



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: John Blood

File: B-298841; B-298841.2

Date: December 21, 2006

John Blood for the protester.

Azine Farzami, Esq., Department of Agriculture, for the agency.

Nora K. Adkins, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under tree thinning solicitation that requested a housing plan be provided with the quotation, awardee's quotation stated that its workers would camp on-site, but did not address or indicate that it would not comply with the housing provisions of the Migrant and Seasonal Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2000), and was therefore not unacceptable; the agency did not have duty to specifically confirm prior to award that awardee would comply with the Act during contract performance.

2. Agency may properly consider an evaluator's personal knowledge of and documented past experiences with a vendor in a past performance evaluation.

DECISION

John Blood protests the agency's evaluation of quotations received in response to solicitation No. AG-82MK-S-06-0019, issued by the Forest Service, United States Department of Agriculture, for tree thinning to protect area properties and power lines from wildfires in three units in the Gunnison Ranger District of the Grand Mesa, Uncompahgre and Gunnison National Forests in Colorado.

We deny the protests.

The request for quotations (RFQ), issued as a small business set-aside under simplified acquisition procedures, contemplated the award of a fixed-price order to the vendor whose quotation represented the best value to the government. Quotations were to be evaluated based on price, and the following four technical criteria listed in descending order of importance: technical capability, past

performance, quality control plan, and proposed work plan and schedule; price was to be given the same evaluation weight as the combined weight of the technical criteria. RFQ § M.1.1. The past performance criterion states, “Includes number of planting contracts performed in the last three years, references and telephone numbers.” RFQ § M.1.1.2. The proposed work plan and schedule criterion was to be “evaluated for conformance with the minimum production as stated in the contract. Also include plans for housing workers on the resulting contract.” RFQ § M.1.1.4.

The agency received five quotations. Mr. Blood submitted the lowest-priced quotation at \$19,654.40 and Native Ecology’s quotation of \$19,717.00 was second low. Native Ecology’s quotation was evaluated with “outstanding” technical capability, “acceptable” past performance, “outstanding” quality control plan, “acceptable” proposed work plan and schedule, and “outstanding” overall. Agency Report, Tab J, Consensus Rating Sheet. Mr. Blood’s quotation was rated with “acceptable” technical capability, “marginal” past performance, “acceptable” quality control plan, “acceptable” proposed work plan and schedule, and “acceptable minus” overall. Agency Report, Tab H, Consensus Rating Sheet. Of the vendors’ quotations, Native Ecology’s was ranked first technically and Mr. Blood’s was ranked fourth. Agency Report, Tab K, Purchasing Agent’s Report. Based on the foregoing, the purchasing agent determined that Native Ecology’s quotation represented the best value to the government. These protests followed.

Mr. Blood first argues that the agency erred in evaluating the awardee’s quotation’s housing plan under the proposed work plan and schedule criterion.

Section H.4 of the draft contract included in the solicitation details the applicable camping and worksite provisions. This section also states, “The contractor shall provide a general plan with the technical proposal, and shall provide a more specific plan based on items awarded, prior to start [of] work.” RFQ § H.4.

The work plan in Native Ecology’s quotation in response to this criterion only stated with regard to a housing plan, “[w]orkers will camp on-site.” Agency Report, Tab J, Native Ecology’s Quotation at Work Plan. Mr. Blood’s quotation similarly stated, “This [contractor] will camp in a self contained fifth wheel on site,” and indicated that “[n]o ‘outdoor’ fires are necessary” and that he “has never had problems complying with the camping rules.” Agency Report, Tab H, John Blood’s Quotation, at 4.

Mr. Blood asserts that in the performance of this contract Native Ecology will be using migrant workers subject to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). 29 U.S.C. §§ 1801-1872 (2000). The draft contract includes at section H.7 “Labor Standards for Contracts Involving Migrant and Seasonal Agricultural Workers.” Section H.7(d)(4) provides that migrant and seasonal agricultural workers can only be housed “in a commercial establishment” unless a certification has been obtained from the Department of Labor (DOL) allowing other housing arrangements. This section further states, “Within 10 days after award, and

prior to the issuance of notice to proceed, the contractor must notify the contracting officer of the planned worker housing site.” Mr. Blood asserts that Native Ecology has received no appropriate certification from DOL and its quotation should therefore have been considered unacceptable.¹

However, nothing in Native Ecology’s quotation indicates that it will not comply with the MSPA. Even assuming that it intends on using covered workers in the performance of this contract, which neither its nor Mr. Blood’s quotation states will be the case, the RFQ’s instructions do not require that a vendor demonstrate compliance with the MSPA, but only that a general housing plan be provided. Under section H.7, any required MSPA housing plan and certification are only required to be provided after award. Thus, Native Ecology’s quotation was not unacceptable and the agency had no duty to specifically confirm prior to award that Native Ecology would comply with the MSPA contract requirements. Native Ecology’s actual compliance with section H.7 is a matter of contract administration not for consideration by our Office. See Sealift, Inc., B-298588, Oct. 13, 2006, 2006 CPD ¶ 162 at 3.

Mr. Blood also asserts the agency erred in evaluating his past performance as “marginal.” He alleges that the agency improperly relied on the prior knowledge of an evaluator, who had inspected Mr. Blood’s work on a previous contract, to evaluate its past performance and did not rely upon the contracting officer representative’s report for that contract. Mr. Blood notes that the contracting officer representative rated Mr. Blood’s performance as satisfactory, see Supplemental Agency Report, Tab F, Contractor Performance Report, and assertedly had more accurate knowledge of Mr. Blood’s performance on that contract and recognized that incomplete specifications inhibited Mr. Blood’s work.

The record shows that two evaluators rated Mr. Blood’s past performance and the consensus rating of his past performance was “marginal.” One evaluator, who did not have personal knowledge of Mr. Blood’s past performance, rated it as “acceptable minus” because of reported “safety concerns” with his “tree felling practices.” Agency Report, Tab H, Rating Sheet Evaluator 1. The other evaluator had personal knowledge of Mr. Blood’s past performance and rated it “marginal minus.” Agency Report, Tab H, Rating Sheet Evaluator 2. The second evaluator explained, “[My] first hand knowledge of Mr. Blood differs from his bid submission. Monarch Pass project took additional time from original contract [specifications] and reworking of the units was required.” Id. The second evaluator served as an inspector of Mr. Blood’s work on the Monarch Fuels Reduction Project, which involved thinning and pruning, and was involved with the project on a regular basis. The evaluator/inspector completed 7 of the 18 daily diaries for the contract, all of

¹ Mr. Blood asserts that although he will camp on-site, he will not camp his employees.

which note dismay with Mr. Blood's work schedule and tree felling practices. Agency Supplemental Report, Tab E, Contract Daily Diaries. The evaluator/inspector in various places notes: "Mr. Blood's work is unacceptable," "Mr. Blood continues to slip further behind his schedule," "distance that slash has been dragged ... is still an issue," "I mentioned the same pocket of trees that need work from our last visit," "[he] has not gone back to clean up." Id. The final inspection report completed by a different inspector found Mr. Blood's work to be "acceptable but by a very small margin. Less than acceptable areas are small enough and dispersed enough to make it more expensive to the [government] to continue trying to bring things up to standards." Id. at 2.

The evaluation of past performance, including the agency's determination of the relevance and scope of the vendor's performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable, inconsistent with the solicitation criteria, or undocumented. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 5. If at the time the award selection is made, the contracting officer has no reason to question the validity of the past performance information furnished, he or she can rely upon this information without further investigation. John Blood, B-290593, Aug. 26, 2002, 2002 CPD ¶ 151 at 4. In fact, an evaluator's personal knowledge of an vendor may properly be considered in a past performance evaluation, notwithstanding the protester's disagreement with this individual's conclusions, since an agency may rely upon its reasonable perception of inadequate past performance, even where the contractor disputes the agency's position. See MAC's Gen. Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 at 3-4; Omega World Travel, Inc., B-271262.2, July 25, 1996, 96-2 CPD ¶ 44 at 4. Based on this record, the agency could reasonably rate Mr. Blood's past performance as marginal.²

The protests are denied.

Gary L. Kepplinger
General Counsel

² Mr. Blood also argues that its negative past performance rating constituted a determination of nonresponsibility of a small business that was required to be referred to the Small Business Administration (SBA) for consideration under the SBA's certificate of competency procedures. However, where, as here, a vendor's past performance is determined unsatisfactory pursuant to a best value evaluation scheme, the matter is one of relative technical merit, not responsibility, and does not require referral to the SBA. John Blood, supra, at 4 n.2.