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Decision

Matter of: Gemini Tech Services, LLC

File: B-422620

Date: September 5, 2024

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Kasia Dourney, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision to include eventual awardee in the competitive range is denied where the decision was reasonable and consistent with the terms of the solicitation.
 2. Protest challenging agency's cost realism evaluation is denied where the evaluation was reasonable and consistent with the solicitation's evaluation criteria.
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DECISION

Gemini Tech Services, LLC, a small business of Willow Park, Texas, protests the issuance of a task order to JP Logistics & Consulting, LLC, of Prince George, Virginia, under request for proposals (RFP) No. W519TC-23-R-0094, issued by the Department of the Army for logistics support services. The protester challenges the agency's decision to conduct discussions with JP and the evaluation of the awardee's price.

We deny the protest.

BACKGROUND

The agency issued the solicitation on October 3, 2023, as a competitive 8(a) set-aside,¹ to holders of the Enhanced Army Global Logistics Enterprise basic ordering agreement for logistics readiness center maintenance, supply, and transportation requirements. Agency Report (AR), Tab 4, RFP at 1-2. The Army sought proposals for logistics support services, including maintenance, supply, and transportation support at the Army Redstone Arsenal in Alabama. *Id.* at 2.

The solicitation contemplated the issuance of a single cost-plus-fixed-fee task order, for one base year and four 1-year option periods. *Id.* The solicitation contemplated the evaluation of the following factors: technical, past performance and cost/price. *Id.* Award was to be made to the:

responsible [o]fferor with the lowest evaluated (fair and reasonable) priced proposal that is determined [t]echnically [a]cceptable with [s]ubstantial [c]onfidence in [p]ast [p]erformance.

RFP at 62, § M.4.1.²

The RFP instructed that the agency would use a multistep evaluation process. Initially, the Army was to conduct a strict compliance review; compliant proposals would then advance to step 1, the evaluation of technical proposals. RFP at 61, § M.3.2.

The technical evaluation was to assess offerors' staffing and management plans, and the proposed management approach and organizational structure. *Id.* at 63, § M.5.1. The solicitation provided that the agency would "evaluate the [t]echnical proposals of the first five or 20 [percent] of the lowest total proposed priced compliant offers against the technical evaluation criteria." *Id.* at 62, § M.4.1 STEP 1.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for the performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. Firms participating in this program are commonly referred to as "8(a)" contractors.

² The solicitation instructed that the Army would "evaluate the [t]echnical [f]actor on an [a]cceptable/[u]nacceptable basis," and that [t]echnical [t]radeoffs [would] not be made and no additional credit [would] be given for exceeding acceptability." RFP at 62, § M.4.1. The RFP defined acceptable as a proposal that "clearly meets the minimum requirements of the RFP." *Id.* at 63, § M.5.1.1.

The evaluation of past performance, by contrast, was to be evaluated by "using a qualitative assessment by assigning confidence ratings." *Id.* at 62.

During step 2, the Army was to evaluate each offeror's past performance and proposed cost/price, the latter for both reasonableness and realism. *Id.* at 62, § M.4.1 STEP 2; *id.* at 66, § 5.3.1. Next, all proposals with realistic pricing and a substantial confidence rating under the past performance factor would advance to step 3. *Id.* at 62, § M.4.1 STEP 2 (d).

As relevant to this protest, the RFP advised that award would be made without discussions but reserved the agency's right to conduct discussions if they were deemed advantageous by the contracting officer. *Id.* at 62, § M.4.1 STEP 1. The solicitation included the following language about conducting discussions in step 1:

IF AND ONLY IF discussions are conducted, upon completion of the Technical Factor evaluations, the Government will make a subsequent competitive range determination, [in accordance with] FAR 15.306, based on the final ratings of each technical proposal against the Technical Factor evaluation criteria. Only Offerors determined Technically Acceptable will remain in this subsequent competitive range and proceed to the Past Performance, and Cost/Price evaluations identified in STEP 2 above.

Id. at 62-63, § M.4.4.1.

With respect to discussions, the RFP further advised that the agency reserved the right to "conduct discussions at any stage of the evaluation process." *Id.* at 61, § M.2.

