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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: Bay Area Travel, Inc.; Cruise Ventures, Inc.; Tzell-AirTrak Travel Group, Inc.

File: B-400442; B-400442.2; B-400442.3; B-400547; B-400547.2; B-400547.3; B-400564; B-400564.2; B-400564.3

Date: November 5, 2008

Josephine L. Ursini, Esq., for the protesters.

James H. Roberts III, Esq., Van Scoyoc Kelly PLLC, for CW Government Travel, Inc., the intervenor.

Scott N. Flesch, Esq., and Maj. Daniel A. Woolverton, Department of the Army, for the agency.

Sharon L. Larkin, Esq., and Guy R. Petrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO will review the issuance of task and delivery order in excess of \$10,000,000 under indefinite-delivery/indefinite-quantity contracts to ensure that the “enhanced competition” requirements of the National Defense Authorization Act are met and to ensure that the evaluation is in accord with the solicitation and applicable procurement laws and regulations.

2. Protests challenging the issuance of three task orders for travel services are denied where the agency evaluated proposals consistent with the evaluation criteria stated in the solicitation and reasonably selected the higher technically rated, higher priced proposals.

DECISION

Bay Area Travel, Inc. of Brandon, Florida; Cruise Ventures, Inc. of Norfolk, Virginia; and Tzell-AirTrak Travel Group, Inc., a joint venture,¹ of Bordenton, New Jersey, protest the issuance of three task orders to CW Government Travel, Inc. of Arlington,

¹ Tzell-AirTrak is a joint venture consisting of Tzell Travel Group and AirTrak Travel Systems. AR (DTA 2), Tab 25-12, Tzell-AirTrak Proposal Volume 2, Technical Approach Volume, at 2.

Virginia, issued by the Department of the Army under request for proposals (RFP) Nos. W91QUZ-08-R-0023, W91QUZ-08-R-0024, and W91QUZ-08-R-0025 for travel services to be provided to military travelers in “Defense Travel Area(s)” (DTA) 2, 3, and 4. The protesters contend that the agency improperly issued the task orders to an offeror whose proposals were higher in price, and that the agency is biased in favor of the awardee.

We deny the protests.

BACKGROUND

The protesters and awardee all hold indefinite-delivery/indefinite-quantity (ID/IQ) contracts to provide worldwide commercial travel office services to the Department of Defense (DoD). The Army conducted a series of task order competitions among ID/IQ contract holders pursuant to Federal Acquisition Regulation (FAR) Subpart 16.5 to acquire travel services for military personnel in various geographic areas called DTAs. At issue here are the task orders for DTAs 2, 3, and 4,² all of which have been issued to CW.³

The RFPs for each of the protested areas were issued on the same day, established the same due date for proposals, included the same evaluation criteria, and contained identical technical requirements and performance work statements; their only difference was that the pricing schedules (schedule B of the solicitations) sought pricing for different DTA locations. In addition, the protesters’ and awardee’s proposals submitted in response to the three DTAs were “virtually the same,” except for DTA pricing. Agency Legal Memorandum (DTA 3) at 60. The evaluation records, too, are nearly identical, although the task orders were issued on different dates.⁴

² DTA 2 encompasses the states along the Gulf Coast of the United States, Puerto Rico, and the Virgin Islands; DTA 3 encompasses Connecticut, Delaware, Massachusetts, Maryland, Maine, North Carolina, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Tennessee, Virginia, and the District of Columbia; and DTA 4 encompasses Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, and Wisconsin. Agency Legal Memorandum (DTA 2) at 2-3; id. (DTA 3) at 3; id. (DTA 4) at 3.

³ CW has also been issued task orders for DTAs 1 and 6, but these task orders have not been protested.

⁴ The DTA 2 task order was issued on July 31, 2008, and the DTA 3 and DTA 4 task orders were issued on August 29. Contracting Officer’s Statement (DTA 2) at 2; Contracting Officer’s Statement (DTA 3) at 2; Contracting Officer’s Statement (DTA 4) at 2.

