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Decision

Matter of: DarkStar Intelligence, LLC

File: B-420609; B-420609.2

Date: June 24, 2022

Edward J. Tolchin, Esq., Offit Kurman, P.A., for the protester.
William K. Walker, Esq., Walker Reausaw, for Chenega Enterprise Systems & Solutions, LLC, the intervenor.
Robert D. Banfield, Esq., Department of the Interior, for the agency.
Samantha S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee should have been disqualified based on its approach to key personnel is denied where the protester has not demonstrated that the awardee made any misrepresentation about its approach and the agency's evaluation of that approach was reasonable and consistent with the terms of the solicitation.
 2. Protests challenging the evaluations of past performance and technical quotations and the resulting award decision are denied where the evaluations were reasonable and consistent with the terms of the solicitation and the protester did not demonstrate competitive prejudice resulting from the alleged errors.
 3. Protest alleging that the agency conducted discussions with only the awardee is denied where the exchange was a request for a price reduction conducted after the agency had selected the awardee under Federal Acquisition Regulation subpart 8.4.
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DECISION

DarkStar Intelligence, LLC, a service-disabled veteran-owned small business of Woodbridge, Virginia, protests the Department of the Interior's (DOI) issuance of a task order on behalf of the Defense Intelligence Agency (DIA) to Chenega Enterprise Systems & Solutions, LLC (ChESS), a small disadvantaged business of Chesapeake, Virginia, under request for quotations (RFQ) No. 140D0422Q0086, for human intelligence (HUMINT) targeting instructors. DarkStar argues that the agency miscalculated quotations and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The DOI issued the solicitation on behalf of the DIA on December 23, 2021. The RFQ was issued under the General Services Administration's Federal Supply Schedule (FSS) using the procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab 4, RFQ at 1.¹ The solicitation sought quotations to support DIA's establishment and maintenance of a standardized education and development program for the Department of Defense HUMINT enterprise. AR Tab 5, Statement of Work (SOW) at 3. Specifically, the contractor will provide experienced instructors to "develop and support a comprehensive HUMINT Intelligence Targeting training program in support of the Department of Defense and Intelligence Community requirements as well as addressing DIA officer development requirements for skilled HUMINT Targeting Officers [.]" *Id.* DarkStar was a subcontractor on the two previous awards for this requirement. AR, Tab 6, DarkStar Technical Quotation at 10.

The solicitation contemplated the issuance of a single time-and-materials task order with a 12-month base period and four 12-month option periods. RFQ at 2. The RFQ provided that award would be made on a best-value tradeoff basis, considering the following five evaluation factors: (1) security; (2) technical and management approach (technical); (3) staffing and transition plan (staffing); (4) relevant past performance; and (5) price. *Id.* at 4-8. Quotations would be evaluated first under the security factor on a pass/fail basis. Only quotations that received a pass rating for this factor would move on to be evaluated under the other factors.² *Id.* at 8-9. The non-price factors, when combined, were significantly more important than price. *Id.* at 8.

The agency received quotations from seven vendors, including DarkStar and ChESS, by the January 26, 2022, deadline for receipt of quotations. AR, Tab 15, Award Summary at 5. On February 22, a technical evaluation committee (TEC) provided a consensus evaluation to the contracting officer, who was also the source selection authority (SSA) for this procurement. *Id.* at 5, 19-20. Relevant here, the solicitation did not provide for the assignment of adjectival ratings for the evaluation factors. Rather, the evaluation methodology called for the evaluators to assess quotations by comparing the relative merits of each quotation with the other submitted quotations, under each evaluation factor.

¹ References to the RFQ in this decision are to the amended version. Unless otherwise noted, all citations to the record are to the consecutive numbering of the pages in the Adobe PDF documents provided by the agency.

² The first evaluation factor (security) was not weighted because it was to be evaluated on a pass/fail basis. The remaining evaluation factors (2-5) were listed in descending order of importance. RFQ at 8-9.

As part of the evaluation, the TEC identified a third vendor (*i.e.*, not DarkStar or ChESS) as the highest-rated vendor based on the non-price factors. AR, Tab 14, TEC Report at 5. When assessing vendors under the combined price and non-price factors, the TEC recommended ChESS for award, finding that the firm “provides strong technical capability at a competitive price.” *Id.* at 6. Comparing ChESS and DarkStar, the TEC explained that ChESS’s “quote was found to be more advantageous as it included a proposal for future technical/instructional design tools” and a risk mitigation plan that “provided a more comprehensive stance on managing both small- and large-scale issues requiring identification, mitigation, and resolution.” *Id.*

On March 8, the SSA finalized a best-value tradeoff analysis and determined that ChESS’s quotation represented the best value to the government. AR, Tab 15, Award Summary at 15-20. In the tradeoff analysis, the SSA discussed the advantages presented in the highest technically rated quotation submitted by the third vendor, but ultimately found that the benefits associated with the quotation was not “worth paying \$1,895,635.28 (28.82%) more over ChESS.” *Id.* at 15. The SSA then determined that although DarkStar offered benefits under the technical approach factor and was “comparatively equal” in past performance to ChESS, ChESS presented a better value “because they had a stronger staffing and transition plan” and a more “substantial” risk management plan and processes. *Id.* The SSA concluded that ChESS’s quotation merited its quoted price of \$6,576,775.12--or “paying \$573,378.16 more” than DarkStar’s quoted price of \$6,003,396.96--and was “the overall best value when considering both technical factors and price.”³ *Id.* at 15, 17.

After ChESS was selected for award, the agency emailed ChESS “to request additional discounts on [its] quote dated January 26, 2022,” requesting that any additional discounts be submitted in a revised pricing table. AR Tab 16, Email from DOI to ChESS at 3 (Mar. 8, 2022). ChESS submitted a revised pricing table with further discounted pricing on March 9. DOI issued the task order to ChESS on March 10. AR, Tab 15, Award Summary at 21. This protest followed on March 18.

DISCUSSION

DarkStar, a subcontractor to the incumbent,⁴ contends that ChESS should have been disqualified from award because ChESS did not meet the solicitation’s requirements for key personnel or past performance. DarkStar also asserts that ChESS engaged in an impermissible “bait and switch” with respect to its key personnel. Beyond those allegations, DarkStar raises challenges to the reasonableness of the agency’s evaluation of technical approaches and past performance. DarkStar also contends that the agency’s evaluation was improper because the agency conducted discussions with

³ The quoted price includes the base period and all options plus a potential 6-month extension under FAR clause 52.217-8. AR, Tab 15, Award Summary at 13.

⁴ The incumbent is Battelle Memorial Institute. AR, Tab 4, RFQ amend. 1 at 65.

DarkStar and did not conduct discussions with any other vendor. Finally, DarkStar challenges the best-value tradeoff decision.

In filing and pursuing this protest, DarkStar has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude none furnishes a basis on which to sustain the protest.

Key Personnel

The solicitation provided a mandatory level-of-effort (*i.e.*, required positions) of one senior instructor/program lead, two senior instructors, and two midlevel instructors. AR, Tab 2, RFQ attach. 3, Pricing Table at 76-77; RFQ at 7. Under the staffing evaluation factor, the solicitation identified that all five mandatory positions were “[k]ey [p]ersonnel in support of this requirement.” RFQ at 5. Vendors were required to demonstrate their approaches “to recruit, develop, and retain qualified staff,” as well as submit a resume (of no more than 3 pages) for each proposed instructor. *Id.* The agency stated it would evaluate the proposed personnel's qualifications and “whether each resume clearly states whether the proposed personnel possess an active Top Secret clearance.” *Id.*

Incumbent Personnel

DarkStar argues that DOI should have rejected ChESS's quotation because it was based on an intention to retain incumbent key personnel and staff, but ChESS did not submit resumes for those incumbent key personnel. See Comments & Supp. at 4-6. The agency argues that the TEC reasonably evaluated ChESS's quotation based on the personnel identified by name and supported with resumes, but also with the recognition of the firm's approach for recruiting incumbent personnel as provided in its quotation. Memorandum of Law (MOL) at 3-5; Supp. MOL at 2.

The record here supports the reasonableness of the agency's evaluation. ChESS's quotation provided a staffing plan “that addresses both incumbent capture and new [k]ey [p]ersonnel.” AR, Tab 9, ChESS Technical Quotation at 5. ChESS explained that here, as “[w]ith any contract where there are incumbents, ChESS provides the first opportunity to incumbent staff to fill the positions,” and explained its approach to engaging with those personnel upon award. *Id.* ChESS also offered resumes for five other individuals qualified to perform as key personnel, available in the event the incumbent key personnel were unwilling to continue in their roles. *Id.*

The TEC assessed the qualifications of the personnel that ChESS identified (and for whom resumes were provided), and also took into account the firm's approach to recruiting and retaining the incumbent workforce. AR, Tab 14, TEC Report at 3. In our view, the RFQ did not preclude an approach that proposed to recruit the incumbent staff but also offered specific personnel as back-ups to be used if not all incumbent personnel were recruited, and correspondingly, the solicitation did not require the agency to evaluate that approach as unacceptable. Although DarkStar argues that the

RFQ's requirement to include resumes precluded ChESS's reliance on recruiting incumbent personnel, our Office has concluded that an agency may properly credit a vendor for an approach to recruit incumbent key personnel--rather than the alternates for whom a vendor submitted resumes--where a solicitation did not require evidence of commitment by the key personnel, so long as the vendor showed that it would be able to hire those individuals. *E.g., Jardon & Howard Techs., Inc.*, B-414979, B-414979.2, Oct. 27, 2017, 2017 CPD ¶ 358 at 7-8. This is particularly appropriate where, as here, the solicitation cautioned that "[i]n assessing personnel, the Government reserves the right to consider knowledge available within the Government regarding the experience and qualifications of any of the proposed personnel." RFQ at 5.

Security Clearance Information in Submitted Resumes

DarkStar also argues ChESS should also have been rejected based on the resumes that ChESS did submit--that is, resumes for backup staff--because those resumes did not include the required information regarding security clearances. *Id.* at 1-2. DOI acknowledges that ChESS did not include the information about each individual's clearance on the submitted resumes, as required by the RFQ. Supp. MOL at 2. DOI contends, however, that DarkStar was not competitively prejudiced as a result. *Id.* We agree.

Although ChESS did not identify within each resume that the individual proposed possessed an active security clearance, the record reflects--and DarkStar concedes--that ChESS included the security clearance information in other areas of its quotation AR, Tab 9, ChESS Technical Quotation at 20, 32; Comments & Supp. Protest at 2. To the extent that the agency waived the solicitation requirement to include security clearance information in the submitted resumes, we find that DarkStar has not demonstrated it was prejudiced by the waiver of this requirement.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 17.

Here, DarkStar does not suggest that the firm was prejudiced by the agency's waiver of the resume content requirement in any way, other than the waiver "allowed ChESS to exceed the 3 page limit on resumes." Comments & Supp. Protest at 2. The agency argues, and our review of the record confirms, that ChESS would not have exceeded the page limit for each resume, if the security clearance information was added. Supp. MOL at 2; AR, Tab 9, ChESS Technical Quotation at 40-51. Under the circumstances here, we find that DarkStar cannot establish that it was prejudiced by the agency's waiver of the requirement to include security clearance information within each resume. *See, e.g., Jade Excavation, Inc.*, B-419515, Mar. 18, 2021, 2021 CPD ¶ 128 at 2-3 (discussing minor informalities that may be waived by an agency without prejudice to other offerors). The omission did not implicate the terms of ChESS's quotation, and

DarkStar does not suggest how it would have altered its quotation to its competitive advantage in response to a relaxed requirement regarding resume formatting. Accordingly, these allegations are denied.

