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Decision

Matter of: Tiya Support Services, LLC

File: B-421538.3

Date: May 24, 2024

Robert Nichols, Esq., Michael Bhargava, Esq., and Logan Kemp, Esq., Nichols Liu LLP, for the protester.

Devon E. Hewitt, Esq., and Matthew L. Nicholson, Esq., Potomac Law Group, PLLC, for Akima Intra-Data, LLC, the intervenor.

Major Joshua B. Fix, Department of the Army, for the agency.

Uri R. Yoo, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party notwithstanding the resignation of a proposed key person when the key person remained available and committed to perform on the contract if awarded to the protester.

2. Protest challenging past performance evaluation is denied where the agency reasonably considered a contract performed by the protester's proposed subcontractor when assessing protester's overall confidence rating.

DECISION

Tiya Support Services, LLC, a small business of Baton Rouge, Louisiana, protests the award of a contract to Akima Intra-Data, LLC, a small business of Herndon, Virginia, under request for proposals (RFP) No. W9124B23R0002, issued by the Department of the Army for firefighting, rescue, and emergency services. The protester challenges the agency's past performance evaluation and best-value tradeoff decision.

We deny the protest.

BACKGROUND

On October 17, 2022, the Army issued the RFP as a total small business set-aside using the procedures of Federal Acquisition Regulation part 15. Contracting Officer's

Statement (COS) at 1; Agency Report (AR), Tab 3, RFP at 1.¹ The solicitation sought proposals to provide emergency services support, including 24-hour fire suppression, dispatching, and operations services, as well as prevention and inspection services, at U.S. Army Garrison Fort Irwin, California. COS at 1; RFP at 140. The solicitation contemplated award of a fixed-price contract with a 30-day phase-in period, an 11-month base period, and four 1-year option periods. RFP at 142.

The solicitation provided that award would be made to the offeror whose proposal represented the best overall value to the government considering three factors: (1) mission capability; (2) past performance; and (3) price. *Id.* at 332. Proposals would first be evaluated for technical acceptability under the mission capability factor on a pass/fail basis considering two subfactors: technical capability and proposed staffing. *Id.* Only those proposals found to be technically acceptable for both subfactors would be further evaluated for past performance and price. *Id.* at 332, 334. The award decision would be based on a tradeoff between past performance and price, where past performance was more important than price. *Id.* at 332.

Under the past performance factor, the solicitation instructed offerors to provide “documentation outlining the offeror’s past performance with contracts, as a prime or major subcontractor, which is the same or similar in nature, size, and complexity to the services being procured under this solicitation.” *Id.* at 329. The RFP defined recency as work performed within “six (6) years from the issue date of this RFP” and defined relevant efforts as “services/efforts that are the same as or similar to the effort . . . required by the RFP.” *Id.* at 328. Offerors were required to include a “specific narrative explanation and rationale supporting objectives achieved and assertions of relevance and how it was determined that the work performed previously was the same or similar in nature, size, and complexity to the work specified by this solicitation.” *Id.* Offerors were also required to provide a past performance questionnaire (PPQ), submitted separately, for each contract reference. *Id.* Past performance information was required for “the offeror and all subcontractors, teaming partners, and/or joint venture partners proposed to perform,” and was to “detail the percentage of work performed by each subcontractor or partner based on the total proposed price.” *Id.*

The RFP advised that the past performance evaluation would comprise two separate aspects: first, an evaluation of how relevant a recent effort is to the current requirement; and second, a determination of how well the offeror performed on the referenced contracts. *Id.* at 336-337. The solicitation also provided as follows:

The [p]ast [p]erformance evaluation will assess the relative risks associated with an offeror’s likelihood of success in performing the

¹ The solicitation was amended eleven times. COS at 4. Citations to the solicitation in this decision are to the conformed copy of the RFP provided at tab 3 of the agency report. To the extent the agency report documents contain internally consistent and sequential page numbers, citations to those documents are to the internal page numbers; otherwise, citations are to the Adobe pdf document pages.

contract requirements as indicated by that offeror’s record of past performance. Performance risk is assessed at the factor level after evaluating aspects of the offeror’s recent past performance and focusing on performance that is relevant to the work being procured under this solicitation. . . . Each offeror will receive a performance confidence assessment rating based on the [o]fferor’s recent past performance, focusing on performance that is relevant to the contract requirements.

