

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Paragon Technology Group, Inc.

File: B-412636; B-412636.2

Date: April 22, 2016

John E. Jensen, Esq., Meghan Doherty, Esq., Selena Brady, Esq., and Alexander B. Ginsberg, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester. Robert J. Symon, Esq., Elizabeth A. Ferrell, Esq., Aron C. Beezley, Esq., and Lisa A Markman, Esq., Bradley, Arant, Boult, Cummings, LLP, for Jacobs Technology Inc., the intervenor.

Christopher S. Cole, Esq., Alexis J. Bernstein, Esq., Lt. Col. Mark E. Allen, and Heather M. Mandelkehr, Esq., Department of the Air Force, for the agency. Stephanie B. Magnell, Esq., and Jennifer Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency engaged in misleading discussions is sustained where the record shows that agency's discussion questions did not accurately describe the agency's concern.
 2. Protest is sustained where the agency's past performance evaluation did not follow the terms of the solicitation and was based on an unreasonable interpretation of the solicitation.
-

DECISION

Paragon Technology Group, Inc., of Scott Air Force Base, Illinois, protests the issuance of a task order to Jacobs Technology Inc., of Tullahoma, Tennessee, under request for quotations (RFQ) No. HTC711-15-Q-D032, issued by the United States Transportation Command (USTRANSCOM) to obtain program management, engineering, financial management and acquisition related support for 22 programs of record¹ served by the Program Executive Office – TRANSCOM

¹ Examples of these program areas include the Defense Personal Property System, Dynamic Mission Replanning, and the Mobility Enterprise Information Services. RFQ at 23.

(PEO-T), at Scott Air Force Base in Illinois.² Paragon, the incumbent contractor providing these services, alleges that the agency conducted misleading discussions and that the agency's past performance evaluation was unreasonable.

We sustain the protest.

BACKGROUND

The RFQ, issued pursuant to Federal Acquisition Regulation (FAR) Subpart 8.4 to acquire services under the FSS, contemplated the issuance of a labor-hour³ task order, consisting of one 8-month base period, four 1-year option periods, and one 4-month option period. RFQ at 1.

The RFQ included four evaluation factors: price, technical capability, past performance, and cyber security. Id. at 6. For purposes of award, USTRANSCOM would first rank the proposals by total proposed price. RFQ at 7. Next, starting with the lowest-priced proposal, the agency would evaluate proposals under the seven subfactors identified under the technical capability factor: (1) earned value management analysis; (2) program management support; (3) security engineering; (4) systems engineering; (5) test and configuration management; (6) staffing matrix; and (7) staffing plan. Id. The agency would assign a rating of acceptable, reasonably susceptible of being made acceptable, or unacceptable to each technical capability subfactor.⁴ Id. at 8. If the lowest-priced proposal did not receive a rating of unacceptable for any technical capability subfactor, the agency would evaluate that vendor's past performance, assigning an overall past performance rating of substantial confidence, satisfactory confidence, limited

² The order was issued against Jacobs' General Services Administration Federal Supply Schedule (FSS) mission oriented business integrated services contract.

³ As set forth below, there is a lack of clarity in the record about the type of task order that will be placed here. On its face, the RFQ anticipated the placement of a labor-hour task order, RFQ at 1, while the independent government cost estimate (IGCE) assumed that the order was to be issued on a fixed-price basis. Agency Report (AR), Tab 13, IGCE, at 6. At the hearing conducted in this protest, testimony was mixed about how this task order was to be priced. Compare transcript (Tr.) at 244:16-19 (the pricing structure was fixed-price per contract line item number (CLIN)) with tr. at 252:9-13 ("it's not [a] firm[-]fixed[-]price contract").

⁴ Only proposals with final ratings of acceptable for all technical capability subfactors were eligible for award. RFQ at 8. An initial rating of reasonably susceptible of being made acceptable would be changed to a rating of acceptable or unacceptable in the agency's final evaluation; for award without discussions, the rating would be converted to unacceptable. Id.

confidence or no confidence. Id. at 7, 11. The cybersecurity factor would also be evaluated on a basis of acceptable or unacceptable. Id. at 12.