Bait and Switch

DarkStar also claims that, following the award, ChESS attempted to recruit former and current DarkStar employees, including three DarkStar employees who were staffed on the incumbent task order, and also posted a job listing for a HUMINT targeting instructor. Protest at 6-7. Based on these actions, DarkStar contends that ChESS quoted key personnel it had no intention of using during contract performance. Comments & Supp. Protest at 4-6. DarkStar argues that based on this alleged “bait and switch,” ChESS’s quotation should have been rejected entirely.

The issue of whether personnel identified in an offeror’s proposal (or vendor’s quotation) will, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. *Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4; see also Bid Protest Regulations, 4 C.F.R. § 21.5(a). Nonetheless, our Office will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. *Patricio Enters. Inc.*, *supra* at 4. Our decisions frequently refer to such circumstances as a “bait and switch.” *Id.* To establish an impermissible bait and switch, a protester must show that: (1) the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance; (2) the misrepresentation was relied on by the agency; and (3) the agency’s reliance had a material effect on the evaluation results. *Patricio Enters. Inc.*, *supra*. We find that DarkStar has not established that ChESS engaged in an impermissible bait and switch.

DarkStar has not demonstrated that ChESS’s post-award outreach to employees who have worked on the incumbent task order reflects that ChESS misrepresented its proposed approach to personnel. As discussed above, ChESS’s quotation provided a staffing plan that relied on “both incumbent capture and new [k]ey [p]ersonnel.” AR, Tab 9, ChESS Technical Quotation at 5. Engagement with incumbent personnel after award is therefore consistent with ChESS’s proposed approach, and thus provides no basis to accept DarkStar’s speculation that ChESS made a misrepresentation. See *Knight Point Sys., LLC*, B-416602, B-416602.2, Oct. 26, 2018, 2018 CPD ¶ 371 at 5-7 (denying protest alleging impermissible bait and switch based on recruitment of incumbent personnel where the awardee submitted and the agency reasonably evaluated a “‘two-layer staffing approach’ that involved recruiting and hiring incumbent staff and utilizing the vendor’s proposed staff where necessary.”).

In addition, while DarkStar has provided our Office with ChESS job postings that seek a HUMINT targeting instructor, evidence of recruitment efforts does not establish a

knowing or negligent representation by ChESS that it planned to rely on specific personnel that it did not expect to furnish during performance of the task order. See *ICF Inc., L.L.C.*, B-419049.3, B-419049.4, Mar. 9, 2021, 2021 CPD ¶ 117 at 8-9. Accordingly, DarkStar has not provided any reasonable evidence to support its misrepresentation allegations. Whether ChESS actually supplies qualified key personnel that perform under the task order is a matter of contract administration that our Office does not review under its bid protest jurisdiction. 4 C.F.R. § 21.5(a); *CACI Techs., Inc.*, B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 at 4. Accordingly, this ground of protest is denied.

Non-Price Discriminators

The protester raises a variety of challenges to the agency's evaluation of quotations under the technical factor, as well as under the staffing factor. Among other things, DarkStar contends that: (1) ChESS's quotation was unreasonably evaluated as superior under the technical factor based on its risk management plan when DarkStar's plan was better and more detailed; and (2) ChESS's quotation was unreasonably evaluated as superior under the staffing factor based on ChESS's approach to transition when DarkStar, as a subcontractor to the incumbent, would need no transition. Comments & Supp. Protest at 6-8.

The evaluation of a vendor's quotation is a matter within the agency's discretion. *Technatomy Corp.*, B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 4. In conducting procurements, agencies must even-handedly evaluate quotations against common requirements and evaluation criteria. *Battelle Memorial Inst.*, B-418047.5, B-418047.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 6. A protester's disagreement with the agency's judgment of the relative merits of competing quotations, without more, does not establish that the evaluation was unreasonable. *Id.* at 5.

