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Decision

Matter of: ConsortiEX, Inc.

File: B-422078; B-422078.2

Date: December 22, 2023

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DIGEST

1. Protest that the solicitation was latently ambiguous is without a basis where the protester does not show an ambiguity. To the extent the protester alleges a lack of clarity in the solicitation, the alleged lack of clarity was evident prior to the deadline for receipt of proposals, and this argument, having first been raised after award, is dismissed as an untimely challenge to the terms of the solicitation.
 2. Protest alleging the contracting officer ignored adverse information when making a responsibility determination is dismissed where the assertion on which the protest is based does not constitute the type of allegation that triggers a review under our Bid Protest Regulations.
 3. Protest that the agency's past performance evaluation was unreasonable is denied where the agency's judgments were reasonable and consistent with the terms of the solicitation.
 4. Protest challenging the agency's best-value award decision is denied where the record shows that the selection authority's comparisons were meaningful and based on the agency's reasonable evaluation of the competing proposals.
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DECISION

ConsortiEX, Inc., a small business of Milwaukee, Wisconsin, protests the award of a contract to LSPedia, Inc., a small business of Farmington Hills, Michigan, under request for proposals (RFP) No. 36C10B23R0021, issued by the Department of Veterans Affairs (VA), for implementation and subscription services to ensure VA compliance with the Drug Supply Chain Security Act (DSCSA). The protester contends that the RFP was latently ambiguous with respect to the level of effort required and challenges the VA's evaluation of proposals and source selection decision.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The VA issued the solicitation on August 16, 2023, as a small business set-aside pursuant to the procedures of Federal Acquisition Regulation parts 12 and 19.¹ Agency Report (AR), Tab 4, RFP at 1; COS at 2. The solicitation's PWS explains that DSCSA, 21 U.S.C. §§ 351-360eee-1, requires that drugs be tracked through the supply chain and that their provenance can be established by tracing ownership from the manufacturer to the dispenser on an interoperable data exchange. AR, Tab 5, RFP amend. 1 at 18. The solicitation sought a contractor to provide project management and development for implementation and subscription services to VA locations to ensure that the VA complies with the DSCSA, and to provide education on the use of the system software, including virtual calls for each level of training.² *Id.* at 21; *see also* COS at 1. In short, the contractor was to provide the VA with tools and support needed to meet the requirements of the DSCSA. RFP at 21.

The solicitation contemplated the award of a fixed-price contract with a 12-month base period and four 12-month option periods. RFP amend. 1 at 22. Award was to be made on a best-value tradeoff basis considering the following factors, listed in descending order of importance: technical, past performance, price, and veterans involvement.³

¹ The agency amended the RFP once, on August 22, 2023. Contracting Officer's Statement (COS) at 2. As relevant here, amendment 1 provided a revised version of the performance work statement (PWS), and that version of the PWS is cited here. Amendment 1 did not change the solicitation instructions or the evaluation criteria, and we cite the initial solicitation for that information.

² The PWS provided that the scope of work included all VA locations with a pharmacy that stores or receives pharmaceuticals, consolidated mail outpatient pharmacies, and emergency pharmacy services. RFP amend. 1 at 21.

³ An offeror would receive credit under the veterans involvement factor if the offeror was a service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB). RFP at 107. An offeror that proposed to subcontract with an SDVOSB or VOSB would receive a rating of "some consideration" under the factor. *Id.*

RFP at 105. The solicitation stated that the nonprice factors, when combined, were significantly more important than price. *Id.*

As relevant here, the solicitation provided that the technical factor evaluation would consider the offeror's understanding of the problem, as well as the feasibility of the proposed approach.⁴ RFP at 106. With respect to the price evaluation, the solicitation stated that the agency would evaluate price by adding up all of the line item prices, including all options. *Id.*

For past performance, the solicitation instructed offerors to submit a list of all contracts performed in the three years preceding the proposal submission deadline that were relevant to the solicitation.⁵ RFP at 111. In addition to the list of relevant contracts, the solicitation required offerors to provide a narrative explanation for each contract listed, which described the objective achieved and explained how the effort was relevant to the requirements of the RFP. *Id.* at 112. The solicitation stated that areas of relevance included track and trace services and DSCSA compliance. *Id.* at 111. The solicitation provided that the agency would assess the relative risks associated with the offeror's likelihood of success in fulfilling the requirements, as indicated by the offeror's past performance record. *Id.* at 106.

