

# Decision

**Matter of:** Pathfinder Consultants, LLC

**File:** B-419509

**Date:** March 15, 2021

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Ronald S. Perlman, Esq., and Daniel P. Hanlon, Esq., Holland & Knight LLP, for the protester.

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## DIGEST

1. Protest that the agency unreasonably omitted past performance as an evaluation factor is denied where the agency reasonably determined that evaluating offerors' past performance records was not required.
  2. Protest that the agency unreasonably failed to respond to pre-proposal questions is denied where the protester did not demonstrate that the solicitation's terms were otherwise inadequate, unclear, or ambiguous.
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## DECISION

Pathfinder Consultants, LLC, of Washington, D.C., protests the terms of request for proposals (RFP) No. 36C10B21R0007, issued by the Department of Veterans Affairs (VA) for communications strategies and support services. Pathfinder complains that the RFP unreasonably omits past performance as an evaluation factor, and that the VA improperly failed to answer the firm's pre-proposal questions.

We deny the protest.

## BACKGROUND

On December 15, 2020, the VA issued the RFP to procure communications strategies and support services under the commercial item acquisition procedures set forth in Federal Acquisition Regulation (FAR) parts 12 and 15. Agency Report (AR) Tab 4A, RFP at 1, 25; AR, Tab 4B, Combined Synopsis/Solicitation at 1. The RFP sets forth many required tasks, including communication content management, development of communications strategies for important agency initiatives and high visibility projects,

and other communications support functions (e.g., speaking engagement and congressional affairs support). RFP at 28-41. The RFP also sets forth three optional tasks, including intra-division communication support, web maintenance, and transition-out functions. *Id.* at 41-42.

The RFP contemplates the award of a contract with compensation to be made on both fixed-price and time-and-materials bases, and to be performed over a 12-month base period and two 12-month option periods. RFP at 25. Award will be made on a best-value tradeoff basis, considering technical and price factors. *Id.* at 115. The technical factor is significantly more important than the price factor. *Id.* When evaluating technical proposals, the RFP provides that the agency will consider both an offeror's understanding of the problem, and the feasibility of its approach. *Id.* When evaluating price proposals, the agency will consider total evaluated price (*i.e.*, the total of each proposed fixed-price contract line item, and its proposed labor rates multiplied by the government-provided labor hours). *Id.* at 115-16. Of note, the RFP did not include past performance as an evaluation factor. *See id.*

Pre-proposal questions regarding the solicitation's terms were to be submitted to both the contract specialist and the contracting officer by December 23, 2020. AR, Tab 4B, Combined Synopsis/Solicitation at 3. The RFP specified that the "Government shall coordinate a response." *Id.*

On December 22, Pathfinder submitted a list of 49 questions. Protest exh. A.1, Pathfinder's First Set of Questions. On December 29, the VA issued answers to questions submitted by the offerors as RFP, amend. 1. AR, Tab 6A, RFP amend. 1, Questions and Answers. After reviewing the answers, Pathfinder determined that the agency had only provided complete responses to seven of its 49 questions, and contacted the agency regarding the other questions. The agency responded that it had answered many of the protester's questions in the amendment.

On January 5, 2021, Pathfinder submitted three additional questions. Protest at 3. On January 6, the agency provided answers in a second amendment. *Id.* On January 7, Pathfinder filed this protest with our Office. The solicitation closed on January 8.

## DISCUSSION

Pathfinder raises multiple allegations challenging the agency's conduct of the acquisition. Principally, Pathfinder complains that the VA unreasonably decided not to evaluate past performance as part of this competition because the VA concluded it would not be able to assess each offeror's likelihood of successful performance of this contract based on their past performance records.<sup>1</sup> Protest at 4. Pathfinder also

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<sup>1</sup> Pathfinder also complained that the VA unreasonably omitted level of effort information for fixed-price tasks, as well as educational and experience requirements for key personnel. Protest at 4. The firm argued that these omissions would result in

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complains that the VA did not respond to all of the firm's pre-proposal questions. *Id.* at 3; *see also* Comments at 4. The agency responds that it reasonably determined that past performance was not an appropriate evaluation factor for this acquisition, and that the protester was not entitled to an answer for every pre-proposal question submitted. Memorandum of Law (MOL) at 5-6, 10-12. We discuss the allegations in turn.<sup>2</sup>

First, we do not find that the VA unreasonably omitted past performance as an evaluation factor. The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. *Data Monitor Sys., Inc.*, B-415761, Mar. 6, 2018, 2018 CPD ¶ 79 at 6. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. *Id.* In this context, FAR section 12.206 provides, in relevant part, that past performance information should be considered in accordance with the procedures set forth in FAR subpart 15.3. Under FAR section 15.304(c)(3)(iii), past performance need not be evaluated if the contracting officer documents the reason why past performance is not an appropriate evaluation factor for the acquisition.

Here, the VA documented its determination and adequately explained why it concluded that evaluating past performance was not appropriate for this acquisition. AR, Tab 7, VA Memorandum, Dec. 4, 2020, at 1-2. When drafting the solicitation, the VA noted that the types of communication services to be acquired were not particularly complex or difficult, and that therefore only assessing each offeror's proposed technical approach would provide sufficient indication as to the likelihood of successful performance. *Id.* Further, the VA explained that reviewing past performance information for communications services that are generally performed favorably was unnecessary and would not yield significant data for evaluative purposes. *Id.*; *see also*

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unrealistic prices. *Id.* In its report, the agency responded that it was under no obligation to provide precise labor-hour estimates or dictate personnel requirements. MOL at 9-10. The protester did not rebut the agency's position in its comments. *See generally* Comments.

Where, as here, an agency responds to allegations in its report but the protester does not rebut the agency's position in its comments, we dismiss the allegations as abandoned because the protester has not provided us with a basis to find the agency's position unreasonable. *Medical Staffing Solutions USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3. Thus, we dismiss these allegations as abandoned because Pathfinder did not demonstrate that the agency was somehow required to provide labor-hour estimates, or education and experience requirements for key personnel.

<sup>2</sup> We have reviewed all of the protester's allegations, and find no basis to sustain the protest. To the extent we do not discuss any particular allegation, it is denied.

MOL at 11-12; COS at 5. The protester has provided no basis for us to question the agency's conclusion.

Although Pathfinder argues that the services contemplated by the solicitation should be considered complex and difficult, see Comments at 14-21, such arguments in essence represent disagreement with the agency's determination, and therefore do not provide us with a basis to sustain the protest.<sup>3</sup> Indeed, these arguments only represent a difference of opinion regarding whether each offeror's past performance record would add significant value to the agency's evaluation. See Supp. MOL at 3. Accordingly, we deny the protest allegation.

Second, Pathfinder's allegation that the VA failed to respond to the firm's pre-proposal questions does not provide us with a basis to sustain the protest. We will only sustain a protest challenging an agency's failure to respond to questions where the protester demonstrates that the solicitation is otherwise inadequate, unclear, or ambiguous. *H.G. Properties A, L.P.*, B-280652, Nov. 2, 1998, 98-2 CPD ¶ 104 at 5. In this way, a protester complaining that the agency did not respond to pre-proposal questions must show that the solicitation lacked sufficient clarity to permit competition on an intelligent and equal basis. *Id.*

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<sup>3</sup> Additionally, we note that the protester developed these arguments in a piecemeal fashion because the supporting arguments were not set forth in the initial protest filing. Where a protester supplements initial general protest allegations with specific examples in a later filing, the specific examples must independently satisfy our timeliness rules; otherwise, we will consider them as raised in piecemeal fashion and to be untimely. *University of Maryland*, B-416682, Oct. 24, 2018, 2018 CPD ¶ 366 at 7.

The protester's initial filing offered only a general allegation that the agency should evaluate past performance in order to assess each offeror's risk of unsuccessful performance; in contrast, only in its comments did the protester offer several specific reasons as to why the RFP should include a past performance evaluation factor. *Compare* Protest at 4 (arguing that the VA has no ability to evaluate risk without assessing past performance) *with* Comments at 16-21 (arguing that the agency should have evaluated past performance because an offeror's record of performance providing video communications services, delivering realistic production plans, and performing services for a large organization represents significant data for the agency's evaluation determination). Further, the arguments raised in the protester's comments do not independently satisfy our timeliness rules because they were filed on February 18, well after the January 8 close of the solicitation period. 4 C.F.R. § 21.2(a)(1) (challenges to the terms of the solicitation must be filed prior to the close of the solicitation period). Thus, even if these arguments did not represent disagreement with the agency's determination, we would nevertheless dismiss them as untimely.

Here, we have no basis to conclude that the agency's failure to respond to Pathfinder's pre-proposal questions resulted in an unfair or unequal competition. We have already addressed the protester's contention that the omission of past performance as an evaluation factor was inadequate, and Pathfinder does not sufficiently demonstrate that any other terms of the solicitation are inadequate, unclear, or ambiguous. See Protest at 3-4; Comments at 2-4. Further, Pathfinder's argument, by itself, that the RFP required the VA to provide a response does not demonstrate competitive prejudice, so as to warrant sustaining the protest. See *H.G. Properties A, L.P., supra*. Accordingly, we deny this protest allegation.

The protest is denied.

Thomas H. Armstrong  
General Counsel