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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: Bannum, Inc.

File: B-404712

Date: March 1, 2011

Joseph A. Camardo, Jr., Esq., and Nancy M. Camardo, Esq., for the protester.
David T. Ralston, Jr., Esq., and Frank S. Murray, Jr., Esq., Foley & Lardner LLP, for Keeton Corrections, Inc., the intervenor.
Christine M. Hinkle, Esq., Department of Justice, for the agency.
Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an agency misevaluated the protester's past performance by considering the default termination of an earlier contract is denied where the solicitation did not limit the evaluation of past performance to those references submitted by the offeror, or to events within 3 years of the date of the award.

DECISION

Bannum, Inc., of Odessa, Florida, protests the award of a contract to Keeton Corrections, Inc., of Tallahassee, Florida by the Department of Justice, Bureau of Prisons (BoP), under request for proposals (RFP) No. 200-1021-SE for residential reentry center services for federal offenders in Tallahassee, Florida. Bannum argues that the BoP misevaluated its past performance.

We deny the protest.

On April 18, 2008, the BoP issued the RFP, seeking proposals to provide services under an indefinite-delivery/indefinite-quantity (ID/IQ) contract at daily per-inmate fixed prices for a base year and three option years. RFP at 2, 96. The RFP provided that proposals would be evaluated under three factors: past performance, technical/management, and price. RFP at 104-06. The RFP specified that the past performance evaluation would consider the offeror's probability of successfully performing the contract based on its record of performance on relevant current and past contract efforts. The RFP emphasized that in the past performance evaluation, more recent and more relevant past performance would have a greater impact than less recent and less relevant performance. However, the RFP also noted that "where

[a] relevant performance record indicates performance problems, the Government will consider the number and severity of the problems and the appropriateness and effectiveness of any corrective actions taken (not just planned or promised).” RFP at 104. The past performance evaluation was to be divided into five subfactors: accountability, programs, community relations, personnel, and communications and responsiveness. RFP at 104-05. To enable the evaluation of past performance, the RFP instructed offerors to submit past performance information for “[t]he 5 most relevant contracts and/or subcontracts that were, or are currently being, performed in the last 3 years.” RFP at 63.

The BoP received timely proposals from Keeton and Bannum by the proposal due date of June 18, 2008. The BoP subsequently held multiple rounds of discussions, and set a due date for final proposal revisions of September 8, 2010. Contracting Officer’s Statement at 1-2; AR, Tab 6, Discussions Letters to Bannum, at 25. Bannum listed five contracts in the past performance section of its proposal, for similar contracts performed at Clarksburg, West Virginia; Wilmington, North Carolina; Tupelo, Mississippi; Jackson, Mississippi; and Fayetteville, North Carolina. Agency Report (AR), Tab 5, Bannum Past Performance Proposal, at 4.

In a December 2010 report, the BoP evaluators presented the results of the past performance evaluation. For Bannum, the evaluators considered each of the referenced contracts, and provided a narrative discussion of numerous strengths and weaknesses of the firm’s past performance, and made a determination about the relevance of each referenced contract. Based on the detailed evaluation, the evaluators rated Bannum’s overall past performance as “Green-Acceptable.”¹ AR, Tab 7, Past Performance Evaluation Report, at 12. However, the evaluation report continued by describing an “Additional Consideration” for Bannum: the default termination of a contract for comprehensive sanctions center services in Austin, Texas that had been awarded to Bannum on March 28, 2006. *Id.* at 13. The evaluators noted that after resolution of a bid protest, the start of performance had been rescheduled to February 1, 2007, by mutual agreement. According to the evaluation report, the BoP issued a cure notice to Bannum shortly before performance was to begin because the firm had not obtained required local zoning and permits, and its site had not passed a pre-occupancy inspection. *Id.* The BoP denied Bannum’s requests to extend the date for performance to begin, and ultimately on March 2, 2007, the agency terminated the contract for default. The evaluation report recites these facts and the contracting officer’s consideration of the associated documentation, based on which the contracting officer determined that, in contrast to the “Green-Acceptable” rating for past performance, the

¹ The evaluation report reflects that Keeton’s past performance also received a rating of “Green-Acceptable.” AR, Tab 7, Past Performance Evaluation Report, at 24. Bannum did not challenge the evaluation of Keeton’s past performance.

circumstances of this default termination raised “serious concerns” about Bannum’s ability to perform under the RFP. Id. at 14.

