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Decision

Matter of: 22nd Century Technologies, Inc.

File: B-420139

Date: December 9, 2021

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Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of proposals is denied where evaluation was reasonable and in accordance with the terms of the solicitation.
 2. Protest challenging agency's upward adjustment of proposed cost is dismissed where protester fails to show competitive prejudice.
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DECISION

22nd Century Technologies, Inc., a small business of McLean, Virginia, protests the issuance of a task order to Telesis Corporation, also of McLean, Virginia, under request for proposals (RFP) No. RS3-18-0081, issued by Department of the Army, Army Materiel Command, for systems engineering and technical assistance (SETA) support services for product manager radars. The protester argues the agency unreasonably evaluated its proposal and the awardee's proposal.

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

BACKGROUND

On February 27, 2020, the agency issued the RFP as a small business set-aside to all contract holders under the Department of the Army's Responsive Strategic Sourcing for Services multiple award, indefinite-delivery, indefinite-quantity contract in accordance with Federal Acquisition Regulation (FAR) subpart 16.5. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1-3. The RFP anticipated issuance of a task order on a fixed-price, cost-plus-fixed-fee, and cost basis with a phase-in

period of 1 month, a base period of 11 months, and four 12-month option periods.¹ Agency Report (AR), Tab 9, RFP at 1. The due date for proposals, as amended, was April 1, 2020. COS/MOL at 2.

The RFP provided that proposals were to consist of three volumes: technical, cost/price, and small business participation plan. RFP at 3-4. The technical volume was to address three subparts: corporate experience, manpower, and management plan. *Id.* at 4-6. For corporate experience, the RFP instructed offerors to provide a minimum of one, and up to four, previous projects within the last five years.² *Id.* at 4. The solicitation required that at least one effort demonstrate the prime offeror's experience providing services similar in size, meaning an effort involving at least 65 full-time employees. *Id.* Additionally, offerors were to provide a narrative explaining how the submitted projects demonstrated experience meeting or exceeding RFP requirements pertaining to program management, systems engineering, integrated logistics support, and planning, programming, budgeting, and execution (PPBE) support.³ *Id.* at 5.

For price/cost, the RFP required offerors to provide the price for services, and travel and materials costs necessary to provide the services. *Id.* at 6-11. The RFP advised that services during the phase-in period would be awarded on a fixed-price basis, all other services would be awarded on a cost-plus-fixed-fee basis, and travel and materials costs would be awarded on a cost basis with no fee. *Id.* at 6. The agency would evaluate these prices for fairness and reasonableness, and conduct a realism analysis of costs. *Id.* at 15. With regard to the cost realism analysis, the RFP provided that the agency might upwardly adjust the proposed cost to reach a "most probable cost," if warranted, to ensure the cost elements were at "realistic levels." *Id.*

The RFP provided that proposals would be evaluated under the small business factor, and under the manpower and management plan subfactors, on an acceptable/unacceptable basis; for the corporate experience subfactor, the agency would assign a

¹ The agency amended the solicitation six times. COS/MOL at 2. All citations are to the final version.

² Under the corporate experience subfactor, the RFP permitted offerors to submit the experience of a subcontractor so long as the subcontractor would perform 20 percent of the subject effort. RFP at 4.

³ For manpower, which is not at issue in this protest, the RFP required offerors to propose the exact labor categories and hours as provided in an attachment to the solicitation. *Id.* at 6. For management plan, which is likewise not at issue, the RFP required offerors to address its plan for hiring, retaining, and organizing staff while also providing a management schedule to meet the requirements of the RFP. *Id.*

rating of outstanding, good, acceptable, or unacceptable.⁴ *Id.* at 14. Among proposals rated as acceptable for manpower, management plan, and small business participation, the agency would select for award the proposal representing the best value based on a tradeoff between corporate experience and cost/price, with corporate experience more important than cost/price. *Id.* at 13.

The agency received thirteen proposals by the due date, including proposals from 22nd Century and Telesis. AR, Tab 23, Memorandum for Record at 1. As relevant to this protest, the final evaluation results for 22nd Century and Telesis were as follows:

	22nd Century	Telesis
OVERALL TECHNICAL RATING	Outstanding	Outstanding
Corporate Experience	Outstanding	Outstanding
PROPOSED COST/PRICE	\$65,485,501	\$64,363,294
MOST PROBABLE COST	\$65,603,480	\$64,363,294

AR, Tab 24, Task Order Decision Document at 33; COS/MOL at 11. The evaluators assigned 22nd Century’s proposal three strengths; Telesis’s proposal received four strengths. COS/MOL at 7-10. Although both proposals received an overall technical rating of “outstanding,” the agency considered Telesis’s proposal technically superior to 22nd Century’s under the corporate experience subfactor; the agency thus selected the lower cost, technically superior proposal submitted by Telesis for award. AR, Tab 24, Task Order Decision Document at 53. On January 15, 2021, the agency informed 22nd Century that it was not selected for award. Protest, attach. E, Unsuccessful Offeror Letter at 1. This protest followed.⁵

⁴ As relevant to the protest here, a rating of outstanding indicated that the proposal met the requirements, demonstrated exceptional experience, and contained multiple strengths with a low risk of unsuccessful performance. RFP at 14. A strength was to be assigned where the offeror’s corporate experience exceeded the requirements in a way that would be advantageous to the government. *Id.*

⁵ Our Office is authorized to hear protests of task orders that are issued under multiple-award contracts established within defense agencies (or protests of the solicitations for those task orders) where the task order is valued in excess of \$25 million, or where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is issued. 10 U.S.C. § 2304c(e)(1); 4 C.F.R. § 21.5(l). We have jurisdiction to hear the subject protest as the task order is valued in excess of \$25 million.

