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Decision

Matter of: Sysco Central Texas, Inc.

File: B-422356

Date: May 8, 2024

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DIGEST

1. Protest arguing that the agency failed to consider past performance information of the awardee for a contract awarded after the solicitation's closing date and before award is denied where the agency was not required to consider that information.
 2. Agency's selection of a technically superior, lower-priced proposal for award is unobjectionable where the award decision was reasonable, adequately documented, and consistent with the terms of the solicitation.
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DECISION

Sysco Central Texas, Inc., of New Braunfels, Texas, protests the award of a contract to Labatt Institutional Supply Company (d/b/a Labatt Food Service or Labatt Food Service Corporation), of San Antonio, Texas, under request for proposals (RFP) No. SPE300-20-R-0035, issued by the Department of Defense, Defense Logistics Agency (DLA), for subsistence products. The protester challenges the agency's evaluation of the awardee's past performance and the award decision.

We deny the protest.

BACKGROUND

On September 11, 2020, the agency issued the RFP for a contractor to supply subsistence products, including food and beverage items for Department of Defense and other federally funded customers in the Central Texas area. Agency Report (AR),

Exh. 1, RFP at 88.¹ The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity contract with economic price adjustment, with a guaranteed minimum of \$6.3 million and a maximum of \$126 million. *Id.* The contract would be performed over 60 months, including a first tier period of 36 months and a second tier period of 24 months. *Id.*

The RFP stated that award would be made on a best-value tradeoff basis considering four factors: technical--resource availability; technical--quality control, assurance, and warehouse management system procedures; past performance; and price. *Id.* at 171, 197. For past performance, the RFP instructed that “the offeror shall provide the information required” for contracts “submitted for the timeframe of up to three years prior to the closing date of the solicitation.” *Id.* at 175. The RFP provided that the agency would evaluate the information provided by the offeror and that, “in establishing what is recent for past performance, consideration will be given to those contracts provided with any contract performance within the timeframe of up to three years prior to the solicitation closing date up to the time of award.” *Id.* at 198. The RFP also reserved to the agency the right to consider other information by providing that the agency “may also obtain and use past performance information from sources other than those identified by the offeror, including those from publicly available, non-confidential verifiable sources.” *Id.* at 176, 198.

On or before the November 20, 2020, amended closing date for initial proposals, the agency received proposals from two offerors: Sysco and Labatt. Over the course of the next almost three years, the agency: established a competitive range and held six rounds of negotiations with the offerors; sent two requests for final proposal revisions (FPRs); and received FPRs on or before March 24, 2023. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 12-18. The agency evaluated the FPRs as follows:

	Sysco	Labatt
Technical--Resource Availability	Outstanding	Outstanding
Technical--Quality Control, Assurance, and Warehouse Management System Procedures	Outstanding	Outstanding
Past Performance	Substantial Confidence	Substantial Confidence
Total Evaluated Price	\$28,950,087	\$28,482,434

AR, Exh. 17, Source Selection Decision Document (SSDD) at 9, 36.

¹ The agency amended the RFP five times. References to the RFP are to the conformed version provided by the agency. All citations are to the Adobe PDF page numbers of the documents referenced in this decision, unless otherwise paginated.

The source selection authority (SSA) considered the evaluation results and documented a detailed comparative analysis of the proposals and the award decision. In determining that Labatt's proposal represented the best value to the government, the SSA concluded that Labatt "has a superior non-price proposal and offers the lowest evaluated price," and that it was not in the agency's best interest to pay a premium of \$467,653, or 1.62 percent, for Sysco's "inferior non-price proposal." *Id.* at 37, 40. Of note, the SSA considered Labatt's past performance record to be "slightly superior" to Sysco's based on "a better record of quality performance."² *Id.* at 39.

On January 24, 2024, the agency awarded the contract to Labatt and notified Sysco of the award decision. See Protest, exh. 1, Unsuccessful Proposal Notification Letter. After a debriefing, this protest followed.

