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**Comptroller General
of the United States**

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Decision

Matter of: JSW Maintenance, Inc.

File: B-400581.5

Date: September 8, 2009

Michael A. Gordon, Esq., Fran Baskin, Esq., and Maria Patente, Esq., Law Office of Michael A. Gordon, PLLC, for the protester.

Jennifer M. Miller, Esq., and Anna G. Kizer, Esq., Wyrick Robbins Yates & Ponton LLP, for Ashley-Marie Group, Inc., an intervenor.

Maj. Jonathan P. Widmann, Department of the Air Force, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination that awardee was entitled to a "confidence" past performance rating was based on a reasonable consideration of the relevance of the awardee's past performance information, which included a comparative assessment of the size, scope, and complexity of the awardee's contracts with the solicitation requirements.

DECISION

JSW Maintenance, Inc. of Warner Robins, Georgia, protests the award of a contract to Ashley-Marie Group, Inc. (AMG) of Elizabethtown, North Carolina, by the Department of the Air Force under request for proposals No. FA8501-08-R-0039 for grounds maintenance services for Robins Air Force Base (AFB), Georgia. JSW alleges that the agency's evaluation of AMG's past performance was unreasonable and that the agency failed to reasonably consider the fact that JSW and AMG did not have a similar understanding of the agency's requirements when they submitted their proposals.

We deny the protest.

The RFP, issued on June 20, 2008 as a Small Business Historically Underutilized Business Zone (HUBZone) set-aside, contemplated the award of a fixed-price contract (to include several time-and-material line items) with a 1-year base performance period plus four 1-year option periods, to provide grounds maintenance services (including, but not limited to, mowing, edging, composting, and irrigation

system maintenance) for Robins AFB. The RFP indicated that award would be made to the offeror whose proposal represented the “best value” to the government based on consideration of past performance and price, with past performance being “significantly more important” than price. RFP at 153.

Regarding past performance, the RFP provided that the agency would consider information regarding any critical subcontractors and key personnel. Based on a consideration of the relevance of the past performance information provided and an assessment of the qualitative aspects of the offerors’ performance, the agency would assign each offeror an overall confidence rating of “substantial confidence,” which was defined as “a high expectation that the offeror will successfully perform the required effort,” “satisfactory confidence,” defined as “an expectation that the offeror will successfully perform the required effort,” “limited confidence” defined as a “low expectation that the offeror will successfully perform the required effort,” “unknown confidence,” defined as “the offeror’s performance record is so sparse that no confidence assessment rating can be reasonably assigned,” or “no confidence” where “the government has no expectation that the offeror will be able to successfully perform the required effort.” RFP at 154.

For the purpose of assessing relevance, the RFP established the following scale:

VERY RELEVANT: Present/past performance efforts involved essentially the same magnitude of effort and complexities this solicitation requires. Examples may include such things as 612 or more acres of improved grounds services, 23 or more acres of enhanced grounds services, 83 or more acres of semi-improved grounds services, composting operations and airfield maintenance of essentially the same size as Robins AFB airfield. These quantities represent a facility 80% the size of Robins AFB.

RELEVANT: Present/past performance efforts involved much of the magnitude of effort and complexities this solicitation requires. Examples may include such things as smaller areas of grounds services in the three categories listed above, composting operations, and airfield maintenance.

SOMEWHAT RELEVANT: Present/past performance efforts involved some of the magnitude of effort and complexities this solicitation requires.

NOT RELEVANT: Present/past performance efforts did not involve any of the magnitude of effort and complexities this solicitation requires.

RFP at 153.

Additionally, as it relates to the protest, the RFP provided that when an offeror's contracts were performed concurrently, "the Government may consider these contracts in the aggregate in determining the confidence rating, should the offeror's present and past performance lend itself to this approach." RFP at 154.

Regarding price, the RFP indicated that offerors' prices would be evaluated for reasonableness and balance. RFP at 154.

