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Decision

Matter of: The Victor Group, Inc.

File: B-422827

Date: November 20, 2024

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DIGEST

1. Agency correctly evaluated past performance of small business joint venture that was in a mentor-protégé relationship in accordance with 13 C.F.R. §125.8(e), rather than 13 C.F.R. §125.11, which applies when an individual small business is attempting to use its past performance as a member of a former joint venture.

2. Agency conducted reasonable price and past performance tradeoff where contracting officer was aware of the advantages of the awardee's past performance and considered both past performance and price in accordance with the solicitation.

DECISION

The Victor Group, Inc., of San Antonio, Texas, protests the issuance of a task order to TLS, Joint Venture, LLC (TLSJV), of Grovetown, Georgia, under task order proposal request (TOPR) No. HT940823R00030002, issued by the Department of Defense (DOD), Defense Health Agency, for healthcare environmental cleaning (HEC) at Tripler Army Medical Center, Honolulu, Hawaii. The Victor Group asserts that the agency failed to reasonably evaluate TLSJV's past performance and performed an unreasonable best-value tradeoff.

We deny the protest.

BACKGROUND

The agency issued the solicitation to holders of an indefinite-delivery, indefinite-quantity (IDIQ) contract, which anticipates the issuance of task orders to provide six service levels of environmental cleaning services at various military medical facilities.¹ Agency Report (AR), Tab 4, Tripler TOPR at 4.² The solicitation for the task order at issue is to provide environmental cleaning services at Tripler Army Medical Center. The task order was to be issued on a best-value tradeoff basis considering past performance and price among offerors that were assigned a rating of pass for technical capability. Past performance was considered significantly more important than price. *Id.* at 6.

As relevant to this protest, offerors were required to provide prices for three ranges of square footage for the Tripler facility where the cleaning services would be performed. These ranges were referred to as stepladders and were set forth as follows: stepladder 1 was from 1,059,857 to 1,321,191 square feet; stepladder 2 was from 1,321,192 to 1,582,526 square feet; and stepladder 3 was from 1,582,527 to 1,843,861 square feet.³ AR, Tab 10, Stepladder Pricing. For each stepladder range, offerors were required to provide a monthly fixed price for all tasks and requirements included in the performance work statement for the base period, four option periods, a transition period, and a period for an extension or services. Each period of performance represented a separate line item. Tripler TOPR at 5. The agency computed a total evaluated price for each stepladder range by adding together the proposed prices for each of these line items. *Id.* The solicitation specified that the total evaluated price for each stepladder range would be evaluated for fairness, reasonableness, completeness, and balance. *Id.* at 8. The solicitation informed offerors that as of the date the solicitation was issued, the agency expected to award a task order for services at the Tripler facility for the square footage and amount proposed for stepladder 2. *Id.* at 9.

¹ The six service levels are: surgical areas; patient areas; restrooms; clinical/support areas; administrative areas; and common areas. AR, Tab 5, Past Performance Eval. at 80; Tripler TOPR at 4.

² The agency issued the IDIQ-level request for proposals (RFP) along with task order proposal requests specific to multiple separate locations at the same time. In this decision, we refer to the IDIQ-level solicitation as the IDIQ RFP and the task order solicitations as they pertain to the specific location (e.g., in this case, the “Tripler TOPR”).

³ The agency explains that the stepladder ranges are “a contractual mechanism for mitigating performance-price impacts resulting from non-contractual changes to facility square-footage footprints.” Contracting Officer’s Statement (COS) at 26. In this regard, all three stepladder prices are incorporated into the Tripler task order “and would become effective automatically should the [military treatment facility] change the applicable square footage.” *Id.*

Past performance information was submitted and evaluated under the competition for the multiple award IDIQ contracts. AR, Tab 3, IDIQ RFP at 64-65; Tripler TOPR at 4. Past performance was assigned a confidence rating (substantial, satisfactory, neutral, limited, or no) based on the relevance of the past performance examples submitted, and the quality of the performance. IDIQ RFP at 66. The agency then used the same past performance information that was submitted and rated in response to the IDIQ RFP when conducting the best-value tradeoff for the task orders, including the Tripler task order here. Accordingly, the agency did not solicit additional past performance information or reevaluate past performance as part of the evaluation of task order proposals.

The Victor Group and TLSJV submitted proposals for the Tripler task order which were evaluated as follows:

Total Evaluated Price	The Victor Group	TLSJV
Stepladder 1	\$59,182,374.46	\$63,822,550.38
Stepladder 2	\$72,216,598.32	\$75,084,437.61
Stepladder 3	\$85,140,780.01	\$76,586,022.60
Performance Confidence	Satisfactory	Substantial

AR, Tab 17, Tripler Task Order Decision Document (TODD) at 9, 27.