The agency received six proposals in response to the solicitation, including proposals from Gemini and JP. AR, Tab 23, Source Selection Evaluation Board (SSEB) Report at 1. After conducting a strict compliance review, the agency determined that all six offerors submitted compliant proposals. *Id.* at 2. All six proposals then advanced to step 1, the technical evaluation. *Id.*

After evaluating technical proposals, the Army found all six technically unacceptable.³ AR, Tab 15, Tech. Eval. Email, Jan. 11, 2024 at 1; *see also* AR, Tab 39, Tech. Eval. Emails, Dec. 12-14, 2023. Subsequently, after communications between the technical evaluators and the contracting officer, the initial evaluation ratings were revised: Gemini's proposal was found technically acceptable while the other five proposals

³ The contemporaneous record submitted by the Army in its agency report includes conflicting information regarding the agency's initial findings of technical acceptability. Specifically, while the SSEB report indicates that "[f]ive of the six [o]fferors were determined to be Unacceptable for the Technical Factor [in accordance with] M.4.1 Step 1," email exchanges between the technical evaluators and the contracting officer reveal that initially, all six offerors were found technically unacceptable. *Compare* AR, Tab 23, SSEB Report at 2 *with* AR, Tab 15, Tech. Eval. Email, Jan. 11, 2024 at 1; AR, Tab 39, Tech. Eval. Emails, Dec. 12-14, 2023; *see also* AR, Tab 35, Decl. of Contracting Officer and AR, Tab 38, Revised Decl. of Contracting Officer (providing additional information about the evaluation record).

remained unacceptable. AR, Tab 24, Source Selection Decision (SSD) at 3-4; Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 3. The agency then decided to open discussions with all six offerors. AR, Tab 24, SSD at 4; COS/MOL at 3.

After conducting discussions and receiving revised proposals, the five offerors previously found technically unacceptable were subsequently determined to be acceptable. AR, Tab 24, SSD at 4. All offerors then proceeded to step 2, in which the Army evaluated past performance and cost/price. *Id.* at 4-5. The agency evaluators concluded that the cost proposals submitted by JP and Gemini were both reasonable and realistic. *Id.* at 5; AR, Tab 21, Gemini Cost/Price Eval. Report at 10.

The final evaluation ratings were as follows:

	Gemini	JP
Technical	Acceptable	Acceptable
Past Performance	Substantial Confidence	Substantial Confidence
Cost/Price	\$46,307,094	\$42,309,387

AR, Tab 24, SSD at 4-5. The source selection authority concluded that JP’s proposal, which had the lowest total evaluated cost/price, an acceptable technical proposal, and a substantial confidence past performance rating, provided the best value to the government and selected the firm for award. *Id.* at 5-6. After requesting and receiving a debriefing, Gemini filed this protest with our Office.

DISCUSSION

Gemini challenges the agency’s decision to conduct discussions with JP and argues that the establishment of a competitive range that included all offerors was unreasonable, unequal, and inadequately documented. Protest at 6-9. The protester also argues that the Army conducted an inadequate cost realism evaluation of JP’s proposed cost/price. *Id.* at 9-11. We have considered each of Gemini’s arguments, and although we do not discuss them all, we find that none provides a basis upon which to sustain the protest.

Competitive Range Determination

The protester contends that, in establishing a competitive range during step 1 of the evaluation, the Army violated the terms of the RFP which “articulated clear limits on the composition of the competitive range.” *Id.* at 7. Gemini alleges that the solicitation explained that if discussions are conducted, then “[o]nly [o]fferors determined [t]echnically [a]cceptable will remain in this subsequent competitive range and proceed to the [p]ast [p]erformance, and [c]ost/[p]rice evaluations identified in STEP 2 above.”

Id.; Comments at 5 (*quoting* RFP at 62-63). Additionally, FAR section 15.306 instructs contracting officers to populate the competitive range with only the “most highly rated proposals.” Protest at 7 (*quoting* FAR 15.306(c)(1)). The protester contends that, as a result of these provisions, the RFP limited the competitive range to offerors who were evaluated as technically acceptable during the step 1 evaluation; here, Gemini was the only offeror with an acceptable technical rating. *Id.* The protester therefore contends that no discussions were necessary and the agency should have made award to Gemini. *Id.* at 1; Comments at 3-4.

In further support of its position, Gemini also argues that the Army’s justification for conducting discussions was unreasonable as the decision relied on incorrect facts. Comments at 2-4. In this regard, the protester notes that the agency’s competitive range determination incorrectly states, as the predicate for conducting discussions, that “each offeror was determined to be technically unacceptable,” while in fact, Gemini was the lone acceptable offeror. *Id.* at 3 (*quoting* AR, Tab 17, Competitive Range Determination); Supp. Comments at 4. As further undermining the reliability of the agency’s record, Gemini points out that the competitive range determination was documented well over a month after the Army actually commenced discussions with offerors. See 2nd Supp. Comments at 2.

