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Decision

Matter of: EM Key Solutions, Inc.

File: B-420221; B-420221.2

Date: January 10, 2022

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DIGEST

1. Protest challenging agency's technical evaluation is denied where awardee's quotation received a significant strength that the protester's quotation did not because the two quotations were different, not because they were evaluated disparately, and where protester has not shown that agency assessed unreasonably duplicative strengths in the awardee's quotation.
2. Protest challenging agency's past performance evaluation is denied where agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria.
3. Protest that awardee had an organizational conflict of interest based on unequal access to information is denied where the protester fails to demonstrate any hard facts reflecting a conflict, and the record reflects that any advantage arising from awardee's prior contract performance as a subcontractor was a normally occurring incumbent advantage.

DECISION

EM Key Solutions, Inc. (EM Key), a service-disabled veteran-owned small business (SDVOSB) of Tierra Verde, Florida, protests the issuance of a task order to InnoVet Health LLC, an SDVOSB of Cheyenne, Wyoming, under request for quotations (RFQ) No. 36C10B21Q0324, issued by the Department of Veterans Affairs (VA) for independent verification and validation (IV&V) services for the VA's Financial

Management Business Transformation (FMBT) program. The protester argues that the agency unreasonably evaluated vendors' quotations and that the awardee had an impermissible organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

The RFQ states that the point of the FMBT program is to replace the agency's financial management and automated acquisition systems with the Integrated Financial and Acquisitions Management System (iFAMS), a financial management software product. The RFQ further explains that the agency requires a contractor to provide independent testing and quality assurance services, or IV&V services, in support of this system modernization. Agency Report (AR), Tab 4, RFQ at 82, 87. The iFAMS solution is meant to result in a single, integrated financial system that will replace the "many financial systems" that currently exist. *Id.* at 82.

On June 23, 2021, the agency issued the RFQ as an SDVOSB set-aside, using the Federal Supply Schedule (FSS) procedures of Federal Acquisition Regulation (FAR) subpart 8.4, to holders of the General Services Administration's Multiple Award Schedule under Special Item Number 54151S for information technology services. RFQ at 1. The RFQ contemplated the issuance of a fixed-price time-and-materials task order with a 12-month base period of performance, four 12-month option periods, and eight optional tasks. RFQ at 88.

The RFQ provided for the issuance of an order on a best-value tradeoff basis considering the following factors, listed in descending order of importance: technical, past performance, and price. RFQ at 192. When combined, the technical and past performance factors were significantly more important than the price factor. *Id.* With regard to the technical factor, the solicitation established an adjectival rating scheme and advised that evaluators would assess that factor for strengths, weaknesses, and deficiencies.¹ AR, Tab 6, Selection Evaluation Plan at 17.

As relevant here, the solicitation advised vendors that the agency would evaluate past performance by conducting a "performance risk assessment based on the quality, relevancy, and recency of the [o]fferor's past performance, as well as that of its major subcontractors." *Id.* at 193. Under the technical factor, the RFQ required vendors to propose a technical approach that included a detailed description of "the barriers,

¹ The agency defined a strength as an aspect of a quotation that "enhances the merit of the proposal or increases the probability of successful performance of the contract" when judged against "a stated evaluation criterion" and defined a significant strength as an aspect of a quotation that "appreciably enhances the merit of a proposal or appreciably increases the probability of successful contract performance." AR, Tab 6, Selection Evaluation Plan at 17.

challenges, and risks involved in meeting and/or exceeding the requirements at PWS [Performance Work Statement] 5.2 [FMBT IV&V services and standards] and 5.3 [optional tasks] . . . and the extent to which uncertainties are identified and resolutions proposed.” *Id.* at 196.