Because of the identical nature of the DTA evaluation records, and in order to avoid redundancy, we cite to primarily the evaluation record for DTA 2 in our decision below as illustrative of the evaluation records for all three DTAs.

The RFPs provided for the issuance of a single task order for each of the DTAs on a best value basis, considering the following evaluation factors: business approach, technical approach, past performance, and price.⁵ The solicitations provided that non-price evaluation factors, when combined, were “approximately equal to price”; price was stated to be “significantly more important” than any of the individual non-price factors alone. *See, e.g.*, RFP (DTA 2) at 31. Under the business approach and technical approach factors, proposals were given adjectival ratings of blue (outstanding), green (good), yellow (fair), pink (poor), or red (unacceptable).⁶ Under the past performance factor, proposals were rated blue (very low risk), green (low risk), yellow (moderate risk), red (high risk), or white (unknown risk).⁷ The price factor was to be “weighted but not rated.” Agency Report (AR) (DTA 2), Tab 37, Source Selection Decision, at 2-3.

For the business approach factor, the RFPs stated that the government would evaluate “the detail of the offeror[']s business approach to provide travel services in accordance with all of the requirements and the ability to obtain and implement the necessary resources to support the requirements, e.g., personnel financial resources, and equipment.” For the technical approach factor, the RFPs provided for the evaluation of the offerors’ technical approaches to providing travel services in accordance with the solicitation requirements. For the past performance factor, the RFP advised that the government would evaluate all DoD commercial travel office contracts held by the offeror and their subcontractors since the contracts were awarded on September 19, 2007. *See, e.g.*, RFP (DTA 2) at 31-32.

⁵ Each task order was for 2-year base period and included three 1-year options. *See, e.g.*, RFP (DTA 2) at 32; attach. 18, DTA 2 Price Model.

⁶ As relevant here, “blue” was defined as “[o]utstanding in all respects; offers one or more significant strengths not offset by weaknesses; very good probability of success with overall low degree of risk in meeting the Government’s requirements.” “Green” was defined as “[h]igh quality in most respects; offers one or more strengths not offset by weaknesses; good probability of success with overall low to moderate degree of risk in meeting the Government’s requirements.” AR (DTA 2), Tab 37, Source Selection Decision, at 2-3.

⁷ As relevant to the evaluation of past performance, “blue” was defined as “[b]ased on the offeror’s performance record, essentially no doubt exists that the offeror will successfully perform the required effort.” “Green” was defined as “[b]ased on the offeror’s performance record, little doubt exists that the offeror will successfully perform the required effort.” AR (DTA 2), Tab 37, Source Selection Decision, at 3.

For the price factor, the RFPs stated that the agency would use a “price model” that was included with each RFP to determine each offeror’s “total evaluated price.” The price model, which was specific to the applicable DTA, contained a number of contract line item numbers (CLIN) for the base and option years. For each of the CLINs, the agency identified a transaction or service to be provided, along with the quantity of transactions or services to be ordered. Offerors were to provide unit prices for each CLIN, which would be multiplied by the quantity of transactions or services listed in order to obtain a total price for each transaction or service. The sum of the prices for all transactions or services constituted the offeror’s total evaluated price. See, e.g., id., attach. 18, Price Model.

Bay, Cruise, Tzell-AirTrak, and CW provided proposals in response to the RFPs for DTAs 2, 3, and 4.⁸ Discussions were held with each of the offerors in connection with each DTA, after which offerors submitted revised proposals. The revised proposals for each of the DTAs were evaluated by the same source selection evaluation board (SSEB) and source selection official (SSO)⁹ and were rated as follows:

	Bay	Cruise	Tzell-AirTrak	CW
Overall Rating	Green	Blue	Green	Blue
Business Approach	Green	Blue	Green	Blue
Technical Approach	Green	Blue	Blue	Blue
Past Performance	Green	Green	Green	Blue
DTA 2 Pricing	[\$[REDACTED]]	[\$[REDACTED]]	[\$[REDACTED]]	\$15,785,202.81
DTA 3 Pricing	[\$[REDACTED]]	[\$[REDACTED]]	[\$[REDACTED]]	\$25,305,128.16
DTA 4 Pricing	[\$[REDACTED]]	[\$[REDACTED]]	[\$[REDACTED]]	\$13,097,151.00

AR (DTA 2), Tab 37, Source Selection Decision, at 4; id. (DTA 3), Tab 40, Source Selection Decision, at 4; id. (DTA 4), Tab 36, Source Selection Decision, at 4.

