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Decision

Matter of: Sabre Systems, Inc.

File: B-420090.3

Date: June 1, 2022

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DIGEST

1. Protest challenging the agency's evaluation of the awardee's proposed professional employee compensation plan is sustained where the evaluation relied on an unreasonable interpretation of the term "professional employee" to exclude certain categories of workers.
 2. Protest challenging the agency's evaluation of the protester's technical proposal is denied where the agency reasonably did not assess additional strengths to aspects of the proposal that met, but did not exceed, requirements.
 3. Protest that the agency unreasonably equalized offerors' past performance is denied where the agency assessed each offeror's past performance record in accordance with the stated evaluation criteria.
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DECISION

Sabre Systems, Inc., of Warminster, Pennsylvania, protests the award of a contract to American Systems Corporation, of Chantilly, Virginia. Sabre challenges the award under request for proposals (RFP) No. N00421-20-R-0127, issued by the Department of the Navy, Naval Air Systems Command, for mission system software engineering, development, integration, testing, and in-service support for U.S. Naval aircraft major defense acquisition programs. Sabre contends that the agency's evaluation of

American Systems' total compensation plan and its cost realism assessment were unreasonable. Sabre also alleges that the agency unreasonably evaluated its proposal under the technical and past performance factors.

We sustain the protest.

BACKGROUND

The Navy issued the solicitation on October 2, 2020, contemplating the award of an indefinite-delivery, indefinite-quantity contract with a 5-year ordering period and cost-plus-fixed-fee and cost-reimbursable components. RFP at 1, 2, 73. The RFP sought services in support of the Navy's Software Engineering Department and the Naval Air Systems Command program managers, including "direct software systems engineering support services throughout the full life cycle of a weapon system from concept development through disposal, [applying] to [n]aval [a]ircraft weapons and support systems." *Id.* at 28.

The RFP provided that award would be made on a best-value tradeoff basis. *Id.* at 159. The RFP further informed offerors that the lowest-priced proposal meeting the solicitation requirements might not be selected for an award if award to a higher-priced offeror was determined to be more beneficial to the government. *Id.* The RFP also advised, however, that the perceived benefits of the higher-priced proposal must merit the additional price. *Id.*

Proposals would be evaluated on the basis of three factors (in descending order of importance): (1) technical; (2) past performance; and (3) price/cost. *Id.* at 160. The technical factor was comprised of three subfactors (in descending order of importance): (a) understanding of the work; (b) workforce; and (c) management approach. *Id.* The RFP advised that the technical and past performance factors, when combined, were significantly more important than price/cost. *Id.* The RFP also informed offerors that, while price/cost was "not the most important evaluation factor, [] its degree of importance [would] increase commensurably with the degree of equality" among proposals. *Id.*

The agency received timely proposals from four offerors, including Sabre and American Systems. Agency Report (AR), Exh. 6, Proposal Analysis Report (PAR) at 2-3. Following an evaluation of proposals, the agency made an initial award to American Systems on July 30, 2021. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 8-9. After receiving debriefings, Sabre and another unsuccessful offeror filed protests with our Office challenging the agency's evaluation of proposals and award decision. Subsequently, the agency took corrective action and our Office dismissed both protests as academic based on the agency's proposed corrective action. See *COLSA Corporation*, B-420090, Sept. 13, 2021 (unpublished decision); *Sabre Systems, Inc.*, B-420090.2, Sept. 13, 2021 (unpublished decision).

After the reevaluation, the agency assigned the following ratings to the proposals of Sabre and American:

	SABRE	AMERICAN SYSTEMS
Technical	Good	Good
Understanding of Work	Good	Good
Workforce	Good	Acceptable
Management Approach	Good	Good
Past Performance	Substantial Confidence	Substantial Confidence
Proposed Cost/Price	\$191,341,314	\$165,409,684
Most Probable Cost/Price	\$211,471,556	\$190,126,983

AR, Exh. 6, PAR at 42. The source selection authority (SSA) conducted a comparative assessment of proposals and concluded that the proposal submitted by American Systems represented the best overall value to the government. AR, Exh. 7, SSA Decision Memorandum (SSDM) at 13. In selecting American Systems for award, the SSA determined that the benefits offered by the “slight technical and past performance advantages” of Sabre’s higher priced proposal did not merit the \$21 million price premium. *Id.* at 12.

The agency notified Sabre of its award decision and, after receiving a debriefing, Sabre filed this protest.

DISCUSSION

Sabre challenges several aspects of the agency’s evaluation of proposals and award decision. First, the protester alleges that the agency failed to meaningfully evaluate the awardee’s total compensation plan under Federal Acquisition Regulation (FAR) provision 52.222-46 and conducted a flawed cost realism analysis. Protest at 13-21; Protester’s Comments at 3-16. Next, the protester challenges the reasonableness of the agency’s evaluation of proposals under the technical and past performance factors. In this regard, Sabre contends that the agency unreasonably evaluated the protester’s technical proposal by failing to recognize multiple additional strengths and unreasonably equalized offerors’ past performance by assessing the same rating to its and American Systems’ proposals despite Sabre’s superior past performance record. Protest at 22-28, 34-36; Protester’s Comments at 16-19.

As discussed below, we find the Navy’s evaluation and consideration of American Systems’ total compensation plan to be unreasonable and inconsistent with the plain meaning of FAR provision 52.222-46. We therefore sustain the protest on that basis. We find the remaining evaluation challenges to be without merit and only discuss several representative examples here. Although we do not address all of the protester’s

arguments, we have reviewed each argument and find that none provides a basis to sustain the protest, except as discussed below.¹

Evaluation of Professional Compensation

Sabre argues that the Navy failed to evaluate American Systems' total compensation plan as required by FAR provision 52.222-46. Specifically, the protester contends that the agency improperly excluded a large number of labor categories from its professional compensation evaluation. Protest at 17-18; Protester's Comments at 3-7.

The solicitation here required each offeror to provide, as part of the price/cost volume of its proposal, a total compensation plan "for each proposed professional employee" in accordance with FAR provision 52.222-46. RFP at 150. The plan was to include: (1) the proposed direct labor rate for each professional employee proposed; (2) the total cost of the proposed fringe benefits package for each professional employee proposed, along with a summary of benefits making up the package and an itemization of benefits that require employee contribution; and (3) data used by the offeror in establishing the total compensation structure. *Id.* The solicitation also provided a detailed list of required labor categories and the anticipated level of effort in labor-hours for each labor category. *Id.* at 152-154.

The RFP informed offerors that the agency would evaluate total compensation plans in accordance with FAR provision 52.222-46. *Id.* at 155-156, 162. As relevant here, that provision states that the "[r]ecompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished

¹ For example, the protester argues that the agency failed to consider offerors' unique technical approaches in its cost realism analysis. Protest at 20. The solicitation here, however, specified the required labor categories, level of effort for each labor category, and other direct costs, thereby precluding the opportunity for a creative technical approach to affect costs. See RFP at 152. On this record, we find that the cost/price evaluators reasonably decided that comparison of proposed costs against offerors' technical approaches was not necessary to evaluate cost realism. COS/MOL at 29-31.

The protester also alleges that it was unreasonable for the agency to find the awardee's proposed cost to be realistic when the cost was significantly lower than both the protester's proposed cost and the independent government cost estimate (IGCE). The protester further asserts that the Navy erroneously used outdated national Bureau of Labor Statistics (BLS) data in its analysis. Protest at 20-21. The record shows, however, that the agency reasonably compared proposed costs against both the IGCE and 2019 BLS data specific to the California-Lexington Park, Maryland, region, which was the most current data available as of the date proposals were due. See generally, AR, Exh. 4, Sabre Cost Evaluation Report; AR, Exh. 5, American Systems Cost Evaluation Report. The agency then adjusted costs where the proposed costs were found to be unrealistically low. See *id.*; COS/MOL at 38-39. On this record, we find the agency's cost realism analysis to be reasonable and appropriately documented.

