U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Operations Services, Inc.

File: B-420226

Date: January 4, 2022

Shomari B. Wade, Esq., Aaron M. Levin, Esq., Christopher M. O'Brien, Esq., Greenberg Traurig, LLP, for the protester.
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Timothy J. Ryan, Esq., Defense Logistics Agency, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging agency misevaluated proposals is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Operations Services, Inc. (OSI), an 8(a) small business of Fayetteville, North Carolina, protests the award of a contract to Advanced Technology Logistics, Inc. (ATL), an 8(a) small business of Tyrone, Georgia, under request for proposals (RFP) No. SP3300-20-R-5005 issued by the Defense Logistics Agency for warehouse and logistics support services. The protester alleges the agency erred in permitting two offerors to propose the same subcontractor, and disparately evaluated past performance.

We deny the protest.

BACKGROUND

On March 3, 2020, the agency issued the RFP as a competitive 8(a) set-aside pursuant to Federal Acquisition Regulation (FAR) part 19.8 seeking logistics support services at two DLA facilities in Portsmouth, Virginia. Memorandum of Law (MOL) at 1. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity contract with a five-year ordering period. Agency Report (AR), Tab 2, RFP at 10.

The RFP provided award would be made on the basis of a best-value tradeoff between the following five evaluation factors: (1) performance confidence assessment; (2) management approach; (3) staffing approach; (4) transition and sustainment of operations approach; and (5) cost/price. *Id.* at 76-77. Of note, the RFP explained the performance confidence assessment was the most important evaluation factor, and that the four non-cost/price factors, when combined, were significantly more important than cost/price. *Id.* While the RFP indicated the agency reserved the right to make award without entering into discussions, the RFP also provided the agency could establish a competitive range and conduct discussions in accordance with FAR part 15. *Id.* at 75.

Relevant to this protest, the RFP explained that the performance confidence assessment would involve evaluating an offeror's past performance for recency, relevance, and quality. RFP at 78. Specifically, the RFP provided the agency would first evaluate recency and relevance, and then assess quality for recent and relevant efforts. *Id.* Contracts performed within five years of the solicitation issuance date would be considered recent, and the agency would assess relevance by considering whether prior contracts were similar in scope, magnitude of effort, and complexity to the solicitation's requirements. *Id.*

Finally, the RFP noted the government would consider past performance data for the offeror and any major subcontractors performing either 20 percent of the total dollar value or 25 percent of the total labor hours, but that major subcontractor past performance would be given weight relative to the percentage of effort being provided by that particular subcontractor. RFP at 65-66. Additionally, the RFP explained that major subcontractors must provide a signed commitment certifying that the parties commit to joint performance if the offeror receives the contract award. *Id.*

The agency received eight offers in response to the solicitation, including offers from the protester and intervenor. AR, Tab 7, Source Selection Decision Document (SSDD) at 4. The agency established a competitive range including five offerors, and conducted several rounds of discussions. *Id.* at 4-5. The agency received final proposal revisions from all five offerors in the competitive range, and on Sept. 17, 2021 the agency awarded the contract to ATL. *Id.*; MOL at 2. This protest followed.[1]

ADMISSION TO THE PROTECTIVE ORDER

Preliminarily, we note that, on October 6, 2021, our Office issued a protective order pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.4(a). Electronic Protest

[1] Additionally, the protester filed a size protest concerning ATL at the Small Business Administration (SBA) on Sept. 24, 2021. MOL at 2. On October 26, the SBA issued a size determination concluding that ATL was an "other than small" business for purposes of this 8(a) set-aside procurement. SBA Decision Letter at 1. On November 10, ATL filed an appeal of the SBA's determination with the SBA Office of Hearings and Appeals, which is still pending. ATL Notice of Appeal of Size Determination at 1.