Five vendors, including EM Key and InnoVet, submitted quotations by the July 12 closing date. Contracting Officer’s Statement (COS) at 2. Both the awardee’s and protester’s quotations received an outstanding rating under the technical factor and a low risk rating under the past performance factor. *Id.* The agency assessed three significant strengths and one strength in EM Key’s technical quotation. AR, Tab 13, Selection Decision Document at 13. The agency assessed three significant strengths and three strengths in InnoVet’s technical quotation. See AR, Tab 20, InnoVet Technical Evaluation Report. EM Key quoted a total price of \$28.6 million, while InnoVet quoted \$33.3 million. AR, Tab 13, Selection Decision Document at 3.

The agency concluded that, given the relative weights of the evaluation factors, InnoVet’s “superior” technical quotation justified “paying the price premium of 14% to receive those [technical] benefits.” AR, Tab 13, Selection Decision Document at 26-27. On September 23, the agency made award to InnoVet and advised EM Key of the award decision. COS at 3. On September 28, the agency provided an explanation for the basis of award, upon the protester’s request. *Id.* at 4. This protest followed.

DISCUSSION

EM Key argues that the agency unreasonably evaluated the protester’s and awardee’s technical quotations. This allegation includes two subarguments: (1) the agency disparately evaluated the quotations when it assessed a significant strength in InnoVet’s quotation but did not do the same for EM Key’s quotation, and (2) the agency assessed duplicative strengths in the awardee’s quotation. With respect to the past performance factor, the protester argues that the agency unreasonably assigned a low risk rating to the awardee’s quotation. EM Key also contends that the awardee had an unequal access to information OCI.²

Technical Evaluation

With regard to the agency’s evaluation of the protester’s and awardee’s technical quotations, the protester asserts that the agency assessed an unwarranted significant strength in the awardee’s quotation. The protester argues that this constituted disparate treatment because its own quotation did not receive a significant strength as the

² Moreover, in its various protest submissions, EM Key has raised arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically address all of EM Key’s arguments, we have considered all of them and find that they afford no basis on which to sustain the protest.

awardee's quotation for "substantially similar content." Comments and Supp. Protest at 5. The protester also contends that the agency assessed InnoVet duplicative strengths and significant strengths. *Id.* at 7.

Where, as here, an agency issues an RFQ to FSS vendors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. *Digital Sols., Inc.*, B-402067, Jan. 12, 2010, 2010 CPD ¶ 26 at 3-4. In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *OPTIMUS Corp.*, B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *DEI Consulting*, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2.

The protester argues that the agency unreasonably assessed a significant strength in the awardee's quotation for its "intimate knowledge of FMBT," which was partially based on a table included in InnoVet's quotation that described FMBT barriers, risks, and challenges. Comments and Supp. Protest at 5 (citing AR, Tab 13, Selection Decision Document at 24). The protester asserts that this table merely meets a solicitation requirement to describe the barriers, challenges, and risks involved in meeting or exceeding the requirements; and contends that the agency unreasonably failed to find that substantially similar content in EM Key's quotation, which also included a table, merited a significant strength as well. *Id.*; Supp. Comments at 5.

The agency responds that the fact that the solicitation required vendors to describe the barriers, challenges, and risks involved in meeting requirements does not mean that the manner in which a vendor's quotation addressed this requirement could not merit a significant strength. Rather, the agency asserts, the assignment of a significant strength was consistent with the solicitation, which contemplated such an assessment to recognize an aspect of a quotation that appreciably enhances the merit of a quotation or appreciably increases the probability of successful contract performance. Supp. Memorandum of Law (MOL) at 5; AR, Tab 6, Selection Evaluation Plan at 17. The agency argues that this aspect of InnoVet's quotation addressed these solicitation criteria in a way that demonstrated a more comprehensive understanding of the FMBT program. *Id.* The agency adds that the significant strength was not just based on the awardee's table of barriers, challenges, and risks, but also on other areas of the quotation that demonstrated "superior" understanding.³ Supp. MOL at 6. The source

³ As an example, the agency cites the awardee's "extensive expertise in supporting legacy system interfaces across VA through support of [the Electronic Health Record Modernization program], [the] Office of Connected Care [], and [the Veterans Affairs Learning Opportunities Residency program], providing the benefit of extensive

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selection authority (SSA), after acknowledging certain benefits identified in EM Key's quotation, describes the basis upon which InnoVet's quotation was considered superior:

[InnoVet]'s approach demonstrated a more comprehensive understanding of the FMBT program, and an approach that brings an intimate knowledge of FMBT that allows it to provide superior support immediately. This in-depth knowledge is evidenced by the inclusion of a table listing fifteen insightful FMBT impacting barriers, risks and challenges, which included comprehensive proposed solutions incorporating actions aligned to [REDACTED] to mitigate the issue. [InnoVet] also presented additional unique and distinguished insight emphasizing there are numerous [REDACTED] in the [REDACTED] VA [REDACTED] with the deployment of FMBT, EHRM, and VALOR further underscoring that these [REDACTED] impact FMBT's [REDACTED] and [REDACTED] which may require [REDACTED] previously [REDACTED] as new configurations come online. In contrast, [EM Key]'s approach did not provide this level of comprehensive and intimate knowledge of FMBT.

AR, Tab 13, Source Selection Decision at 24.

The agency contends that in contrast, the table in the protester's quotation listed items "in a more generic description," without demonstrating an understanding of the specific problems presented by FMBT, as the awardee demonstrated. Supp. MOL at 6.

In conducting procurements, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing vendors. *Arc Aspicio, LLC et al.*, B-412612 *et al.*, Apr. 11, 2016, 2016 CPD ¶ 117 at 13. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences in the quotations. *Camber Corp.*, B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 8.

Here, the protester has not shown that its quotation was substantively indistinguishable from the awardee's quotation. Instead, the record shows that the differences in identified strengths stem from differences in the two quotations. We find reasonable the agency's argument that when it evaluated the awardee's quotation, it identified a significant strength for the awardee's "in-depth knowledge" of agency programs like FMBT, beyond the understanding the protester displayed, and that this knowledge was exemplified not only by the table of barriers, risks, and challenges, but also by other areas of the awardee's quotation. AR, Tab 20, InnoVet Technical Evaluation Report at 2. We also find the record supports the agency's argument that, by contrast, the protester's quotation displayed "a more generic description" of these challenges. Supp.

(...continued)

understanding of systems data and processes to support the verification and validation of these critical future iFAMS interfaces." Supp. MOL at 7.

MOL at 6. In short, the protester has not successfully alleged disparate treatment because it cannot show that its quotation is indistinguishable from the awardee's quotation. The protester's disagreement with the agency's identification of a significant strength in the awardee's quotation is not sufficient to show the agency's judgment was unreasonable. *DEI Consulting, supra*.

Next, the protester argues that the agency gave the awardee's quotation both a strength and a significant strength for a single attribute. EM Key complains that the agency assessed a significant strength for demonstrating "significant functional and technical Momentum system expertise with federal financial management, accounting, and business process knowledge," while also assessing a strength for expertise in "SAFe agile [Scaled Agile Framework], IEEE [Institute of Electrical and Electronics Engineers (IEEE)]-based IV&V, federal financial management, and Momentum." AR, Tab 13, Selection Decision Document at 24, 26. The protester points to similar language in the agency's description of the basis for assessing the strength and the significant strength, such as the focus in both areas of the source selection decision on InnoVet's proposed use of more than [REDACTED] subject matter experts with [REDACTED] expertise. Comments and Supp. Protest at 7-8; Supp. Comments at 9.