DISCUSSION

22nd Century contends the agency unreasonably evaluated both its proposal and Telesis's proposal under the corporate experience subfactor. The protester further argues the upward adjustment of its proposed cost was unreasonable, and the agency failed to perform a reasonable best-value tradeoff. For the reasons discussed below, we deny the protest in part, and dismiss it in part.⁶

Challenge to the Evaluation of 22nd Century's and Telesis's Corporate Experience

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. See *STG, Inc.*, B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 9-10. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *MVM, Inc.*, B-407779, B-407779.2, Feb. 21, 2013, 2013 CPD ¶ 76 at 6. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was unreasonable. *Id.* at 5.

22nd Century argues the agency unreasonably failed to assign its proposal additional strengths under the corporate experience subfactor. Protest at 6-7. 22nd Century first contends the agency should have assigned its proposal a strength for providing four examples of 22nd Century's own (as opposed to a subcontractor's) experience. *Id.* According to 22nd Century, the RFP implicitly favored the experience of an offeror over the experience of an offeror's subcontractors by requiring that one of the four experience examples "be the offeror's own." *Id.* The protester contends that it exceeded the solicitation requirement by submitting four examples of its own experience.

We disagree that it was unreasonable for the agency to fail to assign 22nd Century's proposal a strength for providing four examples of the protester's own experience. Although the RFP required that at least one of the submitted efforts demonstrate the prime offeror's experience, the RFP otherwise contains no preference for prime offeror experience over subcontractor experience. See RFP at 4-5. We deny this protest ground.

Second, 22nd Century contends the agency failed to assign its proposal a strength for (1) submitting two efforts that involved more than 65 full-time employees (the RFP's definition for similarity in size), and (2) submitting efforts "substantially larger" than requirements of the subject task order. Protest at 7. Based on the record, we have no basis to find the agency's evaluation unreasonable here. As explained above, the RFP defined a strength not only as experience that exceeded the requirements, but did so in

⁶ Although we do not address each argument raised by the protester, we have considered them and find none to be meritorious.

a way advantageous to the government. RFP at 14. Although its submitted experience exceeded the requirements of the RFP pertaining to project size, 22nd Century does not explain how its experience performing larger requirements would be advantageous to the government; it states only that it exceeded the requirements. See Protest at 6-7. This protest ground is also denied.

22nd Century next argues the agency unreasonably assigned Telesis's proposal a rating of "outstanding" despite Telesis (1) submitting only two efforts for corporate experience, (2) relying on a subcontractor for one of those efforts, and (3) relying "entirely on its subcontractor to demonstrate experience in all but two areas of its proposal." *Id.* at 7-8. As explained below, we deny each of these arguments.

With regard to the first argument, although the RFP provided a minimum and a maximum number of efforts for offerors to submit for corporate experience, the RFP set no preference for the number of submissions; it merely set a minimum and maximum. See RFP at 4. 22nd Century's argument that the agency should have downgraded Telesis's rating because Telesis submitted only two efforts is thus unsupported by the terms of the solicitation.

22nd Century's next two arguments allege, in essence, that Telesis's proposal was overly reliant on subcontractors, which created a risk the agency failed to appreciate and rendered the assignment of a rating of outstanding unreasonable. Protest at 7-8; Comments at 1. We have no basis to find the agency's evaluation unreasonable here; the mere fact that Telesis relied on subcontractor experience did not preclude the agency from rating the experience outstanding, including a low risk of unsuccessful performance, had been satisfied. We thus deny both of these protest grounds.

Challenge to the Upward Adjustment of 22nd Century's Proposed Cost

22nd Century next claims that the agency unreasonably upwardly adjusted its proposed cost from \$65,485,501 to \$65,603,480. Protest at 8. According to 22nd Century, it applied a direct labor escalation rate of 1.9 percent to its proposed cost, per the Bureau of Labor Statistics cost index for September 2020. *Id.* The agency, however, increased the escalation rate from 1.9 percent to 2.0 percent as it believed the latter was the correct figure. COS/MOL at 10. We do not reach a conclusion as to the correct percentage increase because 22nd Century has failed to demonstrate competitive prejudice here.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Exceptional Software Strategies, Inc.*, B-416232, July 12, 2018, 2018 CPD ¶ 237 at 3-4 n.3. Here, 22nd Century's proposed cost was higher than Telesis's even before the upward adjustment by the agency. COS/MOL at 11. Therefore, even if we were to agree that the agency improperly adjusted 22nd Century's cost by 2.0 percent instead of 1.9 percent, 22nd Century would

not have a substantial chance of receiving of the award because (1) its cost would still be higher than Telesis's cost, (2) both technical proposals received a rating of "outstanding," and (3) Telesis's proposal received more strengths. This protest ground is thus dismissed.

Challenge to the Best-Value Determination

Finally, 22nd Century also argues that the best-value determination was unreasonable. This argument derives from the protester's foregoing challenges to the technical and cost evaluations, which we have denied or dismissed. Because the protester has failed to demonstrate that its proposal was more advantageous than Telesis's under either the technical or cost factor, we have no basis to object to the agency's best-value decision here.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel