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**Comptroller General
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Decision

Matter of: Phoenix Management, Inc.

File: B-405980.7; B-405980.8; B-405980.9

Date: May 1, 2012

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Greg Harding, Esq., and Jared Minsk, Esq., Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably evaluated awardee's past performance is denied where decision to rate one reference relevant and one somewhat relevant was based on the work performed under each of the contracts compared to the work that was being solicited.

DECISION

Phoenix Management, Inc. (PMI), of Austin, Texas, protests the Department of the Air Force's award of a contract to Data Monitor Systems, Inc. (DMS), of Oklahoma City, Oklahoma, under request for proposals (RFP) No. FA8101-11-R-0002, for fuels management services at Tinker Air Force Base. PMI protests that the agency unreasonably evaluated the past performance of DMS, violated the Procurement Integrity Act, and acted in bad faith.

We deny the protest.

BACKGROUND

Award was to be made to the technically acceptable offeror that provided the "best value" to the government based on a trade-off between past performance and price. RFP, Addendum to FAR 52.212-2 at 1. There were six technical subfactors: program management and orientation; manpower and organization chart; quality control; safety; environmental; and mission essential contractor services (MECS). Id. at 2. With respect to past performance, the solicitation provided that the agency would consider the past performance of the offerors and their joint venture partners

or major subcontractors. Id. at 9. The solicitation further provided that the agency would consider whether the past performance was recent and relevant, as well as the quality of performance. Id. at 8-10.

Eight offerors responded to the solicitation. Following the evaluation of proposals, discussions, and the submission and evaluation of final proposal revisions (FPR), award was made to DMS. PMI protested the award. In response, the agency determined to take corrective action, including requesting the submission of revised FPRs with respect to past performance. As a result, our Office dismissed the protests on December 5, 2011.

Following the submission and evaluation of the revised past performance FPRs, PMI and DMS were both rated acceptable for the technical factor and substantial confidence for past performance.¹ Since DMS offered to perform for \$18,469,993 and PMI for \$21,766,728, the agency affirmed its award to DMS as providing the best value to the government.

PAST PERFORMANCE

PMI protests that the evaluation of substantial confidence with respect to DMS's past performance was unreasonable because, according to PMI, DMS did not have relevant experience with respect to maintaining MECS. In this regard, the solicitation provided for the evaluation of information submitted by offerors and their references regarding offerors' past performance/experience as it applies to each of the evaluation subfactor areas, including MECS. MECS, in turn, generally was defined as maintaining mission essential contractor services during an extended event, such as a pandemic, as well as acquiring essential personnel and resources, identification and preparedness of personnel for relocation or working at home, alert and notification procedures for mobilizing essential personnel, and communicating expectations during a crisis. RFP, Addendum to FAR 52.212-1, at 9, 18-27; RFP, Addendum to FAR 52.212-2, at 7-12.

In challenging the agency determination that DMS had past performance relevant to MECS, PMI asserts that the agency failed to consider the magnitude of the contracts under which past performance was being considered as compared to the magnitude of the contract to be awarded. In this regard, DMS was evaluated as having only two past performance contract references relevant to MECS, including base operations and support contracts performed at Dobbins and Grissom Air Force bases. PMI notes that the agency considered the Dobbins contract relevant and the Grissom contract only somewhat relevant, even though the Dobbins contract is

¹ The possible past performance ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence.

worth [REDACTED], or about one fifth of the value of the contract to be awarded under the current solicitation, and the Grissom contract is worth between [REDACTED] and [REDACTED]. DMS Past Performance Summary. In PMI's view, both contracts should have been assigned the same relevancy rating based on contract value. PMI further notes that under the Dobbins contract DMS received a quality rating of exceptional, while under the Grissom contract DMS received a quality rating of marginal. PMI concludes that either both contracts were relevant and the overall substantial confidence rating for DMS was unreasonable because on one relevant contract DMS received a marginal rating, or both were only somewhat relevant in which case the substantial confidence rating was unreasonable because DMS did not have significant relevant experience under the MECS subfactor.

In response, the agency explains that in evaluating the past performance of DMS, it considered the two contracts referenced by PMI, plus the eight contracts submitted on behalf of DMS's proposed subcontractor. The agency found that based on these contracts the DMS team had relevant past performance in each of the six task areas covered by the technical subfactors. With respect to the Dobbins and Grissom contracts, the agency advises that the contract values were considered in assigning the relevancy rating, but the contracts were assigned different relevance ratings because on the Dobbins contract DMS performed all the tasks that would be performed under the current solicitation, while on the Grissom contract it performed only some of the tasks that would be performed.

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the assessments are unreasonable or inconsistent with the solicitation criteria. Family Entertainment Servs., Inc., d/b/a IMC, B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5. A protester's mere disagreement with such judgment does not provide a basis to sustain a protest. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. We find no basis to disturb the agency's decision to rate DMS substantial confidence for past performance. First, we disagree with PMI that the agency was required to consider both the Dobbins and Grissom contracts as either relevant or somewhat relevant based solely on the magnitude of the contracts, as related to the work under the current solicitation. Specifically, the solicitation provided that in determining relevancy, the agency would consider "similar service, similar complexity of the effort, breadth and depth of skills, similar contract scope and type, contract magnitude and schedule." RFP, Addendum to FAR 52.212-2 at 38. Thus, magnitude was only one element to be considered in determining whether a contract was relevant with respect to the current solicitation; the type of work performed was also to be considered.

As to PMI's other specific contentions, the agency found the Dobbins contract was relevant because at Dobbins DMS performed all fuels functions and filled all key personnel positions related to their portion of the proposed current Tinker effort,

such that the Dobbins effort was similar in scope, magnitude of effort and complexity to the proposed effort. In contrast, the agency found the Grissom contract was only somewhat relevant because at Grissom DMS performed some, but not all of the tasks that it would perform under the current solicitation. Source Selection Decision (SSD) at 21. In our view, the agency's evaluation in this regard was consistent with the evaluation approach set forth in the solicitation and otherwise reasonable.²

PROCUREMENT INTEGRITY

As noted, the agency notified our Office on December 1, 2011, that it would take corrective action on PMI's earlier protests, allowing offerors to submit a revised FPR for past performance, reevaluating past performance, and making an award decision based on the reevaluation. On December 16, the agency requested offerors to submit the revised past performance proposals by December 21. According to PMI, however, at a holiday luncheon on December 14, an Air Force employee told a PMI employee that the award to DMS would stand. PMI asserts that this incident demonstrates that the agency violated the Procurement Integrity Act, 41 U.S.C. § 2102 (a)(1) (2011).

The Procurement Integrity Act prohibits certain designated personnel from knowingly disclosing source selection information before the award of a contract to which the information relates. 41 U.S.C. § 2102 (a)(1). When a contracting officer receives information of a possible violation of the act, he must determine if the possible violation has any impact on the pending award decision. 48 C.F.R. § 3.104-7(a). If the contracting officer concludes that there is no impact, he is required to forward the information to a designated official. Id. If that individual concurs, the contracting officer may proceed with the procurement. Id.

Here, the agency followed the required procedures. Specifically, after the alleged violation was reported to the contracting officer, she interviewed the Air Force employee at the luncheon, who denied having told the PMI employee that the award to DMS would stay in place, and in fact denied having any knowledge of the source selection process. COS at 17. The agency also interviewed members of the evaluation team and other management personnel who denied providing the agency employee with any source selection information. Id. at 18. Based on this

² In its comments submitted on March 19, 2012, PMI for the first time challenges the evaluation of DMS's past performance on additional grounds, including that the evaluation ignored agency concerns as to whether DMS or its subcontractor would perform certain work. Since PMI did not raise this issue within 10 days of February 10, when it received the documents on which it is based, this protest ground is untimely under our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2) (2011).

information, the contracting officer concluded that no violation had occurred and the procurement could proceed. The head of the contracting activity approved this result. Id. To ensure fairness, however, the agency appointed a new evaluation panel.

On this record, we find no basis to conclude that the agency acted unreasonably. In this regard, even if a violation of the Procurement Integrity Act had occurred, the agency, as indicated above, can proceed with the procurement if the violation did not impact the procurement. 48 C.F.R. § 3.104-7(a). Here, the agency appointed a new team to evaluate offerors' past performance information. As discussed above, we found that the evaluation of DMS's past performance was reasonable. Accordingly, there is no basis to conclude that any violation that may have taken place before the new proposals were received impacted the procurement.

PMI also asserts that the conversation at the holiday party demonstrates that the agency did not intend to take corrective action in good faith because it had already decided to keep DMS's contract in place at least 2 days before it requested the past performance FPRs. However, as discussed above, the Air Force investigated the matter and found no wrongdoing. There is no suggestion in this record that the agency was biased or acted in bad faith.

The protest is denied.

Lynn H. Gibson
General Counsel