

Decision

Matter of: Stevenson Intermountain Seed, Inc.

File: B-420086

Date: November 22, 2021

Jason Stevenson for the protester.

William B. Blake, Esq., Department of the Interior, for the agency.

Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated both the protester's and the awardee's proposals under solicitation's past performance factor is denied where the contemporaneous record shows that the agency's evaluation was reasonable and consistent with the solicitation.

DECISION

Stevenson Intermountain Seed, Inc. (Stevenson), a small business located in Ephraim, Utah, protests the award of a contract to Flying M. Enterprises (Flying M) under request for proposals (RFP) No. 140L3721R0010, issued by the Department of the Interior, Bureau of Land Management (BLM), to purchase various species of land restoration seeds. Stevenson challenges the past performance evaluation and the award to Flying M for certified immigrant Kochia (Kochia) seeds.

We deny the protest.

BACKGROUND

The RFP was issued on June 30, 2021, seeking proposals for award of multiple fixed-price contracts pursuant to the procedures of Federal Acquisition Regulation part 15. The solicitation contemplated the purchase of up to 120 different species of land restoration seeds.¹ RFP at 8; Contracting Officer's Statement at 2. The requirement is referred to as BLM's seed buy program and the program objective is to consolidate the agency's needs for land restoration seeds for most of the western states. The seeds

¹ Citations to the RFP are to the conformed copy provided by the agency as exhibit 2.

are utilized for emergency restoration and stabilization projects after wildland fires, fuel reduction projects, wildlife habitat restoration, and other public land improvement projects. Contracting Officer's Statement at 2. The RFP included a price spreadsheet with the varieties of land restoration seeds listed as separate line items (*i.e.*, seed lots). Contracting Officer's Statement at 2. Offerors were required to enter the total pounds, price per pound, and the percent of purity, *i.e.*, pure live seed (PLS), for each type of seed being offered on this spreadsheet. *Id.*; RFP at 10. Offerors were permitted to submit multiple offers for any seed lot in any category or combination of categories. RFP at 8; Contracting Officer Statement at 2. The solicitation advised that each offer would be evaluated separately. RFP at 70.

The RFP provided that awards were to be made to offerors whose proposals provided the best value to the government, considering the following evaluation factors: technical considerations, past performance, and price. *Id.* at 73. When combined, the solicitation stated that the non-price evaluation factors were somewhat more important than price. *Id.* Of relevance to this protest, the RFP stated that the past performance evaluation would assess the offeror's delivery performance and quality of past performance that occurred during the past three years. *Id.* The RFP also stated that the past performance for a line item might be evaluated based on seeds delivered under prior government contracts. *Id.* at 75. The RFP did not identify any adjectival ratings or numerical scores to be assigned to the non-price evaluation factors.

BLM received proposals from multiple offerors, including Stevenson and Flying M. Contracting Officer Statement at 3. As is relevant here, the solicitation identified a requirement for 9,300 pounds of Kochia seeds, and the four lowest-priced offers to provide the Kochia seeds were as follows:

	Quantity Offered (pounds)	Evaluated PLS Price (per pound)
Stevenson (Lot 1)	1,000	\$23.80
Offeror A	3,000	\$27.27
Stevenson (Lot 2)	1,000	\$34.67
Flying M	10,000	\$34.72

Contracting Officer's Statement at 3.

The contracting officer, who was the source selection authority for the procurement, noted in the source selection documentation that Offeror A and Flying M each had a better record of past performance than Stevenson and therefore their offers represented a better value to the government. The agency made award to Offeror A for 3,000 pounds at a PLS price of \$27.27 per pound and to Flying M for 6,300 pounds at a PLS price of \$34.72 per pound. *Id.* at 3-4; Agency Report (AR) exh. 6, Source Selection Documentation at 2.

After being notified of its nonselection, Stevenson protested with our Office the awards to Offeror A and Flying M at prices higher than its own. See *generally*, Protest at 1-2

(Aug. 20, 2021). We dismissed Stevenson's protest related to Offeror A after the agency notified our Office that Offeror A had withdrawn its offer for 3,000 pounds of Kochia seeds. The agency stated that it then selected Stevenson's offer for 1,000 pounds of Kochia seeds (Lot 1) at a PLS price of \$23.80 per pound. Contracting Officer's Statement at 3-4. Of the remaining 2,000 pounds initially awarded to Offeror A, the agency decided not to select Stevenson's second offer (Lot 2) for 1,000 pounds at a PLS price of \$34.67. Rather, the agency concluded that Flying M's superior past performance justified paying a slightly higher price of \$34.72 (a difference of \$.05 per pound) when compared to Stevenson's offer. Thus, the contracting officer awarded the remaining 2,000 pounds of Kochia seeds initially awarded to Offeror A to Flying M. *Id.*

The agency notified offerors of the awards on August 10. *Id.* at 1. This protest followed.

DISCUSSION

Stevenson protests the agency's decision not to purchase its second lot of Kochia seeds at a lower PLS price than Flying M's. In its various protest pleadings, Stevenson argues that the agency's nonselection of its Lot 2 seeds was unreasonably based on a flawed assessment of the protester's past performance history. See, e.g., Protester's Comments at 4-5 (Sept. 29, 2021); Protest attach. 1 at 1-2 (Aug. 20, 2021); Protest attach. 2 at 1-6 (undated). The protester also disputes the agency's assessment of Flying M's past performance.

