



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Dorado Services, Inc.

File: B-401930.3

Date: June 7, 2010

Joseph M. Goldstein, Esq., Shutts & Bowen LLP, for the protester.
Johnathan M. Bailey, Esq., and Christopher G. Burwell, Esq., Bailey & Bailey PC, for Perry Management, Inc., the intervenor.
Christopher S. Cole, Esq., Department of the Air Force, for the agency.
Nora K. Adkins, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a commercial item acquisition that provided for an integrated assessment of past performance and price of technically acceptable proposals, protest of past performance evaluation and selection of a lower-priced proposal for award is denied, where the agency had the same level of confidence in both offerors' ability to successfully perform the contract and reasonably concluded that there were no meaningful differences in the protester's and awardee's past performance, notwithstanding the protester's slightly more positive references.

DECISION

Dorado Services, Inc., of Sanford, Florida, protests the award of a contract to Perry Management Co., of Honolulu, Hawaii, by the Department of the Air Force under request for proposals (RFP) No. FA4897-08-R-0008 for refuse and recycling services at Mountain Home Air Force Base in Idaho. Dorado challenges the evaluation of past performance.

We deny the protest.

BACKGROUND

On August 7, 2008, the Air Force issued the solicitation as a commercial item acquisition under Federal Acquisition Regulation (FAR) Part 12. The RFP contemplated the award of a fixed-price contract (with a few reimbursable contract line items) for a 1-year base period with four 1-year option periods. *Id.* at 2-32. The

solicitation stated that award would be based on an integrated assessment of the past performance and price of technically acceptable proposals, with past performance being significantly more important than price; however, price was to “contribute substantially” to the selection decision. Id. at 46. The RFP cautioned that only proposals rated technically acceptable would be considered for further evaluation.¹ Id. at 47-48.

Under the past performance factor, the RFP stated that the Air Force would assess each offeror’s probability of successfully accomplishing the proposed effort based on its performance on relevant and recent contracts. Id. at 48. The RFP defined relevant contracts as those that required the offeror to perform refuse and recycling services of the same or similar complexity as the services required here; and the RFP defined recent contracts as those performed within the last 5 years. In addition, the RFP limited the number of contracts to be considered to the 10 most recent contracts. Id. The RFP stated that evaluators would consider the past performance surveys completed by offerors’ references, as well as data independently obtained from other government and commercial sources. From this information, the RFP stated, the evaluators would assign each proposal a confidence rating of either substantial, satisfactory, limited, no, or unknown confidence. As is relevant here, substantial confidence was defined as “[b]ased on the offeror’s performance record, the government has a high expectation that the offeror will successfully perform the required effort,” and satisfactory confidence was defined as “[b]ased on the offeror’s performance record, the government has an expectation that the offeror will successfully perform the required effort.” Id. at 49.

Both Dorado and Perry submitted proposals in response to the RFP. The source selection evaluation team (SSET) found both proposals to be technically acceptable and assigned both proposals a rating of substantial confidence for past performance. However, Perry’s proposed price was lower than Dorado’s. Agency Report (AR), Tab 13, SSET Report, at 10, 14, 18. The SSET recommended to the source selection authority (SSA) that award be made to Perry. The SSA accepted the recommendation and made award to Perry on September 2, 2009.

On September 15, Dorado filed a protest with our Office after receiving a debriefing from the Air Force on September 10. In its protest and subsequently filed supplemental protest, Dorado identified an error in the agency’s price evaluation, challenged the evaluation of Perry’s past performance, and contended that the agency failed to recognize distinctions between proposals in its source selection. After receipt of the agency report and the protester’s comments, a representative from our Office conducted an outcome prediction alternative dispute resolution conference at the request of the Air Force. During this conference, our

¹ Technical acceptability was determined based upon an offeror’s subcontracting plan and small disadvantaged business participation plan. RFP at 47.

representative stated that, based upon the record that existed at that time, our Office would sustain the protest due to the agency's miscalculation of the offerors' pricing and the lack of documentation of the agency's comparative analysis of the two offerors' proposals in support of the source selection decision.

Thereafter, the agency notified our Office of its intent to take corrective action. The agency stated that it would reevaluate past performance and price, conduct a new tradeoff analysis, and issue a new source selection decision. Letter from Air Force to GAO, Nov. 24, 2009, at 1. In light of this information, our Office dismissed Dorado's protest as academic on November 24.

The SSET re-evaluated Dorado's and Perry's proposals and again found both proposals to be technically acceptable, and again assigned both proposals a rating of substantial confidence under the past performance factor. The SSET corrected its price calculations and determined that Perry's proposed price of \$2,226,840 and Dorado's proposed price of \$2,406,585 were fair and reasonable. AR, Tab 13, SSET Report, at 17-18.

With regard to the evaluation of Perry's past performance, the SSET identified six recent and relevant contracts performed by Perry, and noted that references for these contracts rated Perry's performance from satisfactory to exceptional in all areas evaluated. The SSET found that Perry received many positive comments from references, including comments that Perry had consistently remained in compliance with the contract terms and conditions, met all monthly schedules, and had no customer complaints. The SSET acknowledged that Perry had a few problems on a few contracts with vehicle breakdowns and missed pick-ups, but the SSET also noted that these problems were minor in nature and were immediately and effectively corrected. Even for contracts with the minor issues, the references indicated that they would award Perry another contract and, in fact, Perry received a follow-on contract from the Air Force base where most of the minor issues occurred, thus suggesting confidence in Perry's performance.² Based on this information, the SSET assigned Perry's proposal a past performance rating of substantial confidence. Id. at 9-10.

