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Decision

Matter of: Facility Services Management, Inc.

File: B-422259.2

Date: September 24, 2024

John C. Dulske, Esq., Katelyn D. Hoelscher, Esq., and Alyssa Isenberg, Esq., Steptoe & Johnson, PLLC, for the protester.
Adam K. Lasky, Esq., Edward V. Arnold, Esq., and Erica L. Bakies, Esq., Seyfarth Shaw LLP, for J&J Maintenance Inc. d/b/a J&J Worldwide Services, the intervenor.
Kaley E. Angus, Esq., Department of the Army, for the agency.
Samantha S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

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

DECISION

Facility Services Management, Inc. (FSI), of Clarksville, Tennessee, protests the award of a contract to J&J Maintenance Inc. d/b/a J&J Worldwide Services, of Austin, Texas, under solicitation No. W91278-23-R-0051, issued by the Department of the Army, Corps of Engineers (Corps), for operations and maintenance of the Defense Health Agency program at Dwight David Eisenhower Army Medical Center, Fort Eisenhower, Georgia. The protester contends that the agency unreasonably evaluated the awardee's past performance.

We deny the protest.

BACKGROUND

The Corps issued the solicitation on September 23, 2023, using the procedures of Federal Acquisition Regulation part 15. Agency Report (AR), Tab 3, Request for Proposals (RFP) at 4.¹ The agency sought proposals to perform all operation,

¹ Citations to the record are to the documents' Adobe PDF pagination.

maintenance, repair, and facility management support tasks and functions for medical facilities at Eisenhower Army Medical Center, Fort Eisenhower, Georgia. AR, Tab 4, RFP amend. 1 at 32.

The solicitation contemplated award of a single fixed-price contract with a base year and four 1-year options. *Id.* at 5; AR, Tab 14, Source Selection Decision Document (SSDD) at 3. The solicitation established that award would be made on a best-value tradeoff basis considering price and the following four non-price evaluation factors, listed in descending order of importance: (1) past performance information of the prime contractor (past performance); (2) technical approach; (3) management approach; and (4) small business approach. AR, Tab 4, RFP amend. 1 at 8. The non-price factors, when combined, were significantly more important than price. *Id.*

The agency received six timely proposals. Contracting Officer's Statement (COS) at 7. On December 1, the Corps awarded the contract to J&J. *Id.* at 8. Following notification of the award decision, FSI filed a protest with our Office asserting that the agency unreasonably failed to consider J&J's performance under another relevant contract in the past performance evaluation. *Facility Servs. Mgmt., Inc.*, B-422259, Jan. 22, 2024 (unpublished decision) at 1. In response, the agency notified our Office that it intended to take corrective action; specifically, the agency stated that it would consider the contract identified in FSI's protest in the past performance evaluation and make a new award decision. *Id.* at 1-2. We dismissed the protest as academic on January 22, 2024. *Id.*

Subsequently, the agency reevaluated proposals, summarizing the results as follows:

	FSI	J&J
Past performance	Substantial confidence	Substantial confidence
Technical approach	Acceptable	Acceptable
Management approach	Acceptable	Acceptable
Small business approach	Acceptable	Acceptable
Price	\$30,283,290	\$25,988,289

AR, Tab 14, SSDD at 43. Based on the reevaluation, the contracting officer, who also acted as the source selection authority, concluded that J&J's proposal provided the best value. *Id.* at 42-44. Following notification of the award to J&J and receiving a debriefing, FSI filed this protest with our Office.

DISCUSSION

The protester challenges the Corps's evaluation of J&J's proposal under the past performance evaluation factor and the resulting award decision. We have considered all of FSI's arguments and find that none provides a basis on which to sustain the protest.

