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Decision

Matter of: LASEOD Group, LLC

File: B-405888

Date: January 10, 2012

Michael J. Gardner, Esq., and George G. Booker Jr., Esq., Troutman Sanders LLP, for the protester.

J. Hatcher Graham, Esq., for VR Habilis, LLC, an intervenor.

LTC Patrick L. Vergona, Department of the Army, for the agency.

Pedro E. Briones, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly waived a solicitation requirement (that offerors provide past performance information for at least three prior contracts) is denied where the protester was not competitively prejudiced by the waiver and the agency's selection of the awardee's quotation as the most advantageous to the government, based on its higher-rated past performance, was reasonable and consistent with the solicitation's stated evaluation factors.

DECISION

LASEOD Group, LLC, of Suwanee, Georgia, protests the award of a contract to VR Habilis, LLC, (VRH) of Knoxville, Tennessee, under request for quotations (RFQ) No. W911SA-11-T-0245 issued by the Department of the Army for unexploded ordnance clearance at Fort McCoy, Wisconsin.

We deny the protest.

BACKGROUND

The RFQ, which was set aside for small businesses and issued as a simplified acquisition under Federal Acquisition Regulation (FAR) subpart 13.5, provided for the award of an indefinite-delivery, indefinite-quantity (ID/IQ) contract for surface, subsurface, and underwater clearance of unexploded ordnance (UXO). RFQ, Amend. 1, at 2-3; Statement of Work (SOW) at 19. The SOW requires the vendor to dispose of UXO and other hazardous materials in accordance with applicable

federal, state, and local laws and regulations and cites over 20 Occupational Safety and Health Administration (OSHA) and Department of Defense (DOD) safety regulations. SOW at 19-23. The RFQ also requires the vendor to develop health and safety plans, conduct and report safety inspections, and provide on-site safety management. See id.

Vendors were informed that award would be made to the offeror whose quotation was most advantageous to the government based on price and past performance, and that past performance would be more important than price in the source selection. RFQ at 33; Amend. 1 at 8. Vendors were instructed to provide past performance information, including customer surveys, for no less than three contracts performed in the past 3 years that were similar in scope and work and that show the vendor's level of quality.¹ RFQ, Amend. 1, at 9. The RFQ stated that the past performance evaluation could be based on one or more of the following: the contracting officer's (CO) experience and knowledge of the solicited services; customer surveys; Past Performance Information Retrieval System (PPIRS) reports; and any other reasonable basis. Id. Vendors' past performance would be rated using the adjectival ratings described in the RFQ's past performance surveys.² Id., see RFQ, Attach. 1, Past Performance Survey, at 3.

The Army received five quotations, including those of LASEOD and VRH, which were evaluated as follows:³

¹ The survey asked customers to describe the services performed under the contract and its award amount, as well as rate and comment on the vendor's quality of service, schedule, business relations, management of key personnel, and overall performance, including whether the respondent would award another contract to the vendor. RFQ, Attach. 1, Past Performance Survey.

² Past performance was rated as either exceptional, very good, satisfactory, marginal, unsatisfactory, or neutral. RFQ, Attach. 1, Past Performance Survey. As relevant here, an exceptional rating reflects performance that has met or exceeded requirements and has been accomplished with few minor problems; essentially no doubt exists that the offeror would successfully perform. A satisfactory rating reflects performance that has met contractual requirements with some minor problems for which corrective action(s) appear, or were, satisfactory; some doubt exists that the offeror would successfully perform. A marginal rating reflects past performance that has not met some contractual requirements, or a serious problem for which either the contractor has not identified corrective action or for which the proposed corrective action(s) appear only marginally effective or were not fully implemented; substantial doubt exists that the offeror would successfully perform the requirement.

³ Two quotations were eliminated from competition based on vendor size status; one was eliminated based on its unreasonable price. See CO's Statement at 1; Agency
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	LASEOD	VRH
Past performance	Satisfactory	Exceptional
Cost/Price	\$5,295,888	\$5,917,767

CO's Statement at 1; AR, Tab 12, Source Selection Memorandum, at 1-4.