professional employees.” FAR provision 52.222-46(a). The provision notes that such a lowering of compensation “can be detrimental in obtaining the quality of professional services needed for adequate contract performance” and that it is in the government’s best interest that “professional employees, as defined in 29 CFR 541, be properly and fairly compensated.” *Id.* Accordingly, the provision instructs offerors to “submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract.” The provision requires the agency to “evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements.” *Id.* The provision further requires the agency to assess the offeror’s “ability to provide uninterrupted high-quality work” by considering the proposed professional compensation “in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation.” *Id.*

The record shows that the agency, in its evaluation of offerors’ total compensation plans under FAR provision 52.222-46, determined that only a small subset of four labor categories required by the solicitation--*i.e.*, journeyman systems engineer, senior systems engineer, journeyman test engineer, and senior test engineer--were “professional employees” as defined in 29 C.F.R. part 541 (part 541). See AR, Exh. 4, Sabre Cost Evaluation Report at 37; Exh. 5, American Systems Cost Evaluation Report at 26. The agency noted that, while subpart D of part 541 provided the definition for “professional employees,” other subparts of part 541 also provided definitions for other categories of employees.² AR, Exh. 4, Sabre Cost Evaluation Report at 37; Exh. 5, American Systems Cost Evaluation Report at 26; see 29 C.F.R. § 541.300.

Deciding that each of the definitions from the various subparts of part 541 constituted a mutually exclusive “bucket” of employee categories, the evaluators reasoned that “all other labor categories [did] not meet the ‘Professional employee’ definition [contained within subpart D] and instead [should be] considered salaried Executive, Administrative, and Computer Employees.” *Id.*; see 29 C.F.R. § 541.0(b). Based on this rationale, the agency proceeded with its evaluation of professional compensation under the FAR provision, but excluded from its assessment those employees that it determined were included within the various subpart definitions for executive, administrative, or computer employees. *Id.*

The agency argues that its interpretation of the FAR provision and part 541 was reasonable because it “read all of 29 C.F.R. 541 as a whole and [did] not just read the definition of professional employee[s] contained in 29 C.F.R. 541.300.” COS/MOL at 13-21; Agency’s Supp. Briefing at 4. In this regard, the agency argues that it properly interpreted part 541 to give effect to all provisions by excluding from its professional compensation analysis those employees whose duties more closely matched other categories of employees defined in part 541. Agency’s Supp. Briefing at 4-8.

² For example, subpart B of part 541 describes executive employees, subpart C describes administrative employees, and subpart E describes computer employees. See 29 C.F.R. §§ 541.100, 541.200, 541.400.

The protester counters that the agency's interpretation and application of the definitions in part 541 in its professional employee compensation evaluation was unreasonable. Sabre contends that the categories of employees defined in part 541 are not mutually exclusive "buckets," so that an employee who meets the definition of "professional employee" under subpart D should not be excluded from the professional employee compensation analysis just because they also meet the definition of another category of employees in part 541. Comments at 3-7; Protester's Response to Supp. Briefing at 1-4. The protester argues that, by excluding from its total compensation evaluation those professional employees who also fall into other categories of employees, the agency failed to comply with the FAR provision's stated intent to ensure the "quality and stability of the work force to be employed on th[e] contract" and the "ability to attract and retain competent professional service employees." *Id.*; FAR provision 52.222-46(c).

Here, we find that the plain language of the applicable FAR provision unambiguously requires the agency to evaluate the compensation plan for all proposed employees meeting the definition of "professional employees" as defined in subpart D of part 541. Specifically, as stated above, the FAR provides in relevant part that:

Recompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance. It is therefore in the Government's best interest that professional employees, as defined in 29 CFR 541, be properly and fairly compensated.

FAR provision 52.222-46.

Subpart D of part 541 defines professional employees as follows:

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis . . . at a rate of not less than \$684 per week . . . ; and

(2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300(a). The plain reading of this provision, in conjunction with the requirements of FAR provision 52.222-46, requires the agency to evaluate the compensation of a proposed employee that meets this definition, regardless of whether that employee also meets another part 541 labor category definition, such as the definition provided in subpart E of part 541 for a "computer employee."