CW’s proposals were found to be the highest rated under the non-price factors for all of these DTAs. With regard to the business approach factor, CW’s proposals were rated blue and were found to be superior to the protesters’ proposals, including Cruise’s proposals, which were the only ones of the protesters’ proposals to receive blue ratings under this factor. Although the SSO favorably considered Cruise’s “vast corporate experience of 24 years providing Federal and DoD commercial travel services,” the SSO concluded that this “significant strength” in Cruise’s proposals was outweighed by three significant strengths in CW’s proposals, that is, CW’s “over

⁸ Three other ID/IQ contract holders also submitted proposals, the evaluation of which are not relevant here.

⁹ The contracting officer was the SSO.

50 years of experience as the travel management provider to all branches of the military” (including currently providing travel services to over 500 DoD and federal travel management centers), CW’s proposed “comprehensive staffing plan,” and CW’s “detailed, well-defined implementation and transition approach.” AR (DTA 2), Tab 37, Source Selection Decision, at 8; Tab 35-2, CW Final Consensus Report, at 2.

In contrast, Bay’s and Tzell-AirTrak’s proposals were found to offer only “moderate strengths” based on the firms’ less experienced personnel and adequate business approaches, which resulted in green, but not blue ratings. For example, the SSO considered that Bay had only 14 years of experience providing DoD travel services to 13 on-site military travel offices, and Tzell-AirTrak had only 19 years of providing travel services to the government, including current contracts to provide travel services for only [REDACTED].¹⁰ AR (DTA 2), Tab 35-1, Bay Final Consensus Report, at 1; id., Tab 35-4, Tzell-AirTrak Final Consensus Report, at 1.

With respect to the technical approach factor, CW’s proposals were found to be superior in each DTA to each of the protesters’ proposals, even though CW’s, Cruise’s, and Tzell-AirTrak’s proposals all received blue ratings for this factor. In this regard, the SSO found that the “numerous significant strengths” associated with CW’s proposals outweighed the strengths of the other offerors’ proposals. For example, the SSO noted that CW’s proposals offered a comprehensive automated quality control check for reservations, an automated and proprietary quality control system for passenger name records, a designated mobilization officer on call 24-hours a day and 365 days a year, an automated electronic ticket tracking and reporting tool, and an extensive automated centrally billed account reconciliation tool called “ReconPlus.” AR (DTA 2), Tab 37, Source Selection Decision, at 8-9. In addition, the SSO identified as a “significant strength” that CW’s proposals offered:

highly trained personnel with a thorough knowledge and understanding of DoD policies procedures, and regulations as evidenced by its senior staff averaging 14 years of travel industry experience and more than 25 years of DoD management experience, and its travel agents having, on average, more than 20 years of specific military and Government travel experience.

Id. at 9. The SSO also noted three “moderate strengths” that contributed to the blue ratings assessed to CW’s proposals.

¹⁰ The agency did, however, recognize Tzell-AirTrak’s 40 years of experience in managing corporate travel, which was based on the combined experience of the members of this joint venture offeror. This experience was assessed as a “moderate strength” in Tzell-AirTrak’s proposals. AR (DTA 2), Tab 35-4, Tzell-AirTrak Final Consensus Report, at 1.