DISCUSSION

Sysco primarily challenges the agency's evaluation of Labatt's past performance, as well as the agency's award decision. While we do not specifically address all of the protester's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.³

Past Performance

Sysco argues that the agency was required, and failed, to consider Labatt's performance on a contract that was awarded to Labatt after the submission of FPRs and before award. As noted above, the agency received FPRs on or before March 24, 2023, and announced its award decision on January 24, 2024. On November 19, 2023, Labatt began performing an interim contract awarded by the DLA to supply subsistence products in San Antonio, Texas, which the protester characterizes as "the same

² The SSA also considered the proposals to be "equal" under the technical--resource availability factor as they each demonstrated "slight superiority" under different aspects; and that Labatt's proposal was "slightly superior" under the technical--quality control, assurance, and warehouse management system procedures factor as it contained, for instance, additional procedures that were considered more beneficial than those offered in Sysco's proposal. *Id.* at 38. These technical considerations are not at issue in the protest and are not further discussed.

³ In its protest, Sysco also argued that the agency breached the duty of good faith and dealing due to the "undue delay" between issuing the RFP and making the award decision, which the protester characterized as "stringing [Sysco] along for three years." Protest at 8. The agency explained in detail that it held six rounds of negotiations "in an effort to increase competition" and allow the protester to cure its initially unacceptable proposal. The agency also asserted that it "did not breach any duty of good faith and fair dealing with the protester and did not prejudice the protester by allowing it numerous attempts to submit a valid offer that could be considered for award." COS/MOL at 2, 27-31. Sysco then withdrew this protest ground. Comments at 2 n.1.

services in the same region for the same agency.” Protest at 7. In this context, Sysco argues that the San Antonio contract, which had not yet been awarded and therefore was not referenced in Labatt’s FPR, had to be considered recent per the terms of the RFP and was “too close at hand” for the agency to ignore. *Id.* at 6; see also Comments at 10-11. In response to the protest, the agency explains that it did not consider the San Antonio contract and argues that it was not required to do so.⁴ COS/MOL at 23.

Our Office will examine an agency’s evaluation of an offeror’s past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror’s past performance is primarily a matter within the agency’s discretion. *American Env’tl Servs., Inc.*, B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5; *AT&T Gov’t Sols., Inc.*, B-406926 *et al.*, Oct. 2, 2012, 2013 CPD ¶ 88 at 15-16. Further, where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Alluviam LLC*, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2. Where a dispute exists as to a solicitation’s actual requirements, we will first examine the plain language of the solicitation. *Point Blank Enters., Inc.*, B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4.

As a preliminary matter, while the protester argues that the RFP required the agency to consider recent past performance up to the time of award, we find that the RFP contained a patent ambiguity. As noted above, the RFP instructed offerors to submit contracts to be considered for “the timeframe of up to three years prior to the closing date of the solicitation.” RFP at 175. The RFP also provided that the agency would consider “those contracts provided” by the offerors for “the timeframe of up to three years prior to the solicitation closing date up to the time of award.” *Id.* at 198. Indeed, as the protester points out, both definitions for recency are referenced in the SSA’s decision document. Comments at 8 n.4, *citing* AR, Exh. 17, SSDD at 7.

⁴ The agency also disputes the protester’s claim that Labatt has failed to perform the requirements of the San Antonio contract. The agency explains that after receiving the protest, it confirmed that Labatt has exceeded the requirements and “there are no known failures to meet fill rate requirements under the bridge [or interim] contract in question, contrary to the protester’s unsupported claims.” COS/MOL at 25, *citing* AR, Exh. 22, Contracting Officer’s Decl. While the protester questions the veracity of the agency’s response, Sysco concedes that “the content of the ignored information is immaterial,” and we need not resolve this question of fact because, as the agency notes, the dispositive issue before our Office is not the quality of the San Antonio contract performance but whether the agency was required to consider this contract at all in its evaluation of Labatt’s past performance. Comments at 9; Agency’s Resp. to Req. for Suppl. Documents at 3, 5.

Given this conflict in the RFP, we find that there is, at best, a patent ambiguity in the solicitation. An ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious or glaring error, while a latent ambiguity is more subtle. *One Community Auto, LLC*, B-419311, Dec. 16, 2020, 2020 CPD ¶ 405 at 4. Our Bid Protest Regulations require that protests of the terms of a solicitation, including protests challenging patent ambiguities, must be filed prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

Therefore, while Sysco's position relies on establishing that the RFP required the agency to consider recent past performance up to the time of award, this timeframe is based on one interpretation of a patently ambiguous term in the RFP that the protester was required to challenge prior to the submission of proposals. See, e.g., *STAcqMe LLC*, B-417128, Feb. 25, 2019, 2019 CPD ¶ 95 at 5-6 (acknowledging that information provided in a solicitation's instructions section is not the same as evaluation criteria detailed in the solicitation, but finding that "to the extent that the differing definitions of recency create a conflict or ambiguity in the solicitation, any such ambiguity was patent and must have been protested prior to the closing time for receipt of proposals").

More importantly, the protester has not established that this or any other language in the RFP required the agency to consider the San Antonio contract. As noted above, the RFP reserved to the agency the right to consider past performance information "from sources other than those identified by the offeror[.]" RFP at 176, 198. In other words, the RFP permitted, but did not require, the agency to consider other past performance information.

Indeed, the record shows that the agency considered some "other" past performance information, i.e., information not submitted by the offeror. Specifically, where both Sysco and Labatt submitted DLA contracts in their proposals, the agency "pulled in-house records" and considered interim contracts that directly followed those contracts submitted by the offerors. Those interim, or "bridge" contracts included some performance after the solicitation closed. AR, Exh. 17, SSDD at 30, 32. Unlike those bridge contracts, however, there is no indication in the record that the San Antonio contract was a direct follow-on to a contract submitted in Labatt's proposal.

Moreover, the agency explains that it did not consider past performance information about either offeror "in the short period just before award" and that the San Antonio contract fell into this period that the agency did not consider. COS/MOL at 24. As noted above, the agency received FPRs on or before March 24, 2023, and announced the award on January 24, 2024. AR, Exh. 17, SSDD at 40-41; Protest, exh. 1, Unsuccessful Proposal Notification Letter at 1. In this context, the agency explains that, because the San Antonio contract began on November 19, 2023, well after the deadline for FPRs and shortly before the award,

the Agency had no duty to consider the performance of this new bridge contract that was awarded only shortly before the award protested herein was issued. The Agency is not obligated to, not functionally able to,

review every potential new contract and updated performance information on existing contracts after the close of negotiations and just shortly before award. Doing so would mean continually re-opening negotiations and would make it difficult, if not impossible, to issue any award.

COS/MOL at 25; see also *id.*, citing *American Apparel, Inc.*, B-407399.2, Apr. 30, 2013, 2013 CPD ¶ 113 at 5 and *FR Countermeasures, Inc.*, B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 5 (agency not required to consider past performance information outside of the time period set forth in the solicitation, even where solicitation reserved the agency's right to do so).

We find the agency's explanation reasonable. While the RFP reserved to the agency the right to consider other past performance information, it did not require such consideration. Moreover, the protester does not allege, nor does the record show, that the agency treated offerors unequally in not considering the San Antonio contract. See *FR Countermeasures, Inc.*, *supra* at 5.

As a final matter, we address the protester's characterization of the San Antonio contract as "too close at hand" for the agency to ignore. Protest at 6, citing *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114.

While agencies generally need not evaluate all past performance references, or those not reflected in the proposals, our Office has recognized that in certain limited circumstances an agency evaluating an offeror's past performance has an obligation (as opposed to the discretion) to consider past performance information that is "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information." *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340 at 22, citing *International Bus. Sys., Inc.*, *supra* at 5 (concluding that the agency could not reasonably ignore information submitted by the protester regarding the protester's performance of a recent contract involving the same agency, virtually the same services, and the same contracting officer, simply because an agency official failed to complete the past performance assessment).

Our Office has explained that we generally limit the application of this principle to certain limited circumstances, such as situations where the alleged "too close at hand" past performance information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. *Exelis Sys. Corp.*, *supra* at 22. Our Office has not extended the "close at hand" principle to apply to every case where an agency might conceivably find additional past performance information regarding an offeror's proposal. *Madison Research Corp.*, B-295716, Apr. 25, 2005, 2005 CPD ¶ 95 at 7, citing *U.S. Facilities, Inc.*, B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 12.

Further, in order to succeed on this claim, the protester must show that that the agency was aware (or should have been aware) of the information and that the agency acted unreasonably in failing to consider it. *TriWest Healthcare Alliance Corp.*, B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191 at 33. While Sysco observes that the San

Antonio contract involved the same agency and similar services as this procurement, Sysco has not established that the agency's past performance evaluators and SSA were involved in the San Antonio contract.⁵ Moreover, Sysco has not established that the agency acted unreasonably in not considering the San Antonio contract. Among other things, as discussed above, the RFP did not require the agency to consider this contract, and the agency reasonably explains that it did not, and was not obligated to, consider past performance for either offeror in the short timeframe before award.

