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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:** PharmChem, Inc.

**File:** B-292408.2; B-292408.3

**Date:** January 30, 2004

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Joseph P. Hornyak, Esq., Hector Garcia-Santana, Esq., and Renee C. Macri, Esq., Sonnenschein Nath & Rosenthal, for the protester.

John Peterson for Kroll Laboratory Specialists, the intervenor.

Roberta M. Echard, Esq., Demetria T. Carter, Esq., and Dinah Stevens, Esq., Administrative Office of the United States Courts, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

In a negotiated procurement for urinalysis drug testing services that provided for a cost/technical tradeoff basis for award under which technical merit was significantly more important than price, agency reasonably awarded a contract to the significantly higher-priced awardee where the agency found, based upon the protester's performance of its incumbent contract and Department of Health and Human Services test reports of the protester's laboratory, that protester presented more significant performance risks than the awardee.

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### **DECISION**

PharmChem, Inc. protests the award of contract to Kroll Laboratory Specialists under request for proposals (RFP) No. USCA-03-R-0029, issued by the Administrative Office of the United States Courts for urinalysis drug testing services. PharmChem challenges the agency's evaluation of proposals and source selection decision.

We deny the protest.

The RFP provided for the award of three indefinite-delivery/indefinite-quantity, fixed-price contracts to conduct urinalysis drug testing services for United States Probation Offices and Pretrial Services Offices in the East, Midwest, and West regions of the United States. Offerors were permitted to submit one proposal for a single region, in which the offeror was located, and were informed that "[t]his shall result in three separate contract awards based upon the regions." RFP § M.9. This protest concerns the award for the Midwest region.

A detailed statement of work described the services to be provided. Among other things, the contractors were required to perform drug testing, provide supplies, comply with reporting and confidentiality requirements, and provide testimony preparation and presentation. The contractor was also required to maintain a quality control program that ensured “accuracy over every aspect of specimen handling and processing; analytical procedures; reporting of results; turnaround time; equipment maintenance, internal security; data management; and other measures taken to ensure the integrity of the testing program.” RFP § C.28. In addition to describing their quality control measures, offerors were directed to do the following:

Provide copies of all Federal, state, local and/or private proficiency testing program results for the three years preceding the date of the Request for Proposal. Provide the names and addresses of each proficiency review team, as well as the dates for which the proficiency rating(s) were compiled. Provide copies of the previous two HHS [Department of Health and Human Services] Certification inspection critiques and ensuing correspondence.<sup>1</sup>

RFP § L.3.1.

The RFP provided for a cost/technical tradeoff basis for award. Specifically, offerors were informed that award would be made to the responsible offeror whose technically acceptable proposal reflected the best overall value to the government, and that this determination would be made by “comparing differences in the value of quality of services, methodology operations and experience with differences in cost to the Government.” RFP § M.2.a. The RFP provided that proposals would first be evaluated for compliance with mandatory requirements, then judged for technical excellence based upon the following technical evaluation criteria, in descending order of importance: (1) additional technical capability; (2) past experience/past performance; and (3) personnel qualifications/organization. RFP § M.4. Offerors

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<sup>1</sup> To ensure the validity of drug testing results, the Substance Abuse and Mental Health Services Administration (SAMHSA), HHS, developed mandatory scientific and technical guidelines and strict certification standards for laboratories performing federal workplace drug testing. See 59 Fed. Reg. 29,908 (June 9, 1994); see also <<http://workplace.samhsa.gov/DrugTesting/NatlLabCertPgm/INDEX.html>>. The guidelines provide for periodic inspections (usually twice a year) and proficiency (that is, quality control) testing (quarterly).

were informed that technical excellence was more important than price. RFP § M.9. Offerors were also informed that the

Government reserves the right to determine the specific order and duration of individual activities as the evaluation proceeds, or call for discussions, proposal clarifications, or revisions at any time as may be determined to be in the Government's best interest, and in accordance with [the] Federal Acquisition Regulation [FAR].

RFP § M.2.a.

