



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Nova Technologies

**File:** B-403461.3; B-403461.4

**Date:** February 28, 2011

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James A. Black, III, for the protester.  
Capt. Matthew Dyson, Department of the Army, for the agency.  
Kenneth Kilgour, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency improperly evaluated the protester's past performance is denied where the agency reasonably accorded no weight to the protester's performance of the incumbent effort given the limited period of the protester's performance.

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### DECISION

Nova Technologies, of Panama City, Florida, protests the award of a contract to Veteran Engineering and Technology, LLC (VET), of Colorado Springs, Colorado, under request for proposals (RFP) No. W91QF4-10-R-0021 issued by the Department of the Army for Digital Training Management System (DTMS) sustainment. The protester challenges the agency's past performance evaluation.

We deny the protest.

The RFP sought the delivery of training products and training management support to various Army units and organizations. With respect to past performance, the RFP advised potential offerors of the following:

**e. FACTOR 3 - Past Performance.** The Past Performance evaluation will assess the relative risks associated with an offeror's likelihood of success in performing the solicitation's requirements as indicated by that offeror's record of past performance. Performance risk is assessed at the factor level after evaluating aspects of the offeror's recent past performance and focusing on performance that is relevant to the services being procured under this solicitation.

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(2) Relevancy Assessment. The Government will conduct an in-depth evaluation of all **recent** performance information obtained to determine if it is the same or similar in nature, size, and complexity to the services/products being procured under this solicitation.

RFP at 40-41. Offerors were instructed to go back no farther than 36 months for documentation of their past performance. *Id.* at 37. Although the agency imposed a page limitation on proposals, *id.* at 32, there was no restriction on the number of past performance references that an offeror could submit.

Under past performance, the RFP provided that the agency would evaluate proposals using the following adjectival rating scheme: excellent, good, adequate, marginal, poor, and neutral. RFP at 43-44. As is pertinent to this protest, excellent was defined as “[e]ssentially no doubt exists that the offeror will successfully perform the required effort based on their performance record. Performance Risk Level: Very Low,” and good was defined as “[l]ittle doubt exists that the offeror will successfully perform the required effort based on their performance record. Performance Risk Level: Low.” *Id.* at 42.

The Army evaluated the protester’s proposal as “good” under the past performance factor. The agency considered 3 of the 4 contracts offered by the protest, “however one of the cited contracts [the incumbent effort]<sup>1</sup> was not reviewed due to the limited

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<sup>1</sup> By way of background, on June 10, 2010, the agency initially made award under the RFP to Nova. That award was protested, however, by Training Management Solutions, Inc. The protest was dismissed as academic after the agency represented that it would take corrective action, to include reevaluating proposals and making a new award decision. *See Training Mgmt. Solutions, Inc.*, B-403461, Aug. 19, 2010. Training Management Solutions, Inc., then protested the agency’s corrective action, and we denied that protest. *See Training Mgmt. Solutions, Inc.*, B-403461.2, Sept. 29, 2010, 2010 CPD ¶ 224. As discussed *infra*, offerors resubmitted proposals on August 31 and, following its reevaluation, the army selected VET, rather than Nova, for award. On September 28, the Army terminated for convenience the contract that had been awarded to Nova. Throughout the period of these protests, and the agency’s implementation of its corrective action, however, Nova continued to perform pursuant to the initial contract award. Thus, Nova performed the incumbent contract for approximately 10 weeks prior to submitting its revised August proposal.

period of performance.” Source Selection Decision Document (SSDD) at 8.<sup>2</sup> On September 29, 2010, the Army made award to VET and debriefed the protester the following day. After an unsuccessful agency level protest, Nova filed this protest.

Nova challenges the agency’s evaluation of the past performance portion of its proposal, asserting that the agency improperly failed to credit Nova for successful performance of the incumbent contract for a period of approximately 10 weeks before final proposals were submitted.<sup>3</sup> Had the agency done so, Nova claims that the agency would have evaluated its past performance as “excellent,” not merely “good.” See Protest at 7. The agency argues that it properly accorded no weight to the protester’s incumbent contract past performance reference, given the brief period of Nova’s performance.

