



Decision

Matter of: Nexsys Electronics Inc., d/b/a Medweb

File: B-419616.4

Date: January 7, 2022

Steven Osborne, Nexsys Electronics Inc., doing business as Medweb, for the protester. C. Peter Dungan, Esq., Miles & Stockbridge P.C., for Valor Network, Inc., the intervenor.

Bradley Richardson, Esq., and John G. Terra, Esq., Defense Health Agency, for the agency.

Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of past performance is denied where the evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Nexsys Electronics Inc., doing business as Medweb (Medweb), a small business of San Francisco, California, protests the award of a contract to Valor Network, Inc. (Valor), a small business of Seaside Park, New Jersey, under request for proposals (RFP) No. HT001520R0063, issued by the Department of Defense, Defense Health Agency (DHA) for professional diagnostic radiology services. The protester challenges the agency's evaluation of its proposal.

We deny the protest.¹

¹ The protester proceeded with its protest without the assistance of counsel; therefore no protective order was issued. The agency filed both a protected and redacted version of its report. This decision references the redacted version of the report to the greatest extent possible and is necessarily general in nature to avoid reference to non-public information.

BACKGROUND

The RFP was issued on October 1, 2020, as a small business set-aside under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. Agency Report (AR), Tab 1, RFP at 1, 107. The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract with a base period of 1-year and four 1-year option periods. *Id.* at 84, 112. Award was to be made using a tradeoff considering past performance and price, where past performance was significantly more important than price. *Id.* at 107.

The solicitation sought proposals for diagnostic radiology services such as image interpretation and reporting. *Id.* at 111. The requested services were to be performed at the contractor's place of business. *Id.* The solicitation explained that radiology images and related data would be transmitted between military treatment facilities and the contractor's place of business utilizing secure broadband connections. *Id.* This required the prospective contractor to have the capability and authorization to connect to the relevant Department of Defense information networks. *Id.* at 111-112. Proposals were due by December 11. AR, Tab 12, RFP amend. 0003 at 1.

The agency received eight proposals in response to the solicitation. AR, Tab 19, Source Selection Decision Document (SSDD) at 1. On February 27, 2021, the agency selected Valor for award. Contracting Officer's Statement (COS) at 5. Following the award to Valor, Excalibur Healthcare, P.A. (Excalibur), a small business of Moorestown, New Jersey, filed a protest with our Office. *Id.*; *Excalibur Healthcare, P.A.*, B-419616, B-419616.2, Mar. 8, 2021 (unpublished decision). In response to the protest, the agency filed a notice of corrective action. *Excalibur Healthcare, P.A.*, *supra*. The agency's proposed corrective action rendered the protest academic and as a result, we dismissed the protest on March 8. *Id.*

On April 22, the agency issued RFP amendment 0004.² AR, Tab 16, RFP amend. 0004 at 1. This amendment revised the instructions to offerors under the past performance factor. COS at 3; *compare* RFP at 105, *with* AR, Tab 16, RFP amend. 0004 at 3. Offerors were invited to provide a revised past performance submission no later than May 6.³ AR, Tab 16, RFP amend. 0004 at 1.

The agency received six proposals in response to the amended solicitation. DHA evaluated the proposals submitted by Medweb and Valor as follows:

² We note that Excalibur filed a second protest, challenging the terms of amendment 0004. *See Excalibur Healthcare, P.A.*, B-419616.3, June 11, 2021 (unpublished decision). On June 11, the protest was dismissed as untimely. *Id.*

³ A fifth and final solicitation amendment was issued on May 3. AR, Tab 17, RFP amend. 0005 at 1. This amendment clarified the past performance questionnaire (PPQ) section of the RFP. *Id.* at 1-2. Responses remained due by May 6. *Id.*

	Past Performance	Price
Medweb	Satisfactory Confidence	\$76,809,139
Valor	Substantial Confidence	\$73,532,325

AR, Tab 19, SSDD at 9, 11, 13, 19. DHA performed a tradeoff between the proposals submitted by Medweb and Valor, and concluded that Valor offered the best value to the government. *Id.* at 21. Accordingly, DHA selected Valor for award. *Id.* at 22. Medweb filed this protest on October 3.⁴

Preliminary Procedural Matters

Prior to the due date for submission of the agency report, DHA filed a request for partial dismissal. We briefly address the challenged grounds below.

