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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Ryan P. Slaughter

**File:** B-411168

**Date:** June 4, 2015

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Ryan P. Slaughter, the protester.  
Michael G. McCormack, Esq., Department of the Air Force, for the agency.  
Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

Agency improperly eliminated protester's proposal from the competitive range where the agency established its competitive range without considering prices and improperly excluded the protester's proposal from the competition solely on the basis of its unknown confidence rating.

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### DECISION

Ryan P. Slaughter<sup>1</sup> protests the elimination of its proposal from the competition under request for proposals (RFP) No. FA4418-14-R-0012, issued by the Department of the Air Force, for grounds maintenance services. The protester contends that its exclusion from the competitive range was the result of an improper evaluation.

We sustain the protest.

### BACKGROUND

The RFP, issued as a commercial item Historically Underutilized Business Zone (HUBZone) small business set-aside, provided for the award of a fixed-price

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<sup>1</sup> The protest and proposal were submitted by Ryan P. Slaughter; the Air Force used the names Appalachian American Consulting and AA Consulting for the protester in its evaluation documents. For the sake of consistency, we use Ryan P. Slaughter in this decision.

requirements contract for grounds maintenance services at Joint Base Charleston, South Carolina for an eight-month base period and four option years. The solicitation sought various grounds maintenance services, including maintaining the grounds of the airfields (Bird Aircraft Strike Hazard (BASH) programs), powerlines/electrical right of way (tree pruning), and surface drainage/ditch maintenance, among other things. RFP at 188.

The RFP provided that proposals would be evaluated on best-value basis considering past performance and price, and that past performance was significantly more important than price. Id. at 190. The solicitation stated that the agency would first rank proposals from lowest to highest in total price. Id. at 191. The agency would then evaluate the past performance of the lowest-priced proposal. Id. at 192. If the lowest-priced proposal received a substantial confidence past performance rating, then award would be made to that offeror as the best value to the government. Id. Otherwise, the past performance assessment would continue, beginning with the next lowest-priced proposal, until an offeror with a substantial confidence rating was identified or until all offerors were evaluated. Id. At the conclusion of the past performance assessment, the solicitation advised that the selection authority would “make an integrated assessment best value award decision.”<sup>2</sup> Id.

With regard to past performance, offerors were required to submit information pertaining to no more than five contracts performed within the last five years. Id. at 188. The agency would evaluate this information (and information received from other sources) to assess the recency and relevancy of the contracts.<sup>3</sup> Offerors were informed that the agency’s past performance evaluation would assess the offeror’s probability of meeting the solicitation’s requirements, and assign an overall rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. As relevant here, the unknown confidence

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<sup>2</sup> While the solicitation advised offerors to submit sufficient information to permit a meaningful assessment of its initial proposal, the RFP also reserved the agency’s right to conduct discussions if it was determined to be in government’s best interests. RFP at 192.

<sup>3</sup> With regard to the agency’s assessment of relevancy, a contract would be assigned one of the following ratings: very relevant, relevant, somewhat relevant, and not relevant. RFP at 192. A very relevant rating reflected an effort that “involved essentially the same scope and magnitude of effort and complexities,” a relevant rating reflected an effort that “involved similar scope and magnitude of effort and complexities,” a somewhat relevant rating reflected an effort that “involved some of the scope and magnitude of effort and complexities,” and a not relevant rating reflected an effort that involved “little or none of the scope and magnitude of effort and complexities.” Id.

rating was for those firms that had either no recent/relevant past performance history, or a record that is “so sparse that no meaningful confidence assessment rating can be reasonably assigned.” Id. at 191. The RFP provided that an unknown confidence rating would be “treated neither favorably nor unfavorably.” Id.

The agency received numerous proposals in response to the RFP, including Slaughter’s.<sup>4</sup> The past performance section of the protester’s initial proposal included information for approximately nine contracts, as well as three completed past performance questionnaires. Agency Report (AR), Tab 8, Proposal, at 19-32. The protester also submitted, prior to the RFP’s amended closing date, supplemental past performance information in which the firm included more detailed information about its contracts and included other contracts not in its initial proposal. AR, Tab 9, Supplemental Experience.