The agency responds that while the significant strength and the strength assessed in InnoVet's quotation referenced some of the same areas of expertise, they were based on different attributes in the quotation. The record shows that the significant strength reflected extensive detail provided in InnoVet's technical approach, such as its expertise with Momentum, see Supp. MOL at 108-9, whereas the strength was based on InnoVet's management and staffing approach. AR, Tab 20, InnoVet Technical Evaluation Report at 2-3; see Supp. COS at 7. The agency argues that the evaluation report, in describing the strength assessed for InnoVet's management approach, focused on the inclusion of additional staff with particular expertise, exceeding the solicitation's staffing requirement, and, while the evaluation included a reference to "SAFe agile, IEEE-based IV&V, federal financial management, and Momentum,"--the staff's areas of expertise--these were "merely referenced in the context of [InnoVet's] staffing approach." Supp. MOL at 11. The agency thus asserts that the assessed strength was not duplicative of the significant strength at issue here.

An agency's judgment of whether to assess unique strengths is a matter within the agency's discretion and one that we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable or inconsistent with the applicable evaluation criteria. *SMS Data Products Group, Inc.*, B-418925.2 *et al.*, Nov. 25, 2020, 2020 CPD ¶ 387 at 6. Further, whether the agency counted the benefits of each vendor's approach as multiple aspects of a single strength, or as separate stand-alone strengths is not the operative concern; rather, the relevant inquiry is the reasonableness of the substantive evaluation findings. *Agile-Bot II, LLC*, B-419350.3, B-419350.4, June 16, 2021, 2021 CPD ¶ 231 at 9.

On this record, we find no basis to object to the agency's assessment of both a strength and a significant strength in the awardee's quotation. We find reasonable the agency's

assertion that it identified the strength at issue here based on InnoVet's management approach. Supp. MOL at 10. The record shows that the agency assessed the strength because of the particular staffing and management approach, which offered additional staff with particular expertise, while it assessed the significant strength at issue because of InnoVet's detailed technical approach.⁴ Compare AR, Tab 20, InnoVet Technical Evaluation Report at 2-3 with AR, Tab 20, InnoVet Technical Evaluation Report at 6. In justifying its identification of this significant strength, the agency does mention team expertise, but also points to other aspects of the awardee's technical approach, such as InnoVet's proposal "to [REDACTED] in specific areas where through its extensive [REDACTED] experience and expertise it knows [REDACTED]." *Id.* at 3. Notwithstanding some commonality between the strength and significant strength, the agency has reasonably shown that the assessed strength and significant strength reflect different beneficial aspects of InnoVet's quotation. As a result, we do not find that the protester has shown the agency assessed duplicative strengths in the awardee's quotation. Accordingly, these protest allegations are denied.

Past Performance

The protester argues that the agency unreasonably assigned the awardee's quotation a rating of low risk under the past performance factor. Protest at 4-5; Supp. Protest and Comments at 10-12. The protester contends that the agency performed a "mechanical" review of past performance information "based on a tally of PPQ ratings," and that the agency "emphasizes that simply based on the number of references and quality assessments received . . . InnoVet automatically deserved a better past performance rating." Supp. Comments at 11. The protester also asserts that the agency erroneously attributed the past performance questionnaire (PPQ) for one of the awardee's major subcontractors, [REDACTED], to InnoVet itself. Supp. Protest and Comments at 11. In making this claim, the protester points to a paragraph at the end of the PPQ describing [REDACTED]'s performance. *Id.*

The agency responds that, in accordance with the solicitation, it assessed each individual instance of past performance as to recency, relevancy, and quality; and the past performance report details "do not support the allegation of a mere tally." Supp. MOL at 20. The agency argues that the source selection authority looked beyond the number of assessments to determine that, although the awardee provided "more recent and relevant instances," no discernible difference existed between the two vendors' quotations under the past performance factor. *Id.* at 21. Further, the agency contends that the PPQ the protester mentions was rightly credited to InnoVet, and that "the

⁴ For example, the first sentence in the technical evaluation report regarding the significant strength at issue cites the "extensive detail on [InnoVet's] IV&V approach," while the first sentence explaining the identified strength cites the awardee's "assembled team of resources." AR, Tab 20, InnoVet Technical Evaluation Report at 2, 6.