Under these circumstances, the protester has not established that the agency was required to consider, or acted unreasonably in not considering, the San Antonio contract in its evaluation of Labatt's past performance. Given that the protester has not challenged any other aspect of the past performance evaluation, we have no basis to further question the reasonableness of the evaluation, and we deny this protest ground.

Award Decision

Sysco also argues that the agency failed to adequately document its award decision. Protest at 8; Comments at 11. In this context, the protester argues that the SSA performed only a mechanical comparison of past performance based on adjectival ratings and "failed to document *any* past performance facts or findings whatsoever." Comments at 12 (emphasis original).

The protester's complaints are belied by the record, which demonstrates that the agency's decision was reasonable, adequately documented, and in accordance with the terms of the solicitation. A source selection official has broad discretion in determining the manner and extent to which he or she will make use of technical, past performance, and cost/price evaluation results, and this judgment is governed only by the tests of rationality and consistency with the stated evaluation criteria. *All Point Logistics*, B-407273.53 June 10, 2014, 2014 CPD ¶ 174 at 13-14. A protester's disagreement with the agency's determinations as to the relative merits of competing proposals, or disagreement with its judgment as to which proposal offers the best value to the agency, does not establish that the source selection decision was unreasonable. *General Dynamics-Ordnance & Tactical Sys.*, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 8.

Here, the record shows that the SSA provided a well-reasoned basis for its source selection decision, in which it compared the various qualitative aspects of the proposals and concluded that Labatt's proposal was the best value and presented the superior non-price proposal and lowest price. See AR, Exh. 17, SSDD at 37-40.

⁵ Also, while the protester observes that the contracting officer for this procurement is listed as a "secondary point-of-contact" for the San Antonio contract, other agency documentation provided by Sysco names a different individual as the contracting officer for the San Antonio contract. Protest at 7 n.2; Protest, exh. 6, Justification and Approval for San Antonio Contract at 4; see also AR, Exh. 22, Contracting Officer's Decl. at 1.

Specifically, with respect to past performance, the SSA documented a detailed comparison of the proposals and concluded that Labatt's proposal was superior. The SSA noted that: both offerors received ratings of substantial confidence; the agency "has a high expectation that either offeror will successfully perform the required effort"; and, in looking beyond the adjectival ratings, Labatt's past performance record "is considered to be slightly superior to that of Sysco[s]." *Id.* at 39. In detail, the SSA considered that both offerors' evaluated contracts were "on par" for recency and relevancy but that the quality of Labatt's past performance was considered superior, and concluded as follows:

Labatt[] has shown a greater degree of outstanding performance on past contracts and its performance on the three DLA contracts evaluated has been considered good. Alternatively, Sysco[] showed outstanding support on far less contracts than did Labatt[] and, although Sysco[] showed good overall contract performance on the DLA contract it offered for consideration, Sysco[s] more recent support under the four considered DLA bridge contracts was only considered acceptable for each contract with a marginal rating having been provided for one of the sub-aspects under one of the [Contractor Performance Assessment Rating System] CPARS for one of these bridge contracts. Thus, although both companies received the same Substantial Confidence rating, Labatt[] is considered slightly superior under this overall confidence assessment factor, having shown a better record of quality performance under its past contracts based on the higher degree of satisfaction expressed by customers and DLA under the customer questionnaires and CPARS reports.

Id.

Moreover, Sysco has not established that the SSA was required to conduct a more in-depth analysis and comparison of the offerors' past performance. Our Office has explained that an agency is not required to further differentiate between the past performance ratings based on a more refined assessment of the relative relevance of the offeror's prior contracts, unless specifically required by the RFP. See *Dewberry Crawford Grp.; Partner 4 Recovery*, B-415940.10 *et al.*, July 2, 2018, 2018 CPD ¶ 297 at 23. Here, the RFP did not contain such a requirement, and the record reflects the SSA's discretion in making the decision to select Labatt's technically superior, lower-priced proposal for award. Accordingly, we deny this protest ground.

The protest is denied.

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General Counsel