The VA received timely proposals from six offerors, including the protester and LSPedia. AR, Tab 7, Source Selection Decision (SSD) at 4. The ratings and prices for ConsortiEX and LSPedia were as follows:

	ConsortiEX	LSPedia
Technical	Good	Good
Past Performance	Low Risk	Low Risk
Veterans Involvement	Some Consideration	No Credit
Price	\$33,800,000	\$1,082,000

Id.

The contracting officer, who acted as the source selection authority, reviewed the evaluation findings and compared the offerors' proposals. COS at 2-3. The contracting officer reviewed the evaluators' substantive assessments and concluded that LSPedia's

⁴ The solicitation stated that the agency would evaluate an offeror's understanding of the problem by determining the extent to which the proposal demonstrated a clear understanding of all features involved in solving the problem, meeting or exceeding the requirements, and the extent to which uncertainties were identified and resolutions proposed. RFP at 106. For feasibility, the agency would evaluate the extent to which the proposed approach was workable and the end results achievable. *Id.*

⁵ The solicitation stated that the list of contracts should include prime contracts, task and delivery orders, and major subcontracts with federal, state, and local government, as well as private sector customers. RFP at 111.

proposal presented the best value. *Id.*; see also AR, Tab 7, SSD at 5. In reaching this conclusion, the contracting officer observed that both offerors' proposals were rated as good under the technical factor, both were rated as having low risk for the past performance factor, and the protester's proposal received some consideration that LSPedia's proposal did not under the veterans involvement factor. AR, Tab 7, SSD at 19. The contracting officer observed that LSPedia submitted a larger number of relevant contracts. *Id.* Noting that the two proposals received essentially the same technical and past performance ratings, the contracting officer concluded that any benefit associated with ConsortiEX's proposed involvement of veterans was insufficient to outweigh the technical benefits detailed in LSPedia's past performance report and LSPedia's substantially lower price. *Id.* Stated differently, the agency found nothing in the protester's proposal that could justify paying the proposal's price, which was nearly 34 times higher than LSPedia's. The contracting officer selected LSPedia's proposal for award. *Id.* at 21.

The VA notified ConsortiEX that its offer was unsuccessful and provided the firm with a debriefing. ConsortiEX then filed this protest with our Office.

DISCUSSION

The protester contends that the solicitation's PWS contained latent ambiguities regarding the level of effort necessary to perform the contract. Comments & Supp. Protest at 3-4. The protester also complains that LSPedia's low price indicated that LSPedia did not understand the requirements, and as a result, the VA should have found that LSPedia was not responsible and referred the firm to the Small Business Administration (SBA) under its certificate of competency procedures. Protest at 2. Additionally, the protester contends that LSPedia's proposal should not have been rated as low risk under the past performance factor because it has not performed a contract with the federal government, and the protester also complains that the agency's best-value tradeoff was unreasonable. *Id.* We have reviewed all of these challenges and conclude that none provides us with a basis to sustain the protest.⁶

Latent Ambiguity

ConsortiEX argues "that the Solicitation contained latent ambiguities that led ConsortiEX to compete against an understanding of the requirements that differed from the Agency's." Comments & Supp. Protest at 4. The protester complains that these ambiguities led it to price its proposal substantially higher than the agency's independent government cost estimate (IGCE) and LSPedia's proposed price. *Id.* But for the alleged ambiguities, ConsortiEX claims that it would have submitted a more competitively priced proposal. *Id.* The VA responds that the PWS was unambiguous,

⁶ In its various submissions, ConsortiEX presents arguments that are variations of, or additions to, those discussed below. Although we do not specifically address every argument raised by the protester, we have considered them and find none to be meritorious.