Medweb argues that the revised past performance instructions in RFP amendment 0004 were improper and demonstrate that DHA had an “intent to use unstated evaluation criteria” when evaluating proposals. Protest at 6-8. Medweb also contends that DHA failed to assess the awardee’s technical solution. *Id.* at 8-9. The agency requests that we dismiss these grounds as untimely and legally insufficient, respectively. Req. for Dismissal at 3-7.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Armorworks Enters., LLC*, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time set for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties do not exist in the initial solicitation but are subsequently incorporated into the solicitation (for example, by a solicitation amendment), they must be protested no later than the next closing time for receipt of proposals following the incorporation. *Id.*

RFP amendment 0004 revised the instructions to offerors under the past performance factor. In explaining the work that would be considered as relevant past performance, amendment 0004 stated:

This includes, but is not limited to: a) Work that involved the credentialing of radiologists, b) Work that involved connection/connectivity to a Government [electronic health record] . . . , and c) Work that involved cybersecurity prevention and protection.

⁴ The protest was filed at 6:22 p.m., Eastern Time, on October 2. According to our regulations, we consider the protest to be filed on October 3. 4 C.F.R. § 21.0(g).

AR, Tab 16, RFP amend. 0004 at 3. The protester argues that the phrase “[t]his includes, but is not limited to” shows that the agency intended to consider evaluation criteria outside that described in the solicitation. Protest at 8.

We find this to be an untimely challenge to the terms of the solicitation. RFP amendment 0004 was issued on April 22, and set a due date of May 6 for submission of revised proposals. AR, Tab 16, RFP amend. 0004 at 1. To timely protest the terms of amendment 0004, Medweb was required to raise its arguments prior to the May 6 due date. Since Medweb did not challenge the terms of amendment 0004 until October 3, this protest ground is dismissed as untimely. 4 C.F.R. § 21.2(a)(1).

Next, Medweb challenges the agency’s evaluation of the awardee’s proposal. Protest at 8-9. In this regard, the protester argues that the RFP’s performance work statement (PWS) contained numerous technical requirements and that a technical evaluation of proposed solutions was required. *Id.* The protester asserts that the agency’s failure to assess the awardee’s technical solution resulted in the selection of a non-responsive proposal for award.⁵ *Id.*

As explained above, the RFP contemplated award based on a tradeoff considering past performance and price; there was no technical solution evaluation factor. RFP at 61, 107. To the extent Medweb argues that the RFP should have contained a technical solution evaluation factor, this is an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1). To the extent Medweb argues that the agency should have evaluated Valor’s technical solution, this fails to state a valid basis for protest since the RFP did not require such information to be included with proposals, nor did it require the agency to conduct such an evaluation. 4 C.F.R. §§ 21.1(c)(4), (f); *id.* § 21.5(f); see RFP at 104-109; AR, Tab 16, RFP amend. 0004. Nonetheless, under either theory, this protest ground is dismissed.

DISCUSSION

Medweb argues that the agency’s evaluation of its proposal was unreasonable. Protest at 4-6; Comments at 3-4. The protester contends that the agency erred when evaluating three of Medweb’s four past performance references, and that Medweb should have received a higher rating under the past performance factor. *Id.* The

⁵ Although the protester refers to the concept of responsiveness, we note that this concept is not applicable to negotiated procurements. See FAR 14.301 (discussing bid responsiveness under sealed bidding procedures). Where a proposal submitted under a negotiated procurement fails to meet a material requirement of the solicitation, it must ultimately be rejected as unacceptable, not as non-responsive. *Blocacor, LDA*, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 2 n.1.

agency argues that its evaluation of Medweb's proposal was reasonable. Memorandum of Law at 4-6. We find no basis to sustain the protest.⁶

Where a protester challenges an agency's evaluation of past performance, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement law and regulation. *Cape Envtl. Mgmt., Inc.*, B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8; *American Envtl. Servs., Inc.*, B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5. Our Office consistently recognizes the evaluation of past performance as a subjective area; determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *E.g., Perspecta Enter. Sols., LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 25. We will not substitute our judgment for reasonably-based past performance evaluation ratings. *Id.* An offeror's disagreement with an agency's evaluation, without more, does not demonstrate that those judgments were unreasonable. *Id.*

Here, offerors were to provide up to five past performance references, and the agency was to evaluate those references for recency, relevancy, and quality. See AR, Tab 16, RFP amend. 0004 at 1-5; RFP at 108-109. The RFP stated that recent past performance was work performed or being performed within the last three years prior to the issuance date of the solicitation. RFP at 108. Relevancy was to be determined based on scope, magnitude of effort, and complexity. *Id.* As noted above, the solicitation stated that relevant work included work that involved credentialing radiologists, connecting to government healthcare systems, and cybersecurity prevention and protection. AR, Tab 16, RFP, amend. 0004, at 3. Past performance references would be assessed as: very relevant, relevant, somewhat relevant, or not relevant. RFP at 108-109. Any past performance reference that earned a relevancy rating of somewhat relevant or better would be evaluated for performance quality. *Id.* at 109.