The RFP also provided that the "otherwise successful offeror(s)" would be required to perform an "Operational Capability Demonstration" (OCD) to show that the offeror's proposed approach would meet all of the mandatory statement of work requirements. RFP § M.11.

The agency received proposals from four firms, including PharmChem and Kroll, for the Midwest region.<sup>2</sup> Following the evaluation of initial proposals, only Kroll's proposal was included in the competitive range (although PharmChem's proposal was found technically acceptable).

PharmChem protested the exclusion of its proposal from the competitive range to our Office. Prior to the submission of its report, the agency took corrective action in response to the protest, agreeing to reevaluate proposals, and we dismissed PharmChem's protest as academic.

The agency reevaluated proposals and identified areas of the proposals that needed to be addressed by the offerors during discussions. Several rounds of written "deficiency requests" and "clarification requests" were sent to PharmChem and Kroll.

Following discussions, the agency's technical evaluation team (TET) found that both PharmChem's and Kroll's proposals were acceptable. With respect to the technical excellence evaluation, Kroll's and PharmChem's proposals were evaluated as follows:

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<sup>2</sup> PharmChem was the incumbent contractor for the performance of these services on a nationwide basis.

	<b>Kroll</b>	<b>PharmChem</b>
Additional Technical Capability <sup>3</sup>	Superior	Good/Marginal
Past Experience/Past Performance <sup>4</sup>	Good	Good/Marginal
Personnel Qualifications/Organization	Superior	Superior
<b>Overall</b>	Superior	Good

Contracting Officer's Statement at 8.

Kroll's superior rating under the additional technical capability factor reflected the evaluators' judgment that Kroll's proposal exceeded the solicitation requirements in a number of beneficial ways, including that Kroll had a [Deleted] square foot secure facility at which it analyzed [Deleted] specimens per day and could increase testing to [Deleted] specimens per day without increasing its staff or equipment. In addition, Kroll offered an [Deleted]. Agency Report, exh. 24, Final Consensus Technical Evaluation Report, at 2.

Kroll's good rating under the past experience/past performance factor reflected the evaluators' finding that all of Kroll's reported experience was of similar scope to the

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<sup>3</sup> A superior rating under the additional technical capability factor reflected a proposal that exceeds the mandatory requirements and "provides significant performance improvements/capabilities in several areas that are of enhanced value and benefit to the judiciary." A good rating reflected a proposal that satisfies the mandatory requirements and provides some additional capabilities that represented additional value and enhancement. A marginal rating reflected a proposal that satisfies the mandatory requirements but provides little quantifiable additional performance improvement/capabilities. Agency Report, exh. 3, Evaluation Scorebook, at 12-13.

<sup>4</sup> Under the past experience/past performance factor, a superior rating reflected that all experience clearly showed that the offeror had provided similar services in size, scope, and complexity to the required work, and that all or nearly all of the offeror's references provided positive responses and rated the offeror's quality of work as high. A good rating reflected that most of the offeror's reported experience was for services similar in size, scope, and complexity, and that the offeror received positive responses from references, most of which rated the offeror's quality of work as high or all of which rated the offeror's work as above average. A marginal rating reflected that the offeror's past experience was marginally similar to the required work, and that the offeror received few positive comments from its references, which rated the quality of the offeror's work as minimally acceptable. Agency Report, exh. 3, Evaluation Scorebook, at 13.

solicitation requirements, and that all of its references rated the offeror as excellent and stated that Kroll offered good customer service, was easy to reach, provided a high level of security, and had a state-of-the-art facility. The evaluators also noted, however, that historically the volume of specimens tested by Kroll was smaller than the number that will be tested under this contract. Id. at 2-3.

PharmChem's proposal's good/marginal rating under the additional technical capability factor reflected the TET's finding that although PharmChem's proposal exhibited a number of strengths, including the offer of a [Deleted] square foot secure facility at which PharmChem analyzed up to [Deleted] specimens daily and [Deleted], its proposal also included a number of weaknesses. These weaknesses included that PharmChem's web-based system was [Deleted], that PharmChem's HHS proficiency testing reports exhibited results in the [Deleted] testing cycles that were [Deleted],<sup>5</sup> and that PharmChem's most recent HHS inspection report showed "issues that had been previously cited in prior inspections."<sup>6</sup> Id. at 4-5.