and the protester's interpretation of the provisions at issue was unreasonable. Supp. Memorandum of Law (MOL) at 9.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solutions are possible. *KMK Constr., Inc.*, B-418639.2, Dec. 29, 2020, 2021 CPD ¶ 45 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle; a latent ambiguity exists when, for example, the solicitation is susceptible to two reasonable interpretations that do not rely on conflicting solicitation terms. *IBM Corp., IBM Consulting--Fed.*, B-421471 *et al.*, June 1, 2023, 2023 CPD ¶ 135 at 11. Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Simont S.p.A.*, B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4. Where, before the deadline for proposal submission, a protester is aware of an ambiguity, such as a solicitation's lack of clarity, that ambiguity is patent, and a protest of the ambiguity is timely only if filed before the proposal deadline. *IBM Corp., supra* at 11-12; *Cybergenic Sys., LLC*, B-421213, Jan. 19, 2023, 2023 CPD ¶ 31 at 4; *MindPetal Software Sols., Inc.*, B-418016, Dec. 20, 2019, 2020 CPD ¶ 9 at 5 n.3; *Glock, Inc.*, B-414401, June 5, 2017, 2017 CPD ¶ 180 at 14.

ConsortiEX contends that six sections of the PWS suffered from latent ambiguities. Comments & Supp. Protest at 8-9. We find that the protester has not demonstrated that the PWS contained any ambiguities. To the extent that ConsortiEX alleges that the PWS was vague, its arguments constitute untimely challenges to the terms of the solicitation because they were not raised prior to the closing date for receipt of proposals. We discuss below two representative examples of the PWS requirements that the protester complains were ambiguous.

The protester asserts that PWS section 5.2, Implementation [of a monthly progress report], which requires the contractor to provide, among other things, "Visibility in vendor software of exchanged and stored DSCSA required data for every VA location that receives or stores pharmaceuticals," is latently ambiguous because the PWS does not state whether "required data" includes paper records. Comments & Supp. Protest at 8 (*quoting* RFP amend. 1 at 24). The protester states that it assumed, based on its experience performing other VA contracts, that the PWS required processing of at least 65,000 paper records per year. *Id.* The VA responds that the protester's interpretation is unreasonable because the PWS does not refer to paper claims or paper processing, and it adds that "the Solicitation requires the contractor [to] provide 'software for data exchange, storage and retrieval.'" Supp. COS at 3 (*quoting* RFP at 27).

While the protester is correct that the PWS was silent as to whether "required data" included paper records, it has not advanced any reasonable alternative interpretation of that requirement, as required to demonstrate an ambiguity. The protester assumed that it would need additional personnel to process paper records. While this approach reflects ConsortiEX's approach to pricing PWS section 5.2, we do not find it demonstrates an ambiguity in the PWS. See *General Dynamics Info. Tech., Inc.*,

B-420589, B-420589.2, June 15, 2022, 2022 CPD ¶ 149 at 20. Rather, because ConsortiEX viewed the inclusion of paper records as critical to its proposal,⁷ and because the PWS provided no specific guidance on the topic, ConsortiEX was required to file any protest based on this alleged lack of clarity before the deadline for the receipt of proposals. 4 C.F.R. § 21.2(a)(1); see *IBM Corp., supra*.

As an additional example, the protester argues that the following PWS provision was latently ambiguous with regard to the work required for data tracing/retrieval in support of audits, recalls, and investigations:

1. VA transaction data retrieval process to include:
 - a. Respond to request for information
 - i. Within 24 hours for authorized auditing body (e.g., Office of the Inspector General, Federal Drug Administration)
 - ii. Within 2 days for an Authorized Trading Partner (ATP) in the event of a recall or investigation into suspected illegitimate product.

Comments & Supp. Protest at 9 (*quoting* RFP amend. 1 at 26-27). The protester argues that in order to respond to requests for information within the specified time, the contractor is required to provide code scanning and purchase order processing activities such as paper processing of drop shipments, and the protester asserts that it reasonably included personnel to perform these services in its proposed price. *Id.* The agency does not dispute that the PWS requires the contractor to respond to requests for information; instead, the VA argues that the protester's labor-intensive, paper processing process is inconstant with the nature of the contract, which requires electronic methods of data tracing, not paper processing. Supp. MOL at 15.

We have reviewed the record and are not persuaded by the protester's arguments. As an initial matter, ConsortiEX has again not identified any aspect of the PWS for which two or more reasonable interpretations of the solicitation's terms are possible; that is, it has not supported its assertion that the RFP was ambiguous. Absent such a threshold showing, we conclude that this protest ground fails to state a legally sufficient basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); *Novetta, Inc.*, B-414672.4, B-414672.7, Oct. 9, 2018, 2018 CPD ¶ 349 at 22. To the extent the protester's contention does not involve an ambiguity, but rather, alleges a lack of specificity in the PWS concerning the number of requests for information the contractor would be required to respond to or whether processing of paper records was required, the protester was required to protest the lack of clarity prior to the deadline for proposal submission. *IBM Corp., supra*.

In sum, we find that the protester's allegations here do not pertain to ambiguities in the PWS. Rather, the protester essentially argues that these aspects of the PWS--as well as four other requirements--were vague. ConsortiEX's allegations constitute challenges

⁷ The protester notes that it proposed to perform PWS task 5.2 for \$[DELETED] million in the base year; the IGCE priced the work at \$200,000. Comments & Supp. Protest at 7.

to the terms of the solicitation, and because they were not raised prior to the closing date for receipt of proposals, we dismiss them as untimely.

Responsibility Determination

ConsortiEX argues that the agency failed to consider adverse information with respect to its affirmative responsibility determination for LSPedia. Protest at 12. Specifically, the protester asserts that the awardee's "drastically lower price should have alerted the Agency that LSPedia did not understand the requirements." *Id.* at 14. The protester asserts that if the VA had referred LSPedia to the SBA under its certificate of competency procedures, the SBA would have deemed LSPedia non-responsible. *Id.* The agency responds that the protester's allegations do not satisfy our Office's threshold for review and should therefore be dismissed. MOL at 4.

Our Office will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 4 C.F.R. § 21.5(c). We therefore have reviewed circumstances such as: credible allegations that an agency failed to properly consider that a contractor committed fraud; allegations that principals of a contractor had criminal convictions; or, allegations that a contractor engaged in improper financial practices and improperly reported earnings. *Cargo Transport Sys. Co.*, B-411646.6, B-411646.7, Oct. 17, 2016, 2016 CPD ¶ 294 at 11.

Here, we agree with the agency that LSPedia's submission of a lower-priced offer does not meet our threshold to review the responsibility determination. *Peraton, Inc.*, B-420918.2, B-420918.3, Dec. 8, 2022, 2022 CPD ¶ 311 at 9. Our Office has explained that the submission of even a below-cost offer is not in itself legally objectionable, and does not, by itself, cast any doubt upon the reasonableness of the responsibility determination. *Id.*; see also *VetPride Servs., Inc.*, B-419622, B-419622.2, June 7, 2021, 2021 CPD ¶ 226 at 5 n.5. Accordingly, we dismiss this protest allegation for failure to state a valid basis for protest.

Past Performance Evaluation

The protester complains that LSPedia's proposal should not have been rated low risk under the past performance factor because LSPedia has not performed a contract with the federal government, and its customers (pharmacy manufacturers and prime contractors) are not similar to a VA medical center.⁸ Protest at 16-17. The VA

⁸ In its initial protest, ConsortiEX also alleged LSPedia misrepresented its experience with Rite Aid Pharmacy on the company's website and speculated that LSPedia made similar misrepresentations in its proposal. Protest at 18. Before filing the agency report, the VA submitted a request for dismissal of this allegation. After reviewing the agency's request and the protester's response, we advised the parties that we intended
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responds that the allegation is baseless because the solicitation provided that an offeror could submit contracts performed for government or private sector customers, and the solicitation did not limit relevancy to VA medical centers. MOL at 10. The agency also states that LSPedia included 345 past performance references in its proposal, and the VA found the contracts to be recent and relevant. *Id.* at 11.

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 which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *Metropolitan Interpreters & Translators, Inc.*, B-415080.7, B-415080.8, May 14, 2019, 2019 CPD ¶ 181 at 10. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *CrowderGulf, LLC et al.*, B-418693.9 *et al.*, Mar. 25, 2022, 2022 CPD ¶ 90 at 20.

