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**Comptroller General
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Decision

Matter of: Firestorm Wildland Fire Suppression, Inc.

File: B-310136

Date: November 26, 2007

John Lukjanowicz, Esq., for the protester.

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

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Evaluation of awardee's past performance was reasonable, notwithstanding protester's identification of alleged negative information concerning awardee, where agency did not have personal knowledge of some of the information, and fully considered information of which it was aware.

DECISION

Firestorm Wildland Fire Suppression, Inc. protests the award of a contract to Ferguson Management Company South under request for proposals (RFP) No. AG024B-S-07-0009, issued by the Department of Agriculture (USDA), U.S. Forest Service, for wildland fire-fighting crews. Firestorm challenges the technical capability and past performance evaluations.¹

We deny the protest.

The RFP, a small business set-aside, sought proposals for the services of 20-person fire-fighting crews at sites within specified distances of 6 national forests (10 contract line items (CLIN)). Proposals were to be evaluated on the basis of four factors—past performance, technical capabilities, training/safety, and price. Past performance was to be evaluated on the basis of quality of services, customer satisfaction, timeliness of performance, trends in performance, and business relationships. Under this factor, the evaluators could consider proposal information,

¹ Firestorm initially challenged an award to Mountaineers Fire Crew, LLC but, after reviewing the agency report (AR), Firestorm withdrew that basis of protest.

various past performance databases, and their own personal experience and knowledge. The non-price factors were of approximately equal weight and, combined, were more important than price. Award was to be made to multiple offerors on a “best value” basis.

This protest concerns the award of CLIN 19b, for services within 100 miles of the Shasta-Trinity National Forest. Eight firms, including Firestorm and Ferguson, submitted proposals for CLIN 19b. After an initial review, both firms’ proposals (the only ones relevant here) were included in the competitive range. Following discussions and submission of final proposal revisions, the technical evaluation board’s (TEB) final consensus evaluation ratings for the two proposals were as follows:

	Ferguson	Firestorm
Past Performance	Acceptable	Acceptable
Technical Capability	Exceptional	Acceptable
Training/Safety	Acceptable	Acceptable
Overall	Acceptable	Acceptable
Price	\$943,500	\$975,420

The TEB recommended award to Firestorm, but the contracting officer determined that such an award was not justifiable in light of Firestorm’s higher price, and thus recommended award to Ferguson.² The source selection authority (SSA) adopted the contracting officer’s recommendation and made award to Ferguson. Following a debriefing, Firestorm filed this protest.³

PAST PERFORMANCE EVALUATION

Ferguson’s Proposal

Firestorm asserts that the agency unreasonably evaluated Ferguson’s past performance as acceptable, even though the firm had experienced several noncompliance issues under prior contracts, and one of its fire crews had deployed fire shelters during the 2004 Tool Box fire, which the protester claims is an “extraordinary event.” Noting that its own proposal reflected no noncompliance issues, Firestorm asserts that its rating should have been higher than Ferguson’s.

² Two other offerors had higher rated proposals than Ferguson’s, one of which was lower priced, but these were recommended for award of other CLINs.

³ Firestorm challenges the agency’s award on numerous bases. We have considered them all and find that they have no merit or did not prejudice the protester. This decision addresses Firestorm’s most significant arguments.

The evaluation of proposals, including past performance, is a matter within the discretion of the contracting agency, which our Office will review only to ensure that the agency's judgment was reasonable and consistent with the solicitation criteria and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11; Sterling Servs., Inc., B-286326, Dec. 11, 2000, 2000 CPD ¶ 208 at 2-3.

The past performance evaluation was unobjectionable. As instructed by RFP § L.6(b), Ferguson's proposal listed all of the fire suppression incidents on which it had fire crews from 2002 through 2005; included copies of its evaluations; and listed noncompliance actions taken against the firm, along with explanations of how the actions were resolved and how it planned to mitigate them going forward.⁴ As part of its proposal, Ferguson identified three noncompliance issues from fires in 2002 and 2003. These included [deleted]. Ferguson Proposal, AR at 00529-530. Ferguson described its corrective actions, including its [deleted] to correct the problem. Id. The record shows that the TEB considered the noncompliance issues and corrective action--in addition to the positive information in Ferguson's proposal (including a letter of recommendation⁵)--and determined that Ferguson's past performance warranted an acceptable rating. Specifically, the TEB was satisfied that the firm had taken immediate action to correct the identified problems, which it believed showed that the firm would be proactive in working with the government to correct any problems that might arise. Initial Statement of TEB Chair ¶ 5. The TEB also considered the fact that the incidents were 4 to 5 years old and that, to its knowledge, problems had not recurred. Id. Under these circumstances, and consistent with the RFP evaluation criteria, the TEB could reasonably conclude that Ferguson's past performance was acceptable.⁶

⁴ While our decision refers to various aspects of Ferguson's past performance, in fact, as permitted under RFP § M.5.1(1), the awardee relied on the past performance of its predecessor firm, Ferguson Management Company.