The agency performed a past performance and price tradeoff and issued the task order to TLSJV. *Id.* at 37-38, 40. This protest followed.⁴

DISCUSSION

The Victor Group protests that in evaluating the past performance of TLSJV the agency violated an applicable Small Business Administration (SBA) regulation. The Victor Group further protests that in the best-value tradeoff decision the agency failed to adequately consider past performance and unreasonably considered the proposed price

⁴ The value of the task order here exceeds \$25 million. Accordingly, this protest is within our Office's task order jurisdiction to resolve protests involving task orders issued under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

for stepladder 3. We have considered all The Victor Group's assertions and find no basis to sustain the protest. We discuss the primary issues below.⁵

Past Performance Evaluation

The Victor Group protests that in evaluating the past performance of TLSJV, the agency failed to comply with Small Business Regulation 13 C.F.R. § 125.11. According to the protester, for past performance references submitted by TLSJV involving work its large business member performed while working for a joint venture other than TLSJV, the agency failed to consider, as required by this regulation, specifically what work the large business member of the awardee joint venture performed on past performance references where it performed on the other joint venture's contract.

With respect to past performance offerors were required to submit at least three, but no more than five recent (defined as an effort that was ongoing for at least 6 months within the 5 years preceding the date the solicitation was issued) and relevant past performance examples. IDIQ RFP at 61. If an offeror was a joint venture with no past performance information, the past performance record of all companies forming the joint venture would be considered. *Id.* at 66. Additionally, if the joint venture offeror had fewer than three past performance records the past performance records of the individual companies comprising the joint venture could be submitted. *Id.* at 66. Offerors were required to complete a past performance questionnaire if there was no completed contractor performance assessment report (CPAR) available for a specific past performance example and to submit a white paper that detailed the relevance for each example submitted. *Id.* at 61.

The solicitation included a table that specified the basis for each relevance rating (very relevant, relevant, somewhat relevant, and not relevant). *Id.* at 65. Pertinent here, a rating of "very relevant" was assigned when the past performance example involved aseptic HEC services performed at either medical centers or hospitals with inpatient and specialty care services or at multiple facilities; required all 6 service levels to be performed (surgical areas; patient areas; restrooms; clinical support areas; administrative areas; common areas); and the customer was DOD, another federal agency, or a civilian hospital. *Id.* A rating of "relevant" was assigned when the past performance example involved aseptic HEC services at medial facilities that were more

⁵ For example, GAO previously dismissed The Victor Group's challenge that the agency failed to consider that TLS's proposed price for the stepladder 3 quantity was unrealistically low and unreasonable. See Electronic Protest Docketing System (Dkt.), No. 22 (dismissing protest ground for failing to state a valid basis of protest). GAO dismissed the challenge to TLSJV's proposed price as unrealistic because the solicitation did not provide that price would be evaluated for realism.

than 50,000 square feet; at least 5 service levels were performed; and the customer was DOD, another federal agency, or a civilian hospital.

Past performance was assigned a performance confidence rating (substantial, satisfactory, neutral, limited, or no) based on the relevance of the past performance examples, and the quality of the performance. *Id.* at 66

The awardee, TLSJV, is a joint venture consisting of the small business protégé, Tru Leader Services, LLC, and the large business mentor, NuGate Group, LLC.⁶ TLSJV submitted five past performance references, four of which were evaluated by the agency.⁷ AR, Tab 5, Past Performance Evaluation at 80. Two of the references were submitted for a contract on which NuGate performed as a member of a different joint venture called NJS Joint Venture, LLC. These two references were rated very relevant because they demonstrated performance of the six service levels and otherwise met the criteria for a very relevant rating. *Id.* at 79, 81. A third reference was performed by TLSJV and was rated relevant because it demonstrated performance of five service levels and was performed in a facility that was greater than 50,000 square feet. *Id.* at 79, 81-82. The fourth reference was performed by a subcontractor and rated very relevant because it demonstrated performance of all six service levels and met the other criteria for a very relevant rating. *Id.* at 79, 82. The performance quality ratings for all past performance references were exceptional to satisfactory. *Id.* at 84. The agency concluded that in the aggregate the overall body of TLSJV's past performance resulted in a high expectation that TLSJV would successfully perform the task order and assigned TLSJV's proposal a rating of substantial confidence for past performance.

The Victor Group argues that in evaluating the past performance of TLSJV the agency did not adhere to SBA regulation 13 C.F.R. § 125.11 which provides as follows:

Past performance ratings for certain small business concerns.