If the lowest-priced proposal received ratings of acceptable for each technical capability subfactor, and subsequently received ratings of substantial confidence for the past performance factor and acceptable for the cybersecurity factor, that proposal would be deemed to represent the best value to the agency. Id. If the lowest-priced proposal instead received either a rating of reasonably susceptible of being made acceptable for any technical capability subfactor, or ratings of acceptable for every technical capability subfactor and a past performance rating lower than substantial confidence, the agency would evaluate the next higher-priced proposal. Id. at 8. The agency would continue to evaluate proposals until there was a technically-acceptable proposal with a past performance rating of substantial confidence, or until all proposals had been evaluated. Id. The contracting officer (CO) could then make award without discussions or establish a competitive range and enter into discussions, in either case making award on the basis of an integrated best-value assessment. Id.

For the past performance factor, vendors were required to provide contract references that demonstrated experience in six areas: (1) information technology (IT) programs cost analysis; (2) planning, programming, budgeting and execution; (3) program support in the areas of cost, schedule, performance and risk; (4) support for systems analysis on software development teams; (5) support for configuration management and test and evaluation; and (6) hiring personnel with unique, specialized expertise on short notice and expanding staff to meet contingencies. Id. at 10. The RFQ provided that each contract reference would be assessed as either very relevant, relevant, somewhat relevant, or not relevant.⁵ Id. at 11. The agency planned to use these relevance ratings, as well as information on the quality of a vendor's performance, to assign a vendor a comprehensive performance confidence rating. Id. As pertinent to the protest, the RFQ defined those ratings as follows:

Substantial Confidence – Based on the offeror's recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort.

⁵ The annual IGCE was approximately \$12.4 million per year. AR, Tab 13, IGCE, at 3. In its report addressing this protest, the agency explained that, for a contract to be viewed as very relevant in the past performance evaluation, the vendor needed to have performed certain performance work statement (PWS) tasks at annual values 200 percent larger than (i.e., three times) the value of the IGCE for those PWS tasks here. Agency Memorandum of Law at 8-9; AR, Tab 26, Magnitude Notation, at 1.

Satisfactory Confidence – Based on the offeror’s recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort.

Id.

The agency received seven quotations. CO Statement of Facts (COSF) at 10. The agency eliminated the lowest-priced vendor on the basis of technical unacceptability and evaluated the two next lowest-priced vendors, Paragon and Jacobs, assigning their quotations the following initial ratings:

	Paragon	Jacobs
Technical Capability Subfactors		
(1) <i>earned value management analysis</i>	Acceptable	Acceptable
(2) <i>program management support</i>	Acceptable	Acceptable
(3) <i>security engineering</i>	Acceptable	Acceptable
(4) <i>systems engineering</i>	Acceptable	Acceptable
(5) <i>test and configuration management</i>	Acceptable	Acceptable
(6) <i>staffing matrix</i>	Reasonably Susceptible of Being Made Acceptable	Acceptable
(7) <i>staffing plan</i>	Reasonably Susceptible of Being Made Acceptable	Acceptable
Cyber Security	Acceptable	Acceptable
Past Performance	Satisfactory Confidence	Substantial Confidence
Initial Total Proposed Price	[\$DELETED] million	[\$DELETED] million

AR, Tab 27, Competitive Range Determination, at 4.⁶ The agency then established a competitive range consisting of Paragon and Jacobs and entered into discussions. Id. at 6.

Paragon’s initial staffing matrix included various assumptions that, in each performance period, support for certain PWS program areas would be reduced or eliminated, while full support for other program areas would be required. AR, Tab 19, Paragon Technical Proposal, at 30-35.

⁶ Because Paragon’s proposal received a rating of reasonably susceptible of being made acceptable for technical capability subfactors 6 and 7, the agency evaluated the next higher-priced proposal, which was submitted by Jacobs. Id.

On September 11, 2015, the agency issued Paragon several evaluation notices (ENs), including one related to the staffing matrix subfactor in which the agency instructed Paragon to remove the assumptions in option periods [DELETED] from its proposal and “revise the staffing accordingly.” AR, Tab 43, Paragon Corrected EN, at 1. In revising its proposal, Paragon removed these assumptions and increased its staffing by the corresponding number of FTEs. Id. The agency concluded that Paragon’s response “addressed the assumptions and related staffing for Option Periods [DELETED]” and that the “resulting proposed staffing mix [was] Acceptable.” Id.