PharmChem's good/marginal rating under past experience/past performance reflected the evaluators' determination that PharmChem's proposal exhibited both strengths and weaknesses under this factor. Specifically, the TET found that all of PharmChem's references were for contracts of similar scope and that, as the incumbent contractor, the protester had provided the identical services. In addition, PharmChem received excellent to high ratings from its references. Id. at 4. However, the TET also noted that PharmChem had a number of performance problems under its incumbent contract, including lost samples, false-positive test reports, and delinquent test results, and also noted that one of PharmChem's

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<sup>5</sup> Laboratories are both inspected and tested to maintain their HHS certifications. Laboratories are sent control samples to test on a quarterly basis, and the laboratories are judged on their proficiency and accuracy in identifying drugs. Hearing Transcript (Tr.) at 28, 46-47. PharmChem's results for these particular proficiency tests were in [Deleted]. Tr. at 36. In addition to the proficiency tests, laboratories are inspected twice a year to judge whether the laboratories' procedures are in compliance with HHS's mandatory guidelines. Tr. at 28, 44-47.

<sup>6</sup> PharmChem's two most recent inspection critiques consisted of a "[Deleted] report" and a "typical maintenance inspection report." Tr. at 94. [Deleted] are conducted whenever there is reason to believe that a laboratory's practices [Deleted]. Affidavit of Evaluator/Forensic Scientist ¶ 9. PharmChem's [Deleted] report was formatted differently than its regular inspection report, which made it difficult for the TET to use the earlier report as a baseline to determine whether issues in the most recent inspection report had been previously cited. However, PharmChem's most recent inspection critique identified an issue--"[Deleted]"--that the critique stated "was cited in the laboratory's previous inspections." PharmChem's Technical Proposal, National Laboratory Certification Program Inspection Critique, at 81; see Tr. at 94-95.

identified references reported long “turnaround” times for reporting drug testing results. Id. at 5.

As the apparent successful offeror, Kroll was invited to perform an OCD, as required by the RFP, to demonstrate that Kroll’s proposed approach would satisfy the SOW requirements, which the firm successfully did.

The final consensus technical evaluation report and the firms’ proposals were provided to the contracting officer, who was the source selection official for this procurement. The contracting officer accepted the report’s findings, after examining the proposals to review those sections that related to the TET’s assessed strengths and weaknesses. Tr. at 357, 371. The contracting officer also had some limited discussions with one evaluation panel member, who was a forensic scientist, to understand the evaluations with respect to the HHS proficiency test scores and inspection critiques.<sup>7</sup> Tr. at 357-58. The contracting officer also evaluated the firms’ proposed pricing: Kroll’s final proposed price was \$34.1 million, and PharmChem’s final proposed price was \$27.9 million. Recognizing PharmChem’s more than \$6 million price advantage, the contracting officer concluded that Kroll’s higher-rated proposal reflected the best value to the government. Specifically, the contracting officer stated that

[t]imely and accurate drug test results are critical to ensure that the judicial system meets its responsibility to protect the community by identifying offenders and defendants who are using illicit drugs, and to protect the rights of the individual offenders and defendants by detaining or imprisoning only those whose drug tests are accurately confirmed positive.

Agency Report, exh. 28, Pre/Post-Negotiation Memorandum and Award Determination, at 10. The contracting officer identified, as the important discriminators in his award determination, “PharmChem’s performance problems on [its incumbent] contract, which had continued for more than two years, and the integrity of its quality control program, as reflected in the HHS reports.” Contracting Officer’s Statement at 16; Tr. at 374-75, 381. Award was made to Kroll, and this protest followed.