commentary about [REDACTED] was placed in the General Comments section of the PPQ and reflected the work performed on the effort of which InnoVet was a part.” *Id.*

Where a solicitation requires the evaluation of vendors’ past performance, we will examine an agency’s evaluation to ensure that it was reasonable and consistent with the solicitation’s evaluation criteria, since determining the relative merits of vendors’ past performance information is primarily a matter within the contracting agency’s discretion. *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10. A protester’s disagreement with the agency’s judgment is insufficient to establish that the agency acted unreasonably. *Id.*

We find the agency’s evaluation of InnoVet with regard to past performance was reasonable. The record shows that the agency looked beyond the number of assessments to determine that there was no discernible difference between the two quotations under the past performance factor. Supp. MOL at 20. While the agency rated the quality of vendors’ past performance with a numerical system, their evaluation also considered a detailed summary of each contractual effort, the contract value of each effort, the period of performance for each effort as related to recency, and whether each effort could be considered relevant to the instant procurement. See AR, Tab 10, InnoVet’s Past Performance Evaluation Report.

Further, the protester has not shown that the agency improperly considered the PPQ at issue in evaluating InnoVet’s past performance. The protester has not meaningfully refuted the agency’s assertion that the general comments section of InnoVet’s PPQ mentioned [REDACTED] by name, rather than InnoVet, because [REDACTED] was the prime contractor for the overall effort in which InnoVet participated as a subcontractor. Supp. MOL at 21. We note, in this regard, that this PPQ was completed by the same office that is handling the instant procurement, a fact that the protester itself mentions. Supp. Comments at 10. We find it reasonable that the office that filled out a PPQ would be aware of the roles and performance of the prime and subcontractor under the contract for which the PPQ was completed. Here, the protester’s disagreement with the agency’s evaluation of past performance does not demonstrate that the agency acted unreasonably. *The MIL Corp.*, *supra*.

Unequal Access Organizational Conflict of Interest

The protester alleges that the agency improperly awarded the contract to InnoVet, claiming that InnoVet had a known OCI based on its “extensive involvement” in the agency’s FMBT program. Comments and Supp. Protest at 2. The protester references a pre-closing question and answer exchange, in which a vendor asked the agency which VA contracts would be considered to present a conflict of interest, and the agency responded that “due to the nature of IV&V services, any FMBT related support contract potentially gives rise to an OCI.” AR, Tab 5, Questions and Answers at 3. The protester also asserts that the awardee’s past performance emphasizes the involvement of its subcontractor, [REDACTED], in the VA’s FMBT program. Comments and Supp. Protest at 2. The protester claims that these two assertions combined show the agency

erred in failing to investigate this alleged OCI, given that [REDACTED]'s involvement in the FMBT program "provided a competitive advantage beyond mere incumbency" and gave the awardee the benefit of "competitively useful nonpublic information" for which the awardee's quotation received strengths.⁵ *Id.* at 2-3.

The agency asserts that the protester merely suspects an OCI, and has not pointed to any facts demonstrating the awardee's improper access to proprietary or source selection-sensitive information. Supp. MOL at 14-15. The agency further asserts that [REDACTED]'s past work did not support the agency's FMBT efforts; rather, it assisted FMBT work groups "by providing subject matter expertise in preparing to utilize the iFAMS software product; not support for the FMBT Program." Supp. COS at 3. The agency adds that the contracting officer conducted an investigation based on the protester's OCI claims and spoke to the FMBT contract manager, who confirmed that no OCI existed, advised that [REDACTED]'s work helped prepare for the agency's implementation of the iFAMS product but "was not associated with the actual implementation of iFAMS," and stated that no non-public iFAMS information would even be generated until "the implementation phase of iFAMS," which would not commence until [REDACTED]'s work was completed. *Id.* The agency argues the protester's unequal access OCI allegation is "not accurate because the iFAMS implementation approach is extensively and widely communicated to all [of the] VA's Stakeholders through its Organizational Change Management team." *Id.* at 4. As such, the agency asserts that "the information disseminated is not proprietary, non-public or competitively useful." *Id.*

The protester responds that the contracting officer's investigation is inadequate and inconsistent with the record. Supp. Comments at 2-4. EM Key argues that the awardee's quotation cites its direct FMBT experience and the agency positively noted InnoVet's experience "supporting VHA's efforts on the FMBT implementation." *Id.* at 2 (citing AR, Tab 20, InnoVet Technical Evaluation Report at 2).