VRH's exceptional past performance rating was based on two customer surveys of contracts that the agency found recent, relevant to the work and scope of the solicited requirement, and "comparable [in dollar] amounts" to the required effort. AR, Tab 11, Past Performance Evaluation, at 3.⁴ VRH's surveys rated its quality of service, schedule, business relations, and key personnel management as exceptional or very good, and both surveys rated VRH's overall performance as exceptional. Id.; AR, Tab 13, VRH's Past Performance, at 6-7, 11-12.

LASEOD's satisfactory past performance rating was based on three customer surveys of contracts that the agency also found recent, relevant to the work and scope of the solicited requirement, and "comparable [in dollar] amounts" to the required effort. AR, Tab 11, Past Performance Evaluation, at 2-3. Two LASEOD surveys rated its quality of service, schedule, business relations, and key personnel management as exceptional or very good, and both surveys rated LASEOD's overall performance as exceptional. Id.; AR, Tab 9, LASEOD's Past Performance, at 1-8. The third survey, submitted by the range officer at Fort McCoy (the location for which the services here are being sought), rated LASEOD's quality of service, schedule, business relations, and key personnel management as marginal or satisfactory, and rated LASEOD's overall performance (as the incumbent contractor) as marginal.⁵ AR, Tab 11, Past Performance Evaluation, at 2-3; Tab 9, LASEOD's Past Performance, at 10-13.

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Report (AR), Tab 12, Source Selection Memorandum, at 3. LASEOD does not protest the agency's price evaluations.

⁴ The agency also searched the PPIRS as part of its past performance evaluations but found no PPIRS reports for either VRH or LASEOD. AR, Tab 11, Past Performance Evaluation, at 3; see Tab 9, LASEOD's Past Performance, at 14; Tab 13, VRH's Past Performance, at 13.

⁵ The range officer's survey indicates that he would not award another contract to LASEOD; that LASEOD used many shortcuts to safety regulations to reduce overhead and took too many risks, reducing safety on the job; and that, when asked about its procedures in this regard, LASEOD provided an unsatisfactory explanation. See AR, Tab 9, LASEOD's Past Performance, at 13; Tab 11, Past Performance Evaluation, at 3.

Award was made to VRH, based on its higher-rated past performance, as the vendor whose quotation was the most advantageous to the government, and this protest followed. See AR, Tab 12, Source Selection Memorandum, at 4-5.

DISCUSSION

LASEOD contends that the solicitation required the agency to conduct a comparative analysis of vendors' past performance based on at least three prior contracts of a similar dollar value, and essentially argues that the agency waived the requirement and treated vendors unequally in that regard. See Protest at 3-5; Comments at 7-13. The protester complains that the agency evaluated VRH's past performance based on only two customer surveys--one for a \$146,000 contract and the other for an ID/IQ contract of an unspecified value--which the protester believes are not similar or relevant to the scope of the requirement.⁶ See id. at 6-11. With respect to the agency's evaluation of LASEOD's own past performance, the protester argues that its lower rating was based "disproportionately" on one marginal rating from a customer survey of a \$54,000 contract, rather than on LASEOD's exceptional rating from the survey of its largest, \$1.6 million contract. See id. at 12; Protest at 4. Based on the purportedly flawed past performance evaluation, the protester also challenges the agency's source selection decision. Protest at 4; Comments at 13-14.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4. This general tenet is equally applicable to simplified acquisitions, and our Office will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 at 10-11.

As discussed above, the RFQ required vendors to submit past performance information, including customer surveys, for no less than three similar contracts. The RFQ also required vendors to ensure, and verify, that their surveys were submitted to the CO by the evaluating customer agencies, and advised vendors in that regard that the agency would not seek out incomplete or insufficient information on behalf of vendors and that unverifiable information would not be considered in the past performance assessment. See RFQ, Amend. 1, at 9. The contemporaneous record, however, shows that the agency evaluated the past performance of three vendors, including the awardee, based on fewer than three

⁶ The agency's estimate for this procurement was \$5,000,000. AR, Tab 12, Source Selection Memorandum, at 3.

prior contracts or customer surveys.⁷ AR, Tab 11, Past Performance Evaluation, at 2-3.

An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the agency's evaluation of proposals are found. See, e.g., Special Servs., B-402613.2, B-402613.3, July 21, 2010, 2010 CPD ¶ 169 at 4. Where there is no basis for finding competitive prejudice to the protester, we will not sustain a protest challenging the waiver of a solicitation requirement. Phoebe Putney Memorial Hospital, B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4. In cases where the protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Geonex Corp., B 274390.2, June 13, 1997, 97-1 CPD ¶ 225 at 5. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2; B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 11.

Here, there is no evidence that LASEOD could have improved its competitive position if it had known the requirement to submit at least three customer surveys would be waived. This is because, even if LASEOD had submitted surveys only for the two contracts for which its performance received higher ratings, the agency could nevertheless, consistent with the terms of the RFQ and the decisions of our Office, rely on the agency's own prior experience with the protester to evaluate its past performance. In other words, to the extent that LASEOD's rating was based here, in part, on a marginal-rated survey from the procuring agency, it was otherwise eminently reasonable, if not required, that the agency consider the incumbent's

⁷ The RFQ's requirements are ambiguous in this regard. While the RFQ advised vendors to submit no fewer than three customer surveys, as well as ensure and verify that the CO received them, it also stated that the past performance evaluation "*may be based on one or more of the following*" and, as relevant here, listed (in the following order): the CO's knowledge of and previous experience with the solicited services; customer surveys; PPIRS reports, and "any other reasonable basis." See RFQ, Amend. 1, at 9 (emphasis added). Moreover, the RFQ stated that quotations which did not contain this information "*may be determined unacceptable[.]*" Id. (emphasis added).

marginal performance, regardless of whether the incumbent offeror had submitted the procuring agency's survey.⁸ See, e.g., Gonzales Consulting Services, Inc., B-291642.2, July 16, 2003, 2003 CPD ¶ 128 at 7 (clearly reasonable for agency to rely on its experience with incumbent in evaluating the firm's past performance where solicitation expressly advised offerors that agency would consider experience and past performance); Air-Flo Cleaning Sys., B-259562.2, Jan. 18, 1996, 96-1 CPD ¶ 88 at 4 (agency can rely on its own direct experience to assess offeror's past performance and protester has not shown that its past performance rating was unreasonable in this regard); Northeast Military Sales, Inc., B-404153, Jan. 13, 2011, 2011 CPD ¶ 2 at 6-7 (agency may not ignore adverse past performance information that is too close at hand).

Because the protester has not shown that it would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement at issue would be waived for some vendors, it has not shown that it was competitively prejudiced by the waiver. See Cerner Corp., B-293093, B-293093.2, Feb. 2, 2004, 2004 CPD ¶ 34 at 7-8 n.7 (protest that agency waived page limitation requirement for awardee without affording other offerors the same opportunity denied where protester has not demonstrated prejudice in that regard); Gulf Copper Ship Repair, Inc., B-292431, Aug. 27, 2003, 2003 CPD ¶ 155 at 4 (agency's selection of proposal that failed to conform to a minimum specification is an unobjectionable waiver of solicitation requirement where deviation did not result in prejudice to protester).

We also find no merit to the protester's assertion that the agency evaluated the dollar value of vendors' prior contracts disparately.⁹ While the agency found VRH's

⁸ The protester initially argued that the agency applied unstated evaluation criteria by considering safety and regulatory concerns with LASEOD's performance, and maintained that LASEOD only became aware of such concerns during its debriefing, but was not provided an opportunity to address them. See Protest at 4. In its comments, however, LASEOD did not respond to the agency's arguments in that regard, see Comments at 12; AR at 11; CO's Statement at 9; therefore we find that LASEOD abandoned this protest allegation. COB EventLizenz GmbH, B-401999.2, Jan. 12, 2010, 2010 CPD ¶ 24 at 3 n.2.