⁵ Firestorm asserts that this letter of recommendation should not have been considered in the evaluation because it did not concern performance of responsibilities associated with fire suppression. The agency explains that the letter was considered relevant because its author recognized the crew's ability to adapt and perform well in an emergency situation, and thus reflected on the crew's character and the firm's ability to work with the government. TEB Statement ¶ 7. As noted above, past performance encompassed quality of services, customer satisfaction, timeliness of performance, trends in performance, and business relationships. RFP § M.5.1(1). The agency's consideration of the letter clearly fell within these elements, and therefore was unobjectionable.

⁶ We note that, while Firestorm's proposal stated that no noncompliance actions had been taken against it, the firm acknowledged that it had terminated several of its employees who were not adhering to its company policies. Their termination

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Ferguson's proposal also identified its participation in fighting the Tool Box fire, and included a crew performance rating sheet stating that that the firm did an excellent job while paying close attention to safety issues. Ferguson Proposal, AR at 00755. The evaluators' past performance rating included consideration of the firm's overall satisfactory performance in fighting the Tool Box fire, as reflected in the rating sheet, including the comment. The TEB did not consider the fact that fire shelters had been deployed because this was not mentioned in the rating sheet.

The protester asserts that there is "something wrong" with a performance evaluation that does not mention such an "extraordinary event" as deployment of fire shelters, and that the agency should have delved further into the matter. Firestorm's Initial Comments at 9. In this regard, we have held that, in certain circumstances, evaluators cannot ignore information of which they are personally aware, even if that information is not included in the offeror's proposal. See GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. This "too close at hand" principle does not apply here. While a "72 Hour Report from the Serious Accident Investigation Team" for this fire was prepared by the Bureau of Land Management and sent to the supervisor of the Fremont National Forest, there is no evidence that any of the TEB members or procurement officials involved with this RFP had any knowledge of the report or the deployment of fire shelters.⁷ Contracting Officer's Statement ¶ 19. Thus, the evaluators' failure to consider the information presented by the protester does not provide a basis for questioning the evaluation.

We reach the same conclusion as to an alleged fourth noncompliance incident in connection with the 2003 Cramer fire. In conjunction with an unrelated bid protest, a Ferguson competitor made negative allegations based on a Forest Service accident investigation report. Ferguson's proposal cover letter, without identifying the specific allegations, disputed their accuracy, characterized them as libelous, and noted that all were proven false. Ferguson Proposal, AR at 00527. The accident report, which was prepared because there were two fatalities--which were not

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reduced the size of the crew below the required level and resulted in the voluntary removal of the crew from a fire with the approval of the operations section chief. Firestorm Proposal, AR at 00220.

⁷ In any event, there is no reason to believe that the TEB would have considered the deployment to represent negative past performance. In this regard, the report did not conclude that the shelter deployment was "extraordinary," or that it resulted from anything the crew had done improperly. In fact, it stated that the crew was well-organized, equipped with appropriate protective equipment and clothing, and that the safety zone was adequate to prevent serious injuries. AR, Tab 22.

attributed to any improper actions by Ferguson--included references to [deleted]. While the protester asserts that the TEB should have considered this "negative" information, there is no evidence that the TEB was aware of it. Neither incident was mentioned in the Cramer fire performance review (included in Ferguson's proposal), which remarked that Ferguson had a "good crew," rated the firm excellent for off-line conduct and use of safe practices, and rated it satisfactory for physical condition, hot line construction, mop-up, crew organization, and all supervisory positions. Ferguson Proposal, AR at 00712. As with the Tool Box fire information, the record does not establish that the evaluators had personal knowledge of the Cramer fire information, such that it could be considered "too close at hand" for the evaluators to ignore.⁸ Thus, the evaluators' failure to consider the information does not provide a basis for questioning the evaluation.

Firestorm's Proposal

Firestorm asserts that its past performance should have been rated higher because it included more letters of recommendation (seven) than Ferguson's (one). This argument is without merit. The agency notes that at least three of Firestorm's "letters of recommendation" were actually e-mailed performance evaluations that were included among the firm's other performance evaluations, and that one was actually a certificate of merit similar to a certificate referenced in Ferguson's proposal. TEB Statement ¶¶ 6, 8.⁹ While the RFP did not require letters of recommendation, the TEB viewed those submitted favorably in its evaluation, Supplemental Statement of TEB Chair ¶ 2, but they were taken into account with the entirety of the offerors' past performance information. TEB Statement ¶ 6. In this regard, the TEB considered both past performance proposals to be very equal overall; both firms had a long history and many good performance evaluations, and while both had

⁸ In any event, again, there is no reason to conclude that the TEB would have found this information to have resulted in an unacceptable rating. In this regard, the agency notes that, since it is the incident commander's responsibility for [deleted], the crew's performance should not have been criticized based on [deleted], and that [deleted], the Ferguson crews were doing their required jobs and no further problems were mentioned in the report. Supplemental Contracting Officer's Statement ¶ 4.

⁹ Firestorm also challenges any positive consideration of Ferguson's certificate of merit because the certificate itself was not included in Ferguson's proposal, and Ferguson had incorrectly stated that it was one of only three contractors to receive one. This argument does not provide a basis for questioning the evaluation. According to the agency, 6 of 12 contractors, including Firestorm and Ferguson, received the certificates, but since they were cumulative performance evaluations, and not awards, they were not given any special weight in either firm's past performance evaluation. TEB Statement ¶ 8.

experienced problems, Ferguson had resolved its problems without the need for government intervention, and Firestorm's were considered minor. TEB Statement ¶ 5. We conclude that Firestorm's submission of, in the final analysis, two more letters of recommendation than Ferguson does not provide a basis to question the TEB's evaluation of both proposals as acceptable.

TECHNICAL CAPABILITY EVALUATION

Firestorm asserts that it was unreasonable for the TEB to evaluate Ferguson's proposal as exceptional under the technical capability factor because the TEB only found the firm's quality control plan to be acceptable. In the protester's view, to warrant an exceptional rating, a proposal would have to be evaluated as exceptional under all technical capability subfactors and the evaluation record is insufficient to support this rating.

We will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Firestorm was not prejudiced by any error in the technical capability evaluation. In this regard, had the agency rated Ferguson's proposal acceptable rather than exceptional under this evaluation factor, its overall evaluation rating of acceptable would be unchanged. Since both offerors' proposals' overall rating remains acceptable, and Ferguson's proposal was lower-priced, this change in the evaluation would have no impact on the source selection. Accordingly, the argument is academic and we will not consider it. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

SOURCE SELECTION DECISION

Firestorm asserts that the source selection decision is not supported by adequate documentation because there is no statement from the SSA explaining why he awarded the contract to Ferguson instead of Firestorm. An agency's source selection must be documented in sufficient detail to allow review of the merits of a protest. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10.

Firestorm's challenge is based primarily on its view that the evaluation of Ferguson's proposal under the past performance and technical capability factors was flawed. However, as discussed above, Firestorm's assertions regarding the past performance evaluation have no merit and the protester was not prejudiced by any error in the technical capability evaluation. As a result, the record shows that both proposals were reasonably evaluated as acceptable overall under the non-price factors with Ferguson proposing a lower price than Firestorm. As documented in the best value analysis, and further explained in the contracting officer's supplemental statement, she recommended award to Ferguson based on its lower price and the SSA adopted

that recommendation in making his source selection. AR at 00809, 00816; Supplemental Contracting Officer's Statement ¶ 3. Where, as here, selection officials reasonably regard proposals as being essentially equal technically, price properly may become the determining factor in making award, notwithstanding that the solicitation assigned price less importance than technical factors. M-Cubed Info. Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 8. In short, the record is sufficient to support the source selection.¹⁰

The protest is denied.

Gary L. Kepplinger
General Counsel

¹⁰ Our conclusion is not changed by Firestorm's reliance on the fact that the TEB had originally recommended its proposal for award. The SSA questioned that recommendation and had the contracting officer contact all members of the TEB to request additional, specific rationales to justify a Firestorm award. Supplemental Contracting Officer's Statement ¶ 3. When the TEB was unable to articulate any additional rationales for their recommendation, the SSA refused to follow the initial recommendation. Id. The SSA was correct in his analysis; in view of the offerors' technically equal evaluations and the absence of any information to establish Firestorm's technical superiority, an award to the protester at its higher price would have been improper.