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Decision

Matter of: Lumen Technologies Government Solutions, Inc.

File: B-420178.3; B-420178.4

Date: July 25, 2022

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Jonathan L. Kang, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the conduct of discussions is denied where the agency did not mislead the protester by advising it of a limited number of prices the agency found unreasonably high.
 2. Protest that the agency failed to identify and consider additional information concerning the awardee's past performance is denied where the performance was for contracts awarded by different agencies and where the protester does not establish that the agency was obligated to consider this information.
 3. Challenge to the award decision is denied where the agency reasonably explained the basis for selecting a lower-priced, lower technically rated proposal for award.
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DECISION

Lumen Technologies Government Solutions, Inc., of Monroe, Louisiana, challenges the issuance of a task order to AT&T Corporation, of Oakton, Virginia, by the Department of Justice, Federal Bureau of Investigation (FBI), under request for proposals (RFP) No. 15F06720R0000174, which was issued for network, data and voice services. The protester argues that the agency misled it during discussions; the agency failed to identify and consider additional information concerning the awardee's past performance; and the award decision did not adequately justify the selection of the awardee's lower-priced, lower technically rated proposal.

We deny the protest.

BACKGROUND

The FBI issued the RFP on September 30, 2020, seeking proposals to provide agency-wide network, data and voice telecommunications services. Agency Report (AR), Tab 3, RFP¹ at 1. The agency currently receives these telecommunications services through a number of different indefinite-delivery, indefinite-quantity (IDIQ) contracts, and seeks to transition them to the Enterprise Infrastructure Solutions (EIS) IDIQ contracts awarded by the General Services Administration (GSA). *Id.* at 18-19. The RFP was issued under the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, and anticipated the issuance of two task orders under the EIS contracts: task order 1, for the primary provider of the FBI's requirements; and task order 2, for a secondary provider to provide a physically diverse network "to minimize the risk associated with having a single point of failure." *Id.* at 21. This protest concerns task order 2.

The RFP advised that proposals would be evaluated based on the following four factors, listed in descending order of importance: (1) technical approach; (2) transition and management; (3) past performance; and (4) price. *Id.* at 151-52. For purposes of award, the non-price factors, when combined, were "more important" than price. *Id.* at 151.

The FBI received proposals from three offerors, Lumen, AT&T, and Verizon Business Network Services LLC. Contracting Officer's Statement (COS) at 1. On September 2, 2021, the FBI awarded task order 1 to Verizon and task order 2 to Lumen. *Id.* at 2. AT&T filed protests with our Office (B-420177; B-420177.2; B-420178; B-420178.2) challenging the issuance of both task orders, arguing that the agency unreasonably evaluated offerors' proposed prices, technical proposals, and past performance. On October 15, the FBI advised our Office that it would take corrective action to address the protests by reevaluating proposals and making a new award decision. *AT&T Corp.*, B-420177, B-420177.2, Oct. 20, 2021 at 1 (unpublished decision); *AT&T Corp.*, B-420178, B-420178.2, Oct. 20, 2021 at 1 (unpublished decision). We concluded that the agency's corrective action rendered the protests academic and therefore dismissed them. *Id.*

As part of its corrective action, the agency issued RFP amendment 4, which revised the past performance criteria and pricing templates. The agency received proposals based on the amended RFP from Lumen, AT&T, and Verizon, and conducted discussions with the offerors. COS at 8-10. After concluding discussions, the agency received revised proposals and evaluated Lumen's and AT&T's proposals for task order 2 as follows:

¹ Citations to the RFP are to the version conformed through RFP amendment 4, provided by the agency at Agency Report tab 3.

	LUMEN	AT&T
Technical Approach	Exceptional	Good
Transition and Management	Good	Good
Past Performance	Satisfactory Confidence	Satisfactory Confidence
Price	\$120,555,120	\$56,026,595

AR, Tab 11, Source Selection Decision Document (SSDD) at 51.

The contracting officer, who was also the source selection authority, concluded that AT&T’s proposal provided the “best overall value to the government” for task order 2. *Id.* at 60. As discussed below, the contracting officer found that “although Lumen provides a superior technical approach, those merits do not warrant paying the 115% premium over AT&T’s beneficial solution.” *Id.* at 59. The agency notified Lumen of the award to AT&T and provided a written debriefing. Protest at 2. This protest followed.²

DISCUSSION

Lumen challenges the FBI’s award to AT&T based on three primary arguments: (1) the agency misled the protester during discussions by identifying only a limited number of line item prices that the agency considered high; (2) the agency failed to identify and consider additional past performance information concerning the awardee; and (3) the award decision did not explain why the protester’s higher technically rated proposal was not worth a 115 percent price premium as compared to the awardee’s lower technically rated proposal, and that the award decision improperly departed from the solicitation’s stated selection criteria.³ Protest at 20-21, 25-29; Comments & Supp. Protest at 8-11. For the reasons discussed below, we find no merit to these arguments.

Misleading Discussions

Lumen argues that the FBI misled it during discussions by identifying only a limited number of line item prices that the agency viewed as too high. The protester contends that the agency’s discussions misled it into believing that reducing its prices for those line item prices would make its proposal competitive for award. For the reasons discussed below, find no merit to this argument.

² This task order was issued under the EIS IDIQ contracts established by GSA. The value of the protested contract task order exceeds \$10 million. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B).

³ Lumen also raises additional collateral arguments. Although we do not address each argument, we have considered all of the protester’s contentions and find that none provides a basis to sustain the protest.

Although the regulations concerning discussions in negotiated procurements conducted pursuant to FAR part 15 do not, as a general rule, govern task order competitions conducted pursuant to FAR subpart 16.5, when an agency engages in exchanges with offerors in task order competitions, such exchanges must be fair. *Tetra Tech, Inc.*, B-416861.2, B-416861.3, May 22, 2019, 2019 CPD ¶ 196 at 8; *AT&T Corp.*, B-414886 *et al.*, Oct. 5, 2017, 2017 CPD ¶ 330 at 4. Our analysis regarding fairness will, in large part, reflect the standards applicable to the negotiated procurements in FAR part 15. *Technatomy Corp.*, B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 8.

Discussions, when conducted, must identify proposal deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond, and should also discuss other aspects that reasonably could be addressed in order to materially enhance an offeror's potential for receiving award. FAR 15.306(d)(3); *Serco Inc.*, B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11. When an agency engages in discussions with an offeror, the discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. See FAR 15.306(d)(3); *Southeastern Kidney Council*, B-412538, Mar. 17, 2016, 2016 CPD ¶ 90 at 4. Agencies may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns. *MCT JV*, B-311245.2, B-311245.4, May 16, 2008, 2008 CPD ¶ 121 at 15-16; *Multimax, Inc. et al.*, B-298249.6 *et al.*, Oct. 24, 2006, 2006 CPD ¶ 165 at 12.

Where an offeror's price or cost is high in comparison to competitors' prices or the government estimate, but is not considered unreasonable overall, the agency may, but is not required to, address the matter during discussions. *IAP World Servs., Inc.*, B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4; *AT&T Gov't Solutions, Inc.*, B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 26. Where an agency elects to conduct discussions with an offeror concerning price, it is not required to advise the offeror of the specific areas where its price or cost is too high or to provide a specific price that the offeror must meet; simply advising that its price is too high is sufficient. *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 6. Agencies are also not required to advise an offeror during discussions that its costs or prices are higher or lower than other competitors. See *Centerra Group, LLC*, B-414768, B-414768.2, Sept. 11, 2017, 2017, CPD ¶ 284 at 6.

The FBI conducted discussions with offerors that addressed their task order 1 and task order 2 proposals. For task order 2, the agency identified for Lumen two discussion items, comprising 21 line item prices that the agency stated "exceed that which would be anticipated in a competitive environment."⁴ AR, Tab 6, Lumen Discussions at 29, 33-34. The agency requested that Lumen "reconsider the Proposed Unit Price

⁴ The FBI also identified numerous other discussions items that addressed areas of Lumen's task order 2 proposal where the agency believed that the proposed prices were incomplete or were unreasonable in light of differences between the task order 1 and task order 2 proposals. AR, Tab 6, Lumen Discussions at 28-34.

associated with these items within the Revised Proposal for a best and final price for these items.” *Id.* at 29, 34. The protester responded to the two discussions items by reducing its proposed prices for those line items by 20 percent. *Id.*

The FBI explains that the prices for the 21 line items identified during discussions were for items that were not on Lumen’s EIS IDIQ contract, and that were higher than those proposed by other offerors, thereby raising concerns about whether the prices were fair and reasonable. COS at 14-15; see AR, Tab 10, Price Report at 2-3. The agency states that it did not identify other line items prices for items that were on EIS’s contract, representing approximately 95 percent of all line item prices, because those prices had already been deemed fair and reasonable through the award of the EIS contract. COS at 15.

Lumen argues that the agency’s discussions were misleading because, although its proposed price was significantly higher than the awardee’s price, the agency identified only 21 out of thousands of line item prices as “exceed[ing] that which would be anticipated in a competitive environment.” Comments & Supp. Protest at 6-7. The protester contends that it was misled into believing that only 21 of its line items prices were too high, and that correction of these prices would improve its prospects for award. *Id.* The protester further states that, but for the misleading discussions, it would have made “meaningful changes” to its price. *Id.* at 7. The protester argues that it was misled in a manner similar to that addressed in our decision in *Total Home Health*, B-417283, B-417283.2, Apr. 26, 2019, 2019 CPD ¶ 166, where we found that an agency’s discussions with a protester were prejudicially misleading.

In *Total Home Health*, the protester challenged discussions that took place in a procurement conducted under a solicitation that provided for award to the offeror that submitted the lowest-priced, technically acceptable (LPTA) proposal. *Total Home Health*, *supra* at 2. During discussions, the agency advised the protester that its price proposal was “relatively weak.” *Id.* In response to the discussions notice, the protester asked the agency: “Is there [] a specific area we should be focused on within the proposal or is there a neighborhood the [agency] is looking for bidders to be in?” *Id.* at 3. The agency answered the question by advising that “[w]ith regard to your pricing, the Government anticipated lower pricing on [contract line items (CLINs)] 5, 11, and 14.” *Id.*

We first explained that where a solicitation provides that award will be made on an LPTA basis, advising an offeror that its proposal is technically acceptable, but that its price is weak, is sufficient to let the protester know that it must lower its price to be competitive for award. *Id.* at 5. For this reason, we noted that had the agency simply advised the protester that its price was too high, and declined to provide additional information, this would have satisfied the agency’s obligation to ensure that the discussions with the protester were meaningful. *Id.* We agreed with the protester, however, that the agency misled it because the agency elected to respond to the protester’s request for specific areas to improve its proposal by identifying three CLINs,

despite the fact that reduction of those three CLIN prices to \$0 would have still left the protester's price significantly higher than the awardee's price. *Id.* at 5.

The FBI and intervenor argue that our decision in *Total Home Health* does not support Lumen's protest arguments because the RFP here provided for award on a best-value tradeoff basis that considered both price and technical merit, rather than an LPTA basis. We agree.

In *Total Home Health*, we found that where an agency advises an offeror in an LPTA competition that its proposal is technically acceptable, the only possible area for the offeror to improve its proposal is in the area of price. See *Total Home Health, supra* at 5. Thus, in an LPTA procurement, a discussion that advises an offeror to reduce its price is reasonably understood to indicate that the protester must do so in order to be competitive relative to other offerors. In *Total Home Health*, we found that the agency's response to the protester's request for specific guidance about areas to improve its price was misleading because it was limited to areas that could not have improved its competitive standing. *Total Home Health, supra* at 5.

In a best-value tradeoff competition that considers both price and technical merit (e.g., technical approach, past performance, and experience), price is not the only factor that determines whether an offeror's proposal is selected for award. Firms must make judgments concerning their proposals regarding cost or price as well technical merit--particularly where, as here the solicitation states that technical merit is more important than price. For this reason, we think that an agency conducting a best-value tradeoff competition that considers both price and technical merit may reasonably identify for an offeror prices that are unreasonably high, but not advise it of areas where its prices are higher than those of other offerors.⁵

In sum, we find no merit to the protester's argument that our decision in *Total Home Health* concerning discussions in connection with LPTA award criteria applies to the circumstances here, which concern best-value tradeoff award criteria. Additionally, we note that the agency did not specifically advise Lumen that its line item or overall prices were high relative to other offerors. See AR, Tab 6, Lumen Discussions at 29, 33-34. We therefore find that the agency did not convey any misleading information about the protester's ability to improve its proposal's prospects for award, and thus find no basis to sustain the protest.

⁵ As discussed below in connection with the award decision, Lumen argues that, as in *Total Home Health*, price was the "determining factor" in the award here. Comments & Supp. Protest at 6, 7 n.1. The protester's characterization of our decision in *Total Home Health* and the facts here conflates in important distinction. Although the agency here found that advantages offered by the protester's proposal under the technical evaluation factors did not merit a 115 percent price premium, the award decision did not rely solely on the price. See AR, Tab 11, SSDD at 58-59. Rather, per the award criteria, the award decision considered the technical and price factors to make a best-value tradeoff.

Past Performance Evaluation

Lumen argues that the FBI unreasonably failed to identify and consider what the protester contends is negative information concerning AT&T's performance of similar contract requirements. We find no merit to this argument.

