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Decision

Matter of: Midnight Sun-Centennial Kirratchiaq JV, LLC

File: B-419934; B-419934.2; B-419934.3

Date: October 4, 2021

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DIGEST

1. Where the solicitation fails to incorporate one of two mandatory clauses to indicate whether award was to be made with or without discussions, the agency's decision to award on the basis of initial proposals was unobjectionable.

2. Protest challenging an agency's past performance evaluation is denied where the agency's evaluation is reasonable and consistent with the stated evaluation factors.

DECISION

Midnight Sun-Centennial Kirratchiaq JV, LLC (MSCK),¹ an 8(a) small business of Anchorage, Alaska, protests the award of a contract to Defender Contracting & Construction Services (DCCS), an 8(a) small business of Kansas City, Missouri, under request for proposals (RFP) No. FA4418-21-R-0001. The Department of the Air Force issued the RFP for the Simplified Acquisition of Base Engineering Requirements (SABER) contract. The agency anticipated creating a single-award indefinite-delivery,

¹ MSCK is a mentor-protégé joint venture (JV) between Midnight Sun Global Services, LLC (MSGGS), the JV managing partner and protégé, and Centennial Contractors Enterprises, Inc. (Centennial), the mentor. Agency Report (AR), Tab 36, MSCK Past Performance Proposal at 2.

indefinite-quantity (IDIQ) contract at Joint Base Charleston (JBC).² The protester argues that the agency unreasonably failed to conduct discussions with it. MSCK also argues that the award to DCCS was improper because the agency's price realism evaluation and past performance evaluations were unreasonable.

We deny the protest.

BACKGROUND

The SABER IDIQ is a single award, fixed-price IDIQ contract that the Air Force will use to accomplish a wide variety of "non-complex, multi-discipline, minor construction, maintenance, repair and minimal design" projects on real property at JBC and its outlying areas, such as the Nuclear Power Training Unit (NPTU) and the Navy Brig, Goose Creek, South Carolina. AR, Tab 31, RFP amend. 1 at 2. The Air Force will issue task orders under the IDIQ contract for projects valued between \$2,000 and \$1 million and the contractor will provide labor, equipment, tools, materials, and project supervision needed to complete the work. *Id.* The solicitation advises that the total value of the IDIQ contract will not exceed \$77 million. AR, Tab 4, RFP at 1.

On December 7, 2020, the agency issued the solicitation as an 8(a) small business set-aside under FAR part 15, for negotiated contracts.³ *Id.* The solicitation contemplates a 1-year base period and four 1-year option periods for the IDIQ contract; the solicitation also indicates that performance periods for individual projects will be specified in the individual task orders. *Id.* The RFP provides for award to the offeror whose proposal represents the best value considering three evaluation factors: past performance, technical, and price.⁴ AR, Tab 30, Evaluation Factors at 1. The past performance factor is significantly more important than the price or technical factors. *Id.*

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) subpart 19.8. This program is commonly referred to as the 8(a) program.

³ The RFP was amended once; the amendment is not relevant to the issues in this protest. AR, Tab 31.

⁴ The RFP provided for the following ratings under the past performance factor: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, no confidence, or unknown confidence. AR, Tab 30, RFP attach. 12, Section M, Evaluation Factors at 5. Under the technical factor, proposals will be evaluated as either acceptable or unacceptable, with all technically acceptable proposals treated equally. *Id.* at 1.

The RFP specifies that if the lowest-priced, technically acceptable offer receives a rating of substantial confidence under the past performance factor, the agency will make award to that offeror without further consideration of other offers. *Id.* at 5. If the lowest-priced, technically acceptable offer does not receive a rating of substantial confidence, the agency will evaluate the next lowest-priced offer and so on until determining an offer merits a substantial confidence rating. *Id.* If no offeror is assigned a substantial confidence rating, the agency will conduct a tradeoff between the past performance and price factors. *Id.*

For the price factor, the RFP provides that the agency would initially rank offers according to their total evaluated price. *Id.* at 1. Offerors were required to submit a fixed-price coefficient representing all allowable costs, such as contingencies, profit, and overhead. AR, Tab 29, RFP attach. 11, Section L, Instructions to Offerors at 2. These coefficients were to be used by the agency to determine the price of work for each task order. AR, Tab 5, RFP attach. 1, Statement of Work (SOW) at 22. Essentially, standardized contract unit prices were to be multiplied by an offeror's relevant fixed-price coefficient to determine the actual price for a unit of work.⁵ *Id.*