Where a solicitation requires the evaluation of offerors’ past performance, we will examine an agency’s evaluation only to ensure that it was reasonable and consistent with the solicitation’s evaluation criteria and procurement statutes and regulations, because determining the relative merits of offerors’ past performance information is primarily a matter within the contracting agency’s discretion. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10. Mere disagreement with an agency’s evaluation is not sufficient to render the evaluation unreasonable. Bevilacqua Research Corp., B-293051, Jan. 12, 2004, 2004 CPD ¶ 15 at 8 n.8. Solicitations must identify all significant evaluation factors and any significant subfactors that will be considered in awarding the contract, and the evaluation of proposals must be based on the factors set forth in the solicitation. Federal Acquisition Regulation (FAR) §§ 15.304(d), 15.305(a). While agencies are required to identify the major evaluation factors, they are not required to identify all areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to, or encompassed by, the stated criteria. Mid-Atlantic Design & Graphics, B-276576, July 1, 1997, 98-1 CPD ¶ 132 at 3-4.

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<sup>2</sup> In his statement of facts, the contracting officer, who served as the source selection authority, states that he misspoke in the SSDD; the contracting officer maintains that he reviewed the protester’s performance under the contract but “found that it was impossible to include the information in [his] analysis because the period of performance was so short.” Agency Report (AR), Attach. 6, Contracting Officer’s Statement of Facts at 2.

<sup>3</sup> The protester challenges the agency’s representation of how long the protester has performed the incumbent contract, arguing that the correct calculation would include the total time of performance ending September 28. We think that the agency’s decision to evaluate performance as of the date of the submission of revised proposals was reasonable. In any event, the precise length of time that the protester performed the incumbent contract is not, in this case, dispositive of the protest.

The RFP did not state that, in evaluating past performance, the agency would consider the length of time that an offeror had performed a contract; it is self-evident, however, that the length or duration of an offeror's prior contract effort logically relates to both the relevance and quality of an offeror's past performance. Chenega Tech. Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 6. In evaluating an offeror's likelihood of successful performance, a prior contract effort that is of brief or limited duration is simply not as probative of an offeror's record as a contract for a lengthier period of time. Id. Where, as here, the RFP stated that prior contracts would be assessed to determine whether they were the same or similar in nature, size, and complexity as the requirement being procured under this solicitation, we see nothing unreasonable in the agency's consideration of the length of contract performance in its evaluation of past performance.<sup>4</sup> Given the one year base period of the contract and the fact that Nova had performed the incumbent effort for approximately 10 weeks at the time of the evaluation here, we find the agency's decision to give Nova's performance of that contract no weight and not to consider it as relevant to the evaluation of Nova's past performance was neither unreasonable nor inconsistent with the solicitation.

As a final matter, Nova alleged that the agency should have "level[ed] the playing field," after its evaluation ratings and price had been disclosed to other offerors following the original contract award. As a general matter, an agency is not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency. See, e.g., PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4; Alatech Healthcare, LLC--Protest; Custom Servs. Int'l, Inc.--Costs, B-289134.3, B-289134.4, Apr. 29, 2002, 2002 CPD ¶ 73 at 4; Norvar Health Servs.--Protest and Recon., B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4. Because Nova's ratings and price information was not disclosed as a result of preferential treatment or any improper action on the part of the agency--it was disclosed to the unsuccessful offerors in the context of a post-award debriefing as contemplated by Federal Acquisition

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<sup>4</sup> Nova notes that an agency may reasonably "give differing weight to an offeror's prior contracts based upon their similarity or relevance to the required effort." Comments on AR at 3, quoting TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 12. Thus, the protester asserts, the Army was required to give some weight to the protester's partial performance of the incumbent contract. We see no merit to the argument that, if an agency is permitted to give some weight to the performance of a somewhat similar contract, it must give some weight to a partially performed contract.

Regulation (FAR) § 15.506(d)(2)--the agency was not required to equalize any competitive advantage that may have been afforded to the protester's competitors as a result of the release of this information.

The protest is denied.<sup>5</sup>

Lynn H. Gibson  
General Counsel

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<sup>5</sup> Nova alleged that VET's price was not realistic. This allegation, based on conjecture and unsupported by a factual basis, is dismissed for failure to state a legally sufficient grounds of protest. See Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f) (2010). The protester's allegation that the awardee's use of a subcontractor should have resulted in a lower rating under the management and staffing factor is similarly dismissed; there is no basis in the RFP for such an automatic downgrading of proposals. See RFP at 41. The protester withdrew a final protest allegation regarding the general conduct of the procurement. Protester's Comments, Dec. 20, 2010 at 6.