The type of unequal access to information OCI alleged here exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR 9.505(b), 9.505-4; *Cyberdata Techs., Inc.*, B-411070 *et al.*, May 1, 2015, 2015 CPD ¶ 150 at 6. A protester alleging an OCI must identify "hard facts" that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *Millennium Corp., Inc.*, B-412866, B-412866.2, June 14, 2016, 2016 CPD ¶ 168 at 8.

However, it is well settled that a vendor may possess unique information, advantages, and capabilities due to its prior experience under a government contract as an

⁵ For example, the protester alleges that the awardee's quotation received praise for its "deeper specific understanding of the FMBT Program" precisely because of this OCI. *Id.* at 3 (citing AR, Tab 13, Selection Decision Document at 23).

incumbent contractor, and the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. See FAR 9.505-2(a)(3); *Lovelace Sci. & Tech. Servs.*, B-412345, Jan. 19, 2016, 2016 CPD ¶ 23 at 12; *Signature Performance, Inc.*, B-411762, Oct. 19, 2015, 2015 CPD ¶ 321 at 5. The existence of an incumbent advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. *Millennium Corp., Inc.*, *supra*.

On this record, we have no basis to conclude that the awardee had an unequal access to information OCI or that the agency failed to investigate a potential conflict.⁶ The record shows that the point of the FMBT program is to replace the agency's financial management and automated acquisition systems with iFAMS, a financial management software product, and that the agency required a contractor to provide independent testing and quality assurance, or IV&V services, in support of this system modernization. RFQ at 82, 87. We find persuasive the agency's argument that [REDACTED] could not possibly have possessed any nonpublic, proprietary information regarding the FMBT program because iFAMS would not be implemented until after [REDACTED] completed its contract. Supp. COS at 3. Moreover, the agency conducted an investigation and concluded that no OCI exists. *Id.*

The protester emphasizes that the presence of a conflict of interest is clear from certain phrases in the awardee's quotation, such as [REDACTED]'s claim that it was involved in the "FMBT development lifecycle," or [REDACTED]'s assertion that it assisted in providing "comments to all FMBT products" for the agency. AR, Tab 15, InnoVet Past Performance at 26-27. However, these phrases do not show that the awardee had access to any nonpublic information that would provide anything other than a normally occurring incumbent advantage. We note the agency's assertion that any information [REDACTED] received was also widely disseminated and, therefore, not nonpublic. Supp. COS at 3. On this record, the protester has failed to present any hard facts indicating that the awardee possessed specific, nonpublic, competitively useful information that would create an OCI. We cannot conclude that the agency gave the awardee preferential

⁶ The intervenor argues that the protester focuses only on part of the agency's response in the aforementioned solicitation question and answer. The intervenor points out that the agency qualified its response with the phrase "due to the nature of IV&V services." Intervenor Supp. Comments at 5 n. 2 (citing AR, Tab 5, Questions and Answers at 3). The intervenor asserts that this qualification is important, because the potential for an OCI with respect to IV&V services arises where a successful vendor performs "FMBT services that would be verified or validated under the instant contract." *Id.* We agree that is not the case here, as [REDACTED]'s past work does not consist of implementing iFAMS for the FMBT program, and so [REDACTED] is not at risk of implementing the same technology that InnoVet and its subcontractors would be testing.

treatment or that the awardee, through its subcontractor, had anything other than a normally occurring incumbent advantage.

The protest is denied.

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General Counsel