The RFP provides that offerors' total evaluated prices were to be calculated by multiplying an offeror's proposed coefficient for each schedule item by the government estimated dollar amounts for that item and then adding these amounts together. AR, Tab 30, Evaluation Factors at 1. The solicitation reserved the right not to award to offerors with proposed prices that were unreasonable or unrealistic. *Id.* The RFP also indicates that the agency would evaluate prices pursuant to FAR section 15.404-1 to determine whether the proposed prices were unrealistic. The RFP further indicates that proposals offering unrealistic prices might be deemed unawardable, and advises that the agency views prices that are too low as an indication that an offeror does not understand requirements. *Id.*

Seven offerors, including MSCK and DCCS, submitted offers by the closing date set for receipt of proposals. AR, Tab 48, Source Selection Decision Document (SSDD) at 2. The agency evaluated proposals and determined it was not necessary to engage offerors in discussions. AR, Tab 45a, Source Selection Authority (SSA) Briefing Slides at 3, 82-84. As relevant here, the agency evaluated MSCK and DCCS as follows:

⁵ The standardized contract unit price book includes RSMeans® price book line items and custom price book line items. The RSMeans® price book is a trade publication that provides cost information on various construction projects. AR, Tab 5, SOW at 20-21. These unit prices are non-negotiable. *Id.* at 20.

	MSCK	DCCS
Technical	Acceptable	Acceptable
Past Performance	Satisfactory Confidence	Substantial Confidence
Price Realism/Reasonableness	No/No	Yes/Yes
Total Evaluated Price	\$58,136,002	\$73,657,866

AR, Tab 48, SSDD at 2-3, 5. The agency determined that DCCS’s proposal was the lowest-priced, technically acceptable offer with a rating of substantial confidence for past performance and therefore, DCCS’s proposal represented the best value to the government in accordance with the evaluation criteria. *Id.* at 5. The Air Force notified the protester that DCCS was awarded the contract. AR, Tab 49, Notice to Unsuccessful Offeror at 1. After receiving a debriefing, MSCK filed this protest.

DISCUSSION

The protester argues that the agency’s decision not to enter into discussions was unreasonable. The protester also argues that the agency unreasonably evaluated its proposal under the past performance and price factors. We have considered each of the protester’s arguments and have no basis to question either the agency’s decision not to hold discussions or its evaluation.⁶

Preliminary Issue

As a preliminary matter, MSCK argues the award to DCCS should be cancelled because the agency violated the protective order issued by our Office in connection with this protest by providing DCCS with a copy of MSCK’s protected protest and failing to ensure that copies of that unredacted protest were destroyed by DCCS. Supp. Protest at 13-16. The protester also argues that DCCS acted improperly when it reviewed the document, which was marked as “**PROTECTED MATERIAL**” on the first page. *Id.* at 16-18. As explained below, while it is undisputed that the agency inadvertently disclosed the protected protest to DCCS and that some DCCS employees reviewed the protest, we cannot conclude there is competitive harm to the protester warranting a cancellation of the award to DCCS.

After the agency received a copy of MSCK’s protest, the contract specialist responsible for the solicitation notified DCCS of the protest via email and attached a copy of MSCK’s protected, unredacted protest, which contained pricing and other confidential information. AR, Tab 105, Contracting Officer Determination & Findings at 38. Upon learning of the disclosure, agency counsel directed the contract specialist to notify DCCS, and request that the company destroy the document. *Id.* at 39.

⁶ While our decision does not discuss every argument raised by the protester, we have considered all the allegations. To the extent a protest ground is not discussed herein, it was found to be without merit.

The contracting officer subsequently conducted an investigation to determine whether the disclosure impacted the procurement. As part of the investigation, DCCS submitted a declaration stating that as soon as the contract specialist directed it to delete copies of the protest, DCCS identified the individuals who received the document, deleted the email with the protest attachment from these individuals' inboxes, and restricted the email from being forwarded. *Id.* at 5. DCCS also represented that neither the email, nor the attached protest, nor the information in the protest had been duplicated or paraphrased in other documents. *Id.* at 77. In addition, DCCS explained that its personnel did not initially realize that they had received protected information because DCCS had not requested the information, personnel did not "digest and read every page," and DCCS was not focused on the protester's information because the source selection had already been made. *Id.* at 83.

