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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Gemmo Impianti SpA

File: B-290427.2

Date: March 12, 2003

Claudio Pilotto for the protester.

J. Page Turney, Esq., and Richard G. Welsh, Esq., Department of the Navy, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under a multi-service contract in which janitorial services comprise the majority of the work to be performed, the agency reasonably found past performance on contracts involving similar janitorial services more relevant than past performance on multi-service contracts where little or no janitorial services were involved.
 2. Past performance of an affiliate may reasonably be credited to an offeror where the offer demonstrates a significant nexus between the affiliate's past performance and the offeror's proposal, such as evidence of shared performance under the prior contract and shared top level executive/management personnel of the two entities with a commitment for involvement by those personnel in performing the contract.
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DECISION

Gemmo Impianti SpA protests the award of a contract to Penauille Italia SpA under request for proposals (RFP) No. N33191-02-R-0402, issued by the Department of the Navy, Resident Officer in Charge of Construction Southern Italy, for various services at the Naval Support Activity, Naples, Italy. Gemmo protests the agency's evaluation and source selection decision.

We deny the protest.

The RFP contemplated the award of a contract for a 9-month base period with 1 option year¹ for the following services: janitorial, grounds maintenance, refuse collection and disposal, inspection/cleaning of sewer/drain systems, replacement of air filters for air conditioning systems, and service calls. The RFP included contract line item numbers (CLIN) and sub-CLINs for regular and emergency services, e.g., basic janitorial services (which the RFP referred to as fixed-price CLINs), and a separate CLIN (and corresponding option CLIN) with sub-CLINs for other services to be ordered on an as-needed basis, e.g., additional sweeping (which the RFP referred to as the indefinite-quantity CLIN).

Award was to be made on a “best value” basis, considering price and three technical factors—past performance, corporate capability and quality control. The corporate capability factors had three equally weighted subfactors—performance plan, staffing plan, and organizational chart. The RFP stated that the three technical factors were of equal importance to each other, and that the combined technical factors were approximately equal in importance to price. The price evaluation was to include a review of the proposed prices for realism and unbalanced pricing.

This is Gemmo’s second protest of the award to Penauille Italia under this RFP.² We sustained Gemmo’s prior protest because the agency’s evaluation under at least two of three technical factors—past performance and quality control—was unreasonable, as was the agency’s evaluation of the relative price difference between the proposals, and thus the agency’s resulting cost/technical tradeoff analysis was defective. Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146.

Following that decision, the agency established a new technical evaluation board (TEB) and source selection board (SSB) to reevaluate the proposals that had been included in the competitive range. The new TEB determined that all of the proposals were unacceptable but capable of being made acceptable, and recommended that discussions be conducted. Agency Report, Tab 2, TEB Report, Sept. 30, 2002, at 1.

The agency did not replace the price evaluation board (PEB) following the first protest. The PEB did not reevaluate the previously proposed prices; it resubmitted its prior reports to the new contracting officer, SSB and source selection authority (SSA). Agency Report, Tab 3, Memo from PEB to Contracting Officer and SSA (Sept. 25, 2002). The prior PEB report analyzed the proposal prices by CLIN, determined that Penauille Italia’s prices were unbalanced between the “fixed-price”

¹ The RFP initially contemplated a longer potential contract term. During discussions following Gemmo’s prior protest of this award, the amended price schedule stated the new performance period.

² Gemmo was the incumbent contractor for much of this requirement prior to the initial protest.

and “indefinite-quantity” CLINs, and stated that the agency should examine the risk that the offeror may make up losses from the “fixed-priced” work through high unit costs for the “indefinite-quantity” work. Agency Report, Tab 3, PEB Report, Mar. 18, 2002, at 8-9. The initial report of the new SSB summarized the CLIN-by-CLIN analysis in the PEB report, although it did not identify the PEB’s determination of price unbalancing. Agency Report, Tab 4, SSB Report, Oct. 10, 2002, at 14-15.