While the agency argues that its interpretation gives effect to all of the relevant regulatory provisions, there are two problems with the agency's application of this premise. First, the plain language of the FAR provision requires that we refer to part 541 for its definition of professional employees. As the agency notes, part 541 is a regulation implementing the Fair Labor Standards Act and, other than providing the definition of a "professional employee," does not provide any additional guidance on how to implement the FAR's requirement to evaluate professional compensation. See Agency's Supp. Briefing at 6. As a result, the only portion of part 541 relevant to the implementation of the FAR provision is its definition of a professional employee under subpart D.

Second, the agency's position is not reasonable even if we were to agree that the entirety of part 541 should be taken into account in determining which employees are "professional employees" under FAR provision 52.222-46. Contrary to the agency's interpretation, nothing in part 541 dictates that an employee who meets the definition for other categories of employees--e.g., as an administrative, executive, or computer employee--cannot also be defined as a professional employee. In fact, part 541, read as a whole, supports the opposite conclusion. For example, subpart E of part 541, addressing computer employees, provides that "[c]omputer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption³ as professionals." 29 C.F.R. § 541.400(a). Another subpart of part 541 expressly states that "work that is exempt under one section of this part will not defeat the exemption under any other section," providing as an example an employee whose primary duty involves a combination of exempt administrative and exempt executive work. 29 C.F.R. § 541.708.

Our Office asked the Navy to address whether the employees the agency excluded from its total compensation plan analysis because they were administrative, executive, or computer employees also met the definition of professional employee under 29 C.F.R. § 541.300(a), *i.e.*, subpart D. In response to our inquiry, the agency answered "in the affirmative." Agency's Supp. Briefing at 3. Despite its affirmative response, the agency also asserts that the excluded employees were not professionals because they would not be involved in discharging professional duties. Agency's Supp. Briefing at 7-8.

Notwithstanding the agency's assertion, our review of the record indicates that at least some of the excluded employees met the definition of professional employees under subpart D of part 541. In this regard, under that subpart, a professional employee is someone whose primary duty is "the performance of work . . . [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.300(a)(2)(i). The record here shows that, for a number of the excluded labor categories, the statement of work

³ Part 541, in general, provides the regulatory implementation of exemptions from the Fair Labor Standards Act. 29 C.F.R. § 541.0.

(SOW) required minimum levels of higher education in the specified field of science or learning related to the duties of the position. See RFP at 56-66. For example, a software developer was required to have a Bachelor of Science or a Bachelor of Art degree from an accredited college in computer science, electrical engineering, electronics engineering, or computer engineering, with at least 24 credits and a grade point average of at least 3.0 in the major. *Id.* at 57-58. The SOW also expressly stated that years of experience could not be substituted for the required college degree. *Id.* at 58. As a result, based on the solicitation's education requirements, a portion of the employees the agency excluded from its analysis of professional compensation qualified as professional employees.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, those needs must be specified in a manner designed to achieve full and open competition. See *Analytical Graphics, Inc.*, B-413385, Oct. 17, 2016, 2016 CPD ¶ 293. Solicitations may include restrictive requirements, such as specific educational degrees, only to the extent necessary to satisfy the needs of the agency or as authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii). Here, the solicitation included restrictive minimum requirements for specialized degrees for many of the excluded labor categories, evidencing the agency's expectation that performance of work under these labor categories would "[r]equir[e] knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." See RFP at 56-66; 29 C.F.R. § 541.300(a)(2)(i). Thus, we conclude that the record does not support the agency's assertion that the excluded employees would not be involved in discharging professional duties.

Our Office has stated that the purpose of a review of compensation for professional employees is to evaluate each offeror's ability to provide uninterrupted, high-quality work, considering the realism of the proposed professional compensation and its impact upon recruiting and retention. *ENGlobal Gov't Servs., Inc.*, B-419612.3, Dec. 15, 2021, 2022 CPD ¶ 12 at 11; *L-3 Nat'l Sec. Sols., Inc.*, B-411045, B-411045.2, Apr. 30, 2015, 2016 CPD ¶ 233 at 7. If the agency determines that the awardee's proposal envisions lower compensation levels compared to the incumbent contractor, then the agency must further evaluate the awardee's proposed compensation plan on the basis of maintaining program continuity, among other considerations. *ENGlobal Gov't Servs., Inc.*, *supra*; *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 5-6; FAR provision 52.222-46(b).

Here, we find that the agency failed to reasonably evaluate offerors' proposed total compensation plans in accordance with FAR provision 52.222-46 when it unreasonably excluded from its analysis certain proposed employees who met the definition of a professional employee as defined in subpart D of part 541. Accordingly, we sustain the protester's challenge to the agency's evaluation of professional employee compensation.

Technical Evaluation

Sabre also argues that the Navy unreasonably evaluated Sabre's technical proposal by failing to recognize additional strengths and erroneously assigning Sabre's proposal the rating of good rather than outstanding under the technical factor. In this regard, the protester contends that the agency should have assigned it multiple additional strengths under each of the three technical subfactors. Specifically, under the understanding of the work subfactor, Sabre argues that the agency erred in failing to assess multiple strengths for Sabre's various achievements and its understanding stemming from its role as the incumbent contractor. Protest at 22-24. Under the workforce subfactor, the protester contends that the agency unreasonably limited the benefit of the one strength assigned for providing [DELETED] percent named personnel, overlooked advantages of six new teaming partners, and ignored the benefit of Sabre's key personnel exceeding the minimum requirements. *Id.* at 24-25. Finally, under the management approach subfactor, the protester argues that the agency should have assigned additional strengths for its excellent current performance as reflected in its Contractor Performance Assessment Reporting System (CPARS) report for the incumbent contract. *Id.* at 25-28.

The agency responds that it considered the aspects of Sabre's technical proposal that the protester argues deserve additional strengths and reasonably concluded that the benefits offered did not rise to the level of a strength as defined in the solicitation. COS/MOL at 41-45. The agency also contends that it reasonably and properly did not consider information in CPARS in its evaluation under the technical factor. *Id.* at 44-45.

In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *Alutiq Technical Services LLC*, B-411464, B-411464.2, Aug. 4, 2015, 2015 CPD ¶ 268 at 4. A protester's disagreement with the agency's conclusions, without more, does not render the evaluation unreasonable. *Id.*; *The Eloret Corp.*, B-402696, B-402696.2, July 16, 2010, 2010 CPD ¶ 182 at 5.

We have reviewed each of the protester's contentions with respect to the agency's evaluation of Sabre's technical proposal and find that they do not provide a basis to sustain the protest. The record shows that the agency thoroughly reviewed the protester's proposal and assigned strengths to the areas in which it determined Sabre exceeded specified requirements in a manner advantageous to the government. See AR, Exh. 2, Technical Evaluation Consensus Report at 24-30. Then, based on the finding of one strength under each of the three technical subfactors, the agency assigned a rating of good to Sabre's proposal under each subfactor, resulting in an overall

technical rating of good.⁴ *Id.* As to the various examples of areas where Sabre argues it should have received a strength, the agency explains that it did not believe a strength was warranted. COS/MOL at 42-45; AR, Exh. 16, Decl. of Technical Evaluation Team (TET) Lead at 2-4.

While the protester characterizes the agency's response as relying on "*post-hoc* rationalizations" without supporting evidence in the contemporaneous record, Protester's Comments at 17, the agency was not obligated to document the aspects of Sabre's proposal that did not warrant strengths. Where, as here, a protester asserts that an agency should have assessed additional strengths to various aspects of its proposal, we have stated that agencies are not required to document every aspect of their evaluations, particularly the reasons why a proposal did not receive a strength for a particular feature. *22nd Century Techs., Inc.*, B-416669.5, B-416669.6, Aug. 5, 2019, 2019 CPD ¶ 285 at 5.