With regard to the evaluation of Dorado's past performance, the SSET identified eight recent and relevant contracts performed by Dorado, and noted that references for these contracts rated Dorado's performance from very good to exceptional in all areas evaluated. The SSET found that Dorado received positive comments from

² The SSET also noted that in one contract, Perry received satisfactory ratings for all areas of performance except for maintaining "diversion rates," where it received unsatisfactory and marginal ratings. However, the SSET did not consider these unsatisfactory and marginal ratings to be relevant because maintaining diversion rates was not part of the contract here. AR, Tab 13, SSET Report, at 9.

references, including that the firm's management works well with the government, and although the firm had a vehicle accident and breakdown on one contract, the problem was resolved quickly with no missed schedules. Based on this information, the SSET assigned Dorado's proposal a past performance rating of substantial confidence. Id. at 14.

The SSET concluded that both offerors' proposals were "essentially equal" under the past performance factor because there was "little or no risk to performance of the contract by either offeror." In this regard, the SSET noted that favorable comments from past performance references for both offerors were "quite similar," as were the minor vehicle problems experienced by both offerors. The SSET determined that Perry's proposal, which was lower in price and rated equal to Dorado's proposal under the past performance factor, provided the best overall value to the government. Thus, the SSET recommended to the SSA that award be made to Perry. Id. at 18.

The SSA reviewed the SSET's recommendation, offerors' proposals, and the available past performance information, and performed her own independent comparative assessment of proposals. Based on her assessment, the SSA agreed with the SSET that the two offerors' past performance were essentially equal and that Perry's lower-priced proposal provided the best value to the government. AR, Tab 14, Source Selection Decision, at 1-2.

On March 3, Perry was awarded the contract. Dorado requested a debriefing, which it received on March 9. Dorado filed the current protest with our Office on March 12.

DISCUSSION

In its protest, Dorado challenges Perry's past performance rating and the agency's determination that the past performance of Dorado and Perry was essentially equal. Dorado argues that Perry should not have received a substantial confidence rating under the past performance factor, and its past performance should not have been considered equal to Dorado, because Perry received lower reference ratings, received more unfavorable comments from references, and experienced more performance problems under its contracts than did Dorado. Dorado contends that the agency failed to consider differences in offerors' past performance when performing a price/past performance tradeoff. Comments at 6-11.

The Air Force responds that it was reasonable to rate Perry's past performance substantial confidence because, in accordance with the rating definitions, the agency had high confidence in Perry's performance based on information provided by references and other data available to the agency. The Air Force further contends that there was no meaningful difference between offerors' past performance, and therefore the agency reasonably determined that Perry's lower-priced proposal provided the best value to the government. Contracting Officer's Statement at 7-10.

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, 2010 CPD ¶ 81 at 10. Where a protester challenges the past performance evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6; S4, Inc., B-299817, B-299817.2, Aug. 23, 2007, 2007 CPD ¶ 164 at 9. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals, and its judgment 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., *supra*, at 6.

Based on our review of the record, we find the agency's assessment of a substantial confidence rating to Perry's proposal under the past performance factor was reasonable and consistent with the terms of the solicitation. As noted above, the Air Force noted in its evaluation documents that Perry received overall satisfactory to exceptional ratings on all of its relevant contracts, as well as many positive comments from references. The SSET also recognized Perry's performance problems, but noted that the problems were minor in nature and quickly addressed, and that references indicated that they would still award Perry a follow-on contract. In fact, in one instance, Perry has been awarded a follow-on contract, which demonstrated to the SSET confidence in Perry's performance. Based on our review of the record, and given the discretion afforded agencies in the assessment of past performance, we find that the agency's assessment of a substantial confidence rating to Perry's proposal was reasonable.

We also find reasonable the agency's conclusion that the offerors' past performance were essentially equal. When a selection official determines that proposals are equal, it means that overall there is no meaningful difference in what the proposals have to offer; it does not mean the proposals, or in this case past performance histories, are identical in every respect. Northern Virginia Serv. Corp., B-258036.2, B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36 at 8-10. Here, the record shows both offerors received positive past performance references and both also experienced minor performance issues. Although it is true that Perry's references were slightly less favorable than Dorado's, and Perry experienced a few more minor performance problems than Dorado, as noted above, the agency fully considered these issues (including specific examples identified by Dorado during this protest) and did not find the slightly less favorable performance history of Perry to indicate that Perry was less likely to successfully perform the contract than Dorado. That is, the agency concluded that any differences in offerors' performance histories were not meaningful here. Although Dorado disagrees with this assessment, it has not shown it to be unreasonable. See Wackenhut Servs., Inc., *supra*, at 6.

In sum, the record here shows that the agency performed a comprehensive and comparative analysis of offerors' past performance, which is documented in a detailed SSET report and well-reasoned source selection decision. As discussed above, this record shows that the agency reasonably concluded that there were no meaningful differences in the offerors' past performance, and therefore we find nothing improper in the agency's selection of Perry's lower-priced proposal for award.

The protest is denied.

Lynn H. Gibson
Acting General Counsel