The SSB recommended, and the SSA approved, a revised competitive range consisting of Gemmo’s and Penauille Italia’s proposals. Id. at 16-17. The agency conducted written discussions with these offerors, and requested and received proposal revisions. Both the TEB and the PEB evaluated the revised proposals. The final evaluation results were as follows:

	Gemmo	Penauille Italia
Past Performance	Acceptable	Superior
Corporate Capability	Acceptable +	Acceptable
Performance Plan	Acceptable +	Acceptable +
Staffing Plan	Acceptable	Acceptable
Organizational Chart	Superior	Acceptable
Quality Control	Acceptable	Acceptable +
Overall	Acceptable	Acceptable +
Price	\$5,332,703	\$5,567,997

Agency Report, Tab 8, Final SSB Report, Nov. 14, 2002, at 3, 6.

The SSB accepted the final evaluation results of the TEB and summarized the bases for each of the ratings. As indicated above, the organizational chart subfactor was the only criterion where Gemmo’s proposal was rated higher than Penauille Italia’s, which led to Gemmo’s higher rating for corporate capability. This was attributed to Gemmo proposing more people and labor hours than Penauille Italia. However, the SSB determined that this advantage was “somewhat negated by the fact that Penauille Italia is successfully performing the contract at its proposed staffing level” and by Penauille Italia’s proposal to “augment staffing levels as necessary throughout contract performance.” Id. at 8. The SSB also accepted the evaluation by the PEB of the final prices, which determined that both offerors proposed fair and reasonable prices. Id. at 6. The SSB determined that, although Gemmo’s price was 4.4 percent lower than Penauille Italia’s, Gemmo’s proposal presented a performance risk because it will employ many of the same people proposed by Penauille Italia, with 14 percent more labor hours than offered by Penauille Italia at a lower price. Id. at 9. The SSB concluded:

The [s]uperior technical aspect of Gemmo’s proposal is 1/9 of the technical evaluation and this advantage is reduced by other factors discussed above. Conversely, the advantages offered by Penauille Italia under Past Performance and Quality Control are 2/3 of the total

technical evaluation. Gemmo offers the government a 4.4% lower price, the value of which is reduced by greater (when compared to Penauille Italia) performance risk. This solicitation encompasses vital services in high visibility areas, such as the [Department of Defense Dependent] schools, the Naples hospital, the airport, and the temporary lodging. The Best Value method of contracting was selected to obtain the highest quality service at a reasonable price. Therefore, in accordance with the stated evaluation factors, the SSB recommends award to Penauille Italia's higher technically rated, lower risk proposal.

Id. at 10.

The SSA concurred with the SSB's analysis and recommended source selection decision. Id. at 11. On November 19, the agency again made award to Penauille Italia. Following a debriefing, Gemmo filed this protest, in which it challenges the agency's evaluation under all of the technical factors.

In reviewing an agency's evaluation and source selection decision, we will not reevaluate the proposals; we will only review the evaluation to determine whether the evaluation was reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. Gemmo Impianti SpA, supra, at 3. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 4. Our review of the record here shows that the agency's evaluation was reasonable.

With regard to the past performance factor, the RFP stated that the evaluation of this factor would be based on information received from the references identified in proposals and from other sources, with the agency considering the quality of an offeror's past performance and the relevance of contracts performed to the solicited contract in term of size, magnitude and complexity. RFP § M-3.a. Since the agency determined that the majority of the contract work was for janitorial services, the past performance evaluation considered contracts involving janitorial services to be the most relevant. Agency Report, Tab 6, Final TEB Report, Nov. 14, 2002, at 2.