The Air Force received 12 timely offers in response to the solicitation, including proposals from AMG and JSW, and made an initial award on September 9, 2008 to Family Entertainment Services (FES). JSW filed a protest challenging the award to FES, which was dismissed as academic on October 3, based on the agency's decision to terminate the award and eliminate FES from the competition. Thereafter, the Air Force decided to make award to AMG as the best value offeror; AMG had received a "satisfactory confidence" past performance rating and submitted the lowest price of the remaining offerors in the amount of \$7,155,951. JSW, which received a past performance rating of "substantial confidence" and proposed a price of \$8,742,463.40, then filed this protest.¹

JSW challenges AMG's "satisfactory confidence" past performance rating. According to JSW, the rating was unreasonable because, as a newly formed company, AMG had no past performance record itself and the past performance record of its key personnel involved contracts that were, in JSW's view, significantly smaller in size, magnitude, and complexity, as compared to the Robins AFB requirements. JSW also argues that AMG's rating was flawed because it was based on an unreasonable aggregation of AMG's contracts. According to JSW, AMG should have received "at best, a limited confidence rating." Protest at 4. In addition, JSW argues that the best value decision was flawed because the Air Force failed to resolve an "apparent latent ambiguity" in the specifications or to consider AMG's "unreasonably low price" as part of its best value decision. Protest at 2.

Our Office examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of offerors' proposals are primarily matters within the contracting agency's discretion. Kay & Assocs., Inc., B-291269, Dec. 11, 2002, 2003 CPD ¶ 12 at 4. In this regard, our Office will not question an agency's determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation criteria. Id. Moreover, a protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

¹ JSW filed two prior protests challenging the award to AMG. The agency took corrective action in response to each of these protests.

As an initial matter, JSW's suggestion that AMG was not entitled to a satisfactory confidence rating because AMG was a newly formed company is misplaced. While the record reflects that AMG was in fact a newly formed company, and therefore did not have a past performance record itself, the Air Force based its assessment of AMG's past performance on information submitted for AMG's key personnel. Given that the RFP expressly authorized the Air Force to consider past performance information regarding "any critical subcontractors and key personnel," RFP at 154, there is no basis for challenging the agency's evaluation in this regard.

JSW's arguments regarding the relevance of AMG's past performance record are also without merit. The record reflects that the Air Force considered past performance information submitted by AMG with respect to four contracts performed by AMG's key personnel. These included: (1) a base-wide grounds maintenance contract for Cannon AFB, New Mexico, which the Air Force considered to be "relevant"; (2) a grounds maintenance services contract for the Federal Law Enforcement Training Center (FLETC), Glynco, Georgia, which the Air Force also evaluated as "relevant"; (3) a base-wide grounds maintenance services contract, for the Naval Support Activity in Mechanicsburg, Pennsylvania, which the Air Force, evaluated as "somewhat relevant"; and (4) a post-wide grounds maintenance services contract at Fort Jackson, South Carolina, which the Air Force considered to be "somewhat relevant." Agency Report (AR), Tab 12b, Performance Confidence Assessment Group Report, at 3-4.

In challenging the agency's assessments regarding the relevance of AMG's contracts, JSW highlights the fact that AMG's contracts were for lower dollar values and did not involve some of the requirements of the Robins contract. In this regard, JSW argues that the Air Force's relevancy assessments of the Cannon AFB and the FLETC contracts were unreasonable given that the dollar values of the two contracts were approximately one-quarter and one-half of the Robins AFB contract, respectively. In addition, JSW argues that the Cannon AFB contract is dissimilar because the air base is located in a desert climate, which presents fewer grounds maintenance challenges than Robins AFB, and because the contract did not involve composting operations. According to JSW, the FLETC contract should not have been considered relevant because, in addition to being smaller in dollar amount than the Robins AFB contract, it did not require composting operations or airfield maintenance. JSW also takes issue with the Air Force's assessment of the Navy contract in Mechanicsburg and the Fort Jackson contract as "somewhat relevant." JSW contends that, unlike the Robins AFB contract, these contracts are for smaller values and do not involve many of the Robins contract requirements.

