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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: R&K Contractors, Inc.

File: B-292287

Date: July 23, 2003

Gary R. Sorensen, Esq., for the protester.
Ruth Kowarski, Esq., General Services Administration, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of selection of slightly higher-priced proposal with higher-rated past performance is denied where selection decision was consistent with solicitation and reflected a reasonable price/past performance tradeoff.
 2. General Accounting Office's granting of an extension of the due date for the protester's comments on the agency report does not waive the timeliness requirements for filing a supplemental protest, and thus new and independent protest issues, first raised in comments submitted more than 10 days after receipt of the agency report on which the issues were based, are dismissed as untimely.
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DECISION

R&K Contractors, Inc. protests the award of a contract to Quantum Contracting, Inc. under request for proposals (RFP) No. GS-08P-03-VJC-0017, issued by the General Services Administration (GSA) for building alteration services at the Judge Bruce M. Van Sickle Federal Building/Courthouse in Minot, North Dakota. R&K primarily challenges the reasonableness of the agency's unfavorable evaluation of the protester's past performance; the firm also challenges the agency's selection of Quantum's proposal for award based on that proposal's higher-rated past performance rating and slightly higher price.

We deny the protest.

The RFP, issued on March 7, 2003, as a small business set-aside, sought proposals for building alteration work requiring demolition and construction services (to include, for instance, wall, plumbing, electrical, ceiling, door, ventilation system, painting, and flooring work). The RFP contemplated the award of a fixed-price contract (estimated at between \$25,000 and \$100,000) to the responsible offeror whose offer conforming to the solicitation was considered most advantageous to the government. Two evaluation factors for award were to be considered: past performance and price. Offerors were requested to provide three past performance references for projects similar in size and type to the current project. Amendment No. 2 to the RFP extended the closing date for the receipt of proposals until April 11; that amendment provided a blank line upon which offerors were to insert the amount of the “total lump sum offer.” Nine offers were received and reviewed; six were included in a preliminary competitive range. The competition, however, was ultimately limited to the two lowest-priced proposals, R&K’s (which proposed a total price of \$41,776) and Quantum’s (with a proposed price of \$42,655).

The contracting officer limited her past performance review to information known to her and other GSA contracting personnel about both R&K’s and Quantum’s recent performance on similar GSA projects. This protest focuses on the contracting officer’s finding that R&K’s recent performance of similar work for the agency was plagued with performance problems, including delays, [deleted]. The contracting officer ultimately determined that, in light of these known performance problems involving R&K’s performance [deleted], compared to Quantum’s excellent past performance of similar work for the agency, Quantum’s higher past performance rating and lower performance risk warranted payment of the very slight (\$879) cost premium associated with an award to the firm. This protest followed.

As stated above, R&K primarily challenges the agency’s evaluation of its past performance and the agency’s decision to award a contract for the work to Quantum at a slightly higher price than R&K had proposed. In reviewing an agency’s proposal evaluation, we examine the record to ensure that it was reasonable and consistent with the solicitation’s evaluation terms and applicable statutes and regulations. Digital Sys. Group, Inc., B-286931, Mar. 7, 2001, 2001 CPD ¶ 50 at 7. In deciding between competing proposals, tradeoffs, such as between past performance and price, may be made. The propriety of the tradeoff does not depend on the difference in technical scores or ratings, but on the reasonableness of the source selection official’s judgment concerning the significance of the difference. Id. Our review here therefore focuses upon whether the evaluation record and source selection decision show that the agency reasonably assessed the relative merits of the proposals in accordance with the stated evaluation criteria. KBM Group, Inc., B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 11. An offeror’s mere disagreement with the agency’s assessment of its past performance, or the merits of its proposal relative to others, does not render the source selection unreasonable. See Encorp-Samcrete Joint Venture, B-284171, B-284171.2, Mar. 2, 2000, 2000 CPD ¶ 55 at 4.

PAST PERFORMANCE EVALUATION AND SOURCE SELECTION

The record here shows that the contracting officer's review of R&K's relatively recent performance of a very similar contract—administration of which was handled by the same individuals managing this procurement—became the critical factor in the source selection here, especially since the two proposals, R&K's and Quantum's, were so close in price.

As a preliminary matter, we note that R&K argues that the contracting officer improperly considered the firm's performance of the similar work it performed for GSA at the same building because R&K had not included that contract in its proposal as a past performance reference. This argument is unpersuasive, since it is appropriate for a contracting officer to rely on past performance information of which he or she is directly knowledgeable. See Omega World Travel, Inc., B-271262.2, July 25, 1996, 96-2 CPD ¶ 44 at 4. Additionally, although R&K contends that the contracting officer improperly failed to contact all of R&K's listed references, it is well settled that there was no legal requirement for the agency to do so. See Kalman & Co., Inc., B-287442.2, Mar. 21, 2002, 2002 CPD ¶ 63 at 9. While we recognize that the contracting officer's past performance evaluation was limited here to a single past performance reference for each contractor, given the similarities in the work of each firm's project to this procurement, and the minimal cost difference between the two firms, we find, as discussed below, the evaluation proper and the award decision reasonably based.¹

Although R&K has attempted to refute each of the agency's many examples of what it considered deficient in the firm's prior performance of similar work for the agency, and although we have reviewed every one of the firm's responses, we discuss only an illustrative number of them. First, for instance, the agency reports that there were delays in R&K's performance [deleted]. R&K contends that other delays throughout the contract performance period, however, were due to agency action or failure to timely act. For instance, [deleted].

On the other hand, the agency, besides citing the protester's delay in starting performance, reports that, [deleted] and that many months after award of the 60-day contract, the parties were still resolving cost claims under the contract.

¹ The agency reports that it had considered R&K's references but determined that they related to types of work dissimilar to the work required under the RFP. Nonetheless, the agency reports that after this protest was filed, the contracting officer did contact the references provided by both R&K and Quantum, and that the results of that admittedly brief, supplemental survey support its source selection, since R&K did not receive ratings as high as Quantum did from its past performance references.

In making her source selection decision, including a tradeoff analysis between the two firms' proposals, the contracting officer cited the poor past performance rating from GSA for R&K [deleted], and the high risk of such poor performance occurring with the current substantially similar contract. Quantum, on the other hand, had received an excellent past performance rating from GSA personnel, with little or no performance problems, and only minimal agency time needed for administration of the contract. The contracting officer, noting the slight price difference between the firms' proposals determined that the Quantum proposal represented the best overall value to the government.

Our review of the record confirms the reasonableness of the evaluation and source selection. In short, given the agency's recent experience involving performance problems under R&K's contract for substantially similar work,² discussed above, and the very slight difference in price between the two proposals, we have no basis to question the reasonableness of the contracting officer's determination that payment of the \$879 cost premium involved in an award to Quantum based on its higher past performance rating (and associated lower performance risk) was warranted. The record shows that the tradeoff analysis was made in accordance with the RFP's evaluation terms, allowing for equal consideration of both past performance and price, and that the agency acted reasonably in determining that Quantum's higher past performance rating (and lower performance risk), at a price only slightly higher than R&K's, offered the most advantageous proposal.

UNTIMELY ISSUES

R&K received the agency's report responding to its protest on June 11. Several days later, R&K requested and was granted a 3-day extension for the filing of its comments on the report. R&K's comments, filed on June 26, 15 days after its receipt of the report, elaborated upon contentions made in its protest (*i.e.*, regarding the evaluation of R&K's past performance), and raised additional grounds of protest based upon information it learned in the agency report.

The agency asserts that the additional protest grounds are untimely, as they are admittedly based upon the agency's report and accompanying documents, yet were not filed in our Office within 10 days of the protester's receipt of the report. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2003) (requiring protests regarding other than improprieties in a solicitation to be filed within 10 days of when the protester knew or should have known its basis of protest). On the other hand, R&K contends that its comments do not raise new grounds of protest, but rather, provide additional support for its initial general protest of the evaluation of its past performance, and

² [deleted]

the agency's award decision, and thus should be regarded as timely filed within the 3-day extension granted for comments regarding its initial protest contentions.

As a general rule, the timeliness of specific bases of protest raised after the filing of a timely protest depends on the relationship the later-raised bases bear to the initial protest. Where the later-raised bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements; conversely, where the later-raised bases merely provide additional support for an earlier, timely raised protest basis, we will consider the later-raised arguments. Ti Hu, Inc., B-284360, Mar. 31, 2000, 2000 CPD ¶ 62 at 4.

Our review of the record confirms the reasonableness of the agency's position that the protest issues raised by R&K for the first time in its comments constitute new and independent protest grounds, rather than mere support for the initial protest grounds. R&K's initial protest submission is limited to a general challenge to the agency's unfavorable evaluation of the firm's past performance. [deleted] R&K protested for the first time in its comments, however, that the agency's reported use of simplified acquisition procedures under the RFP is improper, that the agency failed to conduct discussions with the protester about its past performance, and allegedly improperly held discussions with the awardee regarding price. R&K also argued for the first time in its comments that the agency had improperly reviewed the proposals prior to the scheduled closing date, that amendment No. 2 to the RFP should not be considered a request for revised proposals (but rather an extension to the initial closing date), and that any post-protest supplemental past performance evaluation by the agency is improper.

Our review of the record confirms that the nature of the allegations raised for the first time in the protester's comments (which, R&K admits, respond to information it first learned in the agency report) are significantly different, so as to constitute separate and independent protest grounds that must independently satisfy the timeliness requirements of our Bid Protest Regulations. See id. (independent protest grounds arising under the same evaluation factor); RAMCOR Servs. Group, Inc., B-276633.2 et al., Mar. 23, 1998, 98-1 CPD ¶ 121 at 9 n.9 (individual examples of flaws in evaluation must be alleged in a timely manner). These new and independent protest grounds had to be filed within 10 days of receipt of the report. 4 C.F.R. § 21.2(a)(2). The fact that our Office granted the protester's request for a 3-day extension on filing its comments did not, and cannot, waive the timeliness requirements for filing new bid protest issues.³ ATA Defense Indus., Inc., B-282511.8,

³ The protester requests that we consider the protest grounds raised in its comments under either the significant issue or good cause exceptions to the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. § 21.2(c). The protester's position—that, due to its pressing work schedule, it was unable to meaningfully respond to the agency's report within the 10 days allowed for protest comments to

(continued...)

May 18, 2000, 2000 CPD ¶ 81 at 4. These additional protest grounds contained in the protester's comments therefore are untimely and will not be considered.

The protest is denied.

Anthony H. Gamboa
General Counsel

(...continued)

be submitted--does not establish "good cause" to warrant applying that exception to our longstanding timeliness rules. See Continental Maritime of San Diego, Inc.-- Claim for Cost, B-249858.5, Dec. 17, 1993, 93-2 CPD ¶ 323 at 3-4. Similarly, the matters raised are not of such widespread interest to the procurement community as to be considered significant issues under the exception to our timeliness rules, since, although significant to the protester, they are limited to this particular procurement. Source Diversified, Inc., B-259034, Mar. 1, 1995, 95-1 CPD ¶ 119 at 3.