluation result was, in fact, the result of unequal treatment, rather than differences in the offerors’ proposals. *DataSource, Inc., supra*.

Past Performance

The protester also challenges the agency’s evaluation of both Epsilon’s and Teracore’s past performance. We address these challenges in turn.

Epsilon argues that the agency unreasonably failed to evaluate the past performance of the protester’s subcontractor, the incumbent contractor. The protester argues that because the solicitation stated that the past performance of “offerors” would be evaluated, it was unreasonable for the agency to consider only the prime contractor’s past performance. Comments & Supp. Protest at 21- 22 (citing RFP at 8). The protester asserts that nothing in the solicitation suggests that only the prime’s past performance will be considered, and that FAR 15.305(a)(2)(iii) states that the “evaluation should take into account past performance information regarding. . .

subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.”

We find this argument to be without merit. In this respect, the solicitation did not state whether the agency would evaluate a subcontractor’s past performance, with the RFP being silent on this issue and the agency providing an incoherent answer to a pre-submission question asking for clarification on this subject. Moreover, while the protester argues that FAR 15.305(a)(iii) requires consideration of subcontractor past performance, the instant RFP was governed by FAR part 16, not part 15. Because the RFP did not provide for the evaluation of subcontractor past performance and FAR 15.305(a)(iii) did not apply to the acquisition, the protester has not demonstrated that it was contrary to the terms of the solicitation or regulation for the agency to have failed to consider the past performance of Epsilon’s subcontractor. *Cf. Atlantic Sys. Grp., Inc.*, B-413901, B-413901.2, Jan. 9, 2017, 2017 CPD ¶ 38 at 7 (denying a protest alleging that the agency unlawfully failed to consider a subcontractor’s past performance in violation of FAR 15.305(a)(iii), because the solicitation was conducted under FAR part 8); *see also* FAR 16.505(b)(1)(v)(A)(1) (providing that the contracting officer should (rather than shall) consider past performance when developing ordering procedures under FAR 16.505).

The protester further argues that Teracore’s past performance did not warrant the assigned rating of good. In addition, the protester contends that the agency improperly considered a contract reference that was more than three years old, in violation of the solicitation requirements. The agency concedes both these errors--including that Teracore’s past performance rating should have been lowered to acceptable--but argues that they were not prejudicial because the SSA did not rely on past performance in his best-value tradeoff.

The protester argues that it was competitively prejudiced, however, because its proposal should have been credited as superior to Teracore’s under the past performance factor. In this respect, the protester notes that its ratings on the only contractor performance assessment reporting system (CPARS) report reviewed by the agency were higher than Teracore’s ratings on the only CPARS report for performance meeting the solicitation’s recency requirements.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 17.

Here, we find that the errors conceded by the agency did not prejudice the protester. Past performance was the least important evaluation factor. And, while the SSA noted each offeror’s past performance rating, neither Epsilon’s nor Teracore’s past performance was mentioned within the best-value tradeoff section. *See* AR, Tab H, SSDD at 4-5, 16-17. Indeed, past performance was not part of the agency’s tradeoff between proposals. *Id.* at 16-17. Instead, the tradeoff examined the technical

differences between the two offerors' proposals and found that the technical advantages of Teracore's proposal outweighed Epsilon's lower price. Specifically, the tradeoff decision noted that Teracore's proposal, for example, provided a "superior technical capability allowing for automation and innovation SMEs that support all the technical tasks, robust quality assurance and a consistent assessment methodology approach above what's required." *Id.* at 17.

We also note that while Epsilon received high ratings on its CPARS entry, the agency stated that these ratings "received less weight to indicate the past work is not completely relevant to the tasks in our solicitation and did not show they had direct experience providing FISMA program management and technical security assessment services support." AR, Tab G, Technical Evaluation Report at 12. The agency included a similar conclusion with respect to the past performance submitted by Teracore. *Id.* at 7. In light of the lack of relevance of either offeror's past performance, and the fact that the agency's existing tradeoff placed no importance on either offeror's past performance, we see no reasonable possibility that a new best-value tradeoff would find a meaningful difference between the two proposals with regard to past performance.

The protest is denied.

Thomas H. Armstrong
General Counsel