Past Performance

The protester focuses on the evaluation of the awardee, arguing that the agency unreasonably failed to consider certain adverse past performance information arising from J&J's performance on another contract, specifically a contract with the Corps for operations and maintenance services at a medical treatment facility in Korea ("Korea Delivery Order"). Comments at 1-6. The agency maintains that it evaluated J&J's past performance reasonably and in accordance with the solicitation's stated evaluation criteria. Memorandum of Law (MOL) at 11-15. For the reasons explained below, we find that the agency's evaluation was reasonable.

An agency's evaluation of past performance, which includes its consideration of the 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. *Teya Enters., LLC*, B-420907, Oct. 24, 2022, 2022 CPD ¶ 266 at 3-4. When a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation criteria, and with applicable procurement statutes and regulations. *Id.*; *Apogee Eng'g, LLC*, B-414829.2, B-414829.3, Feb. 21, 2019, 2019 CPD ¶ 85 at 6. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation findings. *Intercontinental Constr. Contracting, Inc.*, B-415040 *et al.*, Nov. 8, 2017, 2018 CPD ¶ 82 at 7. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *APC Constr., LLC*, B-419771, July 13, 2021, 2021 CPD ¶ 258 at 6.

For past performance, the solicitation instructed offerors to provide "examples of recent, relevant projects that demonstrate the company's ability to perform work similar in scope and magnitude to that required by this solicitation." AR, Tab 4, RFP amend. 1 at 9. Offerors were required to submit "evidence of the quality of their past performance for each project," which included evaluations from the Contractor Performance Assessment Reporting System (CPARS) where available. *Id.* at 10. The agency reserved the right to verify the information submitted, and to "review CPARS, or other Government project appraisal systems, for information on other projects performed by the Offeror whether submitted as part of a proposal or not." *Id.* at 11.

The RFP explained that the agency would first assess each past performance reference for relevancy, determining whether the references were "very relevant," "relevant," "somewhat relevant," or "not relevant," based on the similarity in scope, magnitude of effort, and complexity to the contract under this solicitation. *Id.* at 24-25. The

evaluators would then “assess how well an Offeror performed,” including if “the relevant performance record indicate[d] performance problems.” *Id.* at 25. Finally, the agency would assign an overall performance confidence assessment rating based on all past performance references considered.² *Id.* at 25-26. Relevant here, the solicitation defined the overall performance confidence assessment rating of “substantial confidence” as follows: “Based on the Offeror’s recent/relevant performance record, the Government has a high expectation that the Offeror will successfully perform the required effort.” *Id.* at 26.

Here, J&J submitted five past performance references in its proposal, all of which the agency found were somewhat or very relevant “with customer survey ratings ranging from ‘Satisfactory/Very Good/Exceptional’.” AR, Tab 13, Source Selection Evaluation Board (SSEB) Report at 24. Following FSI’s initial protest, the agency reevaluated J&J’s past performance, to include consideration of J&J’s performance on the Korea Delivery Order--which had not been submitted as a reference in J&J’s proposal. See *id.* at 28-29. The evaluators found the Korea Delivery Order was very relevant, noting that:

This project was considered “Very Relevant” because the scope and complexity of the work involved essentially the same scope and magnitude, effort and complexity as this solicitation and type of work anticipated under this solicitation. The Contract effort was for medical facility operations and maintenance services to include preventive and unscheduled/corrective maintenance on facility HVAC [heating, ventilating, and air conditioning], plumbing, electrical, fire detection/alarm, building envelope security systems, etc. Work includes options for Real Property Installed Equipment (RPIE) and Boiler Operations.

Id. at 29. With respect to the quality of performance on the Korea Delivery Order, the evaluators found the following:

The CPARS ratings received by J&J were Very Good and Satisfactory. The contractor maintained a 100% quality control (QC) pass rate for all preventative maintenance (PM) tasks inspected and 100% QC pass rate for corrective maintenance (CM) work inspected, exceeding the associated task order performance requirements summary (PRS) standard of 95% PC pass rate. J&J completed 100% of all urgent connective maintenance (CM) service orders as assigned. J&J exceeded task order PRS standards of at least 95% for monthly completion of non-life safety preventative maintenance at 100%. They maintained a 93.5% rate for routine unscheduled work. The scope and complexity of the work demonstrated is reflective of the type of work anticipated under this solicitation.

² The available confidence ratings for past performance were “substantial confidence,” “satisfactory confidence,” “neutral confidence,” “limited confidence,” and “no confidence.” AR, Tab 4, RFP amend. 1 at 26.

Id. at 29. Based on its review of the projects submitted by J&J in its proposal, as well as the performance on the Korea Delivery Order, the agency assigned an overall past performance confidence rating of “substantial confidence” for J&J.

The protester does not challenge the agency’s evaluation of the reference projects identified in J&J’s proposal; instead, the protester argues that the agency’s evaluation related to the Korea Delivery Order was unreasonable.³ FSI proffers that in 2023, J&J Korea, Inc.--an entity majority owned by J&J--pled guilty in federal district court to conspiracy to restrain trade and wire fraud in connection with its work as a subcontractor to J&J on the Korea Delivery Order. Protest at 15-20. Based on the information associated with the guilty plea in federal district court, FSI argues that J&J Korea, Inc. “obtained rigged competitor bids and created the false appearance that those bids were competitive,” resulting in the payment of “non-competitive prices” for the subcontract work. *Id.* at 19 (emphasis omitted). According to the protester, the agency’s past performance evaluation was unreasonable because the Corps failed to consider these criminal aspects of performance on the Korea Delivery Order--which encompassed the work of J&J Korea, Inc., as the subcontractor to J&J. Comments at 2-6. Without such consideration, according to FSI, the agency did not properly evaluate J&J’s past performance for quality and performance risk, as required by the solicitation. *Id.*; AR, Tab 4, RFP amend. 1 at 25.

The Corps responds that--consistent with the evaluation approach provided in the solicitation--the evaluators properly considered J&J’s performance on the Korea Delivery Order, using the relevant CPARS assessment, which was positive. In the

³ The protester also argued that the agency failed to consider “performance issues” on a J&J contract at the West Point Keller Army Community Hospital in the past performance evaluation. Protest at 22-23. Prior to the deadline for the agency report, the intervenor requested dismissal of this protest argument “because it [was] made without even a shred of evidentiary support.” Intervenor Req. for Partial Dismissal at 1. The intervenor argued that the only basis for FSI’s argument was speculation based on secondhand information from an unidentified source, unsupported by any declaration. *Id.* at 1-4.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. We dismissed the protest allegation because it was speculative in nature and FSI failed to provide factual support for that allegation. Electronic Protest Docketing System No. 19 (dismissing protest argument as factually and legally insufficient). Our Office will not find improper agency action based on conjecture or inference. *Electra-Motion, Inc.*, B-229671, Dec. 10, 1987, 87-2 CPD ¶ 581 at 1; 4 C.F.R. § 21.5(f).

agency's view, this indicated that "[t]he criminal activity by J&J's subcontractor did not negatively impact the quality of J&J's performance delivered under the project." MOL at 12-13. Consequently, the agency assigned an overall performance confidence assessment rating of "substantial confidence" to J&J.⁴ *Id.*; AR, Tab 14, SSDD at 29.

Notwithstanding the protester's reference to the RFP's general provisions that the agency would evaluate past performance for quality and performance risk, we do not find that FSI has identified anything about the agency's evaluation inconsistent with the specific past performance evaluation criterion set forth in the RFP. In assessing the quality of performance of past projects--such as the Korea Delivery Order--the RFP plainly provided that the agency would consider CPARS assessments, if available, of relevant government projects. AR, Tab 4, RFP amend. 1 at 10. If the CPARS assessment reflected performance problems, the solicitation advised that the agency would consider those performance problems and any corrective action taken to address the identified problems. *Id.* Here, the protester does not argue--and the record does not demonstrate--that J&J's relevant CPARS assessments reflected any performance problems.

