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Decision

Matter of: TPMC-Energy Solutions Environmental Services 2009, LLC

File: B-408343.2; B-408343.5; B-408343.7

Date: August 23, 2013

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DIGEST

1. Agency's crediting of awardee's proposal for experience of one of its proposed subcontractors on incumbent contract did not constitute reliance upon an unstated evaluation criterion where solicitation provided for evaluation of specialized experience of offeror's proposed team.
2. Protest objecting to evaluation of awardee's past performance is denied where record demonstrates reasonable basis for past performance rating assigned.
3. Source selection authority reasonably attributed somewhat elevated risk to protester's proposal where she had reasonable basis for concern that suspension of one of protester's major subcontractors from federal contracting might be reinstated.
4. Absent evidence on the face of a proposal that an offeror has not agreed to comply with limitation on subcontracting clause, GAO will not review an allegation that an offeror does not intend to comply with the limitation.
5. Protest of award to firm partially owned by agency employee--employee holds a 10 percent ownership interest in awardee--is denied where neither the selection official nor the contracting officer knew of the employee's interest at the time of award, and the agency conducted a thorough investigation, establishing that the employee in question had no role in the procurement.

DECISION

TPMC-Energy Solutions Environmental Services 2009, LLC (TES), of Exton, Pennsylvania, protests the award of a contract to Cabrera Services, Inc., of East Hartford, Connecticut, under request for proposals (RFP) No. W912DQ-12-R-3004, issued by the Department of the Army, Corps of Engineers, for remediation services at the Maywood Superfund Site in Maywood, New Jersey. The protester challenges the agency's evaluation of proposals and argues that the agency failed to reasonably consider the conflict of interest stemming from an agency employee's 10 percent ownership interest in the awardee.

We deny the protest.

BACKGROUND

The RFP, which was issued on March 22, 2012, as a small business set-aside, contemplated a single award task order contract (with cost-reimbursement task orders) for a base and four option years. The solicitation provided for award to the offeror whose proposal represented the best value to the government based on consideration of four factors: (1) technical capabilities; (2) technical staff experience; (3) past performance; and (4) cost. The first three factors were listed in order of importance, and, when combined, were significantly more important than cost.

Under the technical capabilities factor, the agency was to evaluate the degree to which the offeror's proposed team demonstrated specialized experience and technical competence related to the type of work to be accomplished under the contract here. The RFP instructed offerors to furnish descriptions of up to ten projects demonstrating their team members' "environmental experience in cost-reimbursable and fixed-price construction, service and other relevant types of contracts related to large-scale construction remediation projects to include shoring, dewatering, excavation and handling of radiologically-impacted soils." RFP, amend. 0003, at 22. The solicitation required ongoing projects to be at least 75 percent complete, and finished projects to have been completed within the 10-year period preceding issuance of the RFP. Id. Proposals were to be rated under the technical capabilities factor (and under the four technical staff experience subfactors described below) as outstanding, good, acceptable, marginal, or unacceptable.¹

¹ Ratings of outstanding and good were defined as follows:

Outstanding: Proposal meets requirements and indicates an exceptional approach and understanding of the requirements. Strengths far outweigh any weaknesses. Risk of unsuccessful performance is low.

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The technical staff experience factor was comprised of the following four subfactors, listed in descending order of importance: personnel experience, organizational approach/management plan, safety and health, and chemical quality management. Under the personnel experience subfactor, the agency was to evaluate the extent to which resumes provided by the offeror for 16 key personnel positions met or exceeded the RFP's requirements.² Under the safety and health subfactor, the agency was to evaluate whether offerors' safety/health plans and accident summaries met or exceeded the solicitation's requirements. In connection with the accident summaries, offerors were to furnish information pertaining to work-related injuries and illnesses, as well as a summary of accidents within the past three years resulting in property damage over \$2,500 or permanent disability or death. The solicitation advised that it was "expected" that offerors and their team members would demonstrate thorough Safety and Health programs, detailed accident prevention plans, no serious accidents, and "OSHA [Occupational Health and Safety Administration] logs that indicate a trend of an improving safety record by the offeror and its team members with a consistent decline in accident rates over the time period covered by the logs." Id. at 32.