Technical and Management Approach

Under the technical factor, the RFQ indicated that the agency would evaluate not only the vendor's approach to perform the work, but also the "[i]dentified risks, if any, associated with the proposed approach and identified actions the Quoter will take to mitigate such risks." RFQ at 9. The TEC characterized ChESS's risk mitigation plan as less compelling than the third vendor's, but more "substantial" than DarkStar's:

Though not as compelling as [the third vendor], ChESS' risk mitigation plan included the use of two management plans used to ensure SOW requirements are being met. One program is focused on corrective action planning while the other identifies small issues in an attempt to mitigate before becoming larger issues. ChESS' corporate leadership is involved in both programs and tracks the resolution status. Leveraging not only one but two quality management programs not only ensures successful performance but provides extra security in risk mitigation. DarkStar's risk mitigation plan included the use of a Risk Management Board, chaired by

corporate leaders, to oversee the risk management process. While this formal process of risk identification and swift mitigation implementation could serve as a benefit to the Government, their risk management plan and processes was not as substantial as the plans submitted by [the third vendor] and ChESS.

AR, Tab 15, Award Summary at 9. The SSA agreed with the TEC's assessment. *Id.* at 15.

The protester argues that this evaluation was unreasonable and unequal, characterizing ChESS's risk management approach as "extremely short" and "high level" and its own plan as "very detailed" and more sophisticated. Comments & Supp. Protest at 6-7. The agency counters that it found "both DarkStar & ChESS submitted comprehensive management plans with demonstrations of their capability to meet SOW requirements." Supp. Contracting Officer's Statement of Facts at 3-4. The evaluators, however, found ChESS's approach more advantageous because, among other things, ChESS's plan included "additional contract oversight and accountability" that DarkStar did not offer. *Id.* The protester urges our Office to discount the agency's argument as an untrustworthy reevaluation performed in the heat of an adversarial protest. Supp. Comments at 5.

As a preliminary matter, in reviewing an agency's procurement actions, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 4 n.3. While we accord greater weight to contemporaneous materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (*citing Quality Elevator Co., Inc.*, B 276750, July 23, 1997, 97-2 CPD ¶ 28 at 3-4). Here, we consider the agency's argument because it is consistent with the contemporaneous evaluation record; and merely provides additional details supporting the TEC's conclusions.

Furthermore, when a protester alleges disparate treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between quotations. *Candor Sols., LLC*, B-417950.5, B-417950.6, May 10, 2021, 2021 CPD ¶ 199 at 5. Based on our review of the record here, we find reasonable the evaluators' assessment that there were substantive differences between the two quotations' discussions of risk mitigation. As set forth above, the TEC identified specific features of ChESS's risk mitigation strategy--with citations to the quotation--that contributed to the agency's assessment that ChESS offered contract oversight and accountability beyond that in the quotations of DarkStar or several other vendors. AR,

Tab 15, Award Summary at 9. The protester does not argue that it offered all the same features; instead, it derides some elements of ChESS's approach as "dumbed down" versions of some elements of its own. Supp. Comments at 5. We find no basis to question the evaluators' conclusion that ChESS quoted a uniquely beneficial, layered risk mitigation approach. Nor does DarkStar's disagreement with the evaluators' conclusion, without more, provide such a basis. *Dev Tech. Grp., Inc.*, B-420230, B-420230.2, Jan. 5, 2022, 2022 CPD ¶ 22 at 7 (denying protest based on "ongoing disagreement" with the agency's risk assessment).

Staffing and Transition Plan

DarkStar argues that the agency unreasonably failed to evaluate its quotation as the most meritorious under the staffing evaluation factor. Comments & Supp. Protest at 7-8. In this regard, the RFQ indicated that the agency would evaluate the vendor's approach to recruit, develop, and retain qualified staff, as well as the vendor's approach to transition from the current contractor. RFQ at 9. The TEC identified ChESS as one of the vendors that "demonstrated the clearest approach to transition the roles and responsibilities of the current contractor to themselves," including a retention plan and a detailed approach. AR, Tab 15, Award Summary at 10-11. DarkStar, by contrast, focused its quotation on keeping incumbent staff, and the evaluators found that DarkStar's quotation "lacked sufficient details regarding tasks, schedule, dependencies, and risk mitigation plans." *Id.* at 11. The SSA agreed with the TEC's assessment. *Id.* at 15.

