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**Comptroller General
of the United States**

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

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Decision

Matter of: Frontier Systems Integrators, LLC

File: B-298872.3

Date: February 28, 2007

T. Michael Guiffre, Esq., James N. Schwarz, Esq., and Elizabeth M. Gill, Esq., Patton Boggs LLP, for the protester.

David B. Dempsey, Esq., Kristen E. Ittig, Esq., David J. Craig, Esq., and Stuart W. Turner, Esq., Holland & Knight LLP, for Chenega Security and Protection Services, LLC, an intervenor.

Damon Martin, Esq., and David Nimmich, Esq., Naval Facilities Engineering Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably decided not to attribute to the awardee the past performance information of its parent company where awardee's proposal indicated that parent's role was limited to providing administrative support functions and reflected that it would have no role in performing the actual security guard functions required by the agency.

2. Protest that awardee's proposal should have been rated "unacceptable" for failing to comply with solicitation requirement that offerors submit "at least" three relevant past performance questionnaires is denied where past performance was evaluated according to a pass/fail evaluation scheme and was therefore ultimately a matter of responsibility and the protester did not challenge the agency's affirmative determination of responsibility with respect to the awardee.

DECISION

Frontier Systems Integrators, LLC protests the award of a contract to Chenega Security and Protection Services, LLC (CSPS) under request for proposals (RFP) No. N40085-06-R-1126, issued by the Department of the Navy, Naval Facilities Engineering Command, for security guard services. Frontier argues that the Navy improperly evaluated CSPS's proposal.

We deny the protest.

The RFP, issued as a competitive set-aside under section 8(a) of the Small Business Act, contemplated the award of a “combination firm-fixed price/indefinite quantity contract” for security guard and patrol services at the Naval Station Newport Complex, Newport, Rhode Island, with a 1-year base period of performance and four 1-year options.

As amended, the RFP provided that “[t]he Government will select the lowest price technically acceptable offer whose proposed approach provides a high degree of confidence that the contractor is capable of meeting or exceeding the performance objectives and standards at a realistic and reasonable cost to the Government.” RFP at 55. Technical acceptability was to be determined with respect to three technical evaluation factors: (1) technical approach/management; (2) corporate experience; and (3) past performance.¹ As it relates to the protest issues raised, the corporate experience factor provided as follows:

Offerors shall provide information on a maximum of twenty (20) guard/security services contracts completed within the past five years, including current (on-going) contracts. Contracts must be similar in size, scope, and complexity as the current requirement. Include a short description, contract number, title, location, and a list of clients and points of contact on individual contracts with accurate telephone numbers. Offerors may include past experience information regarding predecessor companies and key personnel who have relevant experience.

RFP at 57.

The past performance factor provided as follows:

Offerors shall clearly demonstrate a history of performance on contracts of similar scope, size, and complexity to this requirement. The Government will consider any 1) information supplied by the offeror, 2) information obtained by references provided by the offeror,

¹ The RFP also indicated that the technical factors were of equal weight and that when combined they were equal in weight to price. RFP at 55. Including information concerning the relative “weights” of the evaluation factors suggested that the agency intended to perform a price/technical tradeoff in selecting the awardee and was therefore inconsistent with the language in the RFP indicating that award was to be made to the lowest priced technically acceptable offer. This apparent inconsistency, however, was never challenged and the record demonstrates that the agency did not conduct a tradeoff but rather made award to the lowest priced technically acceptable offeror.

3) other relevant past performance and experience obtained from other sources and data bases known to the Government. The Government will use this information to determine if the record indicates accomplishing performance objectives, any problems and corrective actions taken on prior contracts, standards of good workmanship, foreseeing and controlling costs, adhering to schedules, a reputation for reasonable behavior, and generally a business-like concern to the customer's interest.

Offerors shall be responsible for ensuring that the references submit completed questionnaires of at least three similar projects performed within the last five years.

RFP at 57.

By the RFP's closing date, the Navy had received several proposals, including those from CSPA and Frontier. The Navy initially rated CSPA as unacceptable under the past performance factor because none of CSPA's references returned their past performance questionnaires and the agency, therefore, did not have any past performance information for CSPA. As a consequence, Frontier was determined to have submitted the lowest priced technically acceptable proposal.²

On September 14, the Navy notified all offerors that Frontier had been selected for award. Subsequently, however, the Navy concluded that it had erred in evaluating CSPA as unacceptable under the past performance factor and determined that CSPA should have received a "neutral" rating under this factor instead. With a "neutral" rating, CSPA became the lowest priced technically acceptable offeror, and the Navy notified Frontier that CSPA would receive the award.

Upon learning of the agency's revised award decision, Frontier filed a protest with our Office. In response to Frontier's protest, the Navy represented that it intended to reevaluate proposals and make a new award decision. Based on the agency's representations, we dismissed the protest as academic.

In its reevaluation, the Navy rated CSPA as acceptable under all of the technical evaluation factors. With regard to the corporate experience factor, the Navy concluded that CSPA did not itself have any relevant experience and declined to attribute to CSPA, the experience of its parent company, Chenega Corporation, which CSPA had indicated in its proposal would play a role in its performance of the contract. The agency decided not to attribute Chenega's experience to CSPA because Chenega was going to perform a limited administrative role in performance

² Frontier's price was \$26,171,375.07 and CSPA's price was \$25,430,927.67.

of the prospective contract, specifically, accounting, payroll support, and certain quality control certification functions. Agency Report (AR) at 8; AR, exh. 14, Second Source Selection Board Report at 4-5. In rating CSPS as acceptable under the corporate experience factor, the Navy did, however, consider the experience of CSPS' proposed key personnel and major subcontractor, Wackenhut Services, Inc., which was to provide 49 percent of the direct labor costs under the contract. AR at 11; AR, exh. 14, supra. In its proposal, CSPS detailed the experience of its three top corporate officers as well as the experience of Wackenhut, and the Navy concluded that CSPS' key personnel and Wackenhut had extensive experience in the security field with contracts of similar or greater size, scope, and complexity as compared to the prospective contract. Id.

The Navy also did not attribute information concerning Chenega to CSPS in its evaluation of CSPS' past performance, and determined that CSPS did not have any relevant past performance of its own. However, the Navy did receive four past performance questionnaires regarding Wackenhut's past performance and found two of the four to be relevant. Based on these two questionnaires for Wackenhut, which reflected excellent past performance ratings, the Navy revised its prior "neutral" past performance rating for CSPS to a rating of "acceptable." Because CSPS had submitted the lowest priced technically acceptable proposal, the Navy affirmed its prior award decision to CSPS. This protest followed.

Frontier maintains that CSPS should have been rated as unacceptable under the past performance factor. According to Frontier, because CSPS relied on its parent corporation, Chenega, to establish its corporate experience and past performance, it was improper for the agency to disregard "a wealth of information in the public record concerning [Chenega's] poor performance on substantially similar contracts." Protest at 9. Assuming that the agency reasonably did not impute Chenega's information to CSPS, Frontier argues in the alternative that CSPS could not have been found acceptable under the past performance factor because the Navy received and considered only two relevant past performance questionnaires, not three as required by the RFP.

As an initial matter, even assuming that the Navy acted improperly in deciding not to consider information relating to CSPS' parent corporation, Chenega, in its evaluation of CSPS' past performance, Frontier has failed to provide any evidence to suggest that had the Navy considered Chenega's past performance, CSPS would have received a rating of "unacceptable" under the past performance factor. Rather, Frontier simply relies on its bald assertion that there is a "wealth" of public information concerning Chenega's poor performance on similar contracts, which would have led to a rating of unacceptable. Such unexplained, unsupported, and undocumented assertions fail to provide sufficient evidence for a finding by our Office that the Navy's evaluation was materially and prejudicially unreasonable or inconsistent with procurement laws or regulations. See 4 C.F.R. §§ 21.1(c)(4) and (f)

(2006); Bella Vista Landscaping, Inc., B-291310, Dec. 16, 2002, 2002 CPD ¶ 217 at 5 n.4.

In any event, we see nothing improper in the Navy's decision not to consider the past performance information of CSPA's parent corporation in its evaluation of CSPA's past performance. An agency may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. The relevant consideration is whether the resources of the parent or affiliated company—its workforce, management, facilities, or other resources—will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance. Id. at 5.

In challenging the agency's decision not to attribute the past performance information of CSPA's parent company, Chenega, Frontier points to numerous sections of CSPA's proposal referencing the experience and capabilities of Chenega. Frontier also highlights the fact that the relevant experience of CSPA's key employees involved work they had performed on behalf of Chenega, as well as the fact that CSPA intended to rely on a personnel database maintained by Chenega for recruiting purposes.³ When taken together, Frontier contends that CSPA's proposal shows that Chenega will maintain a significant role in performing the required guard and security services contract. CSPA's proposal, however, clearly identified Chenega's role under the contract as limited to providing support type functions, *i.e.*, accounting, invoicing, payroll, and quality control certification, and clearly explained that CSPA and Wackenhut personnel were to manage and perform all of the required guard and security services. CSPA Proposal at 39. Based on these clear and unequivocal representations in CSPA's proposal, the Navy reasonably determined that Chenega would not have a meaningful role in performing the primary services required by the agency and therefore acted properly in not attributing to CSPA the experience or past performance history of its parent corporation.

Frontier also argues that CSPA should have received a rating of "unacceptable" under the past performance factor because CSPA provided only two past performance questionnaires, not three as Frontier contends was required by the RFP. In support of its argument, Frontier points to the section of the RFP stating that offerors were responsible for ensuring that the agency receive completed past performance questionnaires for "at least three similar projects performed within the last five years." RFP at 57. The record reflects that, while the agency found that

³ Frontier also asserts that the workforce proposed by CSPA will actually be employees of Chenega, relying on two phrases in CSPA's proposal concerning supervision of Chenega and Wackenhut employees. Those phrases are taken out of context and fail to establish that Chenega will be the actual employer.

CSPS had no record of past performance itself, the Navy received four past performance questionnaires concerning CSPS' major subcontractor, Wackenhut, and found two of the four to be relevant. AR, exh. 14, Second Source Selection Board Report, at 5. Based on these two references regarding Wackenhut's past performance, which reflected excellent ratings, the Navy rated CSPS' past performance as "acceptable."

The Navy does not challenge the assertion that it received only two relevant past performance questionnaires when it evaluated CSPS as acceptable under the past performance factor; rather, the Navy contends that the solicitation requirement for three relevant questionnaires was not a material requirement since it did not affect the price, quantity, quality, or delivery of the services required and, as a consequence, CSPS' failure to provide three relevant past performance questionnaires did not compel a past performance rating of "unacceptable." In this regard, the Navy notes that the questionnaires were merely one tool with which to assess an offeror's past performance. The Navy also contends that failing to provide the requisite number of relevant questionnaires at most should result in CSPS receiving a past performance rating of "neutral," since, under Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), an offeror without a record of past performance, or for whom past performance information is not available, may not be rated favorably or unfavorably. Thus, with its neutral rating, CSPS would still have been the awardee.

We conclude that the informational defect alleged by Frontier concerning CSPS' past performance does not, by itself, provide a basis for sustaining Frontier's protest, since, as discussed below, the agency's acceptability determination with respect to CSPS' past performance was ultimately a matter of CSPS' responsibility. As a consequence, the Navy retained the discretion to find CSPS' past performance acceptable, notwithstanding the language in the RFP concerning the number of questionnaires offerors were to submit as part of their past performance evaluation.

Where an agency utilizes a lowest price technically acceptable source selection process, the FAR provides that past performance need not be an evaluation factor at all. However, when it is included, it cannot be utilized for the purpose of making a "comparative assessment"; rather, past performance is to be determined solely on a pass/fail basis. FAR § 15.101-2. Our Office has long held that pass/fail evaluations of capability issues, such as past performance, are tantamount to responsibility determinations, with the result that a rating of "unacceptable" in these areas is the same as a determination of nonresponsibility. *See, e.g., Phil Howry Co.*, B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33. Consistent with this premise, in the context of a lowest price technically acceptable evaluation scheme, where the contracting officer determines that a small business' past performance is not acceptable, "the

matter shall be referred to the Small Business Administration for a Certificate of Competency determination.”⁴ FAR § 15.101-2(b)(1).

By including past performance as an evaluation factor in the RFP’s lowest price technically acceptable evaluation scheme here, the Navy essentially carved out one element of a responsibility determination and utilized it as an evaluation factor in this set-aside. This, however, did not alter the fact that the pass/fail past performance evaluation in this context remained a matter of responsibility since, if the Navy had found CSPS’ past performance “unacceptable,” it would have been required to submit that determination to the Small Business Administration for a certificate of competency (COC) review. Since past performance ultimately is a matter of responsibility, the agency could look beyond an offeror’s compliance with the informational requirements set forth in the RFP, and therefore retained the discretion to find CSPS’ past performance acceptable despite CSPS’ failure to submit three past performance questionnaires. Because Frontier has not in any way challenged the Navy’s affirmative determination of responsibility with respect to CSPS, but instead only challenged CSPS’ failure to comply with the informational requirements under the past performance evaluation factor, there is no basis for our Office to conclude that the award to CSPS was improper.

Citing our decisions in Prudent Techs., Inc., B-297425, Jan. 5, 2006, 2006 CPD ¶ 16 and Menendez-Donnell & Assocs., B-286599, Jan. 16, 2001, 2001 CPD ¶ 15 at 3 n.1, Frontier suggests that CSPS’ past performance evaluation was not a matter of responsibility but rather a question of technical acceptability and, as a consequence, the Navy would not have been required to refer CSPS to SBA for a COC review. Prudent Techs., Inc. and Menendez-Donnell & Assocs. are distinguishable, however, since, unlike the case at hand, the protesters in those cases disregarded the solicitation regarding the submission of specific information required by the agency for the purpose of evaluating experience or past performance and, based on this failure, their proposals were found to be technically unacceptable. In these cases, the agency did not have any basis to assess or judge the protesters’ capabilities because of their failure to comply with solicitation requirements. Here, in contrast to the cited cases where the protesters did not submit the required information, CSPS made an effort to comply with all of the RFP’s informational requirements, and in fact submitted four past performance questionnaires. It was only as a result of the

⁴ As an aside, at least in the context of set-asides for small business concerns, we question the purpose of including past performance as a separate evaluation factor where a pass/fail rating scheme is utilized since the past performance evaluation is ultimately reduced to a matter of the firm’s responsibility. This is particularly so given the difficulties associated with how to consider a “neutral” rating in the context of a pass/fail evaluation, which, as noted above, is the rating required for firms without any past performance record or where the record is not available. FAR § 15.305(a)(2)(iv).

Navy's assessment of the information provided by CSPS that CSPS was deemed to have submitted only two "relevant" questionnaires. Notwithstanding this conclusion, however, the Navy determined that CSPS was capable of performing the work and its past performance acceptable--a determination ultimately regarding CSPS' responsibility.

The protest is denied.

Gary L. Kepplinger
General Counsel