The past performance factor provided that the agency would evaluate the recent and relevant performance of the offeror and its team members. For past performance information to be considered recent, it had to relate to projects that were at least 75 percent complete, with the majority of the work completed within the last five years. Offerors were to provide past performance questionnaires (PPQs) for the ten projects identified under the technical capabilities factor and for up to five additional relevant projects, and the solicitation provided that the agency might also review other sources of past performance information. Prior performance efforts were to be rated as very relevant, relevant, somewhat relevant, or not relevant based on the similarity of service and support, complexity, dollar value, contract type, and degree of subcontracting and teaming. Id. at 34. The

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Good: Proposal meets requirements and indicates a thorough approach and understanding of the requirements. Proposal contains strengths which outweigh any weaknesses. Risk of unsuccessful performance is low.

Id. at 33.

² The RFP specified the required qualifications--i.e., educational background, professional credentials, work experience, and working knowledge--for each key position. Id. at 31-36. The solicitation instructed offerors to identify the experience of the proposed individuals working on the sample projects submitted under the technical capabilities factor, as well as their experience on other relevant environmental projects.

relevance ratings and information pertaining to the quality of the previous performance were then to be considered together to assign performance confidence ratings of substantial, satisfactory, limited, no, or unknown confidence.³ Id. at 34-35.

Finally, for purposes of the cost evaluation, offerors were to provide a cost proposal for a sample project. The solicitation advised that the agency would perform a cost realism analysis of the offeror’s proposed cost for the project to determine a probable cost, and that the probable cost would be used in the best value determination, unless the probable cost was less than the proposed cost, in which case the proposed cost would be used.

The agency received eight proposals by the RFP’s June 7, 2012 closing date, to include proposals from TES and Cabrera. The agency evaluated the proposals, established a competitive range, conducted discussions, and solicited revised proposals. After evaluating the revised proposals, the source selection evaluation board (SSEB) rated the proposals of the protester and the awardee as follows:

FACTOR	TES	CABRERA
Technical Capabilities	Good	Outstanding
Technical Staff Experience		
Personnel Experience	Good	Outstanding
Org. appr./mgmt. plan	Outstanding	Good
Safety and Health	Good	Good
Chemical Quality Mgmt.	Outstanding	Outstanding
Past Performance	Substantial Confidence	Satisfactory Confidence

Contracting Officer’s Statement of Facts, June 19, 2013, at 8. Cabrera’s probable cost for the sample project, as determined by the agency pursuant to its cost realism analysis, was \$12,402,966, whereas TES’s evaluated probable cost was \$10,115,490.

³ Of relevance to this protest, a rating of substantial confidence was to be assigned if, based on the recent and relevant performance record of the offeror and its team members, the agency has a “high expectation” that the offeror would successfully perform the required effort. A rating of satisfactory confidence was to be assigned if the agency had a “reasonable expectation” that the offeror would successfully perform.

After reviewing the findings of the SSEB and offerors' evaluated costs, a source selection advisory council (SSAC) recommended to the source selection authority (SSA) that award be made to TES. In the foregoing connection, the SSAC noted that (1) while Cabrera "ha[d] the most highly rated proposal for Factor 1 and the Factor 2 Sub-Factors in aggregate, and therefore [held] an advantage over TES," the difference between the proposals was "slim," and both offerors could perform the required work; (2) TES had a higher past performance rating than Cabrera; and (3) TES had a lower evaluated cost than Cabrera.⁴ SSAC Report, Jan. 11, 2013, at 12. The SSAC concluded that the potential cost savings associated with TES's proposal were significant enough to outweigh the slight technical advantages of Cabrera's, and that TES's proposal thus represented the best value to the government. Id.