The Air Force’s evaluation team first ranked the proposals by price, and then rated each proposal for its past performance. None of the proposals received a substantial confidence rating; however, proposals received ratings of satisfactory, limited confidence, and unknown confidence. With regard to Slaughter’s proposal, the agency’s evaluation team assigned the protester’s past performance a rating of unknown confidence because the agency determined that the firm had failed to submit any relevant contracts. Specifically, the agency evaluated three contracts for which Slaughter submitted past performance questionnaires, and found that, while Slaughter had received very good to exceptional ratings, the contracts demonstrated little or none of the same scope and magnitude of effort required under this solicitation.<sup>5</sup> AR, Tab 20, Past Performance Evaluation, at 3.

After reviewing the evaluation results, the contracting officer decided to establish a competitive range of the most highly rated proposals, which was determined to be only those proposals receiving a satisfactory confidence rating. AR, Tab 13, Competitive Range Determination Briefing Slides, at 112. The contracting officer excluded from the competitive range all proposals that received a limited or

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<sup>4</sup> Because Slaughter proceeded without counsel in this protest, and therefore no protective order was issued, protected information cannot be included in this decision. Accordingly, our discussion of some aspects of the evaluation is necessarily general in nature in order to avoid reference to non-public information. Moreover, consistent with the ongoing status of this procurement, information such as the number of offerors and the exact relative ranking of those offerors has been excluded from our decision. Our conclusions, however, are based on our review of the entire record, including non-public information.

<sup>5</sup> The agency found that all three contracts were for herbicide application rather than grounds maintenance, and thus involved little to none of the scope and magnitude of this procurement. AR, Tab 12, Past Performance Evaluation, at 3.

unknown confidence rating, including Slaughter's. AR, Tab 14, Competitive Range Determination, at 1.

After learning that the firm's proposal had been excluded from the competitive range, the firm filed this protest.

## DISCUSSION

Slaughter challenges the agency's exclusion of its proposal from the competitive range. The protester argues that the agency failed to properly evaluate the firm's past performance, alleging that the firm's proposal should have received a substantial confidence rating rather than unknown confidence. As explained below, we find that the agency reasonably assigned the protester's past performance an unknown confidence rating. Nevertheless, we find that the agency's competitive range determination unreasonably failed to consider price, and improperly excluded the protester's proposal from the competition solely on the basis of its unknown confidence rating.

With respect to the protester's challenges to its unknown confidence rating, Slaughter argues that the agency failed to consider the relevant experience the firm provided with its proposal. In this regard, the protester points to two contracts that the firm included in its past performance information but were not listed as part of the agency's contemporaneous evaluation: a contract for two months of grounds maintenance at a Joint Base (McChord Field), and an eight-month contract for mowing vegetation at an Army Fort (Fort Lewis). The protester argues that, had the agency properly considered its past performance, the firm would have received a substantial confidence rating.

In response, the agency explains that it considered all of the protester's past performance information, but determined that the information had "little or no value upon which to assess AA Consulting's probability of meeting the solicitation requirements." Agency Legal Memorandum at 6. With regard to the first contract (McChord Field), the agency explains the contract began only 11 days before proposals were due, and thus it was reasonable for the agency not to consider this contract in its past performance evaluation. With regard to the second contract (Fort Lewis), the agency explains generally that it considered all of the protester's information, but did not view contracts that involved "mowing grass" as comparable to the solicitation's requirements, which included BASH/Airfield maintenance, and power line/electrical rights of way (tree pruning), among other things. Id.

The evaluation of an offeror's past performance is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method for accommodating them, and we will not substitute our judgment for reasonably based past performance ratings. See MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. The evaluation of experience and

past performance, by its very nature, is subjective, and an offeror's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. Glenn Def. Marine-Asia PTE, Ltd., B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7.

We find nothing improper with the agency's evaluation of the protester's past performance information. While the protester asserts that the agency failed to consider its prior contracts, the agency explains that it, in fact, considered this information and viewed it not to be relevant. The agency's conclusion that these contracts were not sufficiently similar to the grounds maintenance contract requirements is unobjectionable.<sup>6</sup> Given that the agency considered this information, and viewed it as not relevant to the procurement here, the agency's unknown confidence (neutral) rating was reasonable.