Based on our review of the record here, we conclude that the agency's evaluation was consistent with the terms of the RFP and therefore reject the protester's challenge to the agency's past performance evaluation. ConsortiEX contends that LSPedia's proposal should not have received a low risk rating because "Past performance with the private sector is inherently different from past performance with the Federal Government, in terms of both scale and organizational idiosyncrasies." Comments & Supp. Protest at 16. However, as the agency points out, the solicitation did not define relevant as a contract with the federal government. Instead, the solicitation stated that areas of relevance included track and trace services and DSCSA compliance, and the solicitation permitted offerors to submit contracts performed for private sector customers. RFP at 111. LSPedia included 345 past performance references in its proposal, many of which involved providing end-to-end DSCSA compliance. See AR, Tab 15, LSPedia Past Performance Proposal. In the VA's past performance evaluation, the agency noted that LSPedia provided end-to-end DSCSA compliance and supply chain software solutions to two hospitals. COS at 12; AR, Tab 13, Past Performance Evaluation Report at 2-3. Fundamentally, the protester disagrees with the weight the

to dismiss this protest ground. Our Bid Protest Regulations require that a protest include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), and 21.5(f). That is, a protest must include sufficient factual bases to establish a reasonable potential that the protester's allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. *Ahtna Facility Servs., Inc.*, B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. Unsupported assertions that are mere speculation on the part of the protester do not provide an adequate basis for protest. *Science Applications Int'l Corp.*, B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2. The protester has no knowledge of the contents of LSPedia's proposal, and its allegation relies solely on speculation. According, this allegation is dismissed. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 4 ("[T]he allegation amounts to little more than conjecture and does not provide a valid basis of protest.").

VA gave to LSPedia's private sector contracts in assigning a low risk rating. Such disagreement does not provide a basis to sustain the protest. *CrowderGulf, supra*.

Best-Value Award Decision

Finally, ConsortiEX argues that the agency conducted an unreasonable best-value "tradeoff" because the agency relied on flawed evaluation findings, and the source selection authority failed to look beyond the adjectival ratings.⁹ Comments & Supp. Protest at 17-18. The VA responds that the best-value determination was reasonable, the contracting officer gave careful and thoughtful consideration of the proposals, and the contracting officer did not accept the evaluators' findings at face value. Supp. MOL at 24; Supp. COS at 11.

In a best-value tradeoff procurement, it is the function of the source selection authority to perform a tradeoff between cost and non-cost factors, that is, to determine whether one proposal's superiority under the non-cost factor is worth a higher cost. *TRAX Int'l Corp.*, B-420361.7, B-420361.8, June 28, 2023, 2023 CPD ¶ 162 at 19. No price/technical tradeoff is required as part of a best-value source selection, however, when proposals or quotations are deemed technically equal and one was lower-priced than the other. See, e.g., B-420246, *RiverTech, LLC*, Dec. 21, 2021, 2021 CPD ¶ 393 at 5.

ConsortiEX's protest allegations find no support in the record. The protester's arguments regarding the best-value award decision ignore both the degree to which the proposals were considered similar or equal under the nonprice factors and the dramatic difference between their prices. Moreover, the record demonstrates that the evaluators gave thoughtful consideration to the entirety of the competing proposals. Inasmuch as the source selection authority adopted those findings, we deny the allegation that the source selection unreasonably failed to meaningfully consider proposal differences.¹⁰

⁹ Although not determinative here, we disagree with ConsortiEX's characterization of the best-value determination as involving a tradeoff.

¹⁰ We also reject the protester's assertion that the contracting officer failed to look behind the ratings and simply accepted the evaluators' findings. The record reflects that the contracting officer reviewed the evaluators' findings as well as the offerors' proposals. Supp. COS at 11; AR, Tab 7, SSD at 5. Contrary to the protester's assertions, the source selection decision included a substantive discussion of the evaluation results for each factor. AR, Tab 7, SSD at 5-19. The contracting officer then compared the proposals eligible for award. After reviewing the evaluation results for ConsortiEX's and LSPedia's proposals, the source selection authority wrote: "the benefits associated with [ConsortiEX's] proposal in the Veterans Involvement Factor, which is the least important factor, do not outweigh the technical benefits detailed in [LSPedia's] reports and lower price associated with [LSPedia's] proposal." *Id.* at 19. The source selection authority reasonably found that any benefits in the protester's

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Avionic Instruments LLC, B-418604.3, May 5, 2021, 2021 CPD ¶ 96 at 8. Given our conclusions, above, that the agency's underlying evaluation of the offerors' proposals was reasonable, we deny the protester's derivative challenge to the best-value award decision.

The protest is dismissed in part and denied in part.

Edda Emmanuelli Perez
General Counsel

proposal did not warrant a 97 percent price premium. Based on the record presented, we find no basis to object to the best-value award decision.