The SSA did not adopt the SSAC's recommendation with regard to award to TES; instead, she found that Cabrera's proposal represented the best value to the government. The SSA disagreed with the SSAC's finding that Cabrera had only a slight technical advantage over TES; she also concluded that a negative CPARS rating pertaining to Cabrera, which the SSAC characterized as "very negative" (referred to in footnote 4 above), should be viewed as only a "slight weakness." Source Selection Decision (SSD), Apr. 1, 2013, at 31. The SSA also found that the risk associated with an award to TES to be "somewhat elevated." In the foregoing connection, the SSA explained that in February 2013, she had received notice that the U.S. Environmental Protection Agency had suspended one of TES's proposed subcontractors from federal contracting, and, while the suspension had subsequently been lifted as a result of an Interim Administrative Agreement (IAA), she found there was still some risk due to "the possibility that this suspension [might] be re-instituted at some point during the contract's period of performance." Id. at 30.

⁴ The SSAC noted that while Cabrera had an advantage over TES under Factor 1 attributable to its excellent experience performing the same type of work as solicited here, TES's experience on Formerly Utilized Sites Remedial Action Program (FUSRAP) projects demonstrated that it had the technical competence to be successful in performing the required work activities. Id. at 11. In connection with the past performance ratings, the SSAC found that while both TES and Cabrera "demonstrated good examples" of past performance, TES demonstrated "a preponderance of excellent performance ratings for work that was found to be both recent and very relevant;" moreover, Cabrera showed "relatively fewer examples of excellent ratings for work that is recent or relevant." Id. The SSAC also noted that a "very negative CPARS rating" had been discovered for Cabrera, and that while Cabrera had furnished a "very forthright" response to the Evaluation Notice regarding the negative rating, the SSEB still considered the negative rating to be a weakness. Id.

The SSA summarized the basis for her finding that Cabrera's proposal represented a better value than TES's as follows:

TES' probable cost is 18% less than Cabrera, representing a savings of \$2,287,476 on the sample task that served as a basis for the cost comparison. TES submitted a very impressive technical proposal with many strengths and few weaknesses, and its cost proposal is also very attractive. However, viewing the two proposals of Cabrera and TES on the whole, and in light of the weight of technical factors and subfactors, I view the many strengths and benefits presented by Cabrera's technical proposal as being worth the additional cost represented by Cabrera's cost proposal, particularly in light of the overall evaluation scheme where the Government views technical factors, when combined, as significantly more important than cost. Cabrera's technical proposal demonstrated more relevant experience with large-scale [radiological] remediation and FUSRAP projects, and its experience with the Maywood site, and its very good performance on that project, will greatly reduce the Government's risk of unsuccessful performance on this project. In addition, although I view TES as having a slightly more attractive proposal under the least important non-cost factor, past performance, I do not view this strength as sufficient to conclude that TES has a more highly rated technical proposal than the proposal submitted by Cabrera. Cabrera's strengths in the two most important factors exceed those presented by TES. Combined with the overall risk presented by TES's suspended subcontractor performing under an IAA, and the reduced risk of having a highly qualified contractor on site with extensive knowledge and experience with the Maywood site, I view the many strengths in Cabrera's proposal as being worth the additional cost over TES's proposal.

Id. at 31-32.

On May 8, the agency made award to Cabrera and notified the other offerors of the award decision. After requesting and receiving a debriefing, TES protested to our Office on May 20.⁵

⁵ The protester complains that the agency failed to provide it with the preaward notification of the award required by Federal Acquisition Regulation (FAR) § 15.503(a)(2). It is clear from the record here that TES suffered no prejudice as a result of the agency's failure to furnish the required notice--that is, the protester filed a size status protest with the Small Business Administration (SBA), which SBA considered and denied. Accordingly, we will not consider this argument further.

DISCUSSION

TES challenges the evaluation of Cabrera's proposal under the safety and health subfactor of the technical staff experience factor, the past performance factor, and argues that the agency should have recognized that Cabrera would violate the solicitation's limitation on subcontracting provisions. TES also takes issue with the SSA's tradeoff decision finding that its proposal presented "somewhat elevated risk" due the suspension of one of its subcontractors, and argues that the tradeoff determination was flawed because the SSA relied on unstated evaluation criteria and failed to consider the differences in cost over the life of the contract. As a final matter, TES argues that the award to Cabrera was improper since an employee of the agency held a 10 percent ownership interest thereby creating an impermissible conflict of interest, which the agency failed to reasonably consider. We discuss these allegations below.

Safety and Health Subfactor

The protester argues that the agency unreasonably ignored a prior incident involving mishandling of hazardous materials when it assigned Cabrera's proposal a rating of good under the safety and health subfactor. TES contends in this connection that in October 2011, the agency halted Cabrera's performance on a related contract for the removal of radioactive soil and materials from a site (known as the Shallow Land Disposal Area (SLDA)) in Pennsylvania because Cabrera deviated from the established site plan, a deviation that resulted in Cabrera employees mishandling hazardous materials. According to the protester, Cabrera was cited for safety violations and suspended from performing the contract as a result of the incident.⁶

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the

⁶ TES also argues that the agency failed to consider the Nuclear Regulatory Commission's (NRC) recent issuance of a notice of violation and proposed civil penalty against Chicago Bridge & Iron, Shaw's parent company, pertaining to safety-related matters involving Shaw subsidiaries. In response, the agency pointed out that there is no evidence in the record that agency personnel knew or should have known of the NRC notice at the time of their evaluations. In this connection, the SSEB and SSAC issued their reports and the SSA made her source selection decision before the NRC issued the notice of violation in mid-April 2013. We agree with the agency that there was nothing improper about agency personnel failing to take into account information of which they were unaware at the time they made their decisions. Moreover, the protester effectively abandoned this argument by failing to address in its comments, the agency's response to the allegation.

best method for accommodating them. Visual Connections, LLC, B-407625, Dec. 31, 2012, 2013 CPD ¶ 18 at 3. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id. at 4. A protester's mere disagreement with the agency's conclusions does not render the evaluation unreasonable. Id.

The agency responded to the protester's allegations arguing that under the safety and health subfactor, the solicitation only provided for the evaluation of incidents resulting in injury, death, or significant property damage, none of which were implicated by the SLDA incident. The agency further argued that, consistent with the terms of the RFP, the evaluators considered Cabrera's performance on the SLDA contract, including the incident in question, under the past performance evaluation factor.

In commenting on the agency report, the protester did not take issue with, or otherwise seek to rebut, the agency's response; accordingly, we consider it to have abandoned this argument. Organizational Strategies, B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 3. Instead, TES raised a new argument pertaining to the evaluation of Cabrera's proposal under the safety and health subfactor--i.e., that the awardee's proposal should have been determined technically unacceptable for failing to furnish a summary of accidents within the past three years resulting in property damage over \$2,500 or permanent disability or death, as required by the solicitation. The record does not support the protester's factual allegation that Cabrera omitted the required accident summary from its proposal, see Cabrera Final Proposal Revisions at 58b; accordingly, this argument is without basis.

Cabrera's Past Performance

Next, TES argues that it was unreasonable for the agency to assign Cabrera a performance confidence rating of satisfactory given its negative performance on the SLDA contract. In this regard, the protester takes issue with the SSA's rationale for characterizing Cabrera's performance on the SLDA contract as merely a slight weakness based on the difference in contract type and the fact that the key personnel on that contract will not be involved in contract performance.

Where an agency has considered reasonably available and relevant past performance information, its judgments regarding the relative merits of competing offerors' past performance are primarily matters within the contracting agency's discretion and the protester's disagreement with such judgments does not establish a basis for our Office to sustain a protest. Exelis Systems Corporation, supra. Once again, the protester simply disagrees with the agency's ratings, and fails to show that the evaluation of Cabrera's past performance was unreasonable or inconsistent with the stated evaluation criteria.

In its evaluation of past performance, the SSEB--consistent with the terms of the RFP--considered the PPQs furnished by the offerors' references, as well as information retrieved from the Contractor Performance Assessment Reporting System (CPARS). The evaluators found only four of the Cabrera contracts for which they received PPQs to be both recent and at least somewhat relevant. Two of these contracts were considered very relevant; one of the two was performed by Cabrera and the other by Cabrera's proposed subcontractor, Shaw. Performance on both contracts was rated overall as very good. The other two contracts, both performed by Cabrera, were considered relevant; Cabrera's performance on one was considered very good, and on the other, excellent.