For the past performance factor, the RFP required offerors to submit "copies of three (3) recent and relevant ratings in the Contractor Performance Assessment Reporting System (CPARS) on Government contracts reasonably similar in scope and complexity of the services in this solicitation." RFP at 145. The agency was to evaluate the three CPARS ratings, but the RFP also advised that the agency "reserves the right to consider relevant data from other sources. . . ." *Id.* at 154. Lumen's and AT&T's proposals were each assigned a rating of satisfactory confidence for the past performance factor. AR, Tab 11, SSDD at 51.

Lumen argues that the FBI's evaluation of AT&T's past performance should have considered two contracts that were not included in the awardee's proposal, one for the U.S. Coast Guard, and the other for the Department of Homeland Security. Protest at 26. The protester contends that these contracts include requirements similar to those in the RFP and that the awardee has experienced problems in the performance of these contracts. Based on this information, the protester argues that the agency should have assigned a lower rating for AT&T's proposal under the past performance factor. The FBI states that it was not aware of and did not consider the contracts cited by the protester. COS at 18.

Our Office has recognized that in certain limited circumstances, an agency has the obligation--as opposed to the discretion--to consider outside information bearing on an offeror's past performance when those circumstances support a conclusion that the agency should have been aware of the information. See *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Our Office has generally limited application of this principle to circumstances where the information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. See *Ace-Federal Reporters, Inc.*, B-417846.4, B-417846.5, Apr. 23, 2020, 2020 CPD ¶ 150 at 12; *Leidos, Inc.*, B-414773, B-414773.2, Sept. 12, 2017, 2017 CPD ¶ 303 at 10.

We agree with the FBI that although the RFP gave the discretion to the agency to consider additional past performance references that were not identified in an offeror's proposal, there was no requirement for the agency to do so. See RFP at 154. We also agree with the agency that the limited circumstances under which our Office has found agencies obligated to consider outside information about an offeror's past performance do not apply here. In this regard, although the contracts identified by Lumen concern AT&T's alleged performance of the same or similar requirements, the performance was for contracts with the Coast Guard and the Department of Homeland Security, and not contracts performed by the FBI. See *Ace-Federal Reporters, Inc.*; *Leidos, Inc.* For

these reasons, we find no basis to conclude that the agency's evaluation of AT&T's past performance was unreasonable.⁶

Award Decision

Lumen argues that the FBI's award decision was unreasonable because it failed to explain why the protester's higher technically rated proposal was not worth a 115 percent price premium as compared to AT&T's lower technically rated proposal. The protester also argues that the award decision failed to follow the terms of the solicitation with regard to the relative weight of the evaluation factors. For the reasons discussed below, we find no merit to these arguments.

Generally, in a negotiated procurement--including task order competitions under IDIQ contracts--an agency may properly select a lower-rated, lower-priced proposal where it reasonably concludes that the price premium involved in selecting a higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower price. *OGSystems, LLC*, B-417026.5, B-417026.6, July 16, 2019, 2019 CPD ¶ 273 at 12; *NOVA Corp.*, B-408046, B-408046.2, June 4, 2013, 2013 CPD ¶ 127 at 5-6. While an agency has broad discretion in making a tradeoff between price and non-price factors, an award decision in favor of a lower-rated, lower-priced proposal must acknowledge and document any significant advantages of the higher-priced, higher-rated proposal, and explain why they are not worth the price premium. *Id.* A protester's disagreement with the agency's judgment, without more, does not establish that the award decision was unreasonable. *Id.*

The RFP described the basis for award, including the relative importance of the technical approach, transition and management, past performance, and price factors, as follows:

The Government intends to make an award(s) to the responsible Offeror(s) whose proposal, conforming to the solicitation, is determined most advantageous to the Government considering all non-price and price factors.

⁶ The protester also argues, based on its review of AT&T's redacted protest of the initial award of task order 2 to Lumen (B-420178; B-420178.2), that the agency was aware of negative past performance information concerning the awardee's performance of similar contracts because "the Government initially eliminated AT&T from consideration for this award based on its recent performance failures." Protest at 26-27. As discussed above, the FBI states that it was not aware of and did not consider the contracts cited by the protester. COS at 18. Further, the agency and intervenor explain that AT&T's proposal was assigned the same rating of satisfactory confidence as Lumen's proposal in connection with the evaluation for the initial award, and AT&T's proposal was not eliminated from award consideration based on past performance concerns. Memorandum of Law at 18; Intervenor's Resp. to Req. for Dismissal, exh. A, Initial Award Debriefing at 4. On this record, we find no merit to this argument.

The relative importance of the evaluation factors is as follows:

- All non-price evaluation factors when combined are more important than price.
- Non-price factors are shown, in Section M.2, in descending order of importance.