Using each offeror’s proposed daily per-person rates and the estimated quantities stated in the solicitation, the BoP calculated Bannum’s evaluated price as \$5,269,590, and Keeton’s price as \$3,927,720. AR, Tab 8, Source Selection Decision, at 24. After reviewing the strengths and weaknesses of both offerors’ past performance records in detail, and noting that both firms’ proposals received the same overall rating, the contracting officer concluded that Keeton’s lower price made it the best value, and he selected Keeton for award. Id. at 30.

After receiving a debriefing, Bannum filed this protest.

DISCUSSION

Bannum argues that its past performance should have been rated as “Blue-Outstanding,” and that this higher rating would have justified a tradeoff in its favor. In its comments on the agency report, however, Bannum focuses primarily on one aspect of the past performance evaluation, arguing that by the time the BoP evaluated past performance, the default termination of the firm’s contract had occurred more than 3 years earlier, and which Bannum argues should have placed that event outside the BoP’s consideration. We disagree.²

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, since determining the relative merits of offerors’ past performance information is primarily a matter within the contracting agency’s discretion. DGR Assocs., Inc., B-285428, B-285428.2, Aug. 25, 2000, 2000 CPD ¶ 145 at 11. While a solicitation may specify the time frame for references an offeror may submit regarding past performance, such a limitation does not imply a limitation on the agency’s evaluation of past performance. Alaska Mech., Inc., B-404191, Dec. 15, 2010, 2010 CPD ¶ 296 at 4. More generally, an offeror’s mere disagreement with the agency’s assessment of its past performance, or the merits of its proposal relative to others, does not render the source selection unreasonable. Encorp-Samcrete Joint Venture, B-284171, B-284171.2, Mar. 2, 2000, 2000 CPD ¶ 55 at 4.

² Bannum also argues for the first time in its comments that the BoP erred by failing to consider the firm’s past performance on three contracts that occurred after the submission of its initial proposal. Comments at 4-7. However, Bannum has not shown that the BoP contracting officials actually were, or should have been, aware of this additional past performance information.

Although, as noted above, the RFP instructed offerors to submit past performance references that had occurred in the preceding 3 years (which at the time of Bannum's past performance proposal in June 2008 could have included the 2007 default termination), Bannum points to no limitation on the BoP's consideration of relevant past performance that was beyond that time--either in the RFP or by statute or regulation. Rather, the RFP description of the past performance evaluation merely indicated that more weight would be given to more recent experience. It did not foreclose consideration of older (or, for that matter, more recent) performance than the offeror had submitted. In short, Bannum has not shown that the BoP's evaluation was unreasonable or contrary to the terms of the RFP. Nor, more generally, has Bannum shown that the evaluation of its past performance as "Green-Acceptable" was unreasonable. The contemporaneous record reflects the evaluators' fair consideration of both the strengths and weaknesses in the performance record for Bannum in a manner consistent with the RFP.

The protest is denied.³

Lynn H. Gibson
General Counsel

³ Bannum also argued in its protest that Keeton is not a small business. The size status of an offeror is a matter for resolution by the Small Business Administration (SBA), not our Office, and we therefore dismiss those arguments. 4 C.F.R. § 21.5(b) (2010). When this jurisdictional limit was raised during the protest, Bannum argued that the contracting officer should have treated the protest to our Office as a size protest, and therefore the contracting officer should have referred that section of the GAO protest to the SBA. We dismiss that argument and see no basis to expect that a contracting officer must review a GAO protest for issues outside our Office's jurisdiction and refer them to the proper forum.