DarkStar argues that this evaluation is "senseless," asserting that ChESS's "entire 'transition' plan was to hire DarkStar's staff" and DarkStar, as a subcontractor, has been providing the majority of the personnel on the incumbent effort. Comments & Supp. Protest at 7-8. The agency responds that its evaluation was based on the "robust Staffing and Transition Plan" provided in ChESS's quotation, which DarkStar did not match. Supp. MOL at 6-7.

Here, the protester essentially argues that it should have received higher assessments primarily because of its status as a subcontractor on the incumbent contract, claiming "[t]here was no transition to be done." Comments & Supp. Protest at 7-8. Notably, DarkStar is a subcontractor on the incumbent effort, not the incumbent itself. See *id.* Even if DarkStar were the incumbent, a vendor is not entitled to a specific evaluation assessment based on its incumbent status, alone; instead, quotations must be evaluated based on their merit in accordance with the terms of the solicitation. See *OBXtek, Inc.*, B-419478, B-419478.2, Mar. 23, 2021, 2021 CPD ¶ 156 at 8-9 (denying protest that agency was obligated to evaluate protester's approach as most advantageous because it had incumbent performers on its team). DarkStar does not argue that its transition plan provided the same level of detail and rigor that led the agency to identify a discriminator in ChESS's favor. Instead, DarkStar argues that under this factor, no vendor could have been evaluated as more advantageous than DarkStar, a subcontractor performing on the incumbent contract. Such unsupported

assertions aside, the protester's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest.

Past Performance

DarkStar contends that the agency should have deemed ChESS ineligible for award because it failed to submit relevant past performance references for work that ChESS, as the proposed prime contractor, had itself performed. Comments & Supp. Protest at 2-4; Supp. Comments at 2-4. Further, DarkStar argues that the agency improperly relied too heavily on ChESS's proposed subcontractor's past performance reference in the evaluation. Comments & Supp. Protest at 8.

Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. *PricewaterhouseCoopers Public Sector, LLP*, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 10-11. An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of a vendor's performance history, is a matter of discretion which we will not disturb unless the assessment is unreasonable or inconsistent with the solicitation criteria. *Id.*

Under the past performance factor, each vendor was to submit up to three references for work performing requirements similar in size, scope, and complexity to the requirement here. RFQ at 6. Relevant here, the RFQ required: "A minimum of two (2) of the three (3) references submitted must be for work performed by the prime contractor that is submitting the quote." *Id.* The agency confirmed that any vendor without a sufficient past performance record would "not be evaluated favorably or unfavorably" and receive a neutral evaluation. *Id.*

ChESS, a wholly owned subsidiary of the Chenega Corporation, identified three past performance references: (1) a Federal Bureau of Investigation (FBI) contract performed by "Time Solutions, an [Alaska Native Corporation] sister-company" to ChESS; (2) a Centers for Disease Control and Prevention (CDC) contract performed by ChESS; and (3) a Department of Defense HUMINT Joint Center for Excellence contract performed by ChESS's proposed subcontractor, EKS Group, LLC. AR, Tab 11, ChESS Business Quotation at 4; AR, Tab 9, ChESS Technical Quotation at 35-39; AR, Tab 10, ChESS Past Performance Questionnaires. For the FBI contract reference, ChESS asserted in its quotation:

Based on FAR 15.305(a)(2)(iii) and various GAO rulings, the Government's evaluation of an Alaska Native Corporation 8(a) company can consider past performance experience gained by our Chenega sister companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement. As such, ChESS is eligible to reference the relevant experience of other Chenega subsidiaries including Time Solutions, LLC,

particularly since the management team responsible for Time Solutions success will lead ChESS' efforts.

AR, Tab 9, ChESS Technical Quotation at 35.

