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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: SWR, Inc.

File: B-292896.3

Date: June 7, 2004

Benjamin M. Bowden, Esq., Albrittons, Clifton, Alverson, Moody & Bowden, for the protester.

Maj. Jacqueline B. Posner, Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and John Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that protester's current contract for same type of corrosion prevention services as required by solicitation should have been assigned a performance rating and carried greater weight in past performance evaluation, is denied where record shows administrator of that contract reasonably determined that no meaningful performance rating was possible because protester had performed relatively small portion of the work under that contract.

2. Protest that awardee's performance under contract for corrosion prevention services on tactical vehicles should not have been considered relevant past performance in evaluation under solicitation for aircraft corrosion prevention services, is denied where solicitation language did not limit relevant contracts to those for aircraft corrosion prevention services.

DECISION

SWR, Inc. protests the award of a contract to U.S. Logistics, Inc. (USL) under request for proposals (RFP) No. F38610-03-R-0015, issued by the Department of the Air Force, Charleston Air Force Base, South Carolina, for aircraft corrosion prevention cleaning services. SWR principally challenges the Air Force's evaluation of its and USL's past performance/performance risk.

We deny the protest.

The RFP, issued June 23, 2003 as a set-aside for historically underutilized business zone (HUBZone) business concerns, contemplated the award of a fixed-price requirements contract for a base year, with four 1-year options. The RFP provided

for award to the offeror whose conforming proposal was determined to be the “best value” to the government, considering past performance/performance risk (pp/pr) and price, with pp/pr significantly more important than price. Under the pp/pr factor, offerors were to submit a description of no more than seven relevant contracts performed within the last 3 years, and were to have references complete and separately submit Past Performance Questionnaires. RFP at 14-15. The solicitation defined relevant contracts as including “but not limited to” contracts for “aircraft corrosion cleaning and lubrication services . . . of similar scope, magnitude and complexity to the services required to be performed at Charleston” Id. at 15. Proposals were to be rated for both performance (exceptional, very good, satisfactory, marginal, or unsatisfactory) and relevance (not relevant, relevant, or highly relevant), which would result in an overall rating of exceptional, very good, satisfactory, none, marginal or unsatisfactory. The pp/pr evaluation was to take into account past performance information regarding subcontractors that would perform major or critical aspects of the requirement. Id. at 15, 16.

Eight proposals were received by the closing time, and the agency conducted telephonic discussions with, and received final proposal revisions from, the offerors in the competitive range, including SWR and USL. The agency considered seven SWR contracts in the pp/pr evaluation—four were rated not relevant and three highly relevant. Agency Report (AR), Tab 11, Overall Risk Assessment Spreadsheet, at 1. The highly relevant contracts included a 3-year contract at Kaneoche Bay, Hawaii, under which SWR’s performance was rated exceptional, and a 5-year contract at Cherry Point, North Carolina, under which SWR’s performance was rated marginal. Id. The third contract, for services at Westover Air Force Base, Massachusetts, was not assigned a performance rating. In evaluating USL under the pp/pr factor, the agency considered two USL contracts and eight contracts for USL’s subcontractor, Vertex Aerospace. Both of USL’s contracts were rated relevant; five of Vertex’s contracts were rated relevant, two very relevant, and one not relevant. Id. at 2. Based on these ratings, the agency assigned SWR and USL overall risk ratings, respectively, of satisfactory and very good. AR, Tab 12, Integrated Assessment Best Value Decision, at 2. Although USL’s offered price—\$ 7,983,805—was approximately \$374,000 higher than SWR’s—\$7,609,906—the agency determined that USL’s pp/pr rating offset SWR’s price advantage, and made award to USL. Id. at 1, 14.

SWR PAST PERFORMANCE

SWR alleges that the Air Force failed to appropriately evaluate its current relevant past performance under the Westover contract, which requires “substantially the same services” as the requirement here. Protest at 2. SWR suggests that its performance under the Westover contract, coupled with its performance at Kaneoche Bay, supports the position that its problems at Cherry Point were an “anomaly,” and that its overall rating should be higher. Protester’s Comments at 5.