PharmChem challenges nearly all of the evaluated weaknesses in its proposal and complains that Kroll’s proposal was unequally evaluated. In deciding this case, we do not resolve all of PharmChem’s objections to weaknesses evaluated in its proposal, because the record reflects that PharmChem’s incumbent performance and

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<sup>7</sup> This evaluator has significant educational and work experience with respect to drug testing and, in fact, was involved in drafting the HHS mandatory guidelines for laboratories performing workplace drug testing. Tr. at 25-26.

quality control problems, as reflected in the firm's inspection critiques and proficiency tests, were the discriminators in the contracting officer's cost/technical tradeoff decision.<sup>8</sup> Accordingly, in resolving PharmChem's protest, we focus on the weaknesses evaluated in PharmChem's proposal, which the contracting officer identified as technical discriminators justifying award based on a higher-priced proposal; on PharmChem's challenge to the evaluation of Kroll's technical proposal; and on the alleged strengths in PharmChem's proposal that PharmChem asserts were not considered in the cost/technical tradeoff analysis.

PharmChem argues that the agency unreasonably concluded that PharmChem's proposal evidenced quality control problems and that Kroll's proposal did not. In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP criteria. Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4.

With respect to the firms' HHS inspection critiques, the agency noted that there were no issues cited in Kroll's earlier inspection critique that were later cited in that firm's most recent critique, and this was assessed as a proposal strength. On the other hand, the agency found that PharmChem's later inspection critique identified an issue that was previously cited in prior inspections and that this was a proposal weakness.

PharmChem argues that the agency's evaluation of the firms' HHS inspection critiques was irrational because the agency did not consider the materiality of the issues cited in the inspection critiques, but only evaluated whether the most recent inspection critique contained issues that were previously cited. In this regard, PharmChem argues that Kroll's most recent inspection critique reflects a greater number of cited concerns than were in PharmChem's most recent critique and that Kroll was assessed a [Deleted] in connection with this critique, and that the foregoing evidenced that Kroll had more quality control problems than PharmChem.

The agency contends that it was reasonable to focus on whether the firms' most recent inspection critiques identified issues that were cited in previous inspections. This is so, the agency argues, because its purpose in requiring offerors to submit two HHS inspection critiques was to evaluate the firms' "responsiveness in addressing and/or correcting deficiencies between inspections." Supplemental Agency Report

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<sup>8</sup> For example, PharmChem challenged the reasonableness of the evaluators' assessed weakness that the firm's web-based system was [Deleted]. The contracting officer testified, however, that, although he noted this assessed weakness (and accepted the evaluators' judgment regarding it), he did not view this to be an important concern and it did not have any impact in his award selection decision. Tr. at 373.

at 5; Affidavit of the TET Chairperson at 2; Tr. at 89. The agency also states that, although the TET initially attempted to evaluate the seriousness of assessed inspection findings in the firms' critiques, this approach was abandoned as unworkable because the TET could not reach a consensus judgment as to whether one issue was more serious than another. Tr. at 88-89, 138; Agency's Post-Hearing Comments at 4. In this regard, the evaluator who had significant educational and work experience with respect to drug testing, testified that in reviewing the assessed issues in the firms' critiques and reviewing the ensuing correspondence, the evaluation panel could not conclude that a particular issue or issues were significant where the issues were ultimately resolved to HHS's satisfaction. Tr. at 85-86.

From our review of the record, we have no basis to conclude that the agency's evaluation of the firms' inspection critiques was unreasonable or not in accord in the RFP criteria. Although it is true that the TET's evaluation report did not assess the significance of issues identified in the firms' respective inspection critiques, our review of the hearing testimony, the parties' arguments, and the inspection critiques and correspondence supports the agency's argument that the issues identified in Kroll's most recent inspection critique were resolved to HHS's satisfaction and that these issues did not negatively reflect on Kroll's quality control record. In this regard, the hearing testimony established that the number of cited concerns alone does not demonstrate the materiality of the quality control problems, particularly where nearly half of the cited concerns were ultimately found not to be valid.<sup>9</sup> Tr. at 86, 134-35, 144. Rather, we find that the agency could reasonably conclude that the concerns assessed in Kroll's most recent inspection critique were not significant where HHS in its final letter to Kroll concluded that the "information submitted by the laboratory appears to demonstrate that corrective actions are being taken to

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<sup>9</sup> Each inspection critique is accompanied by a cover letter, prepared by Research Triangle Institute (RTI), the contractor who operates the National Laboratory Certification Program for HHS. RTI does not have to accept all of the inspectors' identified concerns, and RTI's cover letter will identify the concerns that a laboratory must address within a specified period of time. Here, RTI's cover letter on Kroll's most recent inspection critique identified only [Deleted] issues to which Kroll was required to respond. Kroll Technical Proposal, RTI Cover Letter to Kroll's 23<sup>rd</sup> Maintenance Inspection Report, Jan. 7, 2003, at 416. In addition to addressing the concerns identified in the cover letter, Kroll responded to all of the concerns identified in the inspection critique. See Kroll Technical Proposal, Kroll Letter to RTI, Feb. 5, 2003, at 454-68. Reviewing all of the correspondence, the evaluator/forensic scientist testified that nearly half of the identified concerns in the critique were not valid. See Tr. at 86, 134-35, 144. The remaining concerns were not viewed as material, particularly because HHS was satisfied with Kroll's responses. See Tr. at 264. The protester has provided no evidence that shows that the concerns found by RTI were material.



address the issues raised.”<sup>10</sup> Kroll Technical Proposal, RTI Letter to Kroll, Feb. 14, 2003, at 605.

With respect to the [Deleted] against Kroll in its most recent inspection critique, the agency states that it noted that this [Deleted] but found that this [Deleted] did not alone indicate quality control problems. Agency Report, exh. 24, Final Consensus Evaluation Report, at 2; Agency’s Post-Hearing Comments at 7-8. As explained at the hearing, a [Deleted] where, based upon the inspection report, the staff time required to review laboratory responses to the critique is [Deleted]. See Tr. at 143; see also [Deleted]. The agency also contends that, from its review of the correspondence following Kroll’s inspection critique, it was clear that Kroll explained or corrected the assessed concerns, and that the [Deleted] is only indicative of quality control problems to the extent that the assessed issues are ultimately found to be valid. Tr. at 143-44, 264. Inasmuch as the agency reasonably found that the issues assessed in Kroll’s inspection critique were not significant, it could reasonably conclude that the [Deleted] in Kroll’s inspection critique was not significant.

We also find reasonable the agency’s judgment that issues that were identified in PharmChem’s most recent inspection critique as “previously cited” were indicative of quality control problems. That is, the citation of issues that were cited in previous inspections indicates the failure of a laboratory to correct identified procedural issues in drug testing. Indeed, the protester raises no objection to the agency’s assessment of weakness and risk for “previously cited” issues or to the agency’s determination that PharmChem’s most recent inspection critique evidenced a previously cited issue. Rather, PharmChem complains that firms were treated unequally because Kroll’s inspection critiques also evidence previously cited issues for which the agency failed to account in its evaluation.<sup>11</sup>

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<sup>10</sup> In addition, this letter identified [Deleted] issues requiring clarification and/or correction, but stated that Kroll’s actions would be reviewed at the next scheduled inspection. Kroll Technical Proposal, RTI Letter to Kroll, Feb. 14, 2003, at 606. This also suggests that the issues did not present pressing concerns.

<sup>11</sup> PharmChem also suggests that the agency adopted this evaluation methodology of considering “previously cited” issues only after the evaluation of initial proposals when the agency knew that PharmChem’s inspection critique evidenced previously cited issues but Kroll’s did not. The record does not support PharmChem’s suggestion that this evaluation methodology was adopted to favor Kroll. Rather, the previously cited issue in PharmChem’s inspection critique was identified in the initial evaluation as a weakness. See Agency Report, exh. 42, Evaluator’s Initial Evaluation Scoresheets, at 46. In addition, as noted by the agency, Kroll’s initial proposal did not include two inspection critiques, as required by the RFP, to allow the TET to assess whether there were previously cited issues.

The agency disputes that the firms were treated unequally, stating that there were no issues identified in Kroll's most recent inspection critique that were previously cited in its earlier critique. In this regard, we heard significant hearing testimony explaining that issues identified in Kroll's prior inspection report were not identified in Kroll's most recent inspection report. Tr. at 288-307, 316-26, 335-36. Moreover, Kroll's most recent inspection critique did not identify any issues as having been previously cited, unlike PharmChem's most recent critique. Because the protester does not show that the agency was incorrect or that issues identified in Kroll's earlier, baseline inspection critique were repeated in the later inspection critique, we have no basis to question the agency's judgment in this regard.<sup>12</sup>

PharmChem also complains that the firms were treated unequally under the additional technical capability factor with respect to the quality control weakness assessed PharmChem's proposal as a result of its HHS proficiency testing reports, which exhibited results in [Deleted] that were [Deleted].<sup>13</sup> In contrast, Kroll's proposal was assessed a strength because its proficiency test reports had [Deleted] outside the [Deleted]. PharmChem complains that this represents unequal treatment because Kroll did not timely submit 3 years of proficiency test reports, as required by the RFP, but timely submitted only 11 HHS quarterly, proficiency test reports and was allowed to submit the final, twelfth report after the TET had already assigned this strength to Kroll's proposal in its final evaluation report.

The agency agrees that Kroll submitted its twelfth proficiency test report after the date of the final TET evaluation report, but states that the evaluators reviewed and discussed the twelfth report and concluded that it did not affect its previous evaluation. The agency also points out in this regard that the twelfth report was received prior to the conduct of Kroll's OCD and to the contracting officer's selection decision.

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<sup>12</sup> PharmChem also complains that Kroll's earlier inspection critique identified an issue as having been previously cited and that the agency did not assess a weakness in Kroll's proposal. The agency contends that it properly did not assess a weakness for this issue because it appeared in the earlier inspection critique, which the agency used as a "baseline" for its evaluation, and not the most recent inspection critique. We do not decide this protest allegation because it was untimely raised. Although PharmChem knew or should have known the basis of this protest allegation from the agency's report, which PharmChem received on November 24, the protester first raised this complaint in its Supplemental Comments, which were filed on December 26, more than 10 days from the date it should have learned the basis of its complaint. See 4 C.F.R. § 21.2(a)(2) (2003).

<sup>13</sup> PharmChem does not challenge the agency's assessment of this weakness.

We fail to see how PharmChem was prejudiced by the agency's acceptance of Kroll's twelfth proficiency test report, which was received prior to the contracting officer's selection decision. As stated by the agency, this twelfth proficiency test report shows [Deleted], see Supplemental Agency Report, exh. 35, Proficiency Test Report, Nov. 14, 2000, and it is thus consistent with the evaluators' judgment; indeed, the protester does not assert that any of the results of the proficiency testing reported in this twelfth report demonstrates that the evaluators' final assessment was unreasonable. Although PharmChem complains that the agency noted in its evaluation report that PharmChem's had submitted only 11 HHS proficiency test reports, the evaluation report was accurate; PharmChem had only 11 proficiency tests during the 3 year period for which proficiency tests were requested.<sup>14</sup> Contrary to PharmChem's argument, we fail to see how the firms were treated unequally, given that PharmChem had only 11 proficiency test reports to provide in response to the RFP.

PharmChem also complains that the agency failed to evaluate the 3 years of state, local and/or private proficiency test reports that offerors provided as required by the RFP. See RFP § L.3.1. The agency responds that, although the RFP requested that offerors submit these reports, they were not evaluated because, unlike the HHS reports, the agency did not know what standards were applied by the state, local, and/or private testing entities. The agency contends that without knowing what standards were applicable, the agency could not fairly compare or assess the results of these tests. Affidavit of TET Chairperson at 2.

We find no basis in this record to object to the agency's failure to evaluate offerors' state, local, and/or private proficiency test reports. Although the protester argues that its state, local, and private proficiency test reports are more favorable than those provided by Kroll (an assertion with which the agency disagrees), PharmChem has not argued or shown that the agency could fairly and reasonably evaluate these reports without knowing the standards applied. For example, in response to the questions of the protester's counsel at the hearing conducted by our Office, the agency's evaluator/forensic scientist could not identify which proficiency test reports related to PharmChem, as opposed to other unrelated laboratories, on the report that PharmChem provided in its proposal for the Pennsylvania Department of Health.<sup>15</sup> See Tr. at 341-43. Given that the agency could not reasonably assess the import of

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<sup>14</sup> PharmChem did not participate in proficiency testing in February 2002 (which presumably would have led to a twelfth report) "[Deleted]." Agency Report, exh. 24, Final Consensus Evaluation Report, at 4.

<sup>15</sup> In the Pennsylvania Department of Health report, the laboratories are identified only by a series of numbers, and there is no identification in the report (or in PharmChem's proposal) as to what number or numbers correspond to PharmChem. PharmChem Proposal at 368-85.

these test reports, we think it was appropriate for the agency not to consider them in its evaluation.

PharmChem also challenges the contracting officer's assessment that PharmChem posed a greater performance risk than Kroll. This assessment was based upon his review of PharmChem's performance of the incumbent contract, as documented in a memorandum prepared by the contracting officer for the incumbent contract to the contracting officer for this procurement. This memorandum reported that until March 2001 PharmChem had been performing the contract successfully, but that, after that date (on which PharmChem moved the location of its main testing laboratory) until the date of the memorandum, PharmChem had serious performance problems, including, among other things, lost specimens, delinquent test results, and false-positive test reports.<sup>16</sup> The memorandum reported that regularly scheduled conference calls had been and continue to be necessary to ensure PharmChem's timely performance. In particular, the memorandum noted that "[a]t this time, the outstanding performance issue remains to be [PharmChem's] failure to consistently meet the 3 working day contractual requirement for reporting test specimens." See Agency Report, exh. 19, PharmChem's Incumbent Contract Performance Evaluation Memorandum, July 24, 2003, at 4.

PharmChem argues that, contrary to FAR § 15.306(d)(3), the agency improperly failed to provide it with an opportunity to address the adverse past performance information reported by the contracting officer for its incumbent contract.<sup>17</sup> PharmChem contends that it would have explained its performance problems and that because its performance of the incumbent contract had allegedly improved, it was prejudiced by the agency's failure to provide it with an opportunity to address this adverse performance information.

The agency responds that it satisfied the requirements of FAR § 15.306(d)(3) because it raised its concerns with PharmChem's performance of the incumbent contract in writing and in on-going conference calls with PharmChem under that contract, and that PharmChem in its responses did not alleviate the agency's concerns.<sup>18</sup> In this

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<sup>16</sup> A false-positive test report is one where a specimen is incorrectly identified as containing a particular drug or substance.

<sup>17</sup> PharmChem also complains that it was not provided with an opportunity to address the negative comment made by one of its references regarding long "turnaround" times for reporting drug-testing results. Because the contracting officer only identified PharmChem's performance of its incumbent contract as the reason for his determination that PharmChem posed a significant performance risk, we do not consider this allegation.

<sup>18</sup> The Administrative Office of United States Courts, as an office within the judicial branch, is not generally subject to the FAR. See Court Copies & Images, Inc.,

(continued...)

regard, the agency disputes PharmChem's protest allegations that it had improved its contract performance. For example, although PharmChem admits that it had a number of false-positive test reports during the performance of the incumbent contract, the protester alleges that it had identified and resolved the cause of the false-positive reports. The agency states that, in fact, despite repeated opportunities to address this concern during contract performance, PharmChem had not only not identified the cause of false-positive reports, but admitted that "the actual cause [of the false-positive reports] has not been determined with any certainty." See Supplemental Agency Report, exh. 36, Meeting Minutes, Apr. 15, 2003, at 15.

PharmChem argues that having the opportunity to address the agency's concerns as part of its contract performance does not satisfy FAR § 15.306(d)(3), because it was not provided with an opportunity to address this adverse past performance information to the contracting officer for this procurement. At least in the context of the facts presented here, we do not agree that FAR § 15.306(d)(3) requires that PharmChem be provided with another opportunity to address the agency's concerns with its past performance, where the record establishes that PharmChem already had an opportunity to address this adverse past performance information with the contracting officer who would be most knowledgeable of the contract requirements and PharmChem's performance under those requirements.

We also find that the protester has not shown that the agency's assessment of its past performance of the incumbent contract was unreasonable. The evaluation of past performance is a matter within the agency's discretion, which we will not find improper unless unreasonable, inconsistent with the solicitation criteria, or undocumented. Sonetronics, Inc., B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48 at 3; IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 5. An agency's past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5, and the protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, PharmChem admits that it had performance problems under its incumbent contract, but contends that it improved its performance. The agency disagrees that PharmChem's performance improved and notes that the information, provided by PharmChem during the protest to demonstrate that its performance had improved or could be explained, is not different from what was presented to the contracting

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(...continued)

B-277268, B-277268.2, Sept. 24, 1997, 97-2 CPD ¶ 85 at 2 n.2. However, here the RFP provided that the agency would conduct discussions and clarifications in accordance with the FAR. See RFP § M.2.a.

officer for the incumbent contract and with which that contracting officer did not agree. Based on our review of the record and the protester's arguments, we conclude that PharmChem's arguments are nothing more than mere disagreement with the agency's evaluation judgment, which provides us with no basis to find unreasonable the agency's perception of PharmChem's incumbent contract performance.

PharmChem also argues that, in performing his cost/technical tradeoff analysis, the contracting officer for this procurement did not consider a number of areas in PharmChem's proposal where PharmChem allegedly offered greater technical capability than Kroll. Specifically, PharmChem states that it proposed a facility with more [Deleted] than Kroll proposed, that PharmChem's facility [Deleted] than does Kroll's, and that PharmChem proposed an [Deleted] web-based tracking and reporting system and detailed "database mirroring."<sup>19</sup>

Based on our review, we find that PharmChem's arguments do not provide us with any basis to challenge the contracting officer's cost/technical tradeoff judgment. With respect to PharmChem's proposal of a facility that [Deleted] than does Kroll's and an [Deleted] web-based tracking and reporting system, each of these parts of its proposal was specifically identified as a strength in the evaluation report that was provided to the contracting officer. In this regard, the evaluation report specifically reported PharmChem's and Kroll's current volume and capacity for specimen testing. Although PharmChem apparently believes that these features of its proposal should have received greater weight in the source selection decision, it has not shown that the contracting officer abused his discretion in determining that PharmChem's past performance and quality control problems were the discriminators in comparing PharmChem's and Kroll's technical merit.

With respect to database mirroring, the record supports the agency's position that both PharmChem and Kroll offered fully compliant redundant, back-up database systems, as required by the RFP. Although PharmChem argues that its back-up system was [Deleted] and Kroll's back-up system was not, the protester does not explain why (even if that is so) its system is superior to Kroll's. In this regard, the agency states that the RFP did not provide for evaluating whether an offeror [Deleted] its database mirroring system [Deleted] and that the agency did not ask either offeror whether its back-up system was [Deleted].

With respect to PharmChem's statement that it proposed a facility with [Deleted] while Kroll proposed a facility with [Deleted], the agency states that even if it is true

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<sup>19</sup> Database mirroring refers to the RFP requirement that the contractor's database, which was stated to include all testing, tracking information, specimen information, and reports, be protected by a separate, redundant, real-time system. See RFP § C.6.5.

that PharmChem offered more [Deleted] than Kroll, this is irrelevant to the agency's determination of technical merit. The agency evaluated the firms' capacity to test specimens under the additional technical capability factor, and both were assessed proposal strengths for their ability to process specimens. See Agency Report, exh. 24, Final Consensus Technical Evaluation Report, at 8, 16. Moreover, the agency specifically noted PharmChem's higher capacity to process specimens, which presumably reflects at least in part PharmChem's [Deleted]. Although the evaluation report and contracting officer selection decision do not specifically mention the [Deleted] each offeror will use in performance, the protester has not shown that its proposal to use [Deleted] was material or that the agency's evaluation that both offerors' proposals warranted a strength for test capacity was unreasonable.

In sum, we find the agency had a reasonable basis to select Kroll's higher-priced, technically superior proposal.

The protest is denied.

Anthony H. Gamboa  
General Counsel