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

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Decision

Matter of: Rod Robertson Enterprises, Inc.

File: B-404476

Date: January 31, 2011

David F. Barton, Esq., and Elizabeth H. Connally, Esq., The Gardner Law Firm, for the protester.

William Robinson, Esq., and Oleta Thomas, Esq., Department of Justice, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an agency used unannounced evaluation criteria in evaluating past performance is denied, where the areas considered in the evaluation were reasonably related to the past performance factor as described in the solicitation.
 2. Unless there is a clear reason to question the validity of the past performance information, an agency is not required to communicate matters of adverse past performance where no discussions are conducted under an acquisition.
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DECISION

Rod Robertson Enterprises, Inc. of San Antonio, Texas, protests the award of a contract to RBEX Inc. dba Apple Towing Company of Houston, Texas, by the Department of Justice, Federal Prisons Industries, Inc. (UNICOR) under request for proposals (RFP) No. USMS07-10 for vehicle towing, storage, maintenance, and disposal services for the U.S. Marshals Service in the Southern District of Texas. The protester argues that the agency incorrectly evaluated its past performance.

We deny the protest.

The RFP was issued on August 26, 2010, as a small business set-aside. The RFP anticipated the award of a fixed-price contract for a base year with four 1-year options. The solicitation stated that the award would be made to the offeror whose proposal provides the best value to the government considering past performance and price. The solicitation required contractors to provide information on contracts

that it “worked on within the last three years” that were similar in scope and relevant to the instant procurement. RFP § M.3(5). The RFP also stated that the agency “may award” a contract based on initial offers received without discussions. RFP § M.1.

Three offerors, including Rod Robertson and Apple Towing, responded to the RFP by the proposal due date. Following an initial evaluation, the agency established a “competitive range,” consisting of the proposals of Rod Robertson and Apple Towing.¹ The agency sent past performance surveys to each reference provided by the two offerors. The agency used the surveys to complete a past performance evaluation on each offeror.

The proposals were rated as follows:

Offeror	Past Performance	Total Price
Rod Robertson	Satisfactory	\$3,035,750
Apple Towing	Outstanding	\$3,343,019

Agency Report, Tab 9, Basis for Award Decision, at 1. Apple Towing submitted five contracts on which it had recently worked. Based on the agency’s review, Apple Towing received an overall outstanding rating under the past performance factor.

Rod Robertson submitted three contracts on which it recently worked. The past performance references rated Rod Robertson’s performance as outstanding on one contract, unsatisfactory on another contract and satisfactory on the third contract. Rod Robertson received an overall satisfactory rating under the past performance factor.

The agency determined that Apple Towing’s outstanding proposal represented superior value to Rod Robertson’s acceptable proposal, and that this outweighed Rod Robertson’s lower price. The agency made award to Apple Towing without discussions. This protest followed.

Rod Robertson challenges the past performance evaluation. As a general matter, the evaluation of an offeror’s past 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,

¹ Although the agency described the selection of these proposals as reflecting the establishment of a “competitive range,” discussions with these firms were not contemplated, and no discussions were conducted. Rather, the agency used the term “competitive range” to designate those proposals for which the agency wished to conduct a more detailed evaluation. Contracting Officer’s Statement at 1.

2010 CPD ¶ 81 at 10. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals, and its judgments as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6.

Rod Robertson contends that the agency's evaluation applied unannounced evaluation criteria by dividing the past performance questionnaire information into what were essentially discrete subfactors, which were not disclosed in the solicitation. The solicitation stated offerors were required to provide information regarding "the level of performance, in terms of delivery and quality achieved . . . and should reflect the offeror's record of performance in the areas of conforming to specifications, adherence to contract schedules, reputation for reasonable and cooperative behavior, commitment to customer satisfaction and business-like concern for the interest of the customer." RFP § M.3(4). The past performance surveys sent to each reference provided by the offerors consisted of 12 questions that were broken down by the agency in the evaluation process into the following five past performance areas: quality of service, timeliness of performance, price/cost control, business relations, and customer satisfaction. Here, the agency was not required to specifically identify these five areas in the solicitation as subfactors because they were reasonably related to the past performance factor as described in the solicitation. Agencies are not required to specifically identify subfactors comprising an evaluation criterion where the subfactors are reasonably related to the stated evaluation criterion, nor are they required to disclose the specific evaluation methodology that they intend to use in making evaluation judgments regarding firms' proposals. Olympus Bldg. Servs., B-285351, B-285351.2, Aug. 17, 2000, 2000 CPD ¶ 178 at 5.

Rod Robertson next focuses on the agency's past performance evaluation of the contract that it performed with the U.S. Marshal's Service--a contract for which it received an overall unsatisfactory rating. Rod Robertson argues that the agency's evaluation of its past performance in this instance constituted "adverse information," which the protester should have received an opportunity to address.² However, where, as here, discussions are not conducted under an acquisition, an agency is not required to communicate with offerors regarding questions about adverse past performance, unless there is a clear reason to question the validity of the past performance information. Universal Fidelity Corp., B-294797.2, Feb. 7, 2005,

² Rod Robertson also contends that the adverse information pertaining to this contract should have been discounted because it received award of the contract in 2006. However, this contract was not completed until June 27, 2008, and was thus "worked on within the last three years." RFP § M-3(5); Agency Report, Tab 6, Past Performance Questionnaire, at 5.

2005 CPD ¶ 88 at 6; contrast Daun-Ray Casuals, Inc., B-255217.3; B-255217.4, July 6, 1994, 94-2 CPD ¶ 42 (discussions were conducted, but the protester was not given an opportunity to address adverse past performance information); see also Federal Acquisition Regulation § 15.306(d)(3) (where discussions are conducted, an agency must discuss “adverse past performance information to which the offeror has not yet had an opportunity to respond.”)

Finally, Rod Robertson argues about the content of the debriefing that the agency provided. We will not consider this issue because the adequacy of a debriefing is a procedural matter that does not involve the validity of an award. The Ideal Solution, LLC, B-298300, July 10, 2006, 2006 CPD ¶ 101 at 3 n.2.

The protest is denied.

Lynn H. Gibson
General Counsel