More to the point, FSI's contention is not that the agency failed to consider the relevant CPARS for J&J, but rather that a subcontractor's misconduct on the Korea Delivery Order should have undermined the CPARS evaluation and should have resulted in the agency finding that there were performance problems with the work. Comments at 2-6. In other words, FSI disagrees with the agency's assessment of J&J's past performance based on the protester's own judgment about the nature and impact of the criminal conviction of the awardee's subcontractor, J&J Korea, Inc. *Id.* Where the agency's evaluation of past performance is consistent with the solicitation, such disagreement is insufficient to render the agency's evaluation unreasonable. *Browning Ferris Indus. of Hawaii*, B-281285, Jan. 21, 1999, 99-1 CPD ¶ 35 at 5 (denying protest challenging past performance evaluation where "agency's determination that the past performance of [the awardee] was satisfactory and posed a low performance risk [was] unobjectionable, notwithstanding the False Claims Act litigation" brought in connection with the same performance history).

Ultimately, even if we agreed with the protester's proposition--which we do not--FSI has failed to establish how it was competitively prejudiced by the alleged flaw in the agency's evaluation. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have

⁴ The agency explains that the contracting officer specifically "investigated the allegations regarding J&J's failure to monitor and manage its subcontractors" and "considered all relevant information relating to J&J's subcontractor's criminal activity in [the agency's] Determination of Responsibility and found J&J to be a responsible contractor for award of this contract." MOL at 13; COS at 11 ("I considered the allegations set forth in the Criminal Information and Sentencing Memorandum filed against J&J Korea."). The protester does not challenge the agency's responsibility determination.

had a substantial chance of receiving the award, there is no basis for finding competitive prejudice. *Credence Mgmt. Solutions, LLC*, B-420408, B-420408.2, Mar. 18, 2022, 2022 CPD ¶ 81 at 11.

According to FSI, in light of the misconduct of J&J Korea, Inc., the overall performance confidence assessment rating of J&J should have been “neutral confidence,” rather than “substantial confidence.” Comments at 7. The protester does not, however, object to the evaluation of the past performance references submitted by J&J, in its proposal. In this regard, the Corps’s reevaluation found that J&J had submitted one “somewhat relevant” and four “very relevant” past performance references, with CPARS quality ratings of “exceptional,” “very good,” and “satisfactory.” AR, Tab 13, SSEB Report at 24-28. In light of these uncontested contract references, we cannot conclude that FSI has demonstrated a reasonable possibility that J&J’s past performance rating of “substantial confidence” would have been drastically reduced, even had the evaluators specifically considered the subcontractor, J&J Korea, Inc.’s misconduct and assessed it to have affected the performance on the Korea Delivery Order.⁵ See *Dismas Charities*, B-298390, Aug. 21, 2006, 2006 CPD ¶ 131 at 5-6 (denying protest alleging that the agency failed to consider adverse past performance information because, even if the agency should have considered the information, the protester did not challenge the awardee’s other positively assessed past performance references that otherwise supported the assigned rating of very good). The protest allegation is therefore denied.

Best-Value

As a final matter, the protester argues that the agency’s best-value tradeoff decision was improper because it was based on a flawed past performance evaluation. Comments at 7-8. This allegation is derivative of the protester’s challenge to the past performance evaluation. Because we find no basis to object to the evaluation, we dismiss this allegation regarding the award decision because derivative allegations do not establish an independent basis of protest. *Merrill Aviation and Def.*, B-416837, B-416837.2, Dec. 11, 2018, 2018 CPD ¶ 421 at 10 (dismissing challenge to source selection decision as derivative of denied challenges to the agency’s technical evaluation).

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ Nor, for that matter, has the protester explained how the agency’s unchallenged assessment of the references provided in J&J’s proposal would have met the definition of a “neutral confidence” rating, which is defined as: “No recent/relevant performance record is available or the Offeror’s performance record is so sparse that no meaningful confidence assessment rating can be reasonable assigned.” AR, Tab 4, RFP amend. 1 at 26.