Docketing System (EPDS) Docket Entry No. 4. On October 15, the protester objected to the admission of ATL's counsel because our protective order only permits each party to make and retain four copies of protected material, but ATL sought admission for six attorneys. *See* EPDS Docket No. 11. The protester suggested admitting six attorneys to the protective order would likely result in the creation of more than four copies of protected material, which would heighten the risk of inadvertent disclosure of protected material. *Id.* Additionally, protester's counsel also noted one of ATL's counsel was recently admonished by our Office for a violation of the protective order. *Id.*

In considering the propriety of granting or denying an applicant admission to a protective order, we review each application in order to determine whether the applicant is involved in competitive decision-making and whether there is otherwise an unacceptable risk of inadvertent disclosure of protected information should the applicant be granted access to protected material. *See Restoration and Closure Services, LLC*, B-295663.6, B-295663.12, Apr. 18, 2005, 2005 CPD ¶ 92 at 4 (*citing McDonnell Douglas Corp.*, B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 7-8).

With regard to the protester's objection to the number of counsel, we note that our Office routinely admits more than four attorneys per party to protective orders, and the number of admitted attorneys has no necessary relationship to the number of copies of protected material created or retained by a party. Indeed, our Office has admitted as many as twelve attorneys for one party (over the objection of opposing parties), concluding that the risk of inadvertent disclosure was sufficiently minimal to warrant providing access. *See Wellpoint Military Care Corp.*, B-415222.5, B-415222.8, May 2, 2019, 2019 CPD ¶ 168 at 5-6.

Concerning the admonishment, the attorney in question appropriately disclosed the admonishment, and the admonishment does not, by its terms, bar that individual from seeking admission to a GAO protective order. Additionally, the protective order violation in question involved a mistake of fact concerning whether an attorney was admitted to a protective order, which is logically unrelated to the protester's concern that ATL's counsel may create or retain too many copies of protected material. Moreover, the attorney identified reasonable remedial steps the firm has taken to prevent a similar situation from recurring.

Accordingly, based on the forgoing and the information provided by ATL's counsel regarding relationships with the parties to the protest, we concluded that the risk of inadvertent disclosure of protected material was sufficiently minimal to warrant providing access under the protective order. On October 19, we admitted ATL's counsel to our protective order over the protester's objection. Admission to the Protective Order at 1.

DISCUSSION

The protester challenges the award to ATL in two primary respects.[2] First, the protester contends the agency failed to reasonably consider the fact that ATL and another offeror proposed the same major subcontractor. Because the solicitation required letters of commitment from major subcontractors, OSI argues it was impermissible for the two firms to propose the same firm. Supp. Protest at 11-15. Next, the protester argues that the agency's past performance evaluation reflects inappropriate disparate treatment. *Id.* We address these arguments in turn.[3]

Major Subcontractor

Because the RFP required letters of commitment from major subcontractors, the protester contends the agency erred by permitting the awardee and Lakota Solutions, LLC (Lakota)--another unsuccessful offeror not party to this protest--to propose the same major subcontractor. Supp. Protest at 11-15. This argument, however, relies on

[2] We note that the protester originally advanced several other protest arguments, which we dismissed as untimely or legally insufficient. For example, the protester initially alleged that the agency did not engage in meaningful discussions because, while the agency conducted discussions, the agency did not inform the protester that one of its past performance references was not relevant. Protest at 12-15. The protester argued the FAR requires that, during discussions, agencies must raise significant weaknesses, deficiencies, or adverse past performance information to which the offeror has not had an opportunity to respond. *Id.*

However, in this case, the agency concluded that one of the protester's past performance references was not relevant, which is not a significant weakness or deficiency in the protester's proposal. *See* AR, Tab 5, Past Performance Evaluation Board (PPEB) Report at 40. More significantly, our decisions have consistently concluded that the relevance of past performance references need not necessarily be raised in discussions because it is not "adverse past performance information" in the sense contemplated by the FAR. *Presidio Networked Solutions, Inc. et al.,* B-408128.33, *et al.*, Oct. 31, 2014, 2014 CPD ¶ 316 at 14; *JAM Corporation*, B-408775, Dec. 4, 2013, 2013 CPD ¶ 282. In short, because the protester did not identify any valid requirement for the agency to raise the relevance of the protester's past performance reference, we concluded that this protest ground was legally insufficient.