At the conclusion of the investigation, the contracting officer determined that DCCS's actions were sufficient to remedy the agency's error. *Id.* at 3. The agency employees involved were notified of their error and provided with training. *Id.* The contracting officer concluded that the disclosure did not impact the procurement because it occurred after the contract was awarded.⁷ *Id.*

The record is clear that the agency's inadvertent disclosure of MSCK's protest occurred after the award. Based on our review, we conclude the agency's actions had no impact on the protester's chances of award of the protested contract. Accordingly, there can be no competitive harm to MSCK (related to its ability to win this contract) from a release of information that took place after MSCK was excluded from further consideration.⁸ See *NSI Tech. Servs. Corp.*, B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344 at 13-14.

⁷ The agency further represented that it would provide the contracting officer's determination and findings to the suspending and debarring official and the clearance approval authority, who determines whether a violation of the Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101-2107, has occurred. AR, Tab 2, Memorandum of Law (MOL) at 47. Both agency counsel and protester's counsel have indicated, however, that they do not consider the PIA applicable here because the disclosure occurred after award. Req. for Dismissal at 3-5; Response to Req. for Dismissal at 3-4.

⁸ We also point out that while the protective order process is essential to the proper functioning of GAO's bid protest process, *PWC Logistics Servs. Co.*, KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25 at 7, and we expect all parties to comply with the terms of the protective order in their handling of protected material, our bid protest procedures do not contemplate that agency personnel will apply for admission, or be admitted, to our protective orders.

Discussions

With regard to the protester's remaining allegations, MSCK argues that the agency should have entered into discussions with it pertaining to the realism of its proposed price and its performance confidence assessment. In this regard, the protester contends that the solicitation did not state that the agency might not engage in discussions. Protest at 29-30. The protester further argues, citing FAR section 15.306(a)(3), that the agency could not make an award without discussions unless the solicitation stated that the government intended to do so. *Id.*; Comments & 2nd Supp. Protest at 31. In its response, the Air Force disagrees and asserts the agency had no obligation to initiate discussions and that its determination that discussions were unneeded was reasonable. AR, Tab 1, Contracting Officer's Statement (COS) at 22-23; MOL at 43-44. We find no basis to sustain this protest ground.

A contracting officer's discretion in deciding not to hold discussions is quite broad. *Coastal Def., Inc.*, B-413890, Dec. 19, 2016, 2016 CPD ¶ 371 at 6. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, and there is no requirement that an agency document its decision not to initiate discussions.⁹ *Id.* As a result, an agency's decision not to initiate discussions is a matter we generally will not review. *Booz Allen Hamilton, Inc.*, B-405993, B-405993.2, Jan. 19, 2012, 2012 CPD ¶ 30 at 13.

Further, while the Competition in Contracting Act (CICA), 10 U.S.C. § 2305(a)(2)(B)(ii)(I), requires an agency to specify its intent with regard to discussions in the solicitation,¹⁰ the solicitation here did not include either the required FAR

⁹ While we have discussed the impact of Defense Federal Acquisition Regulation Supplement guidance on conducting discussions where the procurement is valued above \$100 million, the award amount here makes such guidance inapplicable. See *Science Applications Int'l Corp.*, B-413501, B-413501.2, Nov. 9, 2016, 2016 CPD ¶ 328 at 9-11.

¹⁰ Specifically, solicitations in negotiated acquisitions are required to include:

either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary.

10 U.S.C. § 2305(a)(2)(B)(ii)(I). This provision is implemented by FAR section 15.209(a), which requires RFPs to include the provision at FAR 52.215-1, if the agency intends to make award without discussions, or the provision at FAR 52.215-1 alternate 1, if the agency intends to make award after discussions.

provision or its alternate and was otherwise silent as to whether discussions would be conducted. Although the solicitation provided that “[o]nly those proposals determined to be technically acceptable, either initially or as a result of discussions, will be considered for award,” this provision does not specify the agency’s intent to make an award with or without discussions.¹¹ AR, Tab 30, Evaluation Factors at 2. Where an RFP is silent as to whether an agency intends to conduct discussions, the agency’s decision to award without discussions is unobjectionable.¹² *Kiewit Louisiana Co.*, B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 2. Accordingly, we have no basis to find the agency was required to conduct discussions here.

Past Performance

The protester also challenges the agency’s past performance evaluation and argues the Air Force improperly assigned its proposal a rating of satisfactory confidence for past performance. Protest at 25-29; Comments & 2nd Supp. Protest at 20-30. Specifically, the protester disputes the agency’s assessment of its past performance projects 1 and 5 as relevant and its projects 2, 3, 6, 7, 8, and 10 as somewhat relevant.¹³ The protester also contends the Air Force improperly assessed the performance of MSGS, the protégé member of the protester’s joint venture. The Air Force responds that its evaluation was reasonable and the protester’s disagreement with the agency’s decision-making does not establish otherwise. COS at 12-22; MOL at 32-43; AR, Tab 107, Supp. COS at 7-11; AR, Tab 108, Supp. MOL at 13-14. Upon review of the record, we find the agency’s evaluation reasonable and consistent with the evaluation criteria.

Our Office will review an agency’s evaluation of past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, as determining the relative merit of an offeror’s past performance is primarily a matter within the agency’s discretion. *FEDSYNC BEI, LLC*, B-417492, B-417492.2, July 23, 2019, 2019 CPD ¶ 303 at 9. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror’s disagreement with an agency’s evaluation, by itself, does not demonstrate that those judgments are unreasonable. *A-P-T Research, Inc.*, B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 4.

¹¹ It should be noted that an agency may determine discussions are necessary even where the agency indicates it will make award without discussions. FAR 15.306(a)(3).

¹² We note that in any event, to be timely, any complaint regarding the absence of solicitation guidance as to whether discussions were required would have to have been filed prior to the RFP closing date. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (protests based on improprieties apparent on the face of a solicitation must be filed prior to the deadline for submitting proposals). Since MSCK did not protest the solicitation’s failure to include the agency’s intent with regard to discussions prior to the closing time for receipt of proposals, we will not consider this allegation further.

¹³ MSCK did not challenge the agency’s evaluation of projects 4 and 9.

Here, the solicitation instructed offerors to identify in their past performance proposals up to 10 prior contracts deemed relevant and performed within the last five years. AR, Tab 29, Instructions to Offerors at 5-6. Offerors were required to explain in sufficient detail how each identified contract was relevant. *Id.* at 6. The solicitation advised that relevant contracts should include multi-discipline efforts similar in scope, magnitude, and complexity to the requirements in this RFP, with “a minimum value performed by the offeror equaling or exceeding the magnitude of construction identified for task orders to be issued on this contract.” AR, Tab 30, Evaluation Factors at 5. The solicitation also provided that prior contracts using RSMMeans® pricing would be considered more relevant than other contracts. *Id.* The RFP further provided that the Air Force would use information independently obtained from other sources, including past performance questionnaires and Contractor Performance Assessment Reports (CPARs). *Id.*

MSCK submitted 10 projects that the Air Force assessed as follows:

	RELEVANCY	PERFORMANCE RATING	PAST PERFORMANCE QUESTIONNAIRE	CPARS
1	Relevant	Satisfactory		X
2	Somewhat Relevant	Satisfactory		X
3	Somewhat Relevant	Satisfactory	X	X
4	Very Relevant	Exceptional	X	
5	Relevant	Not Rated		
6	Somewhat Relevant	Not Rated		
7	Somewhat Relevant	Not Rated		
8	Somewhat Relevant	Not Rated		
9	Not Relevant	Not Rated		
10	Somewhat Relevant	Very Good		X

AR, Tab 45b, Proposal Analysis Report at 24-25. The agency considered a rating of substantial confidence to be warranted where it had a “high expectation that the offeror will successfully perform the required effort” based on the offeror’s recent/relevant performance record, and a rating of satisfactory confidence to be merited where it had a reasonable expectation the offeror would successfully perform. AR, Tab 45a, SSA Briefing Slides at 12. The Air Force concluded “there was not enough past performance history to instill a high expectation that the offeror will successfully perform the required effort” and assigned the protester’s proposal a rating of “satisfactory confidence.” AR, Tab 45b, Proposal Analysis Report at 25.

As noted above, MSCK takes issue with the agency’s assessment of the relevancy of a number of its projects. Based on our review, we find that the record supports the agency’s assessments. Although MSCK’s protest provides numerous explanations as to how its proposal meets the Air Force’s requirements, its past performance proposal did not clearly communicate how the identified projects met the solicitation

requirements; in our view, the protester's arguments fail to demonstrate anything other than a disagreement with the agency's judgment. Moreover, the independent past performance information the Air Force reviewed did not support a higher rating as the majority of the responses from questionnaires, and CPARs ratings, indicated the protester's past performance was only satisfactory. *Id.* at 24-25.

For example, for MSCK's first identified project, which was a SABER contract performed at the Wright-Patterson Air Force Base in Ohio, the evaluators observed there was no indication that the work involved: remote locations, facilities with the same level of security as NPTU and the Navy Brig, multiple mission partners, or waterfront projects. AR, Tab 42, MSCK Evaluation Sheet for Project 1 at 1-2. The protester argues that the solicitation did not require the level of detail that the evaluators were seeking, and in particular, did not require information about the security levels of facilities where the prior work was performed. The protester also argues that this project should have been considered more relevant because it used RSMMeans® pricing. Comments & 2nd Supp. Protest at 25-26. We disagree.

It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows for a meaningful review by the procuring agency. *Environmental Restoration, LLC*, B-417080, Feb. 5, 2019, 2019 CPD ¶ 155 at 9. The RFP here directed offerors to provide sufficient detail for the agency to evaluate their past performance. MSCK's past performance proposal contained generic statements that it had performed work at "secure facilities" and that it had served "similar Department of Defense facilities." AR, Tab 36, MSCK Past Performance Proposal at 12. Moreover, the record shows the Air Force expressly noted the RSMMeans® pricing for this project in its evaluation. AR, Tab 42, MSCK Evaluation Sheet for Project 1 at 1; AR, Tab 45b, Proposal Analysis Report at 21. Even so, the agency concluded that MSCK's proposal failed to demonstrate that this project should be rated very relevant because the proposal failed to demonstrate it involved "essentially the same scope and magnitude of effort and complexities this solicitation requires." AR, Tab 45a, SSA Briefing Slides at 11 (defining the "very relevant" past performance rating). Instead, the agency reasonably concluded this project involved work similar to the work here, which merited a rating of relevant. We find nothing improper or unreasonable about the agency's evaluation.

Looking at another example, the agency assessed MSCK's third identified project as somewhat relevant. AR, Tab 41, MSCK Evaluation Sheet for Project 3 at 1. The agency explained that prior contracts rated somewhat relevant involve "some of the scope and magnitude of effort and complexities this solicitation requires." AR, Tab 45a, SSA Briefing Slides at 11. This project was a job order IDIQ contract performed at JBC and the St. Stephan Power Plant in South Carolina by Centennial, the mentor joint venture partner. While the contract had a total maximum value of \$25 million over five years, Centennial had been awarded projects valued at \$17 million. AR, Tab 36, MSCK Past Performance Proposal at 16. The Air Force noted that Centennial did not explain how its role on this past project would align with its expected role as part of MSCK on this contract. AR, Tab 41, MSCK Evaluation Sheet for Project 3 at 1. The agency also

found that the magnitude of this past contract was not comparable to the magnitude of the effort here although the agency recognized that the individual task orders of this past project were within the range of the individual task orders the agency expects to place under this requirement. *Id.*

The protester contends that this project should have been deemed relevant and that the agency ignored its express statement that Centennial's role in the proffered project was the same as its role in the MSCK joint venture. Comments & 2nd Supp. Protest at 27. MSCK also argues that the agency improperly discounted an "exceptional" CPAR rating pertaining to this contract. *Id.*; see AR, Tab 36, MSCK Past Performance Proposal at 9 n.1 ("Centennial's role in this joint venture is aligned with Centennial's role in [MSCK]"); *Id.* at 17 (expressly stating that Centennial is the mentor in the 8(a) mentor-protégé joint venture here, and was the prime contractor performing the work in the identified project).

While we agree with the protester that the agency apparently overlooked statements in its proposal identifying Centennial's role in this project, we do not find that the assessment of somewhat relevant for this past performance record was unreasonable. The total value of the identified project was \$25 million, which is 32 percent less than the value of the contract at issue in this protest. Moreover, Centennial was only awarded task orders valued at \$17 million, which is an even lower percentage of this contract. Given that an agency is afforded broad discretion in evaluating the merits of an offeror's past performance, we find reasonable the agency's assessment of this project as only somewhat relevant.¹⁴

Price evaluation

The protester also challenges the agency's price evaluation and determination that MSCK's proposed price was unrealistic. Protest at 18-24. We need not decide the protester's allegations in this regard, however, because we find the agency's past performance evaluation was reasonable. The RFP required award to be made to the lowest-priced, technically acceptable proposal with a rating of substantial confidence for past performance. Even if MSCK's price proposal had been determined realistic, which would have made it the lowest-priced, technically acceptable offer, MSCK's proposal

¹⁴ With regard to the protester's complaint that the agency overlooked a CPAR rating of exceptional, the record shows that the agency analyzed the CPAR rating and the comments supporting the rating. AR, Tab 45b, Proposal Analysis Report at 21. While the agency's analysis of the CPAR rating for this project is sparse, the contemporaneous record shows that the agency reviewed the explanation for the exceptional rating and found it unjustified.

was not rated as substantial confidence for past performance, and thus would not have been in line for award.

The protest is denied.

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General Counsel