(a) General. In accordance with sections 15(e)(5) and 8(d)(17) of the Small Business Act, agencies are required to consider the past

⁶ The SBA's small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts." 13 C.F.R. § 125.9(a), (b). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. *Id.* § 125.9(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for "any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement." *Id.* § 125.9(d)(1); see also 13 C.F.R. § 121.103(b)(6), (h)(3)(ii).

⁷ The fifth reference was not considered because the agency determined it was not recent. AR, Tab 5, Past Performance Evaluation at 80.

performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors. The agencies shall consider the small business past performance for the evaluated contract or order similarly to a prime-contract past performance.

(b) Small business concerns that have been members of joint ventures—

(1) Joint venture past performance.

(i) When submitting an offer for a prime contract, a small business concern that has been a member of a joint venture may elect to use the experience and past performance of the joint venture . . . where the small business does not independently demonstrate past performance necessary for award. The small business concern, when making such an election, shall:

(A) Identify to the contracting officer the joint venture of which the small business concern is or was a member;

(B) Identify the contract or contracts of the joint venture that the small business elects to use for its experience and past performance for the prime contract offer; and

(C) Inform the contracting officer what duties and responsibilities the concern carried out or is carrying out as part of the joint venture.

(ii) A small business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture.

(2) Evaluation. When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order.

13 C.F.R. § 125.11. (underline added)

The Victor Group protests that the agency did not comply with paragraph (b)(1)(i)(C) because NuGate did not provide, and the agency did not consider, the specific duties and responsibilities that NuGate performed for the two past performance examples it submitted where NuGate was a member of the NJS joint venture. The agency responds that it properly evaluated TLSJV's past performance in accordance with 15 U.S.C. § 644(q)(1)(C) and the SBA implementing regulation 13 C.F.R. § 125.8(e) which applies to the evaluation of small business, mentor-protégé, joint ventures. In this regard, 15 U.S.C. § 644(q)(1)(C) requires the following when an agency is evaluating the past performance of a joint venture:

(C) Joint ventures-- . . . if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award . . . the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture. 15 U.S.C. § 644(q)(1)(C).

The implementing regulation 13 C.F.R. § 125.8(e) provides as follows:

(e) Capabilities, past performance and experience. When evaluating the . . . past performance . . . of an entity submitting an offer as a joint venture for a contract set aside or reserved for small business concerns a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. . . . The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. §125.8(e).

Given the issues presented, our Office invited SBA to provide its views because the allegations concerned the interpretation and application of regulations promulgated by that agency. Dkt. No. 52. Where the SBA's regulations are ambiguous, our Office will defer to SBA's reasonable interpretation of its own regulations as such regulations fall squarely within its responsibility for administering the Small Business Act. *Radiance Techs., Inc.*, B-422615, Aug. 30, 2024, 2024 CPD ¶ 210 at 6 n.10. While our Office will give deference to an agency's reasonable interpretation of its own regulations, where the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. *ASRC Fed. Data Network Techs., LLC*, B 418028, B 418028.2, Dec. 26, 2019, 2019 CPD ¶ 432 at 10.

According to the SBA, the agency properly evaluated the past performance of TLSJV in accordance with 13 C.F.R. § 125.8(e). The SBA explains that 15 U.S.C. § 644(q)(1)(C), and its implementing regulation at 13 C.F.R § 125.8(e), govern how an agency must evaluate the capabilities of a small business joint venture, including those that are in an approved mentor-protégé partnership. SBA Comments at 4. Specifically, if the small business joint venture does not have sufficient past performance to be considered for award, the agency is required to consider the past performance of each entity that

makes up the joint venture, and to determine whether in the aggregate the joint venture has sufficient past performance to perform. 13 C.F.R. § 125.8(e); SBA Comments at 2. The SBA explains that since TLSJV is a small business joint venture in a mentor-protégé relationship, the agency correctly evaluated its past performance by considering the past performance of TLSJV, as well as one of its members, NuGate, as instructed by 13 C.F.R. § 125.8(e).

The SBA further explains that the Small Business Act was amended to add additional ways for certain small businesses to demonstrate their past performance for prime contract opportunities. The SBA explains that the implementing regulation, 13 C.F.R. § 125.11, allows a small business concern that had been a member of a joint venture to use the experience and past performance of that joint venture where the small business does not independently demonstrate sufficient past performance to qualify for award. In that situation, the small business must identify and explain the specific duties and responsibilities it performed as a member of the joint venture, and in evaluating the past performance of the small business the agency must consider this information. The SBA asserts that 13 C.F.R. § 125.11 does not apply in this situation where the offeror is a small business joint venture, and not an individual small business. SBA Comments at 2. The SBA also asserts that 13 C.F.R. § 125.11 does not apply here because NuGate is a large business and the regulation applies to how an agency considers the past performance of a small business.

Based on the plain language of the applicable regulations, and the comments provided by the SBA, we find that the agency correctly evaluated the past performance of TLSJV in accordance with 13 C.F.R. § 125.8(e), and that 13 C.F.R. § 125.11 does not apply here. In this regard, TLSJV is a small business mentor-protégé joint venture; 13 C.F.R. § 125.8(e) specifically addresses the past performance evaluation of a joint venture, including a small business mentor-protégé joint venture, and instructs agencies to consider the past performance of each member of the joint venture, and to consider whether the aggregate past performance of the members of the joint venture satisfy the agency that the joint venture can successfully perform the contract. 13 C.F.R. § 125.8(e). In contrast, 13 C.F.R. § 125.11 informs agencies that when they are evaluating the past performance of a small business offeror that does not have past performance on its own as a prime contractor, it may evaluate the past performance the small business has as a member of a joint venture. Further, 13 C.F.R. § 125.11 by its terms is not relevant to the evaluation of the past performance of a large business such as TLSJV's member NuGate. Here, because TLSJV is a small business joint venture we find the agency properly evaluated TLSJV's past performance pursuant to 13 C.F.R. § 125.8(e), and that the rules outlined in 13 C.F.R. § 125.11 did not apply to the agency's past performance evaluation.

Best-Value Tradeoff Determination

The Victor Group argues that the agency performed an unreasonable best-value tradeoff determination because it did not adequately consider past performance. The protester specifically complains that in conducting the tradeoff, the contracting officer relied on the adjectival ratings without considering the underlying strengths of each offeror.⁸ The protester also asserts that the agency unreasonably considered the prices proposed for stepladder 3 when making the selection decision. As discussed below, we find that the agency conducted a reasonable best-value tradeoff analysis.

In reviewing an agency's tradeoff determination GAO will consider whether the record shows that the source selection authority (SSA) was aware of the advantages of the awardee's proposal, and specifically determined that those advantages were worth the awardee's higher cost. *Science Applications Int'l Corp.*, B-290971, *et al.*, Oct. 16, 2002, 2002 CPD ¶ 184 at 20-21. In this regard, GAO reviews whether the agency fully considered all of the underlying evaluation documentation in concluding that the awardee's technical advantages warranted its higher cost, and whether that judgment was reasonable. *Koontz Elec. Co., Inc.*, B-407946, Apr. 5, 2013, 2013 CPD ¶ 96 at 6-7. There is no requirement, however, that the agency restate an offeror's strengths when comparing proposals in the tradeoff, where the evaluation record elsewhere details (and reflects that the SSA considered) all the evaluated advantages associated with the proposals and the particular benefits these advantages offered. *Valiant Gov't Servs., LLC*, B-416488, Aug. 30, 2018, 2018 CPD ¶ 311 at 6; *Science Applications Int'l Corp.*, *supra*, at 20-21 (where the "record shows that the SSA reviewed all of the detailed reports which, when combined, described the technical advantages of [the higher-priced] proposal," and where the "record also shows that the SSA made a specific determination that [the higher-priced proposals'] technical advantages were worth its higher cost," the record is adequate to determine that "the SSA fully considered all of the underlying evaluation documentation in concluding that the awardee's technical advantages warranted its higher cost, and where there is no basis in the record to question the reasonableness of that judgment.").

⁸ The protester also asserts that the contracting officer improperly based the tradeoff on the past performance evaluation the agency used to award the overall IDIQ contracts. According to the protester the agency should have considered past performance as it related specifically to the facility for which the task order was being issued. This argument is inconsistent with the plain terms of the solicitation and is therefore dismissed as legally insufficient. See 4 C.F.R. § 21.5(f). The Tripler TOPR specifically provided: "Past performance documents shall not be submitted at the TO [task order level]. The Performance Confidence rating assigned at the Basic Contract Level will serve as the past performance rating at the TO level. Performance references relevant to the IDIQ Basic Contract are relevant to this Task Order and are incorporated by reference from the . . . Contract proposal." Tripler TOPR at 3. If The Victor Group had any objection to this methodology it should have protested the terms of the solicitation, but failed to do so.