[3] The protester raises certain collateral arguments not discussed in this decision. We have reviewed the arguments and conclude they provide no basis to sustain the protest. For example, the protester argues that the protest record is inconsistent with the debriefing provided to the protester following award. Comments at 16-18. However, issues concerning the adequacy of a debriefing are not issues our Office will consider because the conduct of a debriefing is a procedural matter not related to the validity of the award. *See, e.g., CAMRIS Int'l, Inc.*, B-416561, Aug. 14, 2018, 2018 CPD ¶ 285 at 5. This protest ground is accordingly dismissed.

a fundamental misreading of the solicitation. Specifically, the RFP requires major subcontractors to provide letters committing to perform in the event that the prime contractor receives the award. RFP at 65. In this case, the RFP provided for only one award; thus, there is no inconsistency or conflict created when the same subcontractor commits to perform with multiple offerors as only one of those offerors can receive an award. Accordingly, the agency did not err in permitting multiple offerors to rely on the same major subcontractor.

The protester also argues the agency's evaluation was unreasonable because, according to the protester, the agency's evaluation of the major subcontractor differed between the awardee and Lakota. Comments at 9-10. Specifically, the protester notes ATL and Lakota both proposed the same major subcontractor, but Lakota received a lower confidence assessment. *Id.* However, the record shows the differences in the evaluation stem from differences in the past performance of the two offerors as prime contractors, not from any disparate evaluation of their major subcontractor. *Compare* AR, Tab 5, PPEB Report at 51-65 *with* 66-83 (Lakota had one "somewhat relevant" reference as prime, while ATL had two relevant efforts). Significantly, the agency's evaluation of the major subcontractor's past performance was substantially identical for both offerors. *Id.* Accordingly, there is no evidence that the agency inappropriately evaluated the major subcontractor's past performance in the way the protester suggests.[4]

Past Performance

With respect to the past performance evaluation, the protester argues the agency engaged in impermissible disparate treatment. Supp Protest at 13-15. Specifically, the protester complains that the agency evaluated one of the protester's past performance efforts as not relevant because it involved only [DELETED] full-time equivalents (FTEs)--the solicitation estimated 89 FTEs would be required for this effort--yet, the agency found one of the awardee's efforts to be relevant even though it involved only [DELETED] FTEs. Comments at 12-13. Further, the protester argues it had relevant past performance references with overwhelmingly positive contractor performance assessment reports (CPARs), but nonetheless received a lower past performance

[4] Relatedly, the protester raises numerous disparate evaluation arguments concerning the past performance of three firms who did not receive award, and are also not party to this protest. Comments at 10-16. However, as a general matter, no competitive prejudice can flow from alleged disparate treatment with respect to other unsuccessful offerors. *See Environmental Chem. Corp.*, B-416166.3, *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 6 n.5. Competitive prejudice is an essential element of any viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. *Interfor US, Inc.*, B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7.

confidence assessment than the awardee, whose past performance submissions included some adverse past performance information.[5] *Id.* at 12-13, 15.

To prevail on a claim of disparate treatment a protester must demonstrate that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in other proposals, or otherwise treated like features of different proposals disparately. *See, e.g.*, *Office Design Group v. United States*, 951 F.3d 1366, 1372 (Fed. Cir. 2020); *Battelle Memorial Inst.*, B-418047.3, B-418047.4, May 18, 2020, 2020 CPD ¶ 176 at 5. That is to say, a protester must show that differences in an evaluation did not stem from differences between the proposals. *IndraSoft, Inc.*, B-414026, B-414026.2, Jan. 23, 2017, 2017 CPD ¶ 30 at 10; *Paragon Sys., Inc.; SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9. Here, the record does not support the protester's claims of disparate treatment, because the differences in the evaluation stem from differences between the offerors' past performance information.