The agency counters that it established the competitive range and conducted discussions in accordance with the terms of the RFP and FAR section 15.306. COS/MOL at 6-9. The Army explains that the protester’s narrow reading of the solicitation’s competitive range provision in section M.4.4.2 is inconsistent with other sections of the RFP and the FAR. *Id.* Specifically, the agency points out that the RFP granted the agency the discretion to conduct discussions “at any stage of the evaluation process.” *Id.* at 8 (*quoting* RFP at 61). Additionally, the Army defends its establishment of the competitive range and opening of discussions with all six offerors as a means of promoting competition and obtaining the best value for the government. *Id.* at 9.

Addressing the protester’s allegations about the documentation of the competitive range decision, the agency submitted two additional declarations from the contracting officer, attempting to reconcile inconsistent information in the record. See AR, Tab 35, Decl. of Contracting Officer; see also AR, Tab 38, Revised Decl. of Contracting Officer.⁴ Specifically, the contracting officer explains that while the initial evaluation, in which all offerors were found unacceptable, was subsequently revised to assign only Gemini’s proposal a rating of acceptable under the technical factor, this change was not reflected in the competitive range determination. The agency concedes that instead, the competitive range decision document “mistakenly stated that all offerors were found to be . . . technically unacceptable.” AR, Tab 38, Revised Decl. of Contracting Officer at 2. The Army represents that notwithstanding this error, its decision to establish the

⁴ The Army states that it submitted the second declaration “to correct several unintended errors in [the first] declaration, make the administrative record accurate, and provide additional clarity as to the events leading up to the [g]overnment’s award decision.” AR, Tab 38, Revised Decl. of Contracting Officer at 1.

competitive range and open discussions with all six offerors was based on the agency's understanding that Gemini's proposal was the only proposal with a rating of acceptable under the technical factor. *Id.*

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).

We find no basis on the record here to question the contracting officer's representations that the decision to conduct discussions with all offerors was made with the understanding that Gemini's initial proposal was in fact technically acceptable. In reaching this conclusion, we view the additional explanation provided by the agency as credible and sufficiently clarifying the inconsistencies in the record. Specifically, the contracting officer explains the sequence of events that preceded the agency's establishment of the competitive range, and her explanations are supported by the contemporaneous record. AR, Tab 38, Revised Decl. of Contracting Officer at 2 (*citing, e.g.,* AR, Tab 32, Emails about Opening Discussions, Jan. 25-29, 2024 at 1). While we agree with the protester that the agency should have better documented its final conclusions regarding the establishment of the competitive range, we find that the other contemporaneous records produced by the agency confirm the Army's interim conclusions regarding offerors' technical acceptability. *See, e.g.,* AR, Tab 18, Letter to Gemini Opening Discussions at 1 (stating that the "[g]overnment evaluated your proposal dated 09 November 2023 and did not identify any significant weaknesses or deficiencies."); *see also* AR, Tab 32, Emails about Opening Discussions, Jan. 25-29, 2024 at 1 (confirming that the agency found Gemini technically acceptable). Accordingly, we conclude that this relatively minor documentation omission has no bearing on the overall reasonableness of the instant source selection process.

Turning to the core of the protester's challenge to the competitive range determination--namely, that the RFP precluded technically unacceptable proposals from being included in the competitive range--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. *Planned Sys. Int'l, Inc.*, B-413028.5, Feb. 21, 2018, 2018 CPD ¶ 126 at 6. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.* Where a dispute exists as to a solicitation's actual

requirements, we will first examine the plain language of the solicitation. *Bauer Techs., Inc.*, B-415717.2, B-415717.3, June 22, 2018, 2018 CPD ¶ 217 at 4.

Additionally, the determination of whether a proposal is in the competitive range is principally a matter within the sound judgment of the procuring agency. *Sea Box, Inc.*, B-408182.5, Jan. 10, 2014, 2014 CPD ¶ 27 at 7. While the exclusion of technically unacceptable proposals is permissible, it is not required. *Albert Moving & Storage*, B-290733, B-290733.2, Sept. 23, 2002, 2003 CPD ¶ 8 at 6. In reviewing a competitive range determination, our Office will review the agency's judgment only to ensure it was reasonable and in accord with the solicitation provisions; a protester's disagreement with an agency's judgment, without more, does not establish that the judgment was unreasonable. *Id.*; *CMC & Maint., Inc.*, B-290152, June 24, 2002, 2002 CPD ¶ 107 at 2.