Where, as here, a solicitation requires the evaluation of past performance, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria. See *FEDSYNC BEI, LLC*, B-417492, B-417492.2, July 23, 2019, 2019 CPD ¶ 303 at 9. An agency's evaluation of past performance, which includes its consideration of the relative merit of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *Id.*; see also, *GiaCare and MedTrust JV, LLC*, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321 at 17.

Based on our review of the record, we find no basis to question the agency's evaluation of Stevenson's past performance. Here, the record shows that the agency assessed Stevenson's past performance based on the contracting officer's personal knowledge of the protester's performance under the agency's seed buy program and on contractor performance assessment reports (CPARs), which she prepared as the contract specialist. AR exh.6, Source Selection Documentation at 2.

The record also shows that Stevenson's CPARs generally reported satisfactory performance, with one exception. In particular, the contracting officer identified concerns related to Stevenson's most recent CPAR for its April 2021 seed contract. Contracting Officer's Statement at 4. According to the contracting officer, who was the

then-contract specialist for this seed buy contract, the agency terminated two of nine seed lots awarded to Stevenson in April 2021 “due to an excessive amount of noxious weeds” present in the two seed lots. *Id.* at 4-5. The contracting officer states that one of the two seed lots, for globemallow seeds, had good test results from Stevenson’s chosen testing laboratory. However a government spot check found that this seed lot had significant issues with multiple noxious weeds and that one of these noxious weeds--Russian thistle--was found at a rate of 3585 seeds per pound.² *Id.* at 4; see also, Protester’s Additional Submission (Sept. 7, 2021) attach.2, Stevenson’s CPAR at 2 (July 21, 2021).

When questioned by the contracting officer about the inferior seeds, Stevenson responded that prior to the April 2021 award, the seeds were cleaned to remove the weed contaminants but after the recleaning process, Stevenson did not retest the seeds to verify that the seeds met the agency’s required standards. This resulted in delivery of contaminated seeds to the government. Contracting Officer’s Statement at 4-5. The contracting officer states that she informed Stevenson that the CPAR would reflect a quality performance rating of marginal and that this negative performance rating would be utilized by the agency on future seed buys. *Id.* at 5. In addition, the contracting officer states that the CPAR was sent to Stevenson for review and comment. *Id.* at 4.

In response, Stevenson argues the incident was a “fluke” and provides “absolutely no indication of Stevenson’s future performance.”³ Protester’s Comments at 4. In its comments, Stevenson contends that the marginal performance rating assigned to its April 2021 contract was for the 50 pounds of globemallow seeds, an extremely small quantity of seeds. *Id.* The protester argues that the agency improperly focused on the negative past performance information for 50 pounds of seeds and failed to consider that over a 35-year period the protester “delivered in excess of 1,000,000 pounds of seed to the BLM with no less than satisfactory performance ratings until this one. . . .” *Id.*

While Stevenson does not agree with the consideration given to this incident by the agency, the protester’s objections provide no basis for us to find that the agency’s actions was unreasonable. The record clearly shows the agency considered both the positive and negative aspects of Stevenson’s past performance under the seed buy program.⁴ The record also shows that the agency used the recent adverse information

² The agency states that the presence of 12 or fewer noxious weed seeds per sample is typical. Contracting Officer’s Statement at 4.

³ To the extent Stevenson challenges the contents/findings of the July 21, 2021 CPAR, this raises a matter of contract administration, which we do not review. Bid Protest Regulations, 4 CFR § 21.5(a); *ProActive Techs., Inc.; CymSTAR Servs., LLC*, B-412957.5 *et al.*, Aug. 23, 2016, 2016 CPD ¶ 244 at 11 n.6.

⁴ Notwithstanding the negative performance information concerning Stevenson’s most recent seed buy contract, the contracting officer still awarded Stevenson seven line items after concluding that Stevenson’s low price reflected the best value to the government. Contracting Officer’s Statement at 3.

as the justification to pay a negligibly higher price of \$50 to a firm without any history of adverse past performance. The evaluation and consideration of past performance, by its very nature, is subjective and we will not substitute our judgment for reasonably based evaluation ratings. An offeror's disagreement with an agency's evaluation judgments, without more, does not demonstrate that those judgements are unreasonable. See *A-P-T Research, Inc.*, B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 4; see also *Glenn Def. Marine-Asia PTE, Ltd.*, B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7.

Next, Stevenson challenges the agency's assessment of Flying M's past performance, noting that there were no CPARs available for the firm. According to the protester, without any CPARs, the contracting officer's reliance on her personal knowledge of Flying M's performance was unreasonable since "it would be impossible for [the contracting officer's] memories to provide complete and accurate details" of Flying M's prior contract performance. Protester's Comments at 3.

As Stevenson correctly points out, the record shows that the evaluation of Flying M's past performance was based on the contracting officer's personal knowledge of the firm's performance under the agency's seed buy program. In this regard, the contracting officer reports that while there are no CPAR records available for Flying M, the firm "has consistently delivered without a single quality issue" under many seed program contracts. Contracting Officer's Statement at 5. Our decisions explain that an agency may properly use information known by its own evaluators, as with any other references, to aid in the evaluation of proposals. *Interfor U.S., Inc.*, B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7 citing, *Northrop Grumman Sys. Corp.*, B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 11; *Park Tower Mgmt., Ltd.*, B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 6. Here, we find the contracting officer's reliance on her personal knowledge to evaluate Flying M's past performance unobjectionable; as a result, this protest ground is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel