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Decision

Matter of: Datapath, Inc.

File: B-419323.3; B-419323.4

Date: January 15, 2021

Lee Dougherty, Esq., and Everett Dougherty, Esq., Effectus, PLLC, for the protester. Richard J. Conway, Esq., and Michael J. Slattery, Esq., Blank Rome LLP, for Envistacom, LLC, the intervenor.

Jonathan A. Hardage, Esq., and Jennifer A. Janulewicz, Esq., Department of the Army, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misevaluated protester's and successful vendor's past performance is denied where record demonstrated that the evaluation was reasonable and consistent with the solicitation's evaluation criteria.
 2. Protest that agency's past performance evaluation reflected disparate treatment is denied where the record did not demonstrate that the protester's past performance record was equivalent to the successful vendor's.
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DECISION

Datapath, Inc., of Duluth, Georgia, protests the issuance of a task order to Envistacom, LLC, of Atlanta, Georgia, under request for task execution plans (RTEP) No. W15P7T-20-F-9108, issued by the Department of the Army, Army Materiel Command, under the Global Tactical Advanced Communication Systems II (GTACS II) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts, for operation, maintenance, and sustainment services for several communication systems and networks, including tactical and strategic antenna systems. Datapath contends that the Army misevaluated both firms' task execution plans (TEP) under the past performance factor, engaged in disparate treatment, and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RTEP, issued May 20, 2020, contemplated the issuance of a single task order consisting of “Cost-Plus-Fixed-Fee (CPFF) Term and Cost efforts” for 36 months (a base year and two option years). Agency Report (AR), Tab 3, RTEP, at 1. The RTEP task order would be issued to the vendor whose TEP was acceptable under two “gate” criteria, technically acceptable, and provided the best value as determined by a past performance-cost tradeoff. *Id.* at 17.

The scope of the required work was described in an accompanying performance work statement (PWS). AR, Tab 29, RFP amend. 1 attach. 9, PWS, at 2. The PWS provided a detailed description of the agency’s requirement for services within the United States and at least 31 listed countries, several of which are in the Middle East. *Id.* at 3. The RTEP directed vendors to submit a TEP consisting of eight elements: a technical volume, a past performance volume, a cost volume, a small business participation plan, a system for award management (SAM.gov) report, an organizational conflict of interest (OCI) declaration and mitigation plan, an Afghanistan business license declaration, and a continuation of essential contractor services plan. RTEP at 3.

For the past performance factor, the RTEP directed vendors to provide information about recent relevant contracts and task orders with the Department of Defense.¹ The RTEP listed seven critical capabilities to which each vendor’s past performance would be compared in assessing the “relevancy” of past performance. Among these, critical capability No. 7 sought past performance that involved “OCONUS [outside continental United States] FSR [field service representative] [s]upport for tactical and strategic networks” in all 31 countries encompassed in the PWS. *Id.* at 9-10. The RTEP explained that past performance that showed personnel deployed to more countries could show greater relevance than vendors showing deployments to fewer countries. *Id.* at 10. In assessing the relevance of past performance overall, the past performance of vendors that demonstrated more of these critical capabilities could be considered more relevant than the past performance of vendors whose performance demonstrated fewer of these critical capabilities. *Id.* Through an assessment of the quality of recent relevant past performance, the Army would then assign an adjectival confidence rating of substantial, satisfactory, neutral, limited, or no confidence. *Id.* at 19-20.

After providing questions to the offerors, including to both Datapath and Envistacom, regarding aspects of their past performance, and receiving responses, the Army prepared a final evaluation. The past performance evaluator noted that Datapath was the incumbent contractor currently performing the requirement, which was listed as the first of the five past performance references in its TEP. The evaluator, who is also the contracting officer’s representative on that reference, determined that the firm had fully demonstrated all seven critical capabilities, including performance of FSR services in

¹ The RTEP advised vendors that “[o]nly Past Performance information for Department of Defense (DoD) contracts will be evaluated.” *Id.* at 10.

the 31 countries (critical capability No. 7) listed in the PWS, so the reference was deemed very relevant. AR, Tab 104, Final Past Performance Evaluation for Datapath, at 6.²

In assessing the quality of Datapath's incumbent performance, the evaluator discussed the firm's performance over time, noting in particular Datapath's marginal rating during an earlier option period due to its failure to meet standards, its difficulty maintaining operations in one country, and the continuation of schedule issues despite the contractor's efforts at improvement. *Id.* at 13. The discussion also noted that Datapath had been unable to retain personnel at the labor rates it had proposed for the incumbent effort, requiring the agency to agree to higher rates and relaxed requirements, which did not fully resolve the problems. In addition, the evaluator noted that DataPath removed its program manager on the earlier effort after there were "issues with false reporting of data." *Id.* at 14. The evaluator also acknowledged that the subsequent performance report for the next option period showed improvement in Datapath's performance rating, but also noted that the improvement was, in part, due to a decision to transition a portion of the work from Datapath to another contractor. *Id.* After reviewing the performance of Datapath and its major subcontractor, the evaluator summarized the most significant points and concluded that Datapath's past performance merited a rating of satisfactory confidence. *Id.* at 49.

For Envistacom, the evaluation determined that the firm's past performance overall fully demonstrated six of the seven critical capabilities, and had partly demonstrated the final critical capability, regarding performance of FSR services in all 31 countries listed in the PWS. AR, Tab 100, Final Past Performance Evaluation for Envistacom, at 46. Based on the assessment of their similarity to the PWS, including the demonstration of critical capabilities, four of the firm's five past performance references were assessed as relevant, and one as somewhat relevant. *Id.* at 45. The narrative review of its performance on each reference determined that the firm had encountered performance issues on a relevant reference, but had then successfully mitigated those issues--improving its ratings from satisfactory to very good. *Id.* at 48. On a second reference, the firm had also encountered problems in the area of documentation, but had implemented improvements to avoid the problem. *Id.* Taken as a whole, the evaluator's judgment was that Envistacom's past performance showed a low risk of encountering performance issues under the PWS, and so its past performance was assessed as satisfactory confidence. *Id.*

The source selection authority (SSA) considered the evaluations and prepared a selection decision memorandum in which she discussed the evaluations and her tradeoff judgments. With respect to past performance, the SSA noted that both Datapath and Envistacom had been rated satisfactory confidence. AR, Tab 109, Memorandum of Source Selection Decision, at 12. With respect to the relevance of

² Of the other four past performance references in its proposal (two of which were for Datapath, and two were for its major subcontractor) one was assessed as relevant, and the remaining three were assessed as somewhat relevant. *Id.* at 46.

their performance records, the SSA summarized the past performance evaluation by noting that Datapath had submitted one very relevant reference, one relevant reference, and three somewhat relevant references, and had fully demonstrated experience with all seven of the critical capabilities. *Id.* The SSA also noted that Datapath's overall performance on the very relevant and relevant references had simply been satisfactory. *Id.* For Envistacom, the SSA noted that all five of its past performance references were relevant, and it had demonstrated experience with six of the critical capabilities, and partially demonstrated one, and its overall performance had been good. *Id.* at 12-13.

Based on these assessments, the SSA determined that Envistacom's past performance evaluation was superior to Datapath's record of satisfactory performance and documented performance issues on its very relevant reference. *Id.* at 13. The SSA noted that Envistacom's evaluated price of \$234.9 million was lower than Datapath's (albeit only slightly, rounded to \$234.9 million), and selected Envistacom's TEP as the best value. *Id.* Following the agency's announcement of the award and a debriefing, Datapath filed this protest.³

DISCUSSION

Datapath raises multiple challenges to the Army's evaluation under the past performance factor. Principally, the firm contends that the Army disregarded poor past performance by Envistacom while overstating problems in the protester's past performance. Datapath contends that evidence it has submitted shows that Envistacom had past performance problems at least as significant as Datapath's, and that the assessment of Envistacom's past performance as superior reflected disparate treatment and resulted in an unreasonable source selection decision. We assess each of the protester's main arguments and, as explained below, conclude that the record supports the agency's evaluation of both firms, and the selection of Envistacom's TEP for award.

Past Performance Evaluation of Envistacom

Datapath's leading contention is that the Army's evaluation of Envistacom's past performance was unreasonable for several reasons.⁴ First, the firm contends that

³ The task order was valued at \$235 million, so this protest is within our jurisdiction to review protests related to the issuance of orders valued over \$25 million under multiple-award IDIQ contracts that were awarded under the authority of Title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

⁴ Datapath raised arguments in its initial protest that were answered by the agency, but not addressed in Datapath's comments. For example, Datapath contended that the Army had improperly considered Envistacom's performance of "other transaction authority" (OTA) agreements in the past performance evaluation, and that doing so was improper. Protest at 24. The Army responded that the evaluation did not consider the OTA agreement, AR, Tab 1, Combined Contracting Officer's Statement of Facts and Legal Memorandum (CCOSOF LM), at 29, and Datapath's comments did not directly

in 2018, Envistacom was issued an order through the “Defense Logistic[s] Agency Tailored Logistics Support” (“DLA TLS”) contract for a tactical hub node (“THN”) pilot program to replace certain satellite terminals, but that the firm has been unable to deliver a single system. Protest at 24. Second, the protester contends that a “[m]odernization [w]ork [o]rder” (“MWO”) was also issued to Envistacom in 2018 under the same DLA TLS, but that the firm’s product has been unable to satisfy the safety and weather testing requirements, and was allegedly 2 years behind schedule. *Id.* Datapath argues that had the agency reasonably considered Envistacom’s past performance, the Army could only have deemed the firm’s past performance significantly risky and deserving of a limited confidence past performance rating. *Id.* at 25.

Datapath thus contends that the evaluation and source selection on this RTEP improperly failed to consider alleged examples of deficient performance by Envistacom. The protester alleges that Envistacom’s allegedly poor performance on the THN and MWO orders was “personally known” to two personnel who performed the past performance evaluation under the RTEP, and thus should have been considered in the evaluation here. *Id.* at 25.⁵

In response, the two evaluation personnel acknowledge that they were copied on emails concerning contract management efforts under the THN and MWO orders, but both individuals denied that the emails informed them of Envistacom’s allegedly deficient performance, or that they were otherwise aware of the circumstances alleged by Datapath until reading the protest. AR, Tab 124, Declaration of Assistant Product Manager, at 1-2; AR, Tab 125, Declaration of Program Officer, at 1-2. Both individuals explain that the THN and MWO procurements were managed in a separate office, and that they had no awareness of Envistacom’s role in either.⁶ *Id.*

address the issue. We consider such issues abandoned and do not address them. *Medical Staffing Sols. USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3 (protester abandoned protest issues). Additionally, Datapath contended that the Army could not have properly assessed the realism of Envistacom’s transition costs, and allegedly held improper discussions that must have disclosed Datapath’s evaluated costs. See Protest at 29-30. Neither allegation was factually supported by the protester and were dismissed. GAO Notice to Parties (Nov. 2, 2020), at 1; 4 C.F.R. § 21.1(c)(4) and (f).

⁵ In its protest, Datapath asserts that “the same Agency office” that awarded Envistacom the THN and MWO work employs the personnel who performed the past performance evaluation here, and those personnel allegedly “specifically kn[ew]” of Envistacom’s alleged failures. Protest at 24-25.

⁶ The intervenor points out that the emails primarily addressed the timing of testing, made only a passing reference to “THN,” and none mentioned Envistacom by name. Intervenor’s Supp. Comments at 9 (citing Protester’s Comments & Supp. Protest, exh. 1).

In contrast to Datapath's assertions, the Army contends that the agency properly reviewed past performance information using references to relevant work that Envistacom identified in its TEP, and information retrieved from the contractor performance assessment reporting system (CPARS). AR, CCOSOF LM, at 20-23, 30. The Army argues that Datapath is, in essence, alleging malfeasance by the contracting officials based on suspicion and speculation that is not factually based. Thus, the Army argues that these arguments do not provide a basis to sustain the protest. *Id.* at 29-30.

In limited circumstances, we have concluded that an agency cannot reasonably ignore negative past performance information about which it is aware. *Yulista Tactical Servs. LLC*, B-417317.3 *et al.*, Jan. 15, 2020, 2020 CPD ¶ 29 at 8. Our review shows that despite Datapath's arguments, there is little evidence in this record to support DataPath's allegations. In fact, the Army notes that the emails relied upon by Datapath do not actually show that either past performance evaluator was advised of the alleged performance failures by Envistacom. AR, Tab 143, Supp. AR, at 6-7.

In response to the Army's rebuttal, Datapath characterizes the emails as identifying the "repercussions" of Envistacom's alleged failures, and asserts that "it can be reasonably inferred that both [personnel] had knowledge" that Envistacom was unsuccessful in performing the THN and MWO orders. Protester's Supp. Comments at 2. We disagree. Instead, even assuming for the purposes of analysis that Datapath accurately depicts Envistacom's unsuccessful performance on the THN and MWO efforts, Datapath has failed to show that the agency erred in not importing this information to assess Envistacom's past performance. Even Datapath describes the THN and MWO efforts as each involving the delivery of products, and not the FSR services covered by the RTEP here. Datapath also fails to rebut the Army's explanation that the THN and MWO orders were issued by a different contracting office. In short, Datapath has provided no basis for our Office to question the evaluators' statements that they were not personally aware of Envistacom's performance of either of these orders. See AR, Tab 124, Declaration of Assistant Product Manager, at 1-2; AR, Tab 125, Declaration of Program Officer, at 1-2.