In contrast, the SSO found that Bay's proposals offered only "moderate strengths" and no "significant strengths," and both Cruise's and Tzell-AirTrak's proposals offered far fewer significant strengths than CW's proposals. Id. at 8, 12-14. For example, the SSO noted only one "significant strength" associated with Tzell-AirTrak's proposals relating to a detailed emergency support plan, and two "significant strengths" associated with Cruise's proposals for the proposals' comprehensive emergency support plan and the firm's "highly trained" personnel with "more than 20 years of experience in commercial travel office operations for Government and military traveler." Id. at 8, 14.

CW's proposals were also found to be superior to the protesters' proposals with respect to the past performance factor, as reflected in the blue ratings that CW's proposals received and the green ratings that the protesters' proposals received. The SSO noted that CW currently provides travel services to military personnel on a worldwide basis under contracts that are similar in scope and magnitude to the DTAs here. For this work, CW received "positive responses to its delivery of quality services," "satisfactory comments in its ability to respond to contract performance issues in a timely manner," and "provided services within cost while meeting all contract requirements." Id. at 9.

Although the SSO also identified positive past performance associated with the protesters' proposals, the SSO also noted negative or less extensive past performance, which resulted in those proposals receiving only green ratings under the past performance factor. For example, Cruise's past performance was considered favorably, but the SSO noted that one of Cruise's subcontractors, [REDACTED] past performance. [REDACTED], which currently provides services similar in scope to the DTA work here, received a contract discrepancy report during the implementation of the contract, which the SSO found "introduces an element of risk that [Cruise] will successfully perform the required effort." Id. at 9. Similarly, the SSO recognized Bay's favorable past performance under relevant contracts, but also noted that the firm was late in delivering rebate checks to the government from airline commissions and still owed the government approximately \$78,000, which the SSO also determined introduced an element of risk to successful performance. Id. at 12-13. With regard to the Tzell-AirTrak joint venture, the SSO noted that Tzell-AirTrak had no relevant past performance, and AirTrak had positive past performance relating to only two relevant DoD commercial travel office contracts. Id. at 14.

With respect to the price factor, as noted above, CW's proposals were higher priced than all of the protesters' proposals under each of the DTAs, except for DTA 4, where [REDACTED]'s proposal was higher priced. Agency Legal Memorandum (DTA 3) at 63. The SSO considered offerors' pricing and selected CW for issuance of all three DTA task orders based on her conclusion that CW's proposals presented the "best overall value" to the government. AR (DTA 2), Source Selection Decision, at 16; AR (DTA 3), Tab 40, Source Selection Decision, at 14; AR (DTA 4), Tab 39, Source

Selection Decision, at 16. In support of her determination, the SSO specifically noted that the benefits provided by CW's proposals under the non-price factors outweighed the additional cost of all other lower-priced proposals. AR (DTA 2), Source Selection Decision, at 9-10, 13, 15; AR (DTA 3), Source Selection Decision, at 9, 11, 13; AR (DTA 4), Source Selection Decision, at 12, 15-16.

Bay, Cruise, and Tzell-AirTrak protested the issuance of the task orders to CW for all three DTAs, contending that the agency gave too little weight to the price factor, performed an unreasonable evaluation, and engaged in a "pattern" of bias in favor of CW.¹¹

JURISDICTION

As a preliminary matter, the agency asserts that this Office is not authorized to consider the issues raised in the protests due to the limitations of the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2304c (2006).¹² However, as discussed below, this Office's consideration of the protest issues is authorized by the recent enactment of section 843 of the National Defense Authorization Act of Fiscal Year 2008 (NDAA), Pub. L. 110-181, 122 Stat. 3, 236-39 (2008), which modified FASA's prior limitations on task order protests. Specifically, the NDAA provides that protests of task order awards are not authorized "except for . . . a protest of an order valued in excess of \$10,000,000." 122 Stat. 237.

The agency acknowledges that the NDAA not only modified FASA's prior limitations on protests, but further, in order to meet the "fair opportunity to be considered" requirements, the NDAA requires that, for orders in excess of \$5,000,000, procuring agencies must, among other things: (1) provide potential competitors with a clear statement of the agency's requirements; (2) disclose the significant factors and subfactors, along with their relative importance, that the agency expects to consider; and (3) provide a written statement documenting the basis for the task order award where, as here, award is to be made on a "best value" basis. *Id.* The agency further acknowledges that the NDAA authorizes protests challenging an agency's failure to comply with these "fair opportunity to be considered" requirements. Army's Legal Memorandum (DTA 2) at 9.

¹¹ The protesters raised identical issues in connection with the issuance of all three DTA task orders. Our Office reviewed the records of all three DTAs in resolving these protests.

¹² Specifically, although FASA provided that, when placing task orders pursuant to multiple award ID/IQ contracts, all contractors with such contracts "shall be provided a fair opportunity to be considered," FASA limited protests of task order awards to assertions that the order increased the scope, period, or maximum value of the contract under which the order was issued. 10 U.S.C. § 2304c(b), (d).

Nevertheless, the agency maintains that GAO is only permitted to review whether the “process” for issuing task orders is followed—that is, whether solicitations identify the agency’s requirements, whether solicitations contain evaluation criteria, and whether best value award decisions are documented; GAO is not permitted to review the agency’s “judgments” or otherwise review the reasonableness of the agency’s evaluation and award decision. Army’s Legal Memorandum (DTA 2) at 4. Thus, the agency asserts that although the NDAA’s provisions permit a protester to challenge an agency’s failure to inform offerors regarding the ground rules under which a task order competition will be conducted, it does not authorize a protest that challenges the agency’s failure to actually follow those rules.

We reject the agency’s arguments. Initially, as noted above, the NDAA authorizes “a protest of an order valued in excess of \$10,000,000.” 12 Stat. 237. The Competition in Contracting Act of 1984 (CICA), as modified by FASA, specifically defines the term “protest,” as follows:

The term “protest” means a written objection by an interested party to any of the following:

- (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of such a solicitation or other request.
- (C) An award or proposed award of such a contract.
- (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

31 U.S.C. § 3551(1) (2000).

In the context of CICA and FASA, and our Office’s well-established practices and procedures employed to implement the protest jurisdiction conferred by those statutes, we view the NDAA’s authorization to consider “a protest of an order valued in excess of \$10,000,000” as providing the same substantive protest jurisdiction conferred by those statutes. In this regard, we find no basis to conclude that, in enacting the NDAA and authorizing certain task order protests, Congress intended to establish a system under which an agency is obligated to advise offerors of the bases for task order competition, and enforces that requirement through authorization of bid protests, but which provides no similar enforcement authority to ensure that agencies actually act in accordance with the guidance they are required to provide to offerors. Rather, consistent with this Office’s past practice and CICA’s provisions that define a protest as an “objection . . . to . . . an award or proposed award,” we

view the NDAA's authorization to consider protests of task orders in excess of \$10,000,000 as extending to protests asserting that an agency's award decision failed to reasonably reflect the ground rules established for the task order competition. Accordingly, our review of the protests here includes our assessment of whether the agency's source selection decisions were reasonably consistent with the terms of the solicitation and applicable procurement laws and regulations. Triple Canopy, Inc., B-310566.4, Oct. 30, 2008, 2008 CPD ¶ __ at 5-7.

DISCUSSION

The protesters contend that the agency did not give sufficient weight to the price factor and failed to adequately document the best value tradeoff among proposals. The protesters argue that because price was the most important factor, the agency was precluded from making award to a higher-priced proposal.¹³ Protest (DTA 2) at 10; Protest (DTA 3) at 5, 8-9; Protest (DTA 4) at 5, 8-9. As discussed below, we find the agency's evaluation to be consistent with the solicitation, reasonable, and sufficiently documented.¹⁴

Although the RFPs provided that price was "approximately equal" to the other factors combined, the solicitations did not preclude award to an offeror with a