As to past performance, Paragon’s initial proposal included two contract references: one for the company’s incumbent USTRANSCOM PEO-T contract (reference 1), and a second for a similar contract under which Paragon also provided PEO-T support to USTRANSCOM (reference 2). AR, Tab 20, Paragon Proposal – Past Performance, at 3, 23. The agency evaluated these contract references as summarized in the first two columns below:

Paragon Past Performance Evaluation				
Performance Area	Contract Ref. 1	Contract Ref. 2	Contract Ref. 3	Contract Ref. 4
<i>(1) IT program cost analysis</i>	Very Relevant	Very Relevant	Somewhat Relevant	Not Relevant
<i>(2) planning, budgeting & execution</i>	Very Relevant	Relevant	Not Relevant	Not Relevant
<i>(3) program support</i>	Relevant	Relevant	Somewhat Relevant	Somewhat Relevant
<i>(4) systems analysis</i>	Relevant	Relevant	Not Relevant	Not Relevant
<i>(5) configuration management</i>	Relevant	Relevant	Not Relevant	Somewhat Relevant
<i>(6) personnel</i>	Relevant	Relevant	Very Relevant	Very Relevant
Approx. Ann. Value (millions)	\$11.3	\$9.5	\$2.6	\$41.6
Relevance Rating	Relevant	Relevant	Somewhat Relevant	Somewhat Relevant

AR, Tab 24, Paragon Initial Past Performance Evaluation, at 2-3; AR, Tab 61, Paragon Final Past Performance Evaluation, at 5.

After assigning ratings of relevant to the first two references and reviewing the assessment of Paragon’s performance, the agency awarded Paragon an overall

past performance rating of satisfactory confidence. AR, Tab 24, Paragon Initial Past Performance Evaluation, at 3. After discussions related to the past performance rating, Paragon submitted two more contract references (references 3 and 4) related to contracts performed by Paragon’s subcontractors, which the agency evaluated as summarized in the last two columns above. AR, Tab 48, Paragon Response to EN 0006. Paragon’s overall past performance rating of satisfactory confidence did not change after the agency evaluated these references. AR, Tab 61 Paragon Final Past Performance Evaluation, at 5.

Jacobs submitted six contract references, which the agency evaluated as follows:

Jacobs Past Performance Evaluation						
Performance Area	Contract Ref. 1	Contract Ref. 2	Contract Ref. 3	Contract Ref. 4	Contract Ref. 5	Contract Ref. 6
<i>(1) IT program cost analysis</i>	Very Relevant	Somewhat Relevant	Somewhat Relevant	Not Relevant	Not Relevant	Not Relevant
<i>(2) planning, budgeting & execution</i>	Very Relevant	Somewhat Relevant	Somewhat Relevant	Not Relevant	Not Relevant	Not Relevant
<i>(3) program support</i>	Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant
<i>(4) systems analysis</i>	Very Relevant	Somewhat Relevant	Somewhat Relevant	Relevant	Relevant	Not Relevant
<i>(5) configuration management</i>	Very Relevant	Somewhat Relevant	Somewhat Relevant	Relevant	Relevant	Relevant
<i>(6) personnel</i>	Very Relevant	Relevant	Somewhat Relevant	Very Relevant	Relevant	Relevant
Approx. Ann. Value (millions)	\$76.8	\$21	\$3.2	\$29.8	\$22.8	\$18
Relevance Rating	Very Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant	Somewhat Relevant

AR, Tab 60, Jacobs Final Past Performance Evaluation, at 2-5. Based on these results, and after reviewing the assessments of Jacobs’ performance, the agency awarded Jacobs an overall past performance rating of substantial confidence. Id. at 5.

After final proposal revisions, Paragon’s total proposed price was \$42,807,478.34, and Jacobs’ total proposed price was \$41,351,302.61. AR, Tab 66, Source Selection Decision Document (SSDD), at 6. The agency made award to Jacobs, concluding that Jacobs’ proposal offered the best value to the agency because

Jacobs had a higher past performance confidence assessment and offered a lower price than Paragon's proposal.⁷ Id. at 10.

On January 12, 2016, the agency provided Paragon with a debriefing and Paragon filed this protest on January 13.

On March 30, a hearing was held in order for our Office to obtain additional information about the agency's evaluation. At the hearing, the agency called three witnesses: (1) an acquisition program manager who served as the source selection evaluation board (SSEB) chairperson in this procurement; (2) a cost analyst who served on the SSEB and finalized the IGCE; and (3) a contract specialist.

DISCUSSION

Paragon alleges that the agency engaged in misleading discussions and challenges the evaluations of its and Jacobs' past performance. For the reasons below, we sustain the protest.

Misleading Discussions

Paragon contends that USTRANSCOM engaged in misleading discussions by directing Paragon to remove its assumptions in option periods [DELETED], when the agency in fact did not object to the assumptions themselves. Paragon Post-Hearing Comments at 3-4. The agency understood that the assumptions corresponded to a fixed reduction in FTEs. Tr. at 31:12-19 (confirming its understanding that the "drop in labor hours in years [DELETED] of the Task Order were the result of the assumptions in Paragon's quote"). Paragon argues that, but for the agency's misleading discussions, Paragon might have increased its staffing by a lesser amount and retained its price advantage over Jacobs, instead of increasing its staffing by the full number of FTEs corresponding to the assumptions. Paragon Post-Hearing Comments at 4, 8, 13.

As described above, in its staffing matrix, Paragon included assumptions that support for some PWS program areas would be reduced or eliminated in certain performance periods. AR, Tab 19, Paragon Technical Proposal, at 30-35. For example, in option period 3, Paragon "made the following assumptions regarding the level of effort required to meet PEO-T requirements:"

[DELETED]

⁷ The RFQ provided that "[o]nce deemed [technically] acceptable, all proposals are considered [technically] equal." RFQ at 8.

Id. at 33. Paragon explained that “[t]hese changes result in a net reduction of required staff of approximately [DELETED] FTEs” in option period 3. Id. Similar assumptions in option periods [DELETED] “result[ed] in a [DELETED] net reduction of required staff of approximately [DELETED] FTEs.” Id. at 34-35.

Here, the RFQ provided that under the staffing matrix subfactor, the agency would evaluate vendors’ ability to “perform the PWS tasks, as reflected in a staffing matrix, which identifies the necessary personnel resources given the Offeror’s approach to performing the PWS tasks.” RFQ at 5.

The agency was “concerned about the assumptions in Paragon’s staffing matrix . . . due to the correlation to the [proposed] hours.” Tr. at 28:1-4. As compared to historical staffing levels, the agency found that Paragon’s proposed staffing for the base period and the five option periods, was reduced by [DELETED] percent, [DELETED] percent, [DELETED] percent, [DELETED] percent, [DELETED] percent, and [DELETED] percent, respectively.⁸ Tr. at 34:1-4. In discussions, USTRANSCOM issued an EN to Paragon in relation to the staffing matrix subfactor, which stated as follows:

Your proposed staffing matrix appears to demonstrate a significant reduction⁹ in Option Periods [DELETED] based on assumptions regarding the PEO-T which was not identified as part of the requirement. Please remove these assumptions from your proposal and revise the staffing accordingly.

⁸ These percentages are based on hearing testimony. Although the agency concluded that Paragon’s proposed staffing was too low in option periods [DELETED] by comparing “the hours proposed by labor skill area” with “historical hours which were provided as part of the RFQ,” this analysis is not part of the record. Tr. at 23:7-11; tr. at 63:17-18 (the agency is “not aware of a document” with the analysis). We need not reach the protester’s allegation that the agency failed to consider Paragon’s staffing as compared to the PWS because we conclude herein that the agency’s discussion question was misleading regardless of whether the agency had a reasonable and documented basis for its conclusion about the staffing shortfall. Paragon Comments & Supp. Protest, at 14. However, we note that, in prior decisions, we have addressed a lack of documentation in the record. See e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8 (protest sustained when the record was not sufficient to allow for a meaningful review of protest issue).

⁹ This “reduction” referred to a reduction in staffing as compared with historical staffing levels. Tr. at 41:13-16.

AR, Tab 43, Paragon Corrected EN PAR-0001 Closed, at 1. Paragon responded that its proposal reflected its “staffing approach, which adjusted program support based on each program’s [DELETED].” Id. Paragon added:

We understand that the assumptions for Option Periods [DELETED] in our proposal that directly relate to [DELETED] that were not identified as part of the requirement should be removed and our staffing approach adjusted accordingly. We have therefore removed the assumptions related to program [DELETED] in Option Periods [DELETED] and adjusted the staffing reductions. This resulted in an increase of [DELETED] FTEs in Option Period [DELETED] and an increase in [DELETED] FTEs in Option Period [DELETED], when compared to our initial proposal submission. Since the Government found our staffing approach to be “sound” for the [DELETED], we did not make any changes to our assumptions or staffing for those performance periods.

Id. Correspondingly, Paragon’s price increased by approximately \$[DELETED]. Protest at 2. The agency concluded that Paragon’s final staffing was acceptable. AR, Tab 43, Paragon Corrected EN PAR-0001 Closed, at 1.

There is no requirement that an agency soliciting vendors for orders under FSS contracts conduct discussions with vendors in accordance with FAR § 15.306. Avalon Integrated Servs. Corp., B-290185, July 1, 2002, 2002 CPD ¶ 118 at 4. Nonetheless, exchanges that do occur with vendors in a FAR Subpart 8.4 procurement must be fair and equitable. COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 5. While FAR Part 15 does not control here, our Office has looked to the standards in FAR Part 15, and the decisions interpreting that part, for guidance in determining whether exchanges with vendors under a FAR Subpart 8.4 procurement were fair and equitable. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6.

In our decisions under FAR Part 15, we have held that the content of discussions is largely a matter of the contracting officer’s judgment. FAR § 15.306(d)(3); American States Utils. Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5. An agency may not, however, mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency’s actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. Thus, for example, where an agency advises an offeror in discussions to revise its proposal in a way that does not reflect the agency’s evaluation, the discussions are misleading. SeKON Enter., Inc.; Signature Consulting Grp., B-405921, B-405921.2, Jan. 17, 2012, 2012 CPD ¶ 26 at 7.

The record shows that, despite the language of the EN and the emails, USTRANSCOM did not in fact object to Paragon's assumptions. Rather, the agency's concern was that Paragon's total proposed hours for option periods [DELETED] were lower than the historical amounts. As discussed below, although Paragon's final proposal retained certain assumptions about reductions in program support in [DELETED], the agency nevertheless found it to be technically acceptable. AR, Tab 66, SSDD, at 8. See also tr. at 36:6-10 (agency found the proposal technically acceptable "despite the assumptions"); tr. at 188:12-18 (agency's instruction regarding the assumptions was a means of "telegraph[ing]" to Paragon to increase its staffing). Indeed, the agency "effectively disregarded" Paragon's assumptions, tr. at 58:1-14, and if the EN were re-written, "it would just say [that] the hours" were the problem. Tr. at 74:11-12.

We find that the agency conducted misleading discussions by directing the protester to remove certain assumptions from its proposal, when those assumptions were not, in fact, of concern to the agency. The record shows that, contrary to the language in the EN, it was possible for Paragon to have retained the assumptions, reduced its staffing by a lesser amount, and still been found technically acceptable. Tr. at 73:18-20 ("[T]here was no threshold, no magic number of [whether a staffing reduction] beyond [DELETED] percent or [DELETED], or whatever number" would still be acceptable). We conclude that, because the EN directed the protester to change its proposal in a manner that did not reflect the basis of the agency's concern, the discussions were misleading. See SeKON, supra. Accordingly, we sustain this basis of protest.¹⁰

¹⁰ Although the agency argues that Paragon was not prejudiced because the EN's references to Paragon's assumptions led Paragon to increase its staffing, resulting in a technically-acceptable proposal, we disagree. USTRANSCOM Post-Hearing Comments at 8. The agency's argument does not address the fact that, as the agency acknowledged, the assumptions corresponded to a fixed number of FTEs. Tr. at 31:12-22. Instead, the EN effectively asked the protester to increase its staffing by the FTEs corresponding to the assumptions. In cases such as this, we need not establish with certainty what the protester's approach would have been if the discussions had not been misleading; rather, a protester's reasonable assertion of a claim that it could have improved its competitive position is sufficient to demonstrate prejudice. See KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175 at 11; Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52 at 11. In this regard, Paragon maintains that the agency's misleading discussions led the firm to raise its staffing by the full amount of the FTEs corresponding to the assumptions. Paragon Post-Hearing Comments at 8. The protester alleges that it might have increased its staffing by a smaller amount, and thereby retained its position as the lowest-priced vendor, had the EN simply informed Paragon that its staffing was too low. Id. The record shows that Paragon revised its staffing in

(continued...)

Past Performance Evaluation of Paragon

Next, Paragon contends that the agency's evaluation of its past performance as warranting a "satisfactory confidence" assessment was fundamentally flawed because the agency failed to evaluate past performance in accordance with the RFQ's relevance criteria. Protest at 19. Specifically, the protester argues that the agency used a 200 percent increase in the estimated value of the PWS level of effort to assess the relevance of the vendors' past performance contract references. Paragon Post-Hearing Comments at 18. Paragon maintains that two of its contract references, including the reference for the incumbent contract, "covered 'essentially the same' scope, magnitude, and complexities required by the [s]olicitation," and should have received ratings of very relevant, resulting in an overall past performance rating of substantial confidence. *Id.* at 20. As discussed below, we find that the agency's evaluation of Paragon's past performance was inconsistent with the terms of the RFQ, and sustain the protest in this area as well.

An agency's evaluation of past performance is a matter of discretion which we will not disturb unless the agency's assessment is unreasonable or inconsistent with the solicitation criteria. *Nova Techs.*, B-405982.2, May 16, 2012, 2012 CPD ¶ 172 at 10. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations and to ensure that the agency's rationale is adequately documented. *DynCorp Int'l LLC*, B-406523.2, B-406523.3, Dec. 16, 2013, 2014 CPD ¶ 7 at 6; *Falcon Envtl. Servs., Inc.*, B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. Agencies are required to evaluate proposals based solely on the factors identified in the solicitation. *Intercon Assocs., Inc.*, B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. Although we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria, undocumented, or not reasonably based. *Sonetronics, Inc.*, B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48 at 3.

The RFQ required that a vendor's contract references, when considered together, have a logical connection to the work in six performance areas. RFQ at 5. The references would receive a rating reflecting their relevance, as defined below:

Very Relevant (VR) – Present/Past performance effort involved essentially the same scope and magnitude of effort and complexities this solicitation requires.

(...continued)

direct response to the agency's flawed EN, and we find this sufficient to establish prejudice.

Relevant (R) – Present/Past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires.

Somewhat Relevant (SR) – Present/Past performance effort involved some of the scope and magnitude of effort and complexities this solicitation requires.

Not Relevant (NR) – Present/Past performance effort involved little or none of the scope and magnitude of effort and complexities this solicitation requires.

Id. at 11. The overall past performance rating was the agency’s level of confidence “that the offeror will successfully perform the required effort.” Id.

While the requirements of the solicitation here are largely unchanged from the previous order, the PWS informed vendors that the scope of the task order could be modified to encompass additional program areas, as follows:

During the life of this contract, there is potential for additional programs and transportation services support. If additional support is required, requirements will be negotiated and the contract modified. There is no guarantee of any additional work beyond the support called for in the PWS. The Government estimates that over the life of the contract the potential support may increase by up to 200%.

Id. at 24. The RFQ contained no details about this potential growth nor about the manner in which the agency planned to use negotiated contract modifications to increase the value of the task order by 200 percent.

Paragon initially submitted two contract references for the past performance factor. AR, Tab 20, Paragon Proposal – Past Performance. The agency assigned ratings of relevant to these contract references and assigned Paragon an overall past performance rating of satisfactory confidence. AR, Tab 27, Competitive Range Determination, at 4.

As part of discussions, USTRANSCOM issued Paragon an EN in relation to its past performance rating, as follows:

Please address the following: Considering “The Government estimates that over the life of the contract the potential support may increase by up to 200%”; please address your past performance in terms of magnitude of effort that this solicitation requires.

AR, Tab 29, Paragon ENs, at 13.

Paragon questioned the rating of satisfactory confidence, “[c]onsidering that Paragon [as the incumbent] has received ‘*Exceptional*’ ratings for all periods of performance on two consecutive contracts performing the same scope and magnitude of effort and complexities this solicitation requires.” AR, Tab 32, Paragon Questions Regarding ENs, at 3. The agency explained that it was “looking for past performance at 200% [more than] the requirement as defined in our PWS,” and that Paragon’s contract references, including that for the incumbent contract, did “not meet the Very Relevant definition (in terms of magnitude this solicitation requires).” AR, Tab 33, USTRANSCOM Response to Paragon ENs, at 3.

In the second EN to Paragon on past performance, the agency wrote:

While your past performance references demonstrate the same scope and magnitude of the current contract; the magnitude of this requirement is not the same when considering the potential contract size. . . . Furthermore, although there is no guarantee this contract will grow to the full 200%, when evaluating past performance, for all performance areas, the magnitude includes potential lifecycle growth which is much larger than the current contract.

AR, Tab 46, Paragon EN 0006, at 4. During the hearing, the agency explained that the “sole basis that [Paragon’s contract references for the incumbent and prior incumbent contracts] were not determined to be very relevant” was because their magnitude was not comparable to the value of the solicitation as increased by 200 percent. Tr. at 105:17-20.

Paragon contends that the agency’s decision to assess the relevance of past performance using a value 200 percent larger than the value of the solicited effort was unreasonable and inconsistent with the requirements of the solicitation. Paragon’s Comments & Supp. Protest, at 18-21. The agency responds that its approach to assessing relevance was reasonable because the solicitation on its face anticipated the possibility that its requirements might increase by 200 percent. Agency Post-Hearing Comments at 8-10.¹¹

¹¹ The intervenor, relying on our discussion in PM Servs. Co., B-310762, Feb. 4, 2008, 2008 CPD ¶ 42 at 3, argues that Paragon’s challenge to its past performance evaluation is untimely, given that the protester was informed of the agency’s interpretation of the solicitation during discussions, because it was not filed within 10 days after the basis for protest was known. We do not agree. The ENs and emails did not constitute the agency’s final evaluation in this respect. We have held that when a firm has been notified that the agency is considering taking an action adverse to the firm’s interest, but has not made a final determination, the firm need not file a defensive protest, since it may presume that the agency will act properly. American Multi Media, Inc.--Recon., B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158

(continued...)

On this record, we do not find the agency's approach to assessing the relevance of past performance to be reasonable or supported by the solicitation. Under any reasonable reading of this solicitation, or the EN notices, the potential growth in the magnitude of this effort did not form part of the solicitation's requirements.¹² Instead, the agency adopted an approach to assessing relevance that was disconnected from its actual PWS requirements and resulted in the unusual and unexpected result that even the incumbent contract for these services was not eligible for the highest relevance assessment. In addition, there was nothing in the solicitation that warned offerors that the agency would take this approach to assessing the relevance of past performance. Instead, the solicitation expressly advised that a rating of very relevant was available for past effort involving essentially the same effort. Because the agency assessed the relevance of past performance using a standard not reasonably anticipated from the terms of the RFQ, we conclude that the agency's past performance evaluation was unreasonable, and we sustain this basis of protest. United Paradyne Corp., B-297758, Mar. 10, 2006, 2006 CPD ¶ 47 at 5 (sustaining protest where the agency's past performance evaluation methodology was "irrational").

CONCLUSION AND RECOMMENDATION

In sum, we find that USTRANSCOM engaged in misleading discussions by issuing Paragon an EN that did not accurately reflect the agency's concerns about the company's proposal. We also find that the agency's past performance evaluation was based on an unreasonable interpretation of the solicitation.

We recommend that USTRANSCOM reopen discussions and provide vendors with additional ENs that accurately describe the agency's concerns. We also recommend that the agency perform a new past performance evaluation of Paragon and Jacobs, in a manner consistent with our decision.¹³ If, as a result, a vendor

(...continued)

at 3; Haworth, Inc.; Knoll N. Am., Inc., B-256702.2, B-256702.3, Sept. 9, 1994, 94-2 CPD ¶ 98 at 4-5.

¹² During the hearing, the agency acknowledged that it could not define the scope of the potential 200 percent growth because it did not know "when programs would be brought in[,] or what programs [would be brought in,] or what the support requirements for those [programs] would be." Tr. at 108:20-22.

¹³ In its challenge to the past performance evaluation, the protester argued that the agency's methodology of aligning PWS tasks with past performance areas was significantly flawed. Paragon Comments & Supp. Protest, at 22-23, 26. Because we are sustaining the protester's complaint that the agency used a flawed methodology to assess the relevance of vendors' contract references, and, as

(continued...)

other than Jacobs is selected for award, the order should be cancelled and award made to the vendor meeting the solicitation's award criteria. Alternatively, if the agency concludes that the solicitation requires amendment, the agency should amend the RFQ to so indicate, allow submission of revised quotations, reevaluate the revised quotations received, and make a new award decision. We also recommend that the agency reimburse Paragon the reasonable costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). Paragon should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of this decision.

The protest is sustained.

Susan A. Poling
General Counsel

(...continued)

explained below, recommending that the agency reevaluate both vendors' past performance, we need not address this argument in our decision. However, the agency may wish to revisit the application of its methodology in this area.