Past performance was ultimately rated on a scale of: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence.⁷ Overall past performance ratings considered "the degree of confidence the Government [had] in the offeror's ability to meet the solicitation requirements[.]" *Id.* The RFP noted that past performance references found to be more recent or more relevant could factor more heavily in the overall rating than less recent or less relevant references. *Id.*

Medweb submitted four past performance references and was assigned a past performance rating of satisfactory confidence. AR, Tab 19, SSDD at 10-11, 19. Medweb's first reference was found to be somewhat relevant. *Id.* at 10. DHA noted

⁶ Medweb raises other collateral arguments. While we do not address each of the allegations raised, we have reviewed them all and find no basis to sustain the protest.

⁷ The rating of unknown confidence was a neutral rating reserved for offerors without a record of past performance. RFP at 109.

that Medweb's first reference was "very comparable in size" to the work detailed in the RFP, however, it did not include the provision of radiologists. *Id.* Medweb's second reference was found to be somewhat relevant. *Id.* DHA noted that it was unclear as to how much of the work performed for this reference was recent, that it did not include the provision or credentialing of radiologists, and that some of the comments in the corresponding PPQ stated "Unknown/Unable to rate." *Id.* The agency assigned little to no weight to Medweb's third reference. *Id.* at 10-11. DHA found that the corresponding PPQ covered a period of 29 days, which it found to be a "very short period of time," and that the PPQ did not provide answers to questions covering cybersecurity or radiologist credentialing. *Id.* DHA favorably evaluated Medweb's fourth reference. *Id.*

Medweb's challenges focus on the agency's determinations of relevancy, arguing that the agency "fixated only on the requirement for credentialing, and failed to consider the other requirements of the PWS." Comments at 3. The protester contends that its past performance references demonstrate the capabilities required by the RFP. Protest at 5. Additionally, with respect to Medweb's third past performance reference, the protester argues that the agency disregarded information in its proposal showing that the period of performance covered three years, not just 29 days. *Id.* at 6

On this record, we find no reason to question the agency's evaluation of Medweb's past performance. The agency's evaluation findings are reasonable, supported by the contents of Medweb's proposal, and are consistent with the terms of the solicitation.

For example, we find reasonable the agency's consideration of the lack of radiologist-related work in Medweb's first two references; this kind of work was specifically called for in the solicitation. Based on the terms of the RFP, it was reasonable for the agency to find these references somewhat relevant and to factor those findings into Medweb's overall past performance rating. See RFP at 108-109 (defining the relevancy ratings and noting that less relevant references could receive less weight in the evaluation).

Regarding Medweb's second reference, we find reasonable the agency's conclusion that recency was difficult to assess. This reference listed the period of performance as "2004-present" and did not specify what work was performed within the last three years. AR, Tab 18, Medweb Proposal at 12-16, 29-32.⁸ Additionally, as noted by the agency, the second reference's PPQ evaluator comments under cybersecurity protection and prevention stated "Unknown/Unable to rate." *Id.* at 15. Further, as noted by the agency, Medweb's PPQs contained positive ratings, but did not consistently contain the highest possible ratings. See *id.* at 10-11, 14-18, 22-23; AR, Tab 19, SSDD at 10-11.

⁸ Citations to Medweb's proposal are to the Adobe PDF page numbers.

Regarding Medweb's third reference, we find the agency's evaluation to be reasonable. While the description of this work included in Medweb's proposal showed a period of performance spanning from March 2018 through the present and stated that Medweb has a "full credentialing team[,]” DHA found that Medweb's proposal lacked enough detail to assess relevancy. See AR, Tab 18, Medweb Proposal at 33-35; AR, Tab 19, SSDD at 10-11. Further, the only corresponding PPQ for this reference covered a period of 29 days, did not specifically address what kind of work was being evaluated, and did not specifically address cybersecurity or radiologist credentialing. *Id.* at 15-16. Based on our review of the record, we find DHA's critiques here to be reasonable.

We conclude that the protester's challenges amount to disagreement with the agency's judgment. As previously explained, the evaluation of past performance is recognized as a subjective area; our Office will not substitute our judgment for reasonably-based past performance evaluation ratings. *Perspecta Enter. Sols., LLC, supra*. Our review of the record shows that the evaluation of Medweb's past performance was reasonable. Accordingly, Medweb's challenges to the evaluation of its past performance references are denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel