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Decision

Matter of: Choctaw Defense Munitions, LLC

File: B-420003; B-420003.2

Date: October 27, 2021

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Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of proposals is denied where the evaluation was reasonable and in accordance with the terms of the solicitation.
 2. Protest alleging agency failed to evaluate a potential unequal access to non-public information organizational conflict of interest is dismissed where the issue involves only private parties.
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DECISION

Choctaw Defense Munitions, LLC, an 8(a) small business of McAlester, Oklahoma, protests the award of a contract to Cherokee Nation Aerospace & Defense, LLC, an 8(a) small business of Huntsville, Alabama, under request for proposals (RFP) No. W81XWH-21-R-0004, issued by Department of the Army, Army Medical Research Acquisition Activity for support services for the Women, Infants, and Children (WIC) Overseas program. The protester argues the agency unreasonably evaluated proposals, which led to an improper award to Cherokee. The protester also contends the awardee failed to disclose, and the agency failed to evaluate, a potential organizational conflict of interest (OCI).

We deny the protest in part and dismiss it in part.

BACKGROUND

On March 11, 2021, the Army issued the RFP as a set-aside for 8(a) small businesses in accordance with Federal Acquisition Regulation (FAR) part 15.¹ Agency Report (AR), Tab 2, Contracting Officer's Statement (COS) at 1. The solicitation sought support services for WIC Overseas, a program that provides families a variety of benefits, such as nutritious food, tips on how to prepare balanced meals, nutrition health screening, and access to other resources. *Id.* at 1. The RFP contemplated the award of a mixed fixed-price and cost-reimbursement contract for a base period of 6 months, with four 12-month option periods and one 6-month option period. AR, Tab 3-1, RFP at 23, 88; AR, Tab 3-13, RFP amend. 1 at 2, 9-11. In accordance with FAR subpart 9.5, the RFP required offerors to disclose, and propose a plan to mitigate, any potential OCIs. RFP amend. 1. at 40.

The solicitation anticipated award on a best-value tradeoff basis where the non-price factors were more important than price. *Id.* at 89. Proposals were to be evaluated based on following evaluation factors, in descending order of importance: (1) technical approach, (2) management and quality control approach, (3) past performance, (4) key personnel experience, and (5) price. *Id.* For the technical approach, management and quality control approach, and key personnel experience factors, the RFP provided that the agency would assign proposals a rating of outstanding, good, acceptable, marginal, or unacceptable.² *Id.* at 92. The RFP further provided that under the past performance factor, the agency would assign separate adjectival ratings for relevancy and confidence. *Id.* The due date for proposals was April 12. *Id.* at 1.

¹ 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 of those contracts through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800.

² As relevant to the protest here, the RFP defined the ratings of outstanding, good, and acceptable as follows:

Outstanding: Proposal indicates an exceptional approach and understanding of the requirements and contains multiple strengths, and risk of unsuccessful performance is low.

Good: Proposal indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low to moderate.

Acceptable: Proposal meets requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate.

RFP at 92.

The agency received three proposals by the due date, including proposals from Choctaw and Cherokee. COS at 1. The final ratings for the proposals of Choctaw and Cherokee were as follows:

	Choctaw	Cherokee
Technical Approach	Outstanding	Outstanding
Management and Quality Control Approach	Acceptable	Outstanding
Past Performance	Very Relevant/ Substantial Confidence	Somewhat Relevant/ Satisfactory Confidence
Key Personnel Experience	Outstanding	Outstanding
Price	\$37,996,876	\$36,013,989

AR, Tab 6-2, Source Selection Decision Document (SSDD) at 10.

The agency notified Choctaw on July 8 that it was not selected for award, and provided a debriefing the same day. COS at 2. Choctaw submitted questions to the agency on July 12, to which the agency responded on July 16. *Id.* Choctaw filed this protest on July 21. *Id.*

DISCUSSION

Choctaw contends the agency (1) failed to identify, evaluate, and mitigate an “obvious” OCI on the part of Cherokee; (2) failed to attribute strengths to Choctaw’s proposal under the management and quality control approach factor; and (3) unreasonably evaluated Cherokee’s proposal under the management and quality control approach, past performance, and key personnel experience factors. Protest at 3-4. In its supplemental protest, Choctaw contends the agency disparately evaluated Choctaw and Cherokee under the management and control quality approach factor. Comments and Supp. Protest at 2. For reasons discussed below, we deny the protest in part and dismiss it in part.³

OCI Allegation

Choctaw alleges that a former Choctaw employee, who oversaw performance of the WIC Overseas program while employed by Choctaw, left its employment and started work with Cherokee. Protest at 13. According to Choctaw, this individual was a former executive at Choctaw Global, LLC, and a managing officer at several of its affiliates, including the incumbent contractor for the WIC Overseas Program. *Id.* As part of his duties, this individual had direct oversight of the WIC Overseas contract and was responsible for approving proposals related to the program. *Id.* Choctaw argues that, given these responsibilities, his change in employment created an unequal access to

³ Although we do not address every allegation raised by the protester, we have considered them and find none to be meritorious.

non-public information OCI that Cherokee failed to disclose and the agency failed to evaluate and mitigate. *Id.*

The FAR instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.501, 9.504, 9.505; *PURVIS Sys., Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. Subpart 9.5 of the FAR, and the decisions of our Office, broadly categorize OCIs into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. As noted above, the allegation here pertains to an unequal access OCI.

As relevant here, an unequal access to non-public information OCI exists where a firm has access to non-public information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR 9.505(b), 9.505-4; *Cyberdata Techs., Inc.*, B-411070 *et al.*, May 1, 2015, 2015 CPD ¶ 150 at 6. When a firm obtains non-public information pertaining to another firm other than through its performance of a government contract, however--via disclosure from a former employee of the other firm, for example--the issue is essentially a dispute between private parties that we will not consider absent evidence of government involvement. See *University of Maryland*, B-416682, Oct. 24, 2018, 2018 CPD ¶ 366 at 4-5; *Ellwood National Forge Co.*, B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 4.

Here, the record fails to show that Cherokee gained access to Choctaw's non-public information as part of the Cherokee's performance of a government contract; the record also fails to show that the government was otherwise involved in the alleged disclosure. As mentioned above, absent government involvement, the movement of an employee between private firms involves only a private dispute, even when the protester alleges the former employee disseminated non-public information to a competitor. This protest ground is dismissed.⁴

Challenge to the Evaluation of Choctaw's Proposal

⁴ In its supplemental protest, Choctaw reformulated its OCI allegation, arguing that Cherokee had proposed to employ a second individual currently employed by Choctaw, who during her employment at Choctaw had gained access to competitively useful information. Comments and Supp. Protest at 26. We deny this argument as it continues to allege only a dispute between private parties and does not claim any involvement by the agency.

Choctaw next contends the agency unreasonably evaluated its proposal under the management and quality control approach factor by failing to recognize two areas of its proposal as strengths.⁵ Choctaw also argues the agency disparately evaluated proposals.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. See *SDS Int'l, Inc.*, B-291183.4, B-291183.5, Apr. 28, 2003, 2003 CPD ¶ 127 at 5. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *MVM, Inc.*, B-407779, B-407779.2, Feb. 21, 2013, 2013 CPD ¶ 76 at 6. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was unreasonable. *Id.* at 5. Moreover, when a protester alleges disparate treatment in an evaluation, it must show the differences in evaluation did not stem from differences between the offerors' proposals. *Battelle Memorial Inst.*, B-418047.5, B-418047.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6. As explained below, we find that the protester has failed to make such a showing here.

Here, Choctaw contends its proposal should have received a strength for the benefits associated with its inclusion of a [DELETED]. According to the protester, its inclusion of this position exceeded the requirements of the RFP because it could use the position [DELETED]. Comments and Supp. Protest at 10. The protester alleges that its proposal offered the "same benefits" as Cherokee's, yet only Cherokee received a strength in this area; according to the protester, this constituted disparate treatment. *Id.* We disagree.

The SSDD explains that Cherokee proposed [DELETED] that were able to fill sites in the event of a vacancy. AR, Tab 6-2, SSDD at 18. The agency thus determined this [DELETED], rather than the existence of a [DELETED], warranted a strength. *Id.* Additionally, the agency did not believe there would be a lot of hours devoted to [DELETED], and thus, did not give Choctaw's proposal a strength for that area. COS at 4. Based on the record, we have no basis to find the agency's evaluation unreasonable here.

Choctaw next contends its proposal should have received a strength under the management and quality control factor for its proposed subcontractor, [DELETED]. Protest at 15. Choctaw argues "no other offeror's teaming members have [the same] level of experience or . . . capability" because [DELETED]. *Id.* at 16. The agency responds that "there was no part of" the protester's proposed subcontracting arrangement that added merit or provided additional benefit under the management and quality approach factor in such a manner as to merit a strength. COS at 5. The agency

⁵ The RFP defined "strength" as "[a]n aspect of an Offeror's proposal that has merit or exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance." RFP at 93.

notes that it did consider the experience of Choctaw's proposed subcontractor under the past performance factor, however, and Choctaw's proposal received a rating of "outstanding," which was the highest rating available, for past performance. As above, we have no basis to find this aspect of the agency's evaluation unreasonable.

With respect to the remaining disparate treatment allegations, Choctaw contends the agency assigned strengths to Cherokee's proposal for (1) its detailed hiring narrative demonstrating its understanding of the hiring complexities for qualified staff and (2) proposing a high level of flexibility in allocating resources. Comments and Supp. Protest at 22. According to Choctaw, its proposal had "the exact same benefits." Comments on Supp. Agency Report at 2.

As mentioned above, when a protester alleges the agency disparately evaluated proposals, it must show the differences in the evaluation did not stem from differences in the proposals. *Battelle Memorial Inst., supra*, at 6. The record does not show that the proposals here were essentially the same. Cherokee provided numerous specific avenues through which it would recruit professionals, such as posting on social media pages and placing flyers in offices. AR, Tab 6-1, Technical Evaluation Report at 10. Cherokee's proposal further provided that it retained a full-time recruiter with an [DELETED]. *Id.* Choctaw, on the other hand, did not provide the same benefits in its proposal. See AR, Tab 4-1, Choctaw Technical Proposal at 17. Rather, it provided a more vague description of recruiting through its "vast network of current and former employees, and social media." *Id.* The record does not support Choctaw's claim of disparate treatment here.

Similarly, the record does not support Choctaw's claim that it offered the same benefits as Cherokee with respect to flexibility in allocating resources. Cherokee proposed to manage staff turnover by [DELETED]; Choctaw did not propose a comparable approach to addressing staff turnover. Choctaw's argument here does not demonstrate any disparate treatment. This argument is also denied.

Challenge to the Evaluation of Cherokee's Proposal

Choctaw also challenges the agency's evaluation of Cherokee's proposal under the management and quality control approach factor. Protest at 17-18. According to Choctaw, it was unreasonable for the agency to assign Cherokee's proposal a rating of "outstanding" for this factor because "only a contractor with intimate knowledge of the current contract" could demonstrate a thorough understanding of the requirements here. *Id.* at 18. In other words, Choctaw contends it was inherently unreasonable for the agency to assign Cherokee's proposal a rating of "outstanding" for management and quality control approach because Cherokee lacks experience as the incumbent. We disagree. The protester has provided no support for its assertion that only a contractor with experience as the incumbent could have the knowledge necessary for a rating of "outstanding" under this factor. Accordingly, this protest ground is denied.

Choctaw next challenges the agency's evaluation of Cherokee's past performance. Protest at 18. According to Choctaw, Cherokee's past performance submissions could not have been similar in size, scope, and complexity to the RFP's requirements because Choctaw's subcontractor, [DELETED], had been performing the requirement since its inception. *Id.* Therefore, Choctaw argues it is impossible for Cherokee to have received ratings higher than "not relevant" and "neutral confidence" under this factor. *Id.* at 18-19.

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, because determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *American Env'tl. Servs., Inc.*, B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5. 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 judgments, by itself, does not demonstrate that those judgments are unreasonable. *Id.*

Here, the RFP required offerors to identify three prior contracts or task orders that demonstrated recent and relevant past performance. RFP at 80. The RFP provided that the efforts would be rated as very relevant, relevant, somewhat relevant, or not relevant.⁶ *Id.* at 92. Based on the offeror's recent relevant work, the agency would also assign a performance confidence rating of substantial, satisfactory, neutral, limited, or no confidence.⁷

Cherokee submitted three past performance narratives, one for itself and two for its sister companies. AR, Tab 6-2, SSDD at 19. The agency did not evaluate the narrative for the sister companies because Cherokee stated that it did not intend to team with other entities or subcontractors. *Id.* With regard to the contract performed by Cherokee itself, the agency determined that some aspects were relevant in terms of complexity, magnitude, dollar value, and contract type. *Id.* at 20. Therefore, the agency decided this submission was "somewhat relevant." *Id.* Additionally, in reviewing various

⁶ A very relevant effort involved essentially the same scope and magnitude of effort and complexities required by the solicitation here; a relevant effort involved similar scope and magnitude of effort and complexities; a somewhat relevant effort involved some of the scope and magnitude of effort and complexities; and a not relevant effort involved little or none of the scope and magnitude of effort and complexities. *Id.*

⁷ A rating of substantial confidence means the agency has a high expectation that the offeror will successfully perform the effort; satisfactory confidence means the agency has a reasonable expectation the offeror will successfully perform; neutral confidence means there is no available record, or the record is too sparse to assess; limited confidence means the agency has a low expectation of successful performance; no confidence means the agency has no expectation of successful performance. *Id.*

contractor performance databases, the agency discovered Cherokee received a rating of “satisfactory” on approximately two-thirds of its prior assessments. *Id.* Based on these findings, the agency assigned it a confidence rating of “satisfactory confidence.” Our Office has no basis to find this evaluation unreasonable.

Finally, Choctaw challenges the agency’s evaluation of Cherokee’s key personnel experience. Our Bid Protest Regulations require that a protest include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), and 21.5(f). That is, a protest must include sufficient factual bases to establish a reasonable potential that the protester’s allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. *Ahtna Facility Servs., Inc.*, B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. We dismiss this protest ground as speculative because Choctaw lacks any knowledge of the key personnel experience submitted by Cherokee.

The protest is denied in part and dismissed in part.

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