RFP at 333. The relevance of an offeror’s past performance, in turn, would be assessed as follows:

A relevancy determination of the offeror’s (including teaming members, joint venture partner(s), major, and critical subcontractor(s)) past performance will be made. In determining relevancy for individual contracts, consideration will be given to the effort, or portion of the effort, being proposed by the offeror, teaming partner, or subcontractor whose contract is being reviewed and evaluated. In establishing what is relevant for the acquisition, consideration should be given to what aspects of an offeror’s contract history would give the most confidence that the offeror will satisfy the current procurement.

Id. at 336-337. The RFP also advised that the “overall past performance evaluation [would be] a subjective decision based on the whole of all data received.”² *Id.* at 328.

The agency received timely proposals from three offerors, including Tiya and Akima. COS at 4. On October 4, 2023, the agency awarded the contract to Akima, and Tiya subsequently protested that award to our Office. *Id.* at 5. We dismissed the protest as academic after the agency advised our Office of its intent to take corrective action by conducting a new past performance evaluation and making a new award decision. See *Tiya Support Services, LLC*, B-421538.2, Dec. 21, 2023 (unpublished decision).

The agency reevaluated proposals and assessed the following ratings to Tiya’s and Akima’s proposals:

	Tiya	Akima
Mission Capability	Acceptable	Acceptable
Technical Capability	Acceptable	Acceptable
Proposed Staffing	Acceptable	Acceptable
Past Performance	Satisfactory Confidence	Substantial Confidence
Total Evaluated Price	\$81,461,185	\$86,972,823

² The relevancy of each referenced contract would be assigned a rating of very relevant, relevant, somewhat relevant, or not relevant. RFP at 337. The agency would assign a rating of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence for overall past performance. *Id.* at 337-338.

AR, Tab 23, Source Selection Decision Document (SSDD) at 5.

The source selection authority (SSA) conducted a new comparative assessment of proposals and again concluded that Akima's proposal provided the best overall value to the government. *Id.* at 29. Specifically, the SSA found that Tiya "had only one contract with a Very Relevant rating, while [Akima] had two contracts with a Very Relevant rating and one contract with a Relevant rating." *Id.* at 27. The SSA also found that the contractor performance assessment reports (CPARS) and PPQs showed that Akima "had higher quality past performance over multiple contracts similar in scope." *Id.*

Based on these findings, the SSA concluded that "[e]ven though [Tiya's] overall proposed price is \$5 [million] lower than [Akima's] proposed price, the government expects to receive a significant benefit in paying for higher quality management and service, as evidenced in [Akima's] high quality past performance, given the critical fire and police functions required for the contract." *Id.* Noting the importance of past performance over price, the SSA concluded that Akima's proposal provided the best overall value to the government. *Id.* at 27, 29.

On February 9, 2024, the agency again selected Akima's proposal for award. COS at 5. After requesting and receiving a debriefing, Tiya filed this protest.

DISCUSSION

Tiya primarily argues that the agency unreasonably evaluated Tiya's past performance and conducted a flawed best-value tradeoff. For the reasons discussed below, we find no basis to sustain the protest.³

Interested Party Status

As a preliminary matter, the agency requests dismissal of the protest, arguing that the protester is not an interested party because it is not next in line for award. Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. 31 U.S.C. §§ 3551-3557. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). In a post-award context, we have generally found that a protester is an interested party to challenge an agency's evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *CACI, Inc.-Fed.*, B-419499, Mar. 16, 2021, 2021 CPD ¶ 125 at 5.

Here, the agency argues that the protester would not be next in line for award due to the unavailability of a proposed key person, rendering Tiya's proposal ineligible for award.

³ Although we do not specifically address every collateral argument the protester raises, we have carefully considered all of them and find that none provides a basis to sustain the protest.

Req. for Dismissal at 6-10. In this regard, the agency asserts that Tiya revealed during its debriefing that its proposed [DELETED] resigned from his position at [DELETED] (Tiya's proposed subcontractor), where he was serving as the [DELETED] under the incumbent contract. *Id.* The agency contends that the protester had actual knowledge of this individual's unavailability before award but failed to notify the agency. *Id.*

The protester responds that, while the proposed key person resigned his position as an employee of Tiya's proposed subcontractor, he nevertheless remained--and continues to be--available to perform the contract if awarded to Tiya. Resp. to Req. for Dismissal at 3; Comments at 25. The protester also maintains that Tiya was under no duty to inform the agency because the individual never in fact became "unavailable" to perform and Tiya had no reason to believe otherwise despite the individual's resignation. Comments at 26. In support of its assertion, Tiya submits a declaration from the key person attesting to his unwavering commitment to perform under the Fort Irwin contract if awarded to Tiya. Comments, exh. 2, Key Person Declaration at 2.

In a negotiated procurement, as is the case here, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. *PAE Applied Techs., LLC*, B-419133, Nov. 4, 2020, 2020 CPD ¶ 363 at 4. We have explained that when a solicitation requires resumes for--or otherwise requires the identification of--specific personnel, the proposed person forms a material requirement of the solicitation. *Id.* Offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. *Id.* When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal. *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 3-4 n.2.

As relevant here, under the proposed staffing subfactor, offerors were to submit a staffing plan that clearly identified individuals meeting specified minimum qualifications for the key positions of project manager and quality control manager. RFP at 326. Tiya's proposed [DELETED] was the individual serving as the [DELETED] under the incumbent contract. AR, Tab 16, Tiya's Mission Capability Proposal at 32-34. Tiya's proposal also stated that "each of [its] key personnel signed statements affirming their commitment to serving in a similar position on the new [Directorate of Emergency Services] contract." *Id.* at 38. Based in part on Tiya's proposed key personnel, the agency assessed Tiya's proposed staffing to be acceptable. See AR, Tab 23, SSDD at 5-6. After receiving Tiya's debriefing questions, which discussed the replacement [DELETED] under the incumbent contract, the agency confirmed with the incumbent contracting officer that Tiya's proposed [DELETED] had resigned from [DELETED] prior to award. Req. for Dismissal at 5-7; see AR, Tab 27, Enhanced Debriefing Questions and Answers at 3.

The protester does not dispute that its proposed [DELETED] resigned from his employment with Tiya's subcontractor [DELETED] and from his position as the

incumbent [DELETED] prior to the completion of the agency's reevaluation. See *generally*, Resp. to Req. for Dismissal. In fact, the protester admits that [DELETED] notified the incumbent contracting officer of the [DELETED]'s resignation and a replacement [DELETED] was then approved to serve--and is currently serving--in that role under the incumbent contract. *Id.* at 2-3. The protester argues, however, that the proposed [DELETED]'s resignation did not change his commitment--and thus his availability--to perform as Tiya's [DELETED] if the agency awarded the contract to Tiya. *Id.* In this regard, he states in his declaration:

. . . I have remained committed to serve again as the [DELETED] at Fort Irwin should Tiya win the follow-on contract there. . . . I never wavered from my commitment to serve again as Fort Irwin [DELETED] should the opportunity arise, even as I felt compelled to resign the position because the Army's award of the contract to another company. I maintained that commitment through both Tiya's initial protest and its current protest.

Comments, exh. 2, Key Person Declaration at 2.

Based on this record, we do not find that the protester's proposal became ineligible for award due to the unavailability of a proposed key person. The solicitation here did not require that proposed key personnel be current employees of the offeror. Instead, the RFP merely warned that "[w]hen key personnel are used as an evaluation factor in best value procurement, an offer can be rejected if it does not have a firm commitment from the persons who are listed in the proposal." RFP at 174. Here, Tiya's proposal identified its proposed key personnel and noted that they "signed statements affirming their commitment." AR, Tab 16, Tiya's Mission Capability Proposal at 38. Although the proposed [DELETED] resigned his employment following the agency's award of the contract to another offeror, the individual confirmed that he has always remained committed to perform if the contract were to be awarded to Tiya. See Comments, exh. 2, Key Person Declaration at 2.