We find the Air Force's assessments of the relevance of AMG's past performance references to be reasonable and consistent with the evaluation scheme set forth in the solicitation. As noted above, the RFP defined the various degrees of relevance principally in terms of the type and extent of the work effort in comparison to the work required at Robins AFB, as opposed to particular dollar values. Thus, the fact

that the dollar values of AMG's contracts were lower than the Robins AFB contract is not determinative of the reasonableness of the agency's evaluation. In this regard, the definition of "very relevant" past performance included benchmark examples of the types of grounds maintenance activities and numbers of maintained acres. These examples provided a guide to the various relevancy ratings, since the ratings were defined by reference to these activities and the amounts, and kinds, of acreage specified.

In assessing AMG under the past performance factor, the record reflects that the Air Force compared the types of activities performed and the number of acres involved under AMG's referenced contracts, with the activities and acres identified in the RFP's definitions of relevance. Specifically, the Air Force concluded that the Cannon AFB contract, which was a performance-based contract, was relevant based on the fact that it required similar grounds maintenance activities, such as maintaining 63 acres of enhanced grounds, 346.6 acres of improved grounds, 1,584 acres of semi-improved grounds, and 18.4 miles of perimeter fence grounds.² The Air Force indicated that the Cannon AFB contract was not considered "very relevant" because it lacked composting operations. AR, Tab 12b, Performance Confidence Assessment Group, at 4. Similarly, the FLETC contract was considered relevant where it involved maintaining 17 acres of enhanced grounds, 680.54 acres of improved grounds, and 456.35 acres of semi-improved grounds, amounts and kinds of acreage which were comparable to those required at Robins AFB. In rating this contract as relevant, as opposed to very relevant, the Air Force specifically considered the fact that the contract did not include airfield maintenance and composting operations. Id. at 5.

The Navy Mechanicsburg and Fort Jackson contracts were considered only "somewhat relevant," which, as indicated above, was defined as involving some of the magnitude of effort and complexities required under the RFP. The Air Force's evaluation of these contracts as only "somewhat relevant" was based in part on the fact that they did not involve airfield maintenance or composting operations. In addition, the number of acres maintained under the Navy Mechanicsburg contract was considered to be "significantly less than what is required by the solicitation," and, while the acres maintained under the Fort Jackson contract were comparable to the Robins AFB contract, the effort did not include maintenance around runways, maintenance of irrigation systems, or perimeter fencing. Id. at 6.

Based on this record, which reflects the Air Force's consideration of the activities, scope, and complexity of AMG's past performance information, we have no basis to

² The RFP included a requirement to maintain perimeter fences at Robins "to be free of all vegetation growth" and to "trim any vegetation encroaching through the fence." RFP at 162.

conclude that the Air Force's evaluations regarding the relevance of AMG's past performance references was unreasonable.

JSW also challenges the agency's consideration of AMG's past performance record in the aggregate when it assigned AMG a "confidence" past performance rating. Notwithstanding the fact that the solicitation expressly authorized the Air Force to consider an offeror's past performance information in the aggregate for the purposes of making its overall confidence assessment, aggregation of AMG's contracts was not appropriate, according to JSW, because the smaller values of its contracts do not reasonably lend themselves to aggregation. In JSW's view, a long-term, high dollar value contract such as the Robins AFB contract is objectively different in terms of magnitude and complexity from AMG's smaller contracts, and therefore presents fundamentally different challenges from the contracts which formed the basis of AMG's past performance record. The agency, however, decided aggregation was appropriate given that AMG's past performance record was based on contracts that were in many instances performed concurrently, and the obligations, when combined, exceeded the Robins requirements for maintaining improved grounds, semi-improved grounds, airfield grounds, and perimeter fencing. AR, Tab 13B, Source Selection Decision, at 6. While JSW may ultimately disagree with the agency's aggregation assessment, its disagreement does not render the agency's decision unreasonable.