The evaluation of proposals is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Eastern Colorado Builders, Inc., B-291332, Dec. 19, 2002, 2003 CPD ¶ 17 at 2. Thus, in reviewing an agency's evaluation, we will not reevaluate proposals; rather, we will examine the record to ensure that the evaluation was reasonable and in accordance with the stated evaluation criteria and applicable procurement laws and regulations. Id.

The evaluation here was unobjectionable. As noted above, the Westover contract was referenced in the Overall Risk Assessment Spreadsheet, a summary of the contracts reviewed for each competitive range offeror that generally includes the rating, relevance, and value of each contract. While the Spreadsheet indicates that the agency rated the Westover contract as highly relevant, it included no assigned evaluation rating for the contract. The agency explains that this is because, notwithstanding that the contract administrator and flight chief for that contract were "very happy" with SWR's performance to date, AR, Tab 12, Integrated Assessment Best Value Decision, at 11, the contract administrator believed there was too little data for a meaningful evaluation. AR, Tab 2, Contracting Officer's Statement, at 2. In this regard, the Air Force reports that the Westover contract calls for 300 aircraft washings per year and that, at the time the agency evaluated SWR's past performance, SWR had performed only 9 washings. As a result, the contracting officer explains, the Westover contract was not assigned a performance rating and was not weighted as significantly as other SWR contracts. AR, Tab 2, Contracting Officer's March, 2004 Statement, at 3. We find nothing unreasonable in the agency's judgment. We think the agency reasonably could determine that, given SWR's brief performance on the Westover contract at the time of the pp/pr evaluation, the fact that the firm so far was performing well was not sufficient to offset the concerns raised by SWR's performance of the Cherry Point contract. We conclude that both the agency's evaluation of the Westover contract and its overall rating for the protester were reasonable.

USL PAST PERFORMANCE

SWR alleges that the agency misevaluated the relevance of USL's prior contracts and that, as a result, its pp/pr rating was improperly inflated. Specifically, the protester asserts that USL has not performed any contracts for aircraft corrosion prevention services, and that its past performance consists solely of experience as a subcontractor maintaining and washing tactical vehicles and aerospace ground equipment for the U.S. Army. Supplemental Protest at 2.

This aspect of the evaluation was unobjectionable. As noted above, the solicitation defined relevant contracts as "including, but not limited to" contracts requiring aircraft corrosion cleaning and lubrication services of the same scope, magnitude and complexity as required under the instant solicitation. RFP at 15. Based on this language, the agency properly could determine that different types of contracts were

relevant for purposes of the pp/pr evaluation; the protester's interpretation essentially ignores the "not limited to" language. The agency explains that it found USL's work on tactical vehicles relevant because it involved "much of the magnitude and complexity that this solicitation requires with respect to corrosion control measures (to include corrosion identification, wash services, prevention, and abatement, fleet servicing, maintenance, modification, repair and vehicle upgrade)." AR, Tab 2, Contracting Officer's March, 2004 Statement, Addendum 1, at 1. The agency's determination of relevance was consistent with the RFP language, and was reasonable.

TEAMING ARRANGEMENT INFORMATION

SWR alleges that USL's proposal failed to include adequate information about its arrangement with its subcontractor. Specifically, SWR asserts that the teaming agreement USL provided fails to specify the responsibilities of each firm and the extent of each firm's participation, and that the agreement shows that USL's contribution to staffing is improperly capped at 49 percent, leaving Vertex to furnish more than half of the staffing. In this regard, the RFP incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.219-14, Limitation on Subcontracting, which provides that, in a contract for services, at least 50 percent of contract costs for personnel shall be incurred by the prime contractor. RFP at 12.

This argument is without merit. The RFP required offerors proposing a teaming arrangement to "provide complete information as to the arrangement." RFP at 15, 16. The teaming agreement in USL's proposal lists Vertex as USL's subcontractor, gives the addresses of the prime contractor (USL) and the subcontractor (Vertex), and specifies that, among other things, USL will provide day-to-day management, tools, equipment, and vehicles necessary to accomplish the work, be the primary contact with the customer, and bear responsibility for financial funding and billing. USL Proposal, Tab 7, Teaming Agreement, at 1, 2, 7 and exh.1, at 1. This information appears sufficient to permit the agency to understand how USL and Vertex will partition and perform the contract work; the RFP required no other specific information. Further, contrary to the protester's characterization of the staffing breakdown between USL and Vertex, the agreement actually states that "USL will give Vertex no less [than] 25%, but up to 49% of the manning requirements." *Id.*, exh.1, at 1. This breakdown is consistent with FAR § 52.219-14. Thus, the awardee meets the subcontracting regulatory requirement, noted above, since USL will perform no less than 51 percent of the contract, and Vertex will perform no more than 49 percent.¹

¹SWR asserts that, regardless of how USL characterizes its arrangement with Vertex, the arrangement must be treated as a joint venture under Small Business Administration (SBA) regulations, and that, since Vertex is not a HUBZone small business, USL did not qualify as a HUBZone small business and was ineligible for

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USL FINANCIAL HISTORY

The RFP advised that the agency would consider the offerors' financial history as part of the pp/pr evaluation, including past payments to suppliers and/or contractors, company credit history with banks and other lending institutions, timely payments to employees and other business-related accounts with federal, state, or local governments. RFP at 15. SWR argues that the agency failed to fully consider USL's financial history in the evaluation. Protest at 3; Protester's Comments at 5.

The record shows that the agency included only one question, regarding timely payment of subcontractors and suppliers, on its past performance questionnaire, and the Air Force states that it "was never [its] intent to perform a detailed financial analysis of all offerors, since an official determination of a small business's overall financial capability is reserved for the U.S. Small Business Administration" AR, Tab 2, Contracting Officer's March, 2004 Statement, at 4. Instead, the agency contacted USL's bank to verify financial information only after it determined to award to USL, as part of its assessment of USL's responsibility. The record shows that the bank's vice president provided the agency with USL's approximate balance, its average balance, and its history of overdrafts. While USL had an initial line of credit to establish its business, this line of credit has been canceled because the firm has not had to borrow again. The vice president stated that USL has an "excellent relationship" with the bank. AR, Tab 13, Determination of Contractor Responsibility, at 1.

While the agency states that it did not intend to perform a detailed evaluation of the offerors' financial history, the solicitation required it to do so; because the agency did not consider all of the listed information in the evaluation, the evaluation was inconsistent with the solicitation. However, competitive prejudice is a necessary

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award. This matter is not for our consideration. Under 15 U.S.C. § 637(b)(6) (2000), SBA has conclusive authority to determine matters of size status for federal procurement purposes and our Office will neither make nor review size status determinations. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2004). Similarly, SBA is the designated authority for determining whether a firm is an eligible HUBZone small business concern, and it has established procedures for interested parties, including procuring agencies, for challenging a firm's status as a qualified HUBZone small business concern. 15 U.S.C. §§ 632(p)(5)(A), 657a (c)(1) (2000); 13 C.F.R. §§ 126.503, 126.801 (2004); Federal Acquisition Regulation (FAR) §§ 19.306, 19.1303. As a consequence, our Office will neither make nor review HUBZone status determinations. Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ __.

element of every viable protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving the award but for the agency's actions, we will not sustain the protest. Base Techs., Inc., B-293061.2, B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31 at 10 n.16; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). There is no showing of prejudice here, since the agency ultimately gathered and reviewed USL's relevant financial information in connection with its responsibility determination, and that information was all positive. Thus, had the information been incorporated into the pp/pr evaluation as the RFP required, there is no reason to believe that it would have had a negative effect on USL's evaluation or on the award decision. Accordingly, this argument does not provide a basis for sustaining the protest.

The protest is denied.

Anthony H. Gamboa
General Counsel