Gemmo's proposal identified the following contracts as past performance references: (1) the predecessor multi-service contract, which included janitorial services; (2) a contract for operation and maintenance of electrical/mechanical systems and the cleaning and maintenance of building facades; (3) a contract for the operation and maintenance of electrical/mechanical systems at various service centers; (4) a base operation support services contract; and (5) a public lighting maintenance contract. Agency Report on Prior Protest, Tab 13, Gemmo's Proposal, attach. A, Past Performance Forms. Other than the predecessor multi-service contract, Gemmo's proposal did not indicate that its referenced contracts included janitorial services, and during interviews with Gemmo's contract references, the agency was told that two of the contracts did not involve janitorial services.

Although contract references rated Gemmo excellent in responding to emergency situations, they generally rated the firm's performance as average to above average overall. The incumbent multi-service contract was most relevant to the solicited contract, although it did not include all the services solicited here. Under that contract, Gemmo had some problems with regard to quality control for janitorial services, which were ultimately resolved; Gemmo received a satisfactory performance rating. In its evaluation, the agency also considered a maintenance contract, not referenced in Gemmo's proposal, for the Navy for which Gemmo received an overall outstanding performance rating; although that contract was smaller than the present contract, the agency considered that this outstanding rating helped to balance other less positive feedback.³ Agency Report, Tab 8, Final SSB Report, at 7.

Penauille Italia's proposal identified three janitorial services contracts performed by ETS Penauille (a corporate affiliate of Penauille Italia), and two contracts performed by Penauille Italia--a multi-service contract that included janitorial and grounds maintenance services and a janitorial services contract. Agency Report on Prior Protest, Tab 14, Penauille Italia's Proposal, attach. A, Past Performance Forms. During the discussions conducted after our prior decision, Penauille Italia stated that ETS Penauille and Penauille Italia had executed formal agreements to share resources. Under one of these agreements, Penauille Italia would provide equipment and technical/organizational support for one of ETS Penauille's janitorial services contract in Italy. Under another, ETS Penauille would provide resources to Penauille Italia to facilitate the expansion of Penauille Italia, both within Italy and internationally. Penauille also identified three top executives and managers that were shared by the two affiliates and whom Penauille Italia committed to performance under its proposal. Agency Report, Tab 12, Penauille Italia's Correspondence to Agency, at 2-3. In addition, the agency considered Penauille Italia's recent performance as the contractor under the present multi-service contract, which was rated as outstanding.

The record shows that the agency evaluated Penauille Italia's past performance as superior to Gemmo's in large part because Penauille Italia's and its affiliate's experience on large janitorial service contracts was considered more relevant to the services to be performed here than Gemmo's, whose experience in providing janitorial services was much more limited. As indicated, the agency emphasized janitorial services experience in its evaluation of past performance because they constitute the majority of the services under this contract.

³ The agency initially also considered poor performance on a construction contract performed by a corporate affiliate of the protester. However, the contract was not similar to the solicited services and Gemmo explained during discussions that the affiliate's performance was not applicable to Gemmo's performance of service contracts. The SSB did not consider this contract in the final evaluation.

The protester challenges this evaluation, contending that multi-service contract experience should have been considered more relevant than janitorial services experience, and claiming that Penauille Italia has no such experience. However, the record shows that Penauille Italia has performed or is performing two multi-service contracts—one referenced in its proposal and its current performance on the present contract. Although Gemmo's proposal referenced more multi-service contracts than Penauille Italia's, the record evidences that the latter's two multi-service contracts more closely matched the services to be provided under the solicited contracts because they both involved janitorial services and other services covered by this RFP. In this regard, given that the majority of the contract services were janitorial, the agency could reasonably emphasize this experience in evaluating past performance. Also, the record confirms that Gemmo's experience performing janitorial services—*i.e.*, the majority of work to be performed under this RFP—was more limited than Penauille Italia's. Thus, based on our review, we find this aspect of the past performance evaluation to be reasonable.