Moreover, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments and explanations concerning the contemporaneous record. *OGSystems, LLC*, B-417026 *et al.*, Jan. 22, 2019, 2019 CPD ¶ 66 at 5; *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. 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 reasonableness of evaluation decisions--provided those explanations are credible and consistent with the contemporaneous record. *OGSystems, LLC, supra*; see *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, the agency's lead technical evaluator responded to each of the protester's arguments for additional strengths, explaining why the evaluators deemed each of the enumerated aspects of Sabre's technical proposal to meet, but not exceed, the specified requirements of the solicitation. See *generally*, AR, Exh. 16, Decl. of TET Lead. For example, the protester argues that its creation of [DELETED] should have been recognized as a strength under the understanding of work subfactor. Protest at 23. The agency's lead evaluator, however, explains that while [DELETED] is an important attribute, "[e]xpertise in [DELETED] is a basic expectation in order to be able to perform the requirements of this contract." AR, Exh. 16, Decl. of TET Lead at 2.

⁴ The solicitation provided that the agency would use the ratings of outstanding, good, acceptable, marginal, or unacceptable to assess proposals under the technical factor and its subfactors. RFP at 162-163. As relevant here, a technical rating of good was to be assessed where the proposal "indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low to moderate." *Id.* A technical rating of outstanding was to be assessed where the proposal "indicates an exceptional approach and understanding of the requirements and contains multiple strengths, and risk of unsuccessful performance is low." *Id.* at 162.

The protester also argues that an additional strength should have been assessed under the workforce subfactor for its proposal of key personnel that exceeded the minimum required experience. Protest at 25. The agency's lead evaluator responds that, because "the software world has changed so much in the past 10 years," the TET did not consider experience beyond 10 years to be particularly relevant or advantageous for the three senior project managers, the only key personnel positions specified in the solicitation. AR, Exh. 16, Decl. of TET Lead at 3.

As for the protester's assertion that the agency should have assessed additional strengths under the management approach subfactor based on the CPARS reports for Sabre's work under the incumbent contract, see Protest at 25-26, the agency responds that the TET properly did not review or rely on any CPARS reports in its evaluation of proposals under the technical factor. AR, Exh. 16, Decl. of TET Lead at 4.

On this record, we find the agency's evaluation of the protester's technical proposal to be reasonable and consistent with the terms of the solicitation. For each of the aspects alleged by the protester as deserving of additional strengths, the agency provided credible post-protest explanations with detailed rationales as to why those aspects of Sabre's proposal merely met requirements without exceeding them. The protester's disagreement with the agency's reasoned judgments in this regard, without more, does not demonstrate that those judgments were unreasonable. See *Cape Envtl. Mgmt., Inc.*, B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8.

Past Performance Evaluation

Sabre next contends that the agency improperly equalized offerors' past performance by unreasonably assigning the same highest rating of substantial confidence to its and the awardee's proposals, even though Sabre's past performance was more relevant and of higher quality. Protest at 34-36. The agency responds that it properly evaluated each offeror's past performance against the solicitation criteria, rather than in comparison with each other. COS/MOL at 50-53.

When a protester challenges an agency's evaluation of past performance, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and with applicable procurement statutes and regulations. *PricewaterhouseCoopers Public Sector, LLP*, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 10. An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion that we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *Id.* at 10-11; *Candor Solutions, LLC*, B-417950.5, B-417950.6, May 10, 2021, 2021 CPD ¶ 199 at 11-12. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *Sterling Med. Assocs., Inc.*, B-418674, B-418674.2, July 23, 2020, 2020 CPD ¶ 255 at 8.

The record shows that Sabre submitted one past performance reference--for its work as the prime contractor on the incumbent contract. AR, Exh. 3, Past Performance Consensus Report at 29. The agency evaluated this past performance reference and concluded it was recent and relevant, with the quality of performance "reported to be nearly all rated Exceptional." *Id.* at 29-32. The evaluators also noted as follows:

Although only one (1) Past Performance contract was reviewed, which under some circumstances may be considered sparse, it is for a contract with the same organization, and very similar effort as this solicitation supporting Navy aircraft acquisition, so it provides a solid basis for review.

Id. at 32. Based on this performance record, the agency concluded that it had a high expectation that Sabre would successfully perform the required effort and assigned a rating of substantial confidence to Sabre's past performance.⁵ *Id.*

American Systems, on the other hand, submitted four past performance references, two for work it performed as a prime contractor and two for its principal subcontractor. *Id.* at 5. The record shows that the agency evaluated each of the submitted references, finding one to be recent and relevant, and three to be recent and somewhat relevant. *Id.* at 5-14. The agency also found that the quality of performance on the reference contracts ranged from very good to exceptional, with the reported ratings on the relevant reference ranging from very good to exceptional.⁶ *Id.* at 13. Based on these findings, the agency concluded that it had a high expectation that American Systems would successfully perform the required effort and assigned to its past performance a rating of substantial confidence. *Id.* at 14.

⁵ The solicitation provided that the agency would rate the relevance of past performance as relevant, somewhat relevant, and not relevant. RFP at 163. The past performance effort would be considered relevant if it "involved similar scope and magnitude of effort and complexities" required, and considered somewhat relevant if it "involved some of the scope and magnitude of effort and complexities" required. *Id.* Then, based on the offeror's recent and relevant past performance record, the agency would assign an overall performance confidence assessment rating of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. *Id.* at 164. As relevant here, the rating of substantial confidence was defined as "the Government has a high expectation that the Offeror will successfully perform the required effort," while the rating of satisfactory confidence was defined as "the Government has a reasonable expectation that the Offeror will successfully perform the required effort." *Id.*

⁶ The agency was not able to locate a CPARS report for one of American Systems' references rated as relevant and thus excluded it from overall rating determination for the past performance factor. See AR, Exh. 3, Past Performance Consensus Report at 11; AR, Exh. 6, PAR at 8.

On this record, we find the agency's evaluation to be unobjectionable. The protester's first objection to the agency's evaluation here is that American Systems' past performance deserved a lower rating than Sabre's because Sabre's past performance was far superior in both relevance and quality. Protest at 34-36. However, the protester's argument in this regard appears to conflate the solicitation's evaluation criteria for the past performance factor with the best-value tradeoff process. Nothing in the solicitation indicated that the agency would compare offerors' past performance records to one another in assigning a performance confidence assessment rating under the past performance factor. Instead, the RFP specifically provided that the agency would evaluate the recency, relevancy, and quality of each submitted past performance reference, focusing on whether the referenced work involved performance similar to specified SOW provisions. See RFP at 161. The RFP also provided that a separate quality rating would not be assigned for each past performance reference submitted; rather, the past performance confidence assessment rating would be "based on the Offeror's overall record of recency, relevancy, and quality of performance." *Id.* The record here shows that the agency followed these stated evaluation criteria by assessing the awardee's past performance against specified SOW provisions and reasonably assigning the rating of substantial confidence based on recent, relevant, and high-quality work. See AR, Exh. 3, Past Performance Consensus Report at 5-14.

Moreover, to the extent the protester argues that the agency failed to sufficiently account for the qualitative difference between offerors' past performance in its best-value tradeoff analysis, the record shows otherwise. In the tradeoff analysis, the SSA specifically noted that, although the protester and awardee both received a past performance rating of substantial confidence, there was "a slight advantage in the Sabre submittal over the American Systems submittal due to the stronger relevancy to this specific solicitation scope, magnitude and complexity, as well as strength of the CPARS quality rating for their relevant contract reference." AR, Exh. 7, SSDM at 9. After considering Sabre's slight advantage in past performance, as well as its slight advantage under the technical factor, the SSA decided that these advantages did not justify a price premium of \$21 million. *Id.* at 11-12. Thus, the record reflects that the agency meaningfully considered the protester's and awardee's past performance, and reasonably concluded that the benefits of Sabre's past performance were not worth the price premium.

PREJUDICE

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *IAP Worldwide Servs, Inc.*, B-417824, B-417824.2, Nov. 13, 2019, 2020 CPD ¶ 119 at 9.

The agency and the intervenor both argue that Sabre cannot show that it was competitively prejudiced by any error in the agency's methodology for evaluating offerors' total compensation plans. The agency contends that, because the purpose of

the total compensation plan evaluation is to determine performance risk, and not to upwardly adjust the proposed costs, a change in the agency's methodology to include additional labor categories in the analysis would not have changed the evaluative outcome. Agency's Supp. Briefing at 10-12. In this regard, the agency notes that it conducted a reasonable cost realism analysis on all proposed labor rates and fringe benefits and upwardly adjusted proposed costs that were deemed to be unrealistic. *Id.* at 12.

