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**Comptroller General
of the United States**

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

Decision

Matter of: IJC Corporation

File: B-408950

Date: December 31, 2013

Pete Kashulines, for the protester.

Heather M. Self, Esq., Department of Agriculture, for the agency.

Frank Maguire, Esq., Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of past performance is denied where the record shows that the agency reasonably considered the protester's and awardee's performance records in accordance with the solicitation criteria.

DECISION

IJC Corporation (IJC), a service-disabled veteran-owned small business concern in Windham, New Hampshire, protests the Department of Agriculture's award of a contract to Drainpipe Plumbing and Solar, of Pahoia, Hawaii, under request for proposals (RFP) No. AG-9AD6-S-13-0004, for plumbing work at Laupahoehoe Science and Education Center, Hilo, Hawaii. The protester asserts that the agency improperly evaluated IJC's past performance.

We deny the protest.

BACKGROUND

The contract requirement includes the excavation and backfill of approximately 1,950 linear feet of trench; the supply and installation of various water lines, two water catchment tanks, and sewer lines; the preparation and coordination for various electrical conduits, as needed; and the complete pressure testing of all water lines prior to backfill. RFP § C. The RFP provided for the award of a fixed-price contract to the offeror whose proposal represents the best value to the government, considering price and past performance, with price being more important. *Id.* §§ L, M.

Past performance references were to be evaluated for recency, relevancy, and quality. RFP § M. The possible relevancy ratings were relevant, somewhat relevant, and not relevant, and possible quality ratings were exceptional, very good, satisfactory, marginal, unsatisfactory, and not applicable. Id. To determine the quality of contract performance, the RFP provided that the government would contact some of each offeror’s customers on past similar projects to ask whether: the offeror was capable, efficient, and effective; the offeror’s performance conformed to the terms and conditions of its contract; the offeror finished within the contract time; the offeror was reasonable and cooperative during performance; and the offeror was committed to customer satisfaction. Id. Based on these ratings, the agency would develop an overall confidence assessment—reflecting the agency’s determination of whether the offeror could perform as proposed and described in the statement of work (SOW)—of substantial, satisfactory, or marginal confidence. Id.

Three offers were received in response to the RFP, including those from IJC and Drainpipe. The table below summarizes the agency’s evaluation of the protester’s past performance references:

Contract	Recent	Relevancy Rating	Quality Rating
AG-95CV-P-10-0036	Yes	Somewhat relevant	Marginal
VA258-C-0388	Yes	Not relevant	Satisfactory
DTFAEN-11-C-00594	Yes	Not relevant	Satisfactory
DTFAEB-13-C-00150	Yes	Not relevant	Satisfactory

Agency Report (AR), Tab 9, Past Performance Evaluations at 1. In contrast, the agency evaluated two of Drainpipe’s cited past performance references for plumbing contracts as recent, relevant, and satisfactorily completed. Id. In addition, the contracting officer had “direct personal knowledge” of two prior Drainpipe contracts, at least one of which was for plumbing work, and both of which were “successfully completed on time.” Contracting Officer’s Statement of Facts (COSF) ¶¶ 11, 13. IJC was given an overall confidence assessment of marginal, while Drainpipe received an overall assessment of substantial. AR, Tab 10, Best Value Determination, at 2. IJC’s proposed price was \$138,353, slightly lower than Drainpipe’s proposed price of \$147,937. AR, Tab 7, IJC Offer, at 2; AR, Tab 8, Drainpipe Offer, at 2. The contracting officer determined that Drainpipe’s higher past performance confidence assessment warranted that firm’s price premium, and award was made to Drainpipe. AR, Tab 10, Best Value Determination, at 2. This protest followed.

DISCUSSION

The protester challenges the evaluation of each of its four past performance references considered by the agency, as well as the overall past performance confidence rating for the awardee. Our Office will examine an agency’s evaluation

of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, because determining the relative merit or relative relevance of an offeror's past performance is primarily a matter within the agency's discretion. LOGMET LLC, B-407061, Oct. 17, 2012, 2012 CPD ¶ 307 at 6; TPMC-EnergySolutions Env'tl. Servs., LLC, B-406183, Mar. 2, 2012, 2012 CPD ¶ 135 at 11. A protester's disagreement with the agency's judgment is insufficient to establish that an evaluation was improper. Harris IT Servs. Corp., B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 at 10. Our review of the record leads us to conclude that the agency's past performance evaluation was unobjectionable, as discussed in further detail below.

IJC Contract AG-95CV-P-10-0036

The agency evaluated IJC contract AG-95CV-P-10-0036 (-0036), for the installation of a catchment tank at a facility in Hilo, Hawaii, as somewhat relevant. The contract reference noted several performance issues and stated that it "will not use contractor for future projects." AR, Tab 9, Past Performance Evaluation, at 2. As a result, the agency evaluated the quality of performance on this contract as marginal. Id. at 1.

The protester "admit[s] that there were issues" with the performance of contract -0036, but denies awareness of the extent of the reference's dissatisfaction with IJC's performance. Comments, November 18, 2013, at 4. The protester asserts that the agency should have permitted IJC the opportunity to respond to this negative past performance information, and claims that had it known the kind of reference this customer would supply, IJC would not have used this contract as a past performance reference. Id. at 4-5. Under Federal Acquisition Regulation (FAR) § 15.306(a), where award is made without discussions, offerors may be given the opportunity to clarify certain aspects of proposals, such as the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond. As we have previously recognized, however, agencies are not required to request clarifications in the context of an award, such as the one here, made without discussions. See Analytic Servs., Inc., B-405737, Dec. 28, 2011, 2012 CPD ¶ 16 at 12; cf. FAR § 15.306(b)(4) (requiring, during discussions, that agencies address past performance information to which an offeror has not had the opportunity to respond).