¹³ The protesters contend that the agency's failure to properly consider price and perform a more detailed cost-technical tradeoff violates FAR §§ 15.303(b)(4) (describing a source selection authority's responsibilities in a negotiated procurement), 15.305 (describing proposal evaluation requirements in a negotiated procurement), 15.308 (describing source selection decision requirements in a negotiated procurement), and 15.101 and subsequent provisions (describing best value and tradeoff requirements). Protesters' Comments (DTA 2) at 8. However, FAR Subpart 16.5 expressly provides that the competition requirements of FAR Part 6 and the policies in Subpart 15.3 do not apply to the ordering process involving ID/IQ contracts. FAR § 16.505(b)(1)(ii). Although the protesters argue that excluding the "policies" of FAR Subpart 15.3 does not prohibit the import of the "procedures" set forth in those provisions, we conclude that FAR Part 15 procedures do not, as a general rule, govern task and delivery order competitions conducted under FAR Part 16. Instead, we will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations. Triple Canopy, Inc., *supra*, at 7.

¹⁴ It is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for meaningful review where its procurement actions are challenged. e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8. Contrary to the protesters' assertions, we find that the record here is adequately documented and supports the reasonableness of the agency's source selection decisions.

higher-priced proposal. For each of the DTAs, the agency documented in detail the superiority of CW's proposals under each of the non-price factors, performed a "head-to-head" qualitative assessment of proposals under each of the evaluation criteria, and reasonably concluded, in a manner that is consistent with the solicitations, that the superiority of CW's proposals were worth the additional price. For example, the SSO specifically found CW's extensive experience in providing travel services to military personnel, its superior history of performance, and the more numerous significant strengths associated with CW's business and technical approaches to be more advantageous than the experience and approaches of the other offerors.¹⁵ AR (DTA 2), Tab 37, Source Selection Decision, at 8-16. Based on our review of the records for each of the DTAs, we find that the agency reasonably concluded that CW's proposal advantages were worth the additional price relative to each of the lower priced proposals. Although the protesters disagree with the agency's conclusions, it has not shown them to be unreasonable, inconsistent with the solicitation, or insufficiently documented.

The protesters challenge specific aspects of their proposal evaluations.¹⁶ For example, Cruise complains that the agency gave too much weight to the negative past performance of its subcontractor, [REDACTED]. It argues that the contract discrepancy report issued to [REDACTED] involved a situation that occurred only on the first day of performance and was corrected within one day, as Cruise explained during discussions. Protesters' Comments (DTA 2) at 19; Protest (DTA 3) at 11; Protest (DTA 4) at 11. However, the agency reasonably determined that even one day of service interruption is significant given the "vital" nature of providing travel service to military personnel who must report to a military duty station without delay. Contracting Officer's Supplemental Statement (DTA 2) at 3. Although service interruptions occurred only on one day, the problems were found to be "far-ranging in magnitude of problems and locations." *Id.* at 4. In this regard, the agency considered the "direct harm" to a specific number of military travelers caused by this service interruption, and also considered that the very fact that a discrepancy report was issued indicated a "significant" deficiency. Agency Legal Memorandum (DTA 2)

¹⁵ To the extent that the protesters argue that their past experience is comparable to CWs, we find that the record supports the agency's conclusion that CW possesses more extensive relevant experience, and a longer history of successful performance, than the other offerors. We further find that the agency's consideration of this experience was contemplated by the evaluation criteria.

¹⁶ Tzell-AirTrak did not challenge the evaluation of its proposals, but asserts that the agency ignored its "substantial price advantage" when selecting CW's proposals for award. Protesters' Comments (DTA 2) at 22. However, as discussed above, we find that the agency reasonably considered price in its best value determination, including Tzell-AirTrak's lower proposed prices, and reasonably selected CW's proposals for award.

at 39; Contracting Officer's Supplemental Statement (DTA 2) at 4. The agency also considered Cruise's explanation, provided during discussions, that the deficiency was minor and was corrected. Nevertheless, the agency determined that, on balance, Cruise's proposals were only deserving of green ratings under the past performance factor because "there was some, albeit, little performance risk on [Cruise's] behalf." Agency Legal Memorandum (DTA 2) at 39. Based on our review, we find that the agency reasonably evaluated this negative past performance and rationally concluded that Cruise's past performance was not deserving of higher blue ratings. Cruise's disagreement with the agency's judgment in this regard does not show that its judgment was unreasonable.