With respect to the protester's arguments concerning past performance relevance, the agency concluded one of the protester's past performance references was not relevant because it was not similar to the current effort either in scope, magnitude, or complexity. AR, Tab 5, PPEB Report at 40. The agency reached this conclusion in part because the effort only involved [DELETED] FTEs as compared to an estimated 89 FTEs for the current effort, but also because the past performance reference involved performing work that was meaningfully different in scope and complexity from the current effort. *Id.* By contrast, the agency found one of ATL's references involving [DELETED] FTEs to be relevant because, while it was not similar in magnitude, it was very similar in scope and similar in complexity to the current effort. *Id.* at 69-70. That is to say, the record suggests that the differences in the agency's evaluation stemmed from the fact that OSI's past performance reference was not similar to the current effort in any respect, while ATL's reference was similar in scope and complexity.

Significantly, the record reflects that the agency was evenhanded in concluding that past performance efforts with similar complexity and scope were relevant, even where the magnitude of the effort was not comparable. For example, the agency found one of the protester's past performance references to be relevant, even though it only involved

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[5] Collaterally, the awardee argues that the agency should have considered the positive CPARs for a past performance reference that the agency concluded was not relevant to this effort. Comments at 17. As a general matter, it is not clear that an agency is required to consider the quality of admittedly irrelevant past performance, but in this case doing so appears contrary to the terms of the solicitation. Specifically, the solicitation provided that the agency would first evaluate recency and relevance, and then assess quality only for recent and relevant efforts. RFP at 77. Here, the agency concluded the protester's past performance effort was not relevant, so the solicitation did not require the agency to assess or consider the quality of the irrelevant past performance effort.

[DELETED] FTEs, because it was otherwise similar in scope and complexity to the current effort. *Id.* at 37. On this record, we see no evidence of inappropriate disparate treatment with respect to the agency's determinations of relevance.

Next, the protester argues the agency disparately evaluated offerors with respect to the quality of past performance. Specifically, the protester argues it had relevant past performance references with overwhelmingly positive CPARs, but received a lower past performance confidence assessment than the awardee, whose past performance submissions included some adverse past performance information. Comments at 12-13, 15. We do not agree that the agency engaged in inappropriate disparate treatment in this case.

Preliminarily, the record reflects that the adverse past performance information in question was addressed in the contemporaneous evaluation. The CPAR assessing officials considered them to be minor issues that were adequately addressed by corrective actions. *See* AR, Tab 5, PPEB Report at 75, 78-79. This view was reflected in CPAR ratings that were uniformly Satisfactory, Very Good, or Excellent. *Id.* Significantly, the agency's evaluation explicitly considered this adverse past performance information, and concluded that, while adverse information was present, the contractor's corrective actions had effectively resolved the issues and the overall performance ratings were positive. *See* SSDD at 10-11.

Turning to the protester's allegation of disparate treatment, while the protester is correct that it had uniformly positive past performance, the protester's past performance information was meaningfully different from the awardee's in numerous respects. In this regard, the protester submitted one relevant reference for itself and three relevant references for its major subcontractor that would be performing [DELETED] percent of the contract labor. *See* AR, Tab 5, PPEB Report at 36-51. By contrast, ATL provided two relevant references for itself, and two very relevant references for its major subcontractor that would be performing [DELETED] percent of the effort. *Id.* at 66-83

Of note, ATL's major subcontractor is the incumbent contractor, which informed the agency's conclusion that the past performance reference for the incumbent effort was very similar to the current effort, and therefore very relevant. MOL at 6 (*citing* AR, Tab 5, PPEB Report at 72-75). Additionally, ATL proposed that its major subcontractor would perform a significantly larger proportion of the work than OSI's major subcontractor, and the solicitation specifically provided that major subcontractor performance would be considered in proportion to the percentage of the work proposed for that contractor. RFP at 65-66. That is to say, the awardee proposed a major subcontractor whose past performance was more relevant, and proposed it to perform a larger portion of the work. These are significant differences between the proposals that

the agency discussed in its evaluation. *See* SSDD at 22. Accordingly, the protester has not met its burden of showing that the agency evaluated substantially identical proposals differently.

The protest is denied.

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