Past Performance Evaluation of Datapath

Datapath also challenges the evaluation of its own past performance as unreasonable. The protester specifically contends that the evaluation unreasonably focused on the firm's earlier problems in performing the very relevant incumbent task order, while failing to adequately consider Datapath's more recent higher ratings that showed those problems had been resolved. Protest at 26. As a result, Datapath argues that the assessment of its past performance as posing medium risk was unreasonable. *Id.*

The Army responds that the evaluators considered each vendor's past performance in considerable detail with respect to the criteria in the RTEP and made reasonable evaluation judgments, including recognizing the course of Datapath's performance of the incumbent order, and its improvement in quality. AR, Tab 1, CCOSOF LM, at 33.

Our review of the record shows that the evaluation documented the firm's performance problems on the incumbent effort, the agency's basis for removing a portion of the work due to the protester's inadequate performance, and the firm's improved performance of the reduced scope of work. While the agency concluded that Datapath's past performance record as a whole showed satisfactory confidence, the agency also reasonably identified a medium risk of poor performance given the firm's inability to successfully perform the full scope of the incumbent effort. We also need not resolve the parties' disagreement about whether the quality of Datapath's performance showed improvement before the agency reduced the scope of the earlier order, or only after the reduction in scope. In our view, the record supports the reasonableness of the Army's evaluation of Datapath's past performance and the assessment of medium risk arising from the firm's documented problems performing a very similar requirement.

Disparate Treatment

Datapath also contends that the past performance records of both itself and Envistacom actually showed similar difficulties--and that each firm made progress on resolving those performance problems--but the agency treated Datapath more harshly in the evaluation than it treated Envistacom. Protester's Comments & Supp. Protest at 11-12. Specifically, Datapath contends that despite demonstrating the same record of improvement as Envistacom, the Army deemed Datapath's difficulties to pose a risk to performance of the PWS, while Envistacom's difficulties were deemed to pose a low insignificant risk. *Id.* at 12.

The Army responds that the past performance record for each firm was assessed in detail and was evaluated reasonably on its own merits. The agency also maintains that the SSA's source selection judgments were reasonable, and that neither the evaluation nor the selection decision reflects disparate treatment. AR, Tab 143, Supp. AR, at 11-13. Most significantly, the agency distinguishes Datapath's situation as requiring a "drastic . . . intervention" to reduce the scope of Datapath's FSR services order, and obtain a second contractor to take over that portion. *Id.* at 11.

It is a fundamental principle of government procurement that agencies must treat offerors equally, which means, among other things, that they must evaluate proposals in an even-handed manner. *Advanced Alliant Sols. Team, LLC*, B-417334, Apr. 10, 2019, 2019 CPD ¶ 144 at 4-5. Although, as discussed above, an agency's evaluation of past performance is a matter of agency discretion, the agency may not engage in disparate treatment of offerors in that evaluation. *Vectrus Sys. Corp.*, B-412581.3 *et al.*, Dec. 21, 2016, 2017 CPD ¶ 10 at 10. Where a protester alleges unequal treatment in an evaluation, it must show that the differences in ratings do not stem from differences in the proposals--in this case, in the firms' records of past performance. *Advanced Alliant Sols. Team, LLC*, *supra*, at 5.

Here, our review of the record does not support Datapath's contention that the Army's evaluation involved disparate treatment. Datapath was the incumbent contractor for this effort, and its inadequate performance resulted in a need for the agency to decrease the

scope work for that contract; this reference also was very relevant because of its similarity to the requirement here.⁷ In contrast, the record of Envistacom's past performance shows that while the firm experienced limited performance problems, it made efforts to mitigate those problems, and the performance reports reflected improved performance as a result. Based on the record showing broad differences in these two firms' performance records, we see no basis to find that the Army engaged in disparate treatment in these past performance evaluations. Rather, the record confirms the Army's conclusion that Envistacom's past performance was superior to Datapath's, and that Envistacom's offer provided the best value at a lower evaluated price.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁷ Although Datapath argues that the requirement was itself defective, and that the removal of a portion of its requirement was based on an agreement with the Army reached as a settlement in lieu of litigation, the contemporaneous record does not appear to support its argument. See Supp. AR, Tab 142, Letter from Army to Datapath (Mar. 25, 2019), at 1-2 (seeking agreement to reduce labor hours and positions due to unacceptable manning and critical impact on customer mission arising from Datapath having vacancies in seven of 37 required positions for over 55 days, and a vacancy in one required position for over 300 days). The record provides a sufficient basis for the Army's evaluation of the two firms differently.