Offerors are reminded that the Government is not obligated to award a negotiated contract on the basis of lowest price or to the Offeror with the highest technical evaluation. As technical evaluations converge, price may become a deciding factor in the award. Therefore, after the final evaluation of proposals, the [contracting officer] will make the award to the Offeror whose proposal offers the best value to the Government considering both non-price and price factors.

RFP at 150.

As discussed above, the FBI assigned Lumen's proposal ratings of exceptional for the technical approach factor, good for the transition and management factor, and satisfactory confidence for the past performance factor. AR, Tab 11, SSDD at 51. The agency assigned AT&T's proposal ratings of good for the technical approach and the transition and management factors, and satisfactory confidence for past performance factor. *Id.* Lumen's proposed price of \$120,566,120 was 115 percent (\$64,539,525) higher than AT&T's price of \$56,026,595. *Id.*

For the technical approach factor, the agency identified numerous strengths in Lumen's proposal that outweighed the benefits provided by AT&T's proposal. *Id.* at 52-56. The agency concluded that Lumen's proposal for this factor was superior to AT&T's: "It is clear, when comparing the two Offerors, Lumen's separation from AT&T in the technical approach is significant, substantially separating the two offerors. Based on the above, Lumen's proposal is far superior to AT&T's for Technical Approach, the most important non-price factor." *Id.* at 56.

For the transition and management factor, the agency found that Lumen's proposal was "slightly stronger than AT&T's." *Id.* at 58. For the past performance factor, the agency found that "the two Offerors provide similar performance records that are not markedly distinguishable from one another." *Id.*

The agency's tradeoff decision concluded that AT&T's proposal provided the best value to the government:

When reviewing the evaluation in totality, considering the evaluation criteria, Lumen offered a far superior approach in the most important factor, Technical Approach. As discussed above on pages 47-51,

Lumen's technical approach was far superior to AT&T's. As was also noted above on pages 51-53, Lumen provided a slightly stronger Transition and Management plan, the second most important non-price factor. Lastly, as detailed above on pages 53-55, neither Offeror created separation in Past Performance. Lumen's offerings for the non-price factors, when considered in totality, are significantly stronger than AT&T at a price that is 115% higher.

Lumen's price is approximately 115% higher than AT&T's, and although Lumen provides a superior technical approach, those merits do not warrant paying the 115% premium over AT&T's beneficial solution. Specifically, AT&T's proposal has several benefits to the Government without any weaknesses or risks. Although Lumen's proposal offers more benefits than AT&T's, the additional benefits do not merit paying a 115% price premium. Accordingly, AT&T's beneficial proposal that offers significant cost savings to the Government in comparison to Lumen's proposal is the best value to the Government.

Id. at 59.

Lumen argues that the agency's tradeoff rationale does not explain "why" the merits of its proposal was not worth a 115 percent price premium. Comments & Supp. Protest at 2-5. The record shows, however, that the agency acknowledged the benefits provided by the protester's proposal, and found that Lumen's proposal was "far superior" to AT&T's under the most heavily weighted technical approach factor and "slightly stronger" under the second-most heavily weighted transition and management factor. AR, Tab 11, SSDD at 56, 58. The agency also found, however, that AT&T's proposal "has several benefits to the Government without any weaknesses or risks." *Id.* at 59. We find that the agency clearly recognized the benefits of the protester's proposal, but expressly found that they were not worth the price premium. Lumen's disagreement with the agency's subjective judgment here does not provide a basis to sustain the protest.

The protester also argues that the tradeoff decision departed from the solicitation's award criteria because price was identified as the least important factor. Comments & Supp. Protest at 11. The protester notes that the RFP stated that "[a]s technical evaluations converge, price may become a deciding factor in the award." RFP at 150. In essence, the protester argues that the RFP provided that price may only increase in importance where the technical results "converge," *i.e.*, where the technical merits were close.

The RFP, however, clearly advised that "the [contracting officer] will make the award to the Offeror whose proposal offers the best value to the Government considering both non-price and price factors." RFP at 150. As our Office has explained, an agency may reasonably select for award a lower-rated, lower-priced proposal, provided the agency explains why the non-price benefits are not

worth the price premium. *OGSystems, LLC, supra; NOVA Corp., supra*. We do not agree with the protester that the RFP states that a lower-priced proposal may only be selected for award where the proposals “converge” in terms of technical merit. Moreover, the protester incorrectly contends that price was the determining factor in this award. Instead, as the RFP required and the selection decision explains, the contracting officer considered both the technical merits and prices for each proposal in concluding that AT&T’s proposal provided the best value. See AR, Tab 11, SSDD at 59. In sum, we find no basis to conclude that the award decision was unreasonable.

The protest is denied.

Edda Emmanuelli Perez
General Counsel