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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Daylight Tree Service & Equipment, LLC

File: B-310808

Date: January 29, 2008

Scott Muir, for the protester.

Melissa McClellan, Esq., U.S. Department of Agriculture, Forest Service, for the agency.

Paula J. Haurilesko, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly considered the past performance of another company in evaluating protester is denied where the two companies shared the same address, telephone number, and point of contact, and where the protester included contacts from contracts performed by the affiliated company in its references.

DECISION

Daylight Tree Service & Equipment, LLC, protests the award of a contract to Woolery Timber Management by the U.S. Department of Agriculture Forest Service under request for proposals (RFP) No. AG-9A63-S-07-0088, for tree and vegetation mastication services. Daylight contends that the Forest Service improperly evaluated Daylight's proposal using past performance information for another company.

We deny the protest.

The Forest Service issued on July 25, 2007, the RFP for a firm fixed-price contract for the mastication of overstocked trees, woody material, and other vegetation in a section of the Tahoe National Forest. RFP at 3. The RFP contemplated awarding to the offeror whose proposal provided the best value to the government, and stated that the award would be based on a trade-off between price and non-price factors, comparing the relative risk of poor or nonperformance with the price. *Id.* at 41. The non-price factors, (1) organizational experience, (2) organizational past performance, (3) local community economic enhancement, and (4) understanding of the government's requirements, were to be of approximately equal value to each

other, and when combined, were to be of approximately equal value to price. Id. Under the past performance evaluation factor, the RFP required the offerors to provide references for work performed during the past 3 years. Id.

The Forest Service received seven proposals in response to the RFP. Contracting Officer's (CO) Statement at 1. The Forest Service provided the sections of the proposals pertaining to the non-price evaluation factors to the evaluation team for review. Id. Two members of the evaluation team recognized Daylight's operations manager as the president of Associated Arborists, Inc., and noted that Daylight's address and telephone number were the same as that listed for Associated Arborists on prior Forest Service contracts. Agency Report (AR), Memorandum of Law, at 5-6. Consequently, the evaluation team assumed that Daylight and Associated Arborists were successor and predecessor companies, and rated Daylight's past performance based on their personal experience with Associated Arborists. CO Statement at 1. Daylight received a neutral rating in the past performance evaluation factor based on instances of poor performance by Associated Arborists, but received a satisfactory rating overall, indicating that it adequately met the requirements of the evaluation factors. AR, Tab 3, CO's Decision Letter, at 1, 2.

The Forest Service awarded the contract to Woolery Timber Management, and Daylight filed an agency-level protest. AR, Tab 3, Daylight Protest, Sept. 27, 2007, at 1. In response to the protest, the Forest Service contacted some of the references listed in Daylight's proposal. AR, Tab 1, Memorandum of Law, at 4. Two of the references stated that they were unfamiliar with the work of Daylight, but recognized the name of Daylight's operations manager in connection with Associated Arborists and provided past performance information with regard to Associated Arborists. Id. at 6. Subsequently, the Forest Service denied Daylight's protest. AR, Tab 3, CO's Decision Letter, at 4.

Daylight filed a protest challenging its past performance evaluation with this office, arguing only that the evaluation was flawed because it and Associated Arborists are not the same company.¹ Protest at 1. The Forest Service argues that, by listing references in its proposal that pertain to contracts performed by Associated Arborists, Daylight itself apparently considered the past performance of Associated Arborists relevant to the performance of Daylight, and therefore the Forest Service

¹ We note that in Daylight's comments on the Agency Report, it raises the argument that the technical evaluation of its equipment also was incorrect. Comments on AR at 2. However, as this issue was not raised during its initial protest to our Office and Daylight was aware of this issue prior to filing with our Office, the issue is untimely. Under our Bid Protest Regulations, to be timely, a protest must be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2007).

reasonably considered Associated Arborists' performance. AR, Tab 1, Memorandum of Law, at 6.

In our view, the evaluation team reasonably included the past performance information of Associated Arborists in its assessment of Daylight's past performance. The use of the same address and telephone number for both companies, combined with the same person representing the companies, strongly suggest that the two companies are, if not predecessor and successor companies, then at least close affiliates, and therefore, the past performance of Associated Arborists could appropriately be considered in evaluating Daylight's proposal. As proof that Daylight and Associated Arborists are not the same company, Daylight merely asserts that it has been awarded contracts by the Forest Service since 2005. However, it has provided no explanation as to how the two companies shared the same address and telephone number while remaining separate entities.

Moreover, the Federal Acquisition Regulation (FAR) directs agencies to take into account past performance information of predecessor companies, key personnel who have relevant experience or subcontractors when such information is relevant to an acquisition. FAR § 15.305(a)(2)(iii). Daylight's operations manager had also been president of Associated Arborists. Therefore, the experience of Associated Arborists under his leadership is relevant to the performance of Daylight. See, e.g., United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 at 6-7 (past performance of a new company based on the experience key individuals gained through prior employment with another, affiliated company is relevant). Finally, the fact, undisputed by Daylight, that it included contacts for work performed by Associated Arborists in its references reinforces the conclusion that consideration of Associated Arborists' past performance in evaluating Daylight's proposal was appropriate.

To the extent that Daylight argues that the Forest Service improperly waited until after Daylight filed an agency-level protest before contacting its references, relying instead on the personal experiences of the evaluation team with regard to the performance of Associated Arborists, we find that the agency's actions were not improper. With regard to the evaluation team relying on its own knowledge, we have held that an evaluator's personal knowledge of an offeror may be properly considered in a past performance evaluation. Omega World Travel, Inc., B-271262, July 25, 1996, 96-2 CPD ¶ 44 at 4. Here, the evaluation team provided documentation from prior contracts with Associated Arborists that support the personal knowledge. In light of our conclusion that it was reasonable to attribute Associated Arborists' past performance to Daylight, the Forest Service properly relied on the personal experiences of the evaluation team with Associated Arborists. With regard to the Forest Service contacting Daylight's references after the agency-level protest was

filed, we do not find it improper, and note that those Daylight-provided references confirmed Daylight's affiliation with Associated Arborists.

The protest is denied.

Gary L. Kepplinger
General Counsel