Here, in conducting the tradeoff, the contracting officer reviewed the offerors' final proposal submissions, as well as the consensus evaluations. AR, Tab 17, Tripler TODD at 28. The contracting officer considered that TLSJV had a superior record of recent, very relevant, and exceptionally successful past performance, which provided a high expectation of successful performance, and she therefore concurred with the rating of substantial confidence the past performance evaluation team (PPET) assigned to TLSJV's proposal. *Id.* at 30. The contracting officer reviewed The Victor Group's past performance record and concurred with the rating of satisfactory confidence the PPET assigned to The Victor Group's proposal. *Id.* at 31. She concluded that she had a higher degree of confidence in TLSJV's likelihood of success, based upon its superior performance record.

The contracting officer considered that past performance was substantially more important in the award decision. She determined that compared to The Victor Group the higher degree of confidence warranted the price premiums for TLSJV's stepladder 1 price (about \$4.6 million, or 7.27 percent higher than The Victor Group) and stepladder 2 price (about \$2.8 million, or 3.82 percent higher, than The Victor Group). *Id.* at 31, 35. In addition, the contracting officer stated that she "cannot simply overlook the fact that" TLSJV's stepladder 3 price was lower than The Victor Group's stepladder 3 price. *Id.* She noted that if TLSJV's proposed stepladder 2 price had been substantially higher than The Victor Group's she may have reached a different conclusion. *Id.* The contracting officer concluded that "[TLSJV's] [s]ubstantial [p]erformance [c]onfidence [a]ssessment, based upon its superior record of successful performance, is a better value at [TLSJV's] lower [s]tepladder 3 [total evaluated price] and, in my judgment, warrants the price premium at [TLSJV's] higher [s]tepladder 1 and 2 [total evaluated prices]." *Id.* at 34.

Based on the record, we find that the contracting officer was fully aware of the merits of each offeror's past performance and did not make her decision based solely on the adjectival ratings that were assigned. As described above, the record shows that the contracting officer considered TLSJV's superior record of successful past performance to warrant the price premium for stepladders 1 and 2.

The Victor Group also complains that the agency improperly considered the proposed prices for stepladder 3 in its best value analysis because the award was made for the stepladder 2 range and price.⁹

⁹ The protester also argues that the agency failed to consider that TLSJV's stepladder 3 price was unbalanced. In support of its unbalanced pricing argument, the protester notes that TLSJV's stepladder 3 price was out of line with TLSJV's proposed prices for stepladders 1 and 2. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated. Federal Acquisition Regulation (FAR) 15.404-1(g)(1). Here, however, as noted above, the stepladder prices were not line items; rather, each stepladder price constituted a total evaluated price for each stepladder range. Tripler TOPR at 5-8.

(continued...)

The Tripler TOPR indicated that the agency expected to issue a task order for the stepladder 2 price but required offerors to submit prices for all three stepladder quantities. Tripler TOPR at 8, 9. The solicitation provided that the agency would make its best-value determination based on a tradeoff between price and past performance. *Id.* at 6. The solicitation did not indicate that the agency would use only the stepladder 2 price in its tradeoff. Further, the solicitation did not prohibit the agency from considering all three stepladder prices in its tradeoff.¹⁰ We therefore have no basis to conclude that the agency acted improperly in considering the price for stepladder 3 in its tradeoff.¹¹

The protest is denied.

Edda Emmanuelli Perez
General Counsel

Accordingly, there is no basis for the protester's unbalanced pricing argument where it is based solely on differences between total evaluated prices. *See Desbuild Incorporated; Framaco-Bozdemir Joint Venture, LLC*, B-421742, *et al.*, Sept. 19, 2023, 2023 CPD ¶ 218 at 9 (because the protesters have failed to demonstrate that the prices on the spreadsheet were considered line items or subline items as part of their allegation of unbalanced pricing, we dismiss this allegation because it fails to state a valid basis of protest).

¹⁰ We also note that the agency has explained that all three stepladder prices were incorporated into the task order and the corresponding stepladder price would become effective automatically if the square footage of the facility changed. COS at 26-27. Given that all stepladder prices were terms of the contract, it was reasonable for the agency to consider all three stepladders in making its best-value tradeoff decision when it was not otherwise contrary to the terms of the solicitation.

¹¹ We also note that in the tradeoff decision, the contracting officer made separate determinations as to whether TLSJV's proposal provided the best-value for each stepladder price. AR, Tab 17, Tripler TODD at 31, 35. Since the agency awarded the task order for the stepladder 2 price, and the contracting officer determined that TLSJV's proposal provided the best value for that price, The Victor Group was not prejudiced by the contracting officer's separate consideration of whether TLSJV's proposal provided the best value at its price for stepladder 3.