Finally, JSW argues that the agency failed to address a "latent ambiguity" in the RFP regarding the agency's requirements, which purportedly caused JSW and AMG to submit proposals based on different understandings of the agency's requirements, and thereby allowed AMG to gain a competitive advantage in terms of price. Specifically, JSW asserts that the performance work statement is ambiguous where it requires the contractor to "maintain" enhanced grounds to a specified height, while requiring a contractor to "mow" improved grounds to a specified height. RFP, Statement of Work at 2. According to JSW, it interpreted the terms "maintain" and "mow" as synonymous, thereby requiring the contractor to ensure that the grass does not exceed the specified height between cuttings. JSW asserts that the term "mow" could have been interpreted to simply mean cutting the grass to a specific height, without also maintaining it at that height in between mowings. The difference is significant, according to JSW, because in order to maintain the fast growing grass at Robins AFB, JSW anticipated using costly chemicals to control growth between mowings; the other option--mowing the improved grounds almost constantly--would be even more costly. Protester's Comments at 9 n.2. According to JSW, AMG's price was based on simply cutting the grass of the improved grounds, and not maintaining the grass to a particular height between mowings, and, as a consequence, AMG's price was "unreasonably low."³

³ In each of JSW's prior protests challenging the award to AMG, JSW argued that the award to AMG was improper because AMG's price was unreasonably low.

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Even assuming that the RFP's use of the terms "maintain" and "mow" created an ambiguity regarding the grass cutting requirements at Robins AFB, JSW offers no evidence to show that AMG and JSW submitted proposals based on different interpretations of the requirements. Absent such a showing, JSW has failed to establish that it was prejudiced as a consequence of the alleged ambiguity. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (prejudice is an essential element of any viable protest). In this regard, JSW theorizes that AMG based its proposal on the more relaxed interpretation as reflected by AMG's price, which is "too low" to otherwise perform the work. The mere fact that AMG's price is low, however, does not necessarily support the inference drawn by JSW regarding AMG's understanding of the requirements since an offeror may have numerous legitimate business reasons for proposing a low price, including submitting a below cost offer.⁴ See M-Cubed Info. Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 8 (indicating that there is no prohibition against an agency accepting a below-cost offer on a fixed-price contract).

JSW also argues that AMG's understanding of the solicitation requirements is demonstrated through statements allegedly made by AMG's vice president to JSW's owner. Specifically, JSW's owner submitted an affidavit representing that he had asked AMG's vice president how AMG was going to maintain the improved grass at its "low price," and AMG's vice president indicated that he intended to mow the improved grounds and did not plan to use chemical "spray" as JSW had planned. Declaration of JSW's Owner, Jan. 26, 2009. These statements, however, do not demonstrate that AMG's understanding of the requirements was any different from JSW's since, by its own admission, mowing the improved grounds was a method of

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Recognizing that whether AMG's price is too low concerns the question of whether its price is "unrealistic," rather than "unreasonable," since price reasonableness concerns whether a price is too high, we summarily dismissed JSW's arguments in this regard because they failed to set forth a valid basis of protest. The solicitation did not require the agency to evaluate prices for realism and an offeror, in its business judgment, properly may decide to submit a price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. To the extent JSW has again challenged the agency's failure to consider the fact that AMG's price was too low, we again dismiss this aspect of JSW's protest for the reasons stated previously.

⁴ The question of whether AMG is capable of performing the work at the price it has proposed is ultimately a matter of responsibility. In this case, the Small Business Administration, which has authority regarding responsibility determinations of small businesses such as AMG, specifically found AMG responsible through the issuance of a certificate of competency for AMG after the agency had initially found AMG nonresponsible.

maintaining the grass at a particular height. See Protester's Comments at 9 n.2. Because the record fails to establish that AMG actually interpreted the solicitation provisions as JSW now claims, JSW has failed to establish that it suffered any prejudice associated with the latent ambiguity it now alleges.

The protest is denied.

Daniel I. Gordon
Acting General Counsel