The evaluators found five CPARS ratings pertaining to Cabrera contracts and five CPARS ratings pertaining to Shaw contracts; four of the five Cabrera contracts and three of the five Shaw contracts were considered only somewhat relevant. The remaining three contracts were all considered very relevant; on one of the Shaw contracts, performance was rated as very good, and on the other, performance was rated as excellent. Cabrera's performance on the final contract (at the SLDA site) was, however, rated as unsatisfactory.

The evaluators contacted the author of the unsatisfactory rating for further information. In response to their questions, he explained that the project was quite complex and that differing site conditions had been discovered after issuance of the order, which was for a fixed price, and that the fixed-price nature of the contract combined with the differing site conditions contributed to many of the performance issues noted in the CPARS rating. He further noted that Cabrera had taken some corrective actions, most notably replacing their project manager and site manager; communications between Cabrera and the agency improved significantly after the corrective action; and that Cabrera's responsiveness, attention to detail, and quality of documentation had also improved. He further noted that, in his opinion, most of the Cabrera staff were competent and well-qualified, and that, as long as the project to be awarded was not overly complex, he would use Cabrera again. SSEB Report at 130-131. Taking all of the foregoing information into account, the SSEB assigned Cabrera an overall performance confidence rating of satisfactory, while identifying the unsatisfactory rating on the SLDA contract as a significant weakness.

In her SSD, the SSA disagreed with the SSEB's finding that the unsatisfactory CPARS rating constituted a significant weakness, finding it to be a "slight weakness" instead. In her view, the problems stemmed in large part from the discovery of differing site conditions under the fixed-price contract and the performance of two key employees, neither of which would be issues under the contract to be awarded here since this contract is cost-reimbursement and since Cabrera did not propose either of the two employees in question to perform on it.

In sum, both the SSEB and the SSA fully considered the relevant information regarding Cabrera's performance on the SLDA contract, and although they differed regarding the magnitude of the weakness associated with Cabrera's SLDA contract performance, they both viewed Cabrera's overall past performance as warranting a satisfactory confidence rating. In this regard, the SSEB and the SSA found that the weakness associated with performance on the SLDA contract was outweighed by strengths associated with Cabrera's very good/excellent performance on other very relevant and relevant contracts, and that, overall, Cabrera's past performance record supported a reasonable expectation of successful performance here. Given this record, we have no basis to conclude that the agency's evaluation was unreasonable or otherwise improper.

Limitation on Subcontracting

TES also argues that Cabrera's proposal should have been rejected because it demonstrates an intention not to comply with the Limitation on Subcontracting clause, FAR § 52.219-14, which requires a small business prime contractor to perform "[a]t least 50 percent of the cost of the contract performance incurred for personnel" with its own employees.

As recognized by the protester, our Office will review an allegation that an offeror does not intend to comply with the limitation on subcontracting clause only where there is evidence on the face of the proposal that should lead the agency to the conclusion that the offeror has not agreed to comply with the subcontracting limitation. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. Otherwise, an agency's judgment as to whether a small business offeror will be able to comply presents a question of responsibility not subject to our review. Reliable Builders, Inc., B-402652, B-402652.3, June 28, 2010, 2010 CPD ¶ 260 at 5. The protester has not cited such evidence here. While TES points to the fee sharing arrangement between the Cabrera and its proposed subcontractor, The Shaw Group, Inc., the incumbent large business contractor for the Maywood site, as evidence of Cabrera's intended non-compliance, there is nothing on the face of the fee sharing agreement that would support that conclusion.

Source Selection Decision

TES challenges the SSA's award decision in several respects. As an initial matter, TES argues that the SSA unreasonably attributed "somewhat elevated" risk to its proposal based on the possibility that one its proposed subcontractors might be suspended from federal contracting. In this regard, the protester maintains that the finding of risk was inconsistent with the Corps' willingness to continue issuing orders to the subcontractor and with the assignment of a performance confidence rating of substantial confidence to its proposal.