The intervenor adds that even if the agency had included all of the excluded employees in its compensation analysis, the agency would still have found the awardee's proposed compensation plan to be sufficient. Intervenor's Resp. to Supp. Briefing at 4-6. In support of this argument, the intervenor points to portions of its proposal showing that almost [DELETED] percent of its proposed personnel in the excluded labor categories were [DELETED] and also eligible for the awardee's [DELETED].⁷ *Id.*; see *generally*, AR, Exh. 10, American Systems Cost/Price Proposal. Noting that the agency found these features sufficiently mitigated the risk of labor rates that were lower than those of the incumbent, the intervenor argues that the agency would have similarly concluded that these features would mitigate any additional risk found in an evaluation of the excluded employees' compensation. Intervenor's Resp. to Supp. Briefing at 4-6; see AR, Exh. 5, American Systems Cost Evaluation Report at 28, 31.

The protester counters that the agency's improper exclusion of more than 80 percent of the proposed personnel from its compensation plan analysis resulted in the agency failing to recognize the extent of the risk posed by the awardee's lowered compensation levels. Protester's Resp. to Supp. Briefing at 4-6. The protester argues that, had the agency properly analyzed the compensation of all professional employees, it would have found that the awardee's lowered compensation across the board posed a significant risk to obtaining and retaining qualified personnel, a risk that could not be mitigated by proposing [DELETED] employees and a [DELETED]. *Id.*

Upon evaluating the awardee's compensation plan for the limited number of employees the agency considered to be professionals, the agency noted as follows:

[T]he Contract Specialist determined that there is a risk in hiring the high level support needed for professional labor categories due to the proposed average[] rates being below the incumbent's average professional direct labor rates and the cost realism rate range in the majority of the professional employee labor categories.

AR, Exh. 5, American Systems Cost Evaluation Report at 30. The agency concluded, however, that "overall the risk would be low due to [DELETED] of the individuals being

⁷ American Systems proposed, as part of its total compensation plan, a "[DELETED]." Intervenor's Response to Supp. Briefing at 5; see *generally*, AR, Exh. 10, American Systems Cost/Price Proposal.

[DELETED] employees” and because the awardee’s “[DELETED] . . . would help to attract and retain qualified personnel.” *Id.* at 28.

Because the agency excluded a majority of proposed employees from its compensation plan analysis--e.g., its comparison of labor rates with incumbent rates--we cannot say with any degree of certainty whether the agency would have reached the same conclusions if the analysis had included these employees. It is possible, as the intervenor argues, that the agency would have found that the proposal of [DELETED] employees and the [DELETED] would mitigate the risk of lower labor rates even for the expanded group of professional employees. It is also possible, as the protester argues, that the agency would have concluded that the increased risk of additional employees being paid or offered lowered compensation for the same work could no longer be mitigated by these aspects of the awardee’s compensation plan. In this latter scenario, the agency could have chosen to further adjust the awardee’s rates to match the incumbent rates, changing the awardee’s most probable cost and possibly resulting in a different best-value tradeoff determination, or even rejected outright the awardee’s proposal under subsection (d) of the FAR provision. See FAR provision 52.222-46(d) (“Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.”).

Under such circumstances, we resolve any doubts regarding prejudice in favor of the protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See *Kellogg, Brown & Root Servs., Inc.-Recon.*, B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. Accordingly, we conclude that Sabre has established the requisite competitive prejudice to prevail in its bid protest.

RECOMMENDATION

We recommend that the agency reevaluate offerors’ total compensation plans in a manner consistent with this decision and FAR provision 52.222-46, and make a new source selection decision based on that reevaluation. We also recommend that the agency reimburse Sabre its reasonable costs of filing and pursuing its protest including attorneys’ fees. 4 C.F.R. § 21.8(d)(1). The protester’s certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

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