We find no merit to Gemini's argument that the agency improperly established a competitive range that included technically unacceptable proposals. Contrary to the protester's view, the RFP did not require the agency to exclude either JP's proposal, or any other proposal, from the competitive range. Instead, under the terms of the solicitation, the agency reserved the right to conduct discussions at any stage of the evaluation process. See RFP at 61, § M.2. This necessarily means that the agency was permitted, as here, to conduct discussions before it determined offerors' final step 1 evaluation ratings.

While the protester argues that the language in the solicitation stating that “[o]nly [o]fferors determined [t]echnically [a]cceptable will remain in this subsequent competitive range and proceed to the [p]ast [p]erformance, and [c]ost/[p]rice evaluations identified in STEP 2 above” called for a competitive range limited to technically acceptable offerors after the completion of the technical factor evaluation, we disagree. Comments at 5-6 (*quoting* RFP at 63, § M.4.4.1.). The above language simply indicates that only offerors with technically acceptable proposals will proceed to step 2, the past performance evaluation, as part of a “subsequent competitive range.” The provision cited by the protester is silent about the process the agency would use if it decided to conduct discussions and establish a competitive range before the completion of the step 1 evaluation. Thus, contrary to the protester's argument, when the solicitation is read as a whole, and all of its provisions are given effect, including the broad provision permitting discussions to take place at any stage, the protester's cramped reading of the solicitation is without a basis. *Planned Sys. Int'l, Inc.*, *supra* at 6.

Our interpretation of the solicitation is also consistent with the discretion afforded an agency's competitive range determination. We note that a fundamental purpose in conducting discussions is to determine whether deficient proposals are reasonably susceptible of being made acceptable. See *Aviate L.L.C.*, B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 8. Here, the agency has reasonably explained that “it was in its best interest to establish a competitive range and open discussions with all six offerors” as the five offerors “that were initially determined technically unacceptable did not require major revisions to become acceptable and includ[ing] all six offerors in the

competitive range [would] promote competition.” COS/MOL at 9; AR, Tab 24, SSD at 4; AR, Tab 17, Competitive Range Determination at 2.

Finally, we note that even if the protester had demonstrated that the agency failed to follow the solicitation criteria when it conducted discussions with all offerors, to include the awardee, the protester has failed to establish that it was competitively prejudiced by the agency’s actions. 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. *SRA Int’l Inc.*, *supra* at 7. Moreover, in the case of discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. *Piquette & Howard Elec. Serv., Inc.*, B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10.

Here, the agency included the protester in the competitive range for discussions. Gemini fails to demonstrate that it would have modified its proposal or proceeded in any way differently if it had known that the agency would conduct discussions with offerors evaluated as technically unacceptable. As such, we fail to see how Gemini was competitively prejudiced by the Army’s decision to hold discussions with all six offerors.

Accordingly, the protester’s challenges to the agency’s decision to hold discussions with the awardee are without merit.

Unequal Treatment During Discussions

Alternatively, Gemini argues that even if the agency “reasonably populated the competitive range with all six offerors,” the Army nevertheless treated the protester unequally during discussions. Protest at 8. Specifically, Gemini complains that the agency failed to advise the firm that its proposed price was higher than its competitors, *i.e.*, notify it of “its proposal’s greatest weakness, price.” *Id.*

The Army responds that it conducted meaningful, reasonable, and fair discussions that do not reflect unequal treatment. The agency points out that it did not specifically issue any evaluation notices to Gemini since the firm was found technically acceptable. COS/MOL at 9-10. Nevertheless, at a later stage, “out of an abundance of caution and due diligence,” it reopened discussions “to allow all offerors, including [Gemini], the opportunity to submit a final proposal revision.” *Id.* at 10. The Army also states that Gemini’s price was found reasonable and as such, the agency was not required to raise this issue with the protester. *Id.* at 11. Based on the record, we agree.

In conducting procurements, agencies must even-handedly evaluate proposals against common requirements and evaluation criteria. *American Sys. Corp.*, B-420132 *et al.*, Dec. 13, 2021, 2021 CPD ¶ 387 at 5. When an agency engages in discussions with an offeror, the discussions must be meaningful, and sufficiently detailed to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially

enhance the offeror's potential for receiving award. *Powersolv, Inc.*, B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 7. With respect to issues related to price, however, we have explained that price need be discussed only if the price is found by the agency to be unreasonable. See, e.g., *Joint Logistics Managers, Inc.*, B-410465.2 *et al.*, 2015 CPD ¶ 152 at 5; see also *Price Waterhouse*, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 4.