As previously noted, the agency received notice in February 2013 that EPA had suspended one of the protester's proposed subcontractors, [deleted], from federal contracting. In early March, the agency received further notice that the suspension had been lifted pursuant to an IAA. The IAA included the following explanation:

[deleted]

IAA at 4. The agreement also stated that [deleted]. Id. at 32.

The SSA considered the IAA in her SSD. She noted that [deleted] was a major first-tier subcontractor under TES's proposal, and that it would play a significant role in the successful performance of the contract if TES were to receive the award. The SSA found that because the suspension had been "only temporarily lifted," and because another federal agency (i.e., EPA) could, without input from the Corps, "eliminate (or significantly hinder) the Corps' ability to issue orders" under the subject contract if it were to decide to reinstitute the suspension, there was "some risk to the Government that TES may not be able to successfully complete all work called for under this contract." SSD at 29. The SSA further noted that in the event TES were to substitute a new subcontractor in place of [deleted], the findings of strength in its proposal that were based on [deleted] experience would "largely be meaningless." Id. In sum, the SSA found that "because [deleted] is a major subcontractor proposed to perform a not insignificant amount of work on this contract, and because the consideration of the risks involved with an offeror's proposal and approach (. . .) is inherent in the evaluation of technical proposals, . . . the overall risk of successful performance for TES is somewhat elevated due to [deleted] suspension and the possibility that this suspension may be re-instituted at some point during the contract's period of performance." Id. at 29-30.

In our view, the record demonstrates a reasonable basis for the SSA's attribution of somewhat elevated risk to the protester's proposal. As a general matter, the evaluation of risk associated with an offeror's proposed approach is appropriate, whether or not risk is specifically stated as an evaluation factor, because consideration of risk is inherent in the evaluation of technical proposals. Government Acquisitions, Inc., B-401048 et al., May 4, 2009, 2009 CPD ¶ 137 at 6 n.14. Moreover, we do not find that the agency's continued willingness to issue orders to [deleted] under its existing contracts is inconsistent with its finding of some risk here. Likewise, we see no inconsistency between the finding of risk and a performance confidence rating of substantial confidence in this evaluation; the confidence rating reflects the government's expectation of successful performance based on the offeror's past performance, whereas the risk found here was unrelated to past performance.⁷

⁷ The protester also argued in its initial protest that the agency should have given it the opportunity to address the above weakness in its proposal during discussions.

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TES also argues that the SSA improperly gave Cabrera credit for the experience of its subcontractor, Shaw. According to TES, it is clear from the SSA's trade-off determination that her primary basis for viewing Cabrera's proposal as superior to its own was that Cabrera was proposing to team with Shaw. In this regard, the protester points to the SSA's repeated references to the reduced risk associated with Cabrera's proposal as a result of its experience at the Maywood site, all of which was provided by Shaw. TES argues that because the solicitation neither required nor expressed a preference for experience at the Maywood site, the agency's focus on this specific type of experience constituted reliance upon an unstated evaluation criterion. The protester also argues that the solicitation did not provide for a prime contractor to be credited with the experience of a proposed subcontractor.

The RFP provided for evaluation of the specialized experience of the offeror and its proposed team members (which, in the case of Cabrera, included Shaw) in performing work related to the work to be performed under the contract here. See, e.g., RFP, amend. 0003, at 30.⁸ Work performed by Shaw as a member of Cabrera's team, and as the incumbent at the Maywood site, clearly qualifies as specialized experience related to the type of work to be completed under this contract. Thus, the SSA acted reasonably, and consistent with the terms of the solicitation, by considering such directly relevant specialized incumbent experience in her selection decision.⁹ To the extent the protester believes the SSA gave too much weight to Shaw's experience, the challenge essentially reflects the protester's disagreement with the agency's judgment, which does not establish a basis for our

(...continued)

The agency responded that the weakness was not raised during discussions because the pertinent events (i.e., [deleted] suspension and re-instatement pursuant to issuance of the IAA) did not occur until well after discussions had closed. The agency maintained in this connection that it was not required to reopen discussions to address a concern that did not arise until after discussions had been concluded, a position that the protester did not seek to rebut in its comments.

⁸ More specifically, under the technical capabilities factor the agency was to evaluate "how well the proposed team (with the offeror as the Prime Contractor) has demonstrated specialized experience and technical competence related to the type of work to be completed under this [contract]. The Government will evaluate how well the example projects . . . demonstrate the offeror's and its team members relevant . . . experience" RFP, amend. 0003, at 30.

⁹ Indeed, even under generally worded experience criteria, agencies may properly consider the extent to which offerors have experience directly related to the work required by the RFP. ITT Corp., Sys. Div., B-310102.6 et al., Dec. 4, 2009, 2010 CPD ¶ 12 at 7.

Office to sustain a protest. Exelis Systems Corporation, B-407111.5 et al., May 20, 2013, 2013 CPD ¶ 123 at 11.

TES also argues that the SSA's tradeoff decision was flawed because it failed to consider the cost differential between Cabrera's proposal and its own over the life of the contract. The protester asserts in this connection that the SSA only considered the difference in probable cost for the sample project (i.e., approximately \$2.3 million), whereas when extended over the entire life of the contract, which has a total value of \$450 million, RFP at 5, the difference is approximately \$100 million. In addition, TES contends that the SSD did not explain why the SSA considered the advantages associated with Cabrera's proposal to be worth a higher price.

The record fails to support the protester's arguments. In her trade-off determination, the SSA recognized that TES's probable cost was 18 percent lower than Cabrera's. She also explained why she thought Cabrera's proposal was worth a cost premium--i.e., "Cabrera's technical proposal demonstrated more relevant experience with [radiation] remediation and FUSRAP projects, and its experience with the Maywood site, and its very good performance on that project, will greatly reduce the Government's risk of unsuccessful performance on this protect." SSD at 31. While the protester disagrees with the SSA's judgment as to whether the advantages she perceived in Cabrera's proposal are worth a cost premium of 18 percent, it is simply inaccurate to argue that she did not take the difference into account or furnish an explanation for why she considered Cabrera's proposal to be worth the difference in cost.

Conflict of Interest

Finally, in a supplemental protest filed on June 24, TES alleged that an employee of the Baltimore District of the Corps of Engineers, has a 10 percent ownership interest in Cabrera. The protester argues that this interest violates FAR § 3.601, which prohibits a contracting officer from "knowingly" awarding a contract "to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees." TES further alleges that if either the employee in question or individuals with whom he is closely associated were involved in the Maywood procurement process, a conflict of interest may have existed.

First, with regard to the alleged violation of FAR § 3.601, the record here clearly establishes that prior to TES's protest, neither the contracting officer nor the SSA was aware of the Baltimore District employee's ownership interest in Cabrera. Indeed, according to the agency, neither was even aware that the individual in question was a Corps employee, an unsurprising circumstance given that the SSA and the contracting officer are both employees of the Corps' Kansas City District, which is over a 1,000 miles from the Baltimore District. Thus, without addressing the issue of whether the employee's 10 percent ownership interest constitutes

substantial ownership, neither can be said to have “knowingly” awarded a contract to a firm substantially owned by a government employee. See, e.g., Biosystems Analysis, Inc., B-198846, Aug. 25, 1980, 80-2 CPD ¶ 149 at 4 (reaching same conclusion as here under the Federal Procurement Regulations, which were applicable to civilian agencies prior to implementation of the FAR, which became effective in 1984).

Second, with regard to the alleged conflict of interest, while we have recognized that an actual or apparent conflict of interest may arise when an agency employee has both an official role in the procurement process and a personal stake in the outcome, TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 8, the record demonstrates that the agency conducted a thorough investigation, once this situation was brought to the contracting officer’s attention through TES’s protest. This investigation established that the employee in question had no role in the procurement process here. The investigation also established that none of the individuals who were involved in the procurement had any contact with this employee during the course of the procurement. As a result, we disagree with TES’s assertion that Cabrera should have been excluded from this competition.

The protest is denied.

Susan A. Poling
General Counsel