While the agency argues that Tiya only belatedly obtained a commitment from the individual in response to the agency's request for dismissal, there is no basis for us to question the key person's declaration that he always intended to serve as [DELETED] in the event of an award to Tiya. Moreover, we resolve any doubts about Tiya's interest here in favor of the protester. *BOF GA Lenox Park, LLC*, B-421522, June 20, 2023, 2023 CPD ¶ 152 at 5. Because the record does not establish that the proposed [DELETED] became unavailable to perform the contract, Tiya's proposal remains eligible for award if the protest were to be sustained. Accordingly, we find that the protester is an interested party to challenge the award in this procurement. *LT4-5, LLC*, B-421243 *et al.*, Jan. 12, 2023, 2023 CPD ¶ 23 at 3.

Past Performance Evaluation

Turning to the protest arguments, the protester primarily challenges the agency's evaluation of Tiya's proposal under the past performance factor. We note at the outset

that the protester does not object to the agency's assessment of relevancy and quality for each of Tiya's individual past performance references. Instead, the protester challenges Tiya's overall performance confidence rating of satisfactory confidence, arguing that Tiya should have received a higher rating based on its favorable performance under the incumbent contract. Protest at 14-19. The protester asserts that instead of "focusing on" this very relevant effort, as contemplated by the stated evaluation criteria, the agency impermissibly averaged the relevancy ratings of Tiya's three past performance references. *Id.*; Comments at 6-14. The agency responds that it properly and thoroughly evaluated each of Tiya's three past performance references and reasonably considered the relevance and quality of each before assessing the overall performance confidence as satisfactory in accordance with the stated evaluation criteria. COS at 6-10; Memorandum of Law (MOL) at 11-14.

An agency's evaluation of past performance, which includes consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion, which we will not disturb unless the assessment is unreasonable or inconsistent with the solicitation criteria. *Horizon Strategies, LLC*, B-419419.5, B-419419.6, Mar. 15, 2023, 2023 CPD ¶ 71 at 17. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. *Id.*; *DynCorp Int'l, LLC*, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 14. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. *WingGate Travel, Inc.*, B-412921, July 1, 2016, 2016 CPD ¶ 179 at 4-5.

The record shows that Tiya provided three past performance references with its proposal: (1) a Chitimacha Reservation support services contract, performed by Tiya's parent entity; (2) a Fort Benning base operations support services contract, performed by Tiya; and (3) a Fort Irwin installation support services contract, performed in part by Tiya's proposed subcontractor [DELETED]. AR, Tab 21, Tiya Past Performance Consensus Evaluation at 1-4; see AR, Tab 17, Tiya Past Performance Proposal at 16-29. During the evaluation, the agency found the Fort Benning contract to be not relevant and the Chitimacha Reservation contract to be somewhat relevant. *Id.* at 1-3. The agency also did not find or receive any CPARs or PPQs for these two references. *Id.* The agency found the incumbent contract to be very relevant, with CPARs and PPQs showing very good and exceptional quality. *Id.* at 3-4. However, the agency noted that the contract was not performed by Tiya and was instead performed by a joint venture for which Tiya's proposed subcontractor [DELETED] was the majority member. *Id.* Based on this evaluation, the agency assessed Tiya's overall past performance to be relevant with a rating of satisfactory confidence, noting that the rating was "based on the offeror's overall relevant past performance record." *Id.* at 4.

In response to the protest allegations, the agency supplemented the record with a declaration of the past performance evaluator, who further explains his rationale for the overall rating.⁴ COS, exh. 1, Decl. of Past Performance Evaluator at 1-2. The evaluator notes that he “considered all aspects of Tiya’s past performance proposal,” including Tiya’s proposed assignment of “a relatively small number of roles” to [DELETED]. *Id.* at 1-2. Specifically, the evaluator points to the portion of Tiya’s proposal that listed ten roles under the solicitation but assigned only two roles ([DELETED]) solely to [DELETED], one role ([DELETED]) to both Tiya and [DELETED], and the remaining seven roles solely to Tiya. *Id.* at 1-2; see AR, Tab 17, Tiya’s Past Performance Proposal at 10.

On this record, we find the agency’s evaluation of Tiya’s past performance to be reasonable and consistent with the stated evaluation criteria. First, while the protester speculates that the agency must have improperly averaged the relevancy ratings of Tiya’s three references to arrive at the overall relevancy rating of relevant and the overall confidence rating of satisfactory, this contention is not supported by the record. Instead, the record shows that the agency evaluated the relevance and quality of each of the protester’s references, then considered these references as a whole in assessing an overall rating under the past performance factor.

While the protester contends that it was improper for the agency to give any consideration to the not relevant or somewhat relevant references in assessing the overall performance confidence rating, we find no support for this contention in the stated evaluation criteria. Here, the solicitation provided that the agency would assess an overall confidence rating by “evaluating aspects of the offeror’s recent past performance and focusing on performance that is relevant,” and that “more relevant past performance is a stronger predictor of future success and will have more influence on the past performance confidence assessment than past performance of lesser relevance.” RFP at 333, 336. While the words “focusing” and “more influence” certainly indicate that the agency would give more weight to more relevant past performance, it would be illogical in this context to interpret these provisions to mean that the agency

⁴ The protester challenges, as *post hoc*, the declarations provided by the agency in response to this protest and alleges that the agency did not adequately document its assessment of Tiya’s overall confidence rating. Comments at 18-21. When reviewing an agency’s evaluation, we do not limit our review to contemporaneous evidence, but consider all of the information provided, including the parties’ arguments and explanations. *Jacobs Tech., Inc.*, B-420016, B-420016.2, Oct. 28, 2021, 2021 CPD ¶ 373 at 4 n.7. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. *Id.*; *Meltech Corp., Inc.*, B-421064, B-421064.2, Dec. 22, 2022, 2023 CPD ¶ 9 at 9. Here, we find the past performance evaluator’s explanations to be credible and consistent with the contemporaneous record as well as the stated evaluation criteria.

would *only* consider the more relevant reference and completely disregard the less relevant references.⁵

Moreover, we have explained that where, as here, a solicitation provides that a similar or more relevant past performance reference would be given more weight, that criteria indicates that the qualitative feedback on a more relevant reference may have more impact on the overall performance confidence than the qualitative feedback on a less relevant effort. See *Alliant SB CTA, LLC*, B-411842.6, Aug. 10, 2016, 2016 CPD ¶ 216 at 9. Such a provision, however, does not mean that less relevant contracts would not be considered at all in assigning an overall relevance rating. See *id.*

In any event, here, the record shows that the agency's overall assessment did not result from the agency's failure to focus on--*i.e.*, accord more weight to--the more relevant references, but rather from the agency's consideration of the fact that the more relevant past performance information was for Tiya's subcontractor, which was proposed to have a limited role in performance of the contract. Based on that consideration, the agency concluded that Tiya's performance record as a whole--which included one very relevant reference partially performed by its subcontractor [DELETED]--warranted an overall relevance rating of "relevant."

The record also shows that the agency did not receive or find any qualitative feedback for the contracts performed by Tiya and its parent entity. AR, Tab 21, Tiya Past Performance Consensus Evaluation at 1-3. Thus, the sole qualitative feedback the agency received was for the work partially performed by Tiya's subcontractor [DELETED], which, as noted above, had a limited role under the procurement. On this record, we find nothing objectionable in the agency's conclusion that Tiya's overall past performance record did not warrant the highest past performance rating of substantial confidence.

In addition, we have explained that the significance of, and the weight to be assigned to, a prime contractor's versus subcontractor's past performance is principally a matter of contracting agency discretion. *Horizon Strategies, LLC*, B-419419.5, B-419419.6, Mar. 15, 2023, 2023 CPD ¶ 71 at 19. To the extent Tiya disagrees with the weight the agency gave to [DELETED]'s past performance, such disagreement, without more, does not form a basis to question the agency's reasoned evaluation. See *id.*

⁵ We note that where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *Shimmick Constr. Co., Inc.*, B-420419.2, May 9, 2022, 2022 CPD ¶ 113 at 7. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.*; *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4.

Finally, the protester asserts that the agency's best-value decision was improper because it was based on the flawed past performance evaluation. Protest at 19-21; Comments at 21-22. Because we deny the protester's challenge to the agency's past performance evaluation, the protester's challenge to the agency's best-value decision, which is based on the same alleged past performance evaluation arguments, is also denied. See *NetCentrics Corp.*, B-421172.2, B-421172.3, Oct. 23, 2023, 2023 CPD ¶ 247 at 22 (explaining that where other challenges to an agency's evaluation have been denied or otherwise dismissed, a derivative challenge to the best-value determination does not afford a basis to sustain the protest).

The protest is denied.

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General Counsel