DarkStar argues that because ChESS is the prime contractor submitting the quotation, ChESS "did not satisfy the past performance requirements here" to submit two relevant past performance references for ChESS itself. Comments & Supp. Protest at 2-4; Supp. Comments at 2-4. DarkStar asserts that the agency could not reasonably attribute the FBI contract to ChESS because it was performed by an affiliate rather than ChESS. DarkStar also contends that ChESS's CDC contract should be excluded from consideration as the contract is not similar in size, scope, or complexity to the task order here. The agency responds that it reasonably credited ChESS's quotation with the FBI contract as part of the agency's past performance evaluation because of the affiliate relationship between ChESS and Time Solutions, LLC. Supp. MOL at 3-4. The agency also asserts that its determination that the CDC contract was relevant is entitled to deference. *Id.*

We need not decide, however, whether the agency's consideration of the two past performance references was reasonable. Here, even if we were to agree with DarkStar's allegations--*i.e.*, the agency improperly considered ChESS's two past performance references as meeting the solicitation's requirements for relevant work performed as "the prime contractor that is submitting the quote"--we would not have a basis to sustain DarkStar's protest. Contrary to DarkStar's insistence that its claims would affect the outcome of the competition because the failure to submit two specific past performance references rendered ChESS's quotation "ineligible for award," the consequence of providing no relevant past performance references was not disqualification. Comments & Supp. Protest at 4; Supp. Comments at 4. Instead, any vendor without an adequate past performance history (or for whom information on past performance was not available), would receive a rating of neutral. RFQ at 10. DarkStar's argument is therefore not grounded in the true terms of the solicitation.

Furthermore, DarkStar does not contest that the solicitation allowed vendors to satisfy at least part of the past performance requirements with references from subcontractors, and that ChESS did offer relevant past performance from its subcontractor. Rather, DarkStar argues that the agency's evaluation of ChESS's past performance, based on the third reference (EKS Group) alone, would still be unreasonable because "[r]eliance on a subcontractor's past performance cannot possibly be as strong as reliance on the prime contractor's performance." Comments & Supp. Protest at 8. Here, the RFQ permitted vendors to submit past performance information for proposed subcontractors and identify the performance work areas to be performed by the subcontractors. RFQ at 6. Because the solicitation expressly anticipated consideration of a subcontractor's relevant experience in evaluating a vendor's ability to perform the solicitation requirements, it was reasonable for the agency to also favorably consider ChESS's subcontractor's prior experience in evaluating ChESS's ability to perform the

requirement. See *Chevo Consulting, LLC*, B-420242, B-420242.2, Jan. 18, 2022, 2022 CPD ¶ 43 at 9. We find no merit to this argument and the allegation is denied.

To the extent that DarkStar argues that the agency may have improperly waived a solicitation requirement for a minimum number of past performance references of the prime contractor itself, our Office has explained that an agency may waive or relax a solicitation requirement for specific past performance references when the award will meet the agency's actual needs without prejudice to the other vendors. *22nd Century Techs., Inc.--Recon.*, B-417478.5, Apr. 28, 2020, 2020 CPD ¶ 153 at 4. Unfair competitive prejudice from such a waiver or relaxation only exists where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. *Id.* Here, DarkStar has never alleged that it would have altered its proposal. Instead, DarkStar argues only that ChESS "should have been ineligible for award." Comments & Supp. Protest at 4; Supp. Comments at 4.

Discussions

DarkStar also argues that the agency improperly conducted discussions when it requested that ChESS reduce its quoted price but failed to provide DarkStar with the same opportunity. Protest at 7-8; Comments & Supp. Protest at 9. The agency denies it conducted discussions with any vendor, and argues that it was proper to seek a price reduction from the awardee. MOL at 3-4.

The record reveals that the agency evaluated ChESS as representing the best value, and selected ChESS for issuance of the task order on March 8. AR, Tab 15, Award Summary at 15. The agency's evaluation and selection of ChESS were based on the initial submissions of all vendors, including the initial quoted prices. *Id.* at 12-13, 19 ("Thus, it is recommended that task order 140D0422F0122 be awarded to ChESS with an overall value of \$5,953,537.25 for five years, and a total of \$5,567,775.12 when including the six-month extension provided by FAR 52.217-8."). The record is clear that it was only after selecting ChESS's quotation for award that the agency contacted ChESS to request "additional discounts" to the vendor's quoted price. *Id.* at 21 (explaining the discount request in a March 10 addendum to the award summary); AR, Tab 16, Email from DOI to ChESS at 3 (Mar. 8, 2022). ChESS responded that it had "found ways to reduce our rates further, for an additional cost savings of 7.04% since our original bid." *Id.* at 1, Email from ChESS to DOI (Mar. 9, 2022).