Bay complains that its proposals for DTAs 2, 3, and 4 should have been assigned blue, rather than green, ratings under the past performance factor. As noted above, the green ratings were based, in part, on Bay's previous history of failing to timely provide rebate checks to the government and the outstanding balance owed the government of approximately \$78,000. Bay notes that its proposals for DTAs 1 and 6, which were identical to the proposals submitted for DTAs 2, 3, and 4, received blue ratings for past performance, even though this issue was known to the agency during those evaluations. Bay questions why its proposals were downgraded under the past performance factor for DTAs 2, 3, and 4. Protesters' Comments (DTA 2) at 20.

The agency explains that subsequent to the evaluation of proposals for DTAs 1 and 6, the agency became aware of additional adverse information that showed "continuing past performance problems in connection with the submission of commission rebate checks to the Government." Declaration of DTA 6 Contracting Officer ¶ 3; Contracting Officer's Supplemental Statement (DTA 2) at 4-5. This additional information caused the SSO for DTAs 2, 3, and 4, to conclude that there was some risk to performance.¹⁷ AR (DTA 2), Source Selection Decision, at 13; AR (DTA 3), Tab 40, Source Selection Decision, at 9; AR (DTA 4), Tab 36, Source Selection Decision, at 11. Based on our review, we find this conclusion to be reasonable.¹⁸

¹⁷ Bay asserts that the "rebate check issue" is irrelevant to the performance of DTAs 2, 3, and 4, because rebates are not required under these task orders. Protesters' Comments (DTAs 3 and 4) at 18. The agency recognized this during the evaluation, which is why the agency concluded that there was "little doubt" of successful performance and assigned a green, rather than a lower rating, to Bay's proposals under the past performance factor. See AR (DTA 2), Tab 35-1, Bay Final Consensus Report, at 5-6. However, the agency reasonably concluded that the failure to meet a contract requirement indicated a risk to performance. Id., Tab 37, Source Selection Decision, at 13.

¹⁸ All three protesters also challenged the evaluation of CW's proposal under each of the evaluation criteria. However, these protest grounds are untimely as they were raised for the first time in the protesters' comments, which were filed more than 10 days after receipt of the record documents upon which the protest grounds are

(continued...)

The protesters maintain that the evaluations are tainted by a “pattern” of bias, based in large part on the protesters’ complaint that the agency has issued all of the DTA task orders (that is, for DTAs 1, 2, 3, 4, and 6) to CW despite CW’s higher proposed prices.¹⁹ Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Ameriko Maint. Co., B-253274, B-253274.2, Apr. 25, 1993, 93-2 CPD ¶ 121 at 5. Thus, the protesters must provide credible evidence clearly demonstrating bias and that the agency’s bias translated into action that unfairly affected the protesters’ competitive positions. Advanced Scis., Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17. The protesters have not shown that the agency’s conduct of this procurement was motivated by bias. The mere fact that the protesters previously failed to receive task orders from the agency does not demonstrate bias. Moreover, as discussed above, the selection of CW for these DTA task orders was reasonable and supported by the record.

The protests are denied.

Gary L. Kepplinger
General Counsel

(...continued)

raised. 4 C.F.R. § 21.2(a)(2) (2008); Hogar Crea, Inc., B-311265, May 27, 2008, 2008 CPD ¶ 107 at 4.

¹⁹ The protesters are factually incorrect in their assertion that CW’s proposals were the highest priced proposals for each of the DTAs. [REDACTED]’s proposals were priced higher than CW’s for DTAs 4 and 6, and both [REDACTED]’s and [REDACTED]’s proposals were priced higher than CW’s for DTA 1. Agency Legal Memorandum (DTA 3) at 63.