In addition, in contrast to the quality of Penauille Italia's past performance, the agency found that Gemmo had experienced some performance problems under the janitorial services portion of its contracts, albeit that these problems were ultimately resolved. The agency was also able to compare the performance of the two offerors as incumbent contractors for these services, where Penauille Italia's higher performance rating indicated superior performance by that firm. While Gemmo challenges the validity of the agency's consideration of the offerors' most recent contract performance—*i.e.*, performance occurring after the date of the original award decision, we see nothing improper in this aspect of the agency's evaluation. Where, as here, an agency undertakes to implement corrective action resulting from an improper award, it generally has the discretion to consider updated past performance of the awardee under that contract. See Tidewater Homes Realty, Inc., B-274689.5, Aug. 11, 1998, 98-2 CPD ¶ 40 at 5. Based on our review, we also find this aspect of the past performance evaluation to be reasonable.

The protester also alleges that it was improper for the agency to evaluate the contracts performed by Penauille Italia's corporate affiliate. This was an issue addressed in our first decision. We stated that, in determining whether one company's performance should be attributed to another, the agency must consider not simply whether the companies are affiliated, but also the nature and extent of the relationship between the two—in particular, whether the proposal demonstrates that the workforce, management, facilities, or other resources of the affiliate may affect contract performance by the offeror. Gemmo Impianti SpA, *supra*, at 4 (citing Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4-5, and ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161 at 3). We found that the agency had not considered the nature and extent of the affiliation.

After reopening discussions, the agency requested information about the affiliation between Penauille Italia and its corporate affiliate. Penauille Italia identified a

formal agreement whereby it assisted its affiliate on the affiliate's referenced Italian contract, thus concretely connecting the performance of its affiliate on that contract to the offeror. It also formally committed top executive and management personnel shared by both affiliates to performance under the solicited contract. In our view, this information gave the agency a reasonable basis to include the past performance of the affiliate in the evaluation of Penauille Italia's past performance. Compare Fluor Daniel, Inc., B-262051, B-262051.2, Nov. 21, 1995, 95-2 CPD ¶ 241 at 12 (shared top level management between subsidiary offeror and parent corporation, where proposal also commits the parent to perform management effort, was sufficient basis to credit subsidiary with the experience of its parent) with ST Aerospace Engines Pte. Ltd., supra at 3-4 (shared top level management is not sufficient basis to credit a firm with an affiliated entity's past performance experience where the proposal does not show that these personnel would be involved in contract performance).

Under the second technical factor, corporate capability, Gemmo protests that the agency unreasonably evaluated Gemmo's staffing plan as merely acceptable, even though its organizational chart was rated superior. Gemmo argues that this evaluation was illogical because Gemmo's staffing plan and organizational chart were essentially the same.

As indicated, the RFP stated two separate subfactors--staffing plan and organizational chart--and, since each concerned different aspects of a proposal, there was no basis to require a rating for one to be the same as the rating for the other. The record shows that both offerors' staffing plans were rated as acceptable because they stated the appropriate job descriptions for the work to be performed; Penauille Italia's staffing plan was found to be detailed and specific to the overall work plan of the RFP, while Gemmo's staffing plan was found to be sufficient to demonstrate its understanding of the solicitation requirements. Agency Report, Tab 6, Final TEB Report, at 5, 9. Gemmo has offered no reason why its staffing plan should receive a higher rating than Penauille Italia's, and the record does not otherwise support its assertion.⁴ Gemmo's proposal was credited with a higher rating under the

⁴ Gemmo alleges that the agency wrongly determined that Gemmo's staffing plan was oriented to a construction contract rather than a services contract. The record shows that the agency initially found a deficiency in Gemmo's staffing plan because the TEB determined that the position descriptions were more akin to those used in performing a construction contract. Agency Report, Tab 2, TEB Report, at 7. After discussions, the TEB determined that Gemmo had not addressed this deficiency at all; however, since the remainder of the proposal demonstrated a clear understanding of the contract requirements, the TEB determined that this was merely a weakness and did not present a significant risk. Agency Report, Tab 6, Final TEB Report, at 5. The SSB did not mention this as a weakness in its report, and it was not considered in the source selection decision. Agency Report, Tab 8, Final SSB Report, at 8. Since it appears that the alleged evaluation error ultimately
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organizational chart subfactor because it proposed more personnel and labor hours than Penauille Italia.⁵ While it may have been more appropriate to evaluate the number of personnel and labor hours under the staffing plan subfactor rather than the organizational chart subfactor, the record shows that the agency reasonably found that the only significant difference between the proposals under these two subfactors was Gemmo's greater number of proposed personnel and labor hours. Based on our review, we find that this relative strength in Gemmo's proposal was reasonably evaluated and considered by the agency in the award selection.