IJC also asserts that the work performed under contract -0036 should have been evaluated as relevant, rather than somewhat relevant, because both contract -0036 and the current requirement included the installation of a catchment tank. Comments at 4. As noted above, the statement of work for the current requirement contained more than just the installation of a catchment tank; it also included the excavation and backfill of approximately 1,950 linear feet of trench, the supply and

installation of various water lines and sewer lines, the preparation and coordination for various electrical conduits, and the complete pressure testing of all water lines prior to backfill. We see no basis in this record to question the agency's conclusion that contract -0036 was only "somewhat relevant" to the work at issue here.

IJC Contract VA258-C-0388

IJC contract VA258-C-0388 (-0388) involved an upgrade to an underground fuel system. AR, Tab 9, Past Performance Evaluation, at 3. The protester asserts that, because contract -0388 included "trenching, soil erosion controls, the installation of piping in the trench, [and] backfilling the trench," the agency unreasonably evaluated it as "not relevant." Comments at 4. The contracting officer, however, explains that, while the current requirement includes some trenching and backfill work, it is estimated to be 20 percent or less of the contract effort. According to the contracting officer, contract references such as this one that did not include plumbing work as extensive as here were evaluated as "not relevant." COSF ¶ 27; see AR, Tab 9, Past Performance Evaluation, at 3. In answering the agency, the protester concedes that the current requirement is only 21 percent trenching, but disagrees with the agency's claims about the extent of the plumbing involved in the current work. Comments at 7.

We have reviewed the agency's rationale for its conclusion, and the protester's response, and we see no basis for overturning the agency's judgment that contract -0388 had limited relevance to the work at issue here. Moreover, even if we agreed with the protester that contract -0388 should be viewed as somewhat relevant, the fact remains that on its other somewhat relevant contract (-0036), performed in Hilo, its performance was reasonably rated as marginal. In addition, the reference advised the agency that it would not use IJC for future projects. Under these circumstances, we see no prejudice to the protester from any such possible error in the relevancy rating assigned for contract -0388. See ITT Corp.-Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 7 (prejudice is an essential element of every viable protest, and where none is shown or otherwise evident we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper.)

IJC Contracts DTFAEN-11-C-00594 and DTFAEB-13-C-00150

IJC contracts DTFAEN-11-C-00594 (-00594) and DTFAEB-13-C-00150 (-00150), for the installation of electric, HVAC, and lighting, were evaluated by the agency as not relevant to the type of plumbing work being procured under the RFP. AR, Tab 9, Past Performance Evaluation, at 1, 4, 5. IJC asserts that contracts -00594 and -00150 should have been evaluated as somewhat relevant because they both included "the installation of some piping." Comments at 4. Again, we find reasonable the agency position that a reference not containing extensive plumbing work of the kind found in the current solicitation was not relevant. COSF ¶ 27.

Here, as noted by the contracting officer, IJC's contracts were for electrical--not plumbing--requirements. Id.

Drainpipe Past Performance

IJC also challenges the agency's evaluation of Drainpipe's past performance. Inasmuch as no protective order was issued in this case, we reviewed, in camera, the agency's documentation regarding the evaluation of the awardee's past performance. This documentation reasonably supported the agency's past performance evaluation. For example, the record indicates that Drainpipe had two past performance references for plumbing contracts that were both "deemed relevant, with a satisfactory quality rating." Best Value Determination at 1. Further, the contracting officer took into consideration his "direct personal knowledge" of two other prior Drainpipe contracts that were "successfully completed on time," at least one of which was for plumbing work. COSF ¶¶ 11, 13; Best Value Determination at 1. In these circumstances, there appears to be no basis to question the agency's overall determination of substantial confidence that Drainpipe "can perform as proposed and described in the Statement of Work." RFP at 78.

Best Value Determination

Finally, the protester challenges the agency's best value determination, asserting that it "seems unwarranted" for the agency to expend "more of the taxpayers' [funds] than is necessary." Protest, exh. A, at 1. A protester's assertion that it should have received the award solely because of its low price, however, fails to state a valid basis for protest where, as here, the RFP provided that award would be based on technical factors as well as on cost. Univ. of Dayton Research Inst., B-245431, Jan. 2, 1992, 92-1 CPD ¶ 6 at 6-7.

In any case, we find the agency's best value determination here to be reasonable. As indicated above, Drainpipe cited in its proposal two past performance references for plumbing contracts that were found to be relevant with a satisfactory quality rating, and the contracting officer was aware of a third Drainpipe contract for plumbing that was "successfully completed on time" and a fourth contract not primarily for plumbing work that was also "successfully completed on time." COSF ¶¶ 11, 13; AR, Tab 10, Best Value Determination, at 1. Drainpipe accordingly received a confidence assessment of "substantial." Best Value Determination at 2. In contrast, IJC had no contracts that were deemed relevant, one past performance reference that was deemed "somewhat relevant" but for which IJC's performance was reasonably rated as marginal, and a fourth contract with satisfactory performance but that was but no better than "somewhat relevant." In these circumstances there is no basis for us to question the contracting officer's

determination that it was worth a price premium of approximately 7 percent to obtain the superiority of Drainpipe's performance record.

The protest is denied.

Susan A. Poling
General Counsel