Here, we find that the agency was not obligated to inform Gemini of its relatively high price. Specifically, the Army found the protester's price to be reasonable, and only 1.34 percent higher than the independent government estimate (of \$45,687,330) for the requirement. See AR, Tab 21, Gemini Cost/Price Eval. Report at 9-10. As such, it was within the agency's discretion as to whether to discuss Gemini's price being higher than the other offerors'. See *Theodor Wille Intertrade AG*, B-409976.3, Jan. 22, 2015, 2015 CPD ¶ 65 at 4. This protest ground is denied.

Evaluation of Cost Realism

Finally, Gemini contends that the agency's cost realism evaluation of JP's proposal was unreasonable because it failed to "match the rigor anticipated by the RFP." Protest at 9. The protester also alleges that the Army's price evaluators unreasonably deferred to the technical evaluators when deciding whether proposals required any most probable cost adjustment. Comments at 12. Furthermore, Gemini argues that the Army failed to conduct an apples-to-apples comparison of Gemini and JP in that the offerors relied on different productive hours assumptions as the bases of their respective staffing estimates. *Id.* In this regard, the protester contends that, for the base period, Gemini "defined its productive person year for collective bargaining agreement labor as [DELETED] hours," as compared to JP's [DELETED] hours, noting "a 56-hour delta" between the two proposals. *Id.* at 14, 15.

The agency responds that the protester's allegations are speculative, and rely "on a snapshot" of the agency's analysis from the SSD, instead of "the 10-page [c]ost/[p]rice [t]eam [r]eports" completed by the cost/price evaluation team. COS/MOL at 12. Furthermore, the Army notes that it was "not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the [cost realism] evaluation require[d] the exercise of informed judgment by the contracting agency," which the agency did. *Id.* at 13 (*citing Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8).

Based on the record here, Gemini has not shown a basis for us to sustain this ground of protest. For example, contrary to the protester's assertion, an agency's technical teams commonly evaluate whether the proposed work hours, and associated cost, reflect an offeror's proper understanding of the requirements; their findings commonly inform the

subsequent evaluation of the price/cost teams.⁵ See FAR 15.404-1(d) (providing that cost realism analysis should determine whether the proposed costs “reflect a clear understanding of the requirements; and are consistent with the unique methods of performance.”); see also RFP at 66, § 5.3.2. (instructing that the cost realism evaluation would establish “whether the proposed cost elements reflect a clear understanding of the requirements; and whether the proposed cost elements are consistent with the unique methods of performance described in the [t]echnical [p]roposal.”).

Furthermore, Gemini has not established, or even alleged, that the productive hours assumptions used by JP were unreasonable. Instead, the protester speculates that had the agency undertaken a more rigorous cost realism evaluation, it would have upwardly adjusted JP’s hours to match Gemini’s assumptions. The protester has failed to explain, however, why its assumptions were correct or why JP’s were incorrect.

Moreover, we will not sustain a protest unless it is clearly shown that the protester was competitively prejudiced by the procurement error. See *Intelsat General Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 19-20 (competitive prejudice is an essential element of a viable protest). Here, we conclude that the protester has not shown a reasonable possibility of prejudice. Specifically, even assuming there was a small difference in offerors’ productive work hour assumptions, we fail to see--and Gemini has not demonstrated--how that could have materially affected the significant difference (of approximately \$4 million) in cost/price between the two proposals. Put differently, we see no basis to conclude that if the agency had upwardly adjusted JP’s productive work hour assumptions, the two offerors’ cost/price would have been sufficiently close to affect the agency’s award decision.⁶

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ The protester also contends that the RFP required an “independent review” of specific cost estimates. Comments at 13 (*citing* RFP at 66). Contrary to the protester’s assertion, the solicitation’s cost/price evaluation scheme did not prohibit the Army’s cost/price evaluators from crediting, or relying upon, the conclusions of the technical evaluators. Instead, the provision simply requires that the Army review and evaluate offerors’ cost elements independent from the representations made in the offerors’ proposals.

⁶ While the protester contends that had the agency performed “the thorough price realism evaluation anticipated by the RFP,” both offerors’ costs “would have been significantly closer,” Gemini fails to establish--or even allege--that it could displace the awardee as the lowest cost firm, in line for award per the terms of the solicitation. Comments at 15.