Under the quality control factor, Gemmo alleges that Penauille Italia's quality control plan should have been considered unacceptable because, under that plan, quality control personnel will also serve as work supervisors, which the agency, under Gemmo's previous contract, viewed as impairing operational autonomy and required separate personnel to perform these duties. However, the RFP does not contain such a requirement and, since each procurement is a separate transaction, action under the prior procurement does not govern action under the present one. See Beneco Enters., Inc., B-283512, Dec. 3, 1999, 2000 CPD ¶ 175 at 5-6 n.6; Red John's Stone, Inc., B-280974, Dec. 14, 1998, 98-2 CPD ¶ 135 at 7. Here, the agency rated Penauille Italia's proposal slightly higher than Gemmo's under the quality control factor because Penauille Italia proposed a supervisory structure for quality control that provided independence for the quality control program (while still splitting the time of some quality control personnel between quality control and other duties), as well as proposing more personnel and hours for quality control. Agency Report, Tab 8, Final SSB Report, at 9. Based on our review, we find this evaluation to be reasonable.

Finally, the protester alleges that Penauille Italia proposed unbalanced prices and the agency did not analyze prices for price unbalancing. Unbalanced pricing exists where, despite an acceptable total evaluated price, the price of one or more CLINs is significantly overstated. Federal Acquisition Regulation (FAR) § 15.404-1(g)(1); Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 3; Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7. Here, although the agency's evaluation of prices prior to the first protest did determine that Penauille Italia's prices were unbalanced due to significantly overstated prices for the "indefinite-quantity" CLINs (but that the associated risk to the agency was not significant), Penauille Italia's most recent price

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did not affect the award decision, we find that the alleged error did not prejudice the protester.

⁵ Although Gemmo's organizational plan had other evaluated strengths—e.g., good equipment list and clearly illustrated management structure—Penauille Italia's proposal had comparable strengths. Agency Report, Tab 6, Final TEB Report, at 5-6, 9-10.

Revisions significantly reduced those CLIN prices. The agency's final price analysis shows that the awardee's individual CLIN prices were not significantly overstated. Agency Report, Tab 7, Final PEB Report, at 4-6. Therefore, the record shows that Penauille Italia's final prices were not unbalanced.⁶

The protest is denied.

Anthony H. Gamboa
General Counsel

⁶ The protester alleges that Penauille Italia's prices are unbalanced because its revised prices under the medical facilities sub-CLIN of CLIN 1001 covering janitorial services are significantly higher than its previous prices for that same sub-CLIN. However, the record shows that the agency considered Penauille Italia's individual CLIN prices to be reasonable (and therefore not overstated). Gemmo has not shown that the agency's determination in this regard was unreasonable. Absent overstated prices, there is no price unbalancing. See FAR § 15.404-1(g)(1).

Also, in a supplemental statement submitted by the protester late in the protest process, the protester alleged that the PEB's price analysis contains calculation errors, and thus the price analysis cannot be relied upon. This is a new protest basis raised by the protester more than 10 days after it received the PEB report providing the basis for the allegation, and is therefore untimely. 4 C.F.R. § 21.2(a)(2) (2002); Oceaneering Int'l, Inc., B-287325, Jun. 5, 2001, 2001 CPD ¶ 95 at 6 (in order for our Office to consider new protest grounds raised during the course of an otherwise timely protest, the new protest grounds must independently satisfy the requirements for a timely protest).