As noted above, the RFQ was issued under the FSS using the procedures of FAR subpart 8.4. Relevant here, section 8.405-4 of the FAR permits agencies issuing orders under the FSS to request price reductions from vendors at any time before placing an order. Specifically, the FAR provides:

Ordering activities may request a price reduction at any time before placing an order, establishing a [Blanket Purchase Agreement (BPA)], or in conjunction with the annual BPA review. However, the ordering activity

shall seek a price reduction when the order or BPA exceeds the simplified acquisition threshold. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order or BPA.

FAR 8.405-4. Additionally, the FSS ordering procedures of FAR subpart 8.4 do not require agencies to conduct discussions in accordance with the negotiated procurement rules of FAR part 15. *Salient Fed. Solutions, Inc.*, B-410174.3, B-410174.4, Apr. 1, 2016, 2016 CPD ¶ 104 at 6. When exchanges do occur with vendors in FAR subpart 8.4 procurements, like all other aspects of such procurements, those exchanges must be fair and equitable. *USGC Inc.*, B-400184.2 *et al.*, Dec. 24, 2008, 2009 CPD ¶ 9 at 3.

Here, in essence, the agency requested that ChESS further improve its already successful quotation by quoting the agency a lower price. The record establishes that even if the request had not been made, ChESS's quotation would have been selected for issuance of the task order. AR, Tab 15, Award Summary at 12-13, 15. As discussed above, competitive prejudice is an essential element of any viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21; *see also Verisys Corp.*, B-413204.5 *et al.*, Oct. 2, 2017, 2017 CPD ¶ 338 at 12-13 (denying protest alleging unequal discussions where the agency had already selected awardee for award prior to engaging in price reduction exchanges). We conclude that there was no prejudice to the protester because the agency requested the price reductions from ChESS only after selecting that vendor for award. We therefore find no basis to sustain the protest. *AllWorld Language Consultants, Inc.*, *supra* at 12-13 (denying protest alleging that agency's request that awardee reduce its quoted price in accordance with FAR section 8.405-4 constituted unequal discussions).

Best-Value Decision

Finally, the protester argues that the agency's best-value tradeoff decision was improper because it was based on a flawed evaluation.⁵ Protest at 8-9 ("[B]ecause the

⁵ DarkStar initially alleged that the agency failed to meaningfully consider price in the award decision. Protest at 8. The agency responded to the protester's arguments in the agency report filed on April 18. MOL at 8. In its comments to the agency report, the protester failed to rebut or otherwise substantively address the agency's response to this allegation. See Comments & Supp. Protest at 4-9. As such, we find that DarkStar has abandoned this allegation. Our Office's Bid Protest Regulations provide that we will dismiss any protest allegation or argument where the agency report responds to the allegation or argument, but the protester's comments fail to address that response. 4 C.F.R. § 21.3(i)(3); *IntegriGuard, LLC d/b/a HMS Federal--Protest & Recon.*, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5 (dismissing abandoned arguments).

Agency's evaluation under the Technical Approach was flawed, the Agency's reliance on the results of that evaluation in its best value determination was unreasonable."); Comments & Supp. Protest at 8-9. This allegation is derivative of the protester's challenges to the agency's evaluation of quotations. As discussed above, we find no basis to object to the agency's evaluation. Accordingly, we dismiss this allegation because derivative allegations do not establish independent bases of protest. *DirectViz Solutions, LLC*, B-417565.3, B-417565.4, Oct. 25, 2019, 2019 CPD ¶ 372 at 9.

The protest is denied.

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