⁹ Contrary to the protester's assertion, the RFQ did not specifically require the agency to consider (nor did the RFQ define the term "scope" to include) only contracts of similar dollar amounts, or otherwise provide for a comparative or relative evaluation of past performance relevance. RFQ at 33; Amend. 1, at 9; see, e.g., Martin Elecs., Inc.; AMTEC Corp., B-404197 et al., Jan. 19, 2011, 2011 CPD ¶ 25 at 14 (protest that agency's past performance evaluation did not consider dollar value of awardee's prior contracts denied where solicitation did not provide for such consideration or comparative evaluation of past performance); Dan River, Inc.,

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\$146,000 contract, as well as its ID/IQ contract of an unspecified value, to be comparable to the requirement, the agency also found LASEOD's \$47,000; \$54,449; and \$1.6 million contracts to be comparable to the requirement. AR, Tab 11, Past Performance Evaluation, at 2-3. In fact, the record shows that the agency considered the value of all five vendors' prior contracts to be similar, even though four vendors submitted past performance information for prior contracts whose values were significantly below the agency's \$5 million estimate for this procurement. See id. at 1-3. In any event, the protester was not prejudiced by the agency's consideration in this regard since the record shows that, to the extent the agency considered the dollar amount of all vendors' prior contracts, it considered a broad range of dollar amounts (from \$47,000 to \$8 million) to be comparable to the \$5,000,000 effort here. AR, Tab 11, Past Performance Evaluation, at 1-3. (The record does not show, however, and the agency does not address, how it determined that the significantly lower contract values were comparable to \$5,000,000. Id.; CO's Statement at 1-3; AR at 5-7.)

Accordingly, LASEOD has not shown that the agency evaluated the protester's past performance unreasonably or inconsistent with the RFQ's stated evaluation factors. See Geonex, supra, (protester was not prejudiced by agency's waiver of requirement that each vendor participate in test demonstration--one of the evaluation criteria--where protester would not be the most highly rated vendor, even if it had achieved a perfect score on the demonstration). The protester has also failed to show that the agency's evaluation of the awardee's past performance was unreasonable.¹⁰ As a general matter, the evaluation of an offeror's past

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B-289613, Apr. 5, 2002, 2002 CPD ¶ 80 at 3-4 (agency not required to consider size of past performance reference in evaluating relevance where RFP did not provide for consideration of this information).

¹⁰ The protester contends that the agency overlooked an alleged recent diving accident that may have occurred during VRH's performance of a current contract and that, according to the protester, resulted in work stoppage and an official investigation. See Protest at 3-4; Comments at 10. However, the protester provides no details regarding the alleged accident and does not assert that VRH caused the accident. Id. The agency's failure to consider the accident alleged by the protester does not provide a basis for questioning the agency's past performance evaluation. Firestorm Wildland Fire Suppression, Inc., B-310136, Nov. 26, 2007, 2007 CPD ¶ 218 at 4-5 (evaluation of awardee's past performance was reasonable, notwithstanding protester's identification of alleged negative information concerning awardee, where agency did not have personal knowledge of some of the information, and fully considered information of which it was aware). Here, the agency states that it was not aware of any such accident prior to evaluation and award and, as discussed above, that it found no PPIRS reports regarding VRH.

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performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Our Office affords particular deference to the technical expertise of agency personnel in cases such as this contract for clearance of unexploded ordnance and hazardous materials where the agency's judgments involve matters of human life and safety. See, e.g., Sig Sauer, Inc., B-402339.3, July 23, 2010, 2010 CPD ¶ 184 at 5-6. Here, the protester has not shown why the agency's rating of VRH's past performance could not reasonably be based on the vendor's exceptional-rated customer surveys.¹¹

In short, although LASEOD disagrees with the agency's judgment, the protester's disagreement does not establish that the agency acted unreasonably. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

We deny the protest.

Lynn H. Gibson
General Counsel

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CO's Statement at 1; see AR, Tab 11, Past Performance Evaluation, at 3; Tab 13, VRH's Past Performance, at 13.

¹¹ We disagree with the protester that the evaluation record lacks sufficient documentation. Here, consistent with FAR § 13.501(b), the record includes a description of the procurement procedures used, the number of offers received, and an explanation of the basis of the contract award decision.