Having found the agency's unknown confidence rating to be reasonable, we nevertheless find that the agency improperly excluded the protester's proposal from the competitive range.

The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency. Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 3. In reviewing an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the evaluation was reasonable and consistent with the RFP evaluation criteria. Foster-Miller, Inc., B-296194.4, B-296194.5, Aug. 31, 2005, 2005 CPD ¶ 171 at 6. Where we find that an evaluation was unreasonable and that a correct evaluation might have resulted in a different competitive range determination, we will sustain a protest. Wilson Beret Co., B-289685, Apr. 9, 2002, 2002 CPD ¶ 206 at 8-9. As explained below, we find that the agency's evaluation here was unreasonable, and, accordingly, we sustain Slaughter's protest.

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<sup>6</sup> While the protester argues that the 2-month contract for grounds maintenance (McChord Field) should have been considered because the contract was finished prior to date of the technical evaluation, we find that it was within the agency's discretion to not consider this contract, given the contract's short 2-month duration compared to the multiyear contract being procured here. See Chenega Tech. Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 6. The protester also asserts that the agency improperly failed to consider its herbicide application contracts. Given that the work being procured here is for a multimillion dollar grounds maintenance contract, we find nothing improper about the agency's conclusion that the protester's much smaller herbicide contracts involve "little or none of the scope and magnitude of effort and complexities" required here. RFP at 192.

The agency's competitive range determination included all those proposals receiving a satisfactory confidence past performance rating. The agency excluded every proposal, including the protester's, that received an unknown (neutral) past performance rating. The record reflects that the exclusion was based entirely on an offeror's past performance rating; price was not considered in the competitive range determination. An agency must consider price in making a competitive range determination. See Arc-Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53 at 3. As a result, we first conclude that the protest must be sustained because the agency established its competitive range without regard to price.

Moreover, since price played no role in the competitive range decision, and since price and past performance were the only two evaluation factors, there is no dispute that the agency excluded the protester's proposal based solely on its unknown past performance rating. This is contrary to the terms of the RFP and the Federal Acquisition Regulation (FAR). In this regard, the solicitation required that the agency evaluate an unknown confidence (neutral) past performance rating neither favorably nor unfavorably. Furthermore, the FAR requires that, "[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance." FAR § 15.305(a)(2)(iv).

The agency maintains that it did not treat the unknown confidence rating unfavorably, but instead properly determined that the proposals receiving a satisfactory confidence rating were the "most highly rated" proposals. Agency Legal Memorandum at 4. We disagree. Concluding that a satisfactory confidence performance rating places a proposal among the most highly-rated, while an unknown confidence rating does not--and using this distinction alone to exclude a proposal from the next phase of the competition--is, by its very nature, unfavorable treatment. See Inlingua Schools of Languages, B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340 at 5-6 (evaluation scheme that penalizes offeror for neutral past performance ratings is improper). Given that the agency is not permitted by either the terms of the solicitation or FAR § 15.305(a)(2)(iv) to evaluate offerors favorably or unfavorably when they lack a record of relevant past performance, we sustain the protest for this reason as well.<sup>7</sup>

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<sup>7</sup> Prejudice is an element of every viable protest. See, e.g., Wilson Beret Co., *supra* at 8. Here, the record shows that the sole basis for Slaughter's exclusion from the competitive range--the protester's unknown confidence rating--was improper. While we recognize that had the agency properly considered price in its competitive range determination, the protester's price might have provided a proper basis to exclude its proposal from the competitive range, the agency might also have concluded that, after discussions, the price rankings would change. What we will not do is make our own judgement about which companies should be included in the range, or  
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## RECOMMENDATION

We recommend that the agency make a new competitive range determination that properly considers prices, and does not exclude offerors with unknown confidence-- or neutral ratings--solely because of their unknown past performance ratings. We also recommend that Slaughter be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling  
General Counsel

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speculate as to how offerors might respond to any discussions, if held. See Arc-Tech, Inc., supra; Global, A 1<sup>st</sup> Flagship Co., B-297235, B-297235.2, Dec. 27, 2005, 2006 CPD ¶ 14 at 10. Accordingly, we conclude that the protester has established the requisite competitive prejudice to prevail in a bid protest.