



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: FitNet Purchasing Alliance

File: B-410263

Date: November 26, 2013

Raul Espinosa, FitNet Purchasing Alliance, for the protester. James L. Weiner, Esq., and Paul Batlan, Esq., Department of the Interior; and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies. Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the agency found the protester, a small business, to be nonresponsible based solely on what amounted to a pass/fail evaluation of the protester's past performance, without referring the matter to the Small Business Administration under the agency's Certificate of Competency procedures.
 2. Protest is sustained where the agency's past performance evaluation was unreasonable and constituted disparate treatment.
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DECISION

FitNet Purchasing Alliance,¹ of St. Augustine, Florida, a small business, protests the placement of an order with Nationwide Supplies, of Garland, Texas, by the Department of the Interior (DOI), Bureau of Indian Affairs, under FedBid solicitation No. 612697-01, for gym floor racks, covers, and accessories. FitNet argues that the agency's past performance evaluation constituted a nonresponsibility determination, which the agency was required to refer to the Small Business Administration (SBA) under its Certificate of Competency procedures. The protester also challenges the agency's substantive analysis of FitNet's past performance.

¹ FitNet's protest and bid were submitted on behalf of FitNet International Corporation, doing business as FitNet Purchasing Alliance. Protest at 1.

We sustain the protest.

BACKGROUND

On May 15, 2014, the DOI posted the solicitation on the FedBid website for a reverse auction.² Contracting Officer (CO) Statement at 2. The solicitation, a small business set-aside, sought gym floor racks, covers, and accessories for the Riverside School in Anadarko, Oklahoma. Agency Report (AR) at 1. Although not stated in the solicitation, the agency advises that the procurement was conducted under the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13. AR (Oct. 3, 2014), at 3. The solicitation advised that bids would be ranked by price, and that the bids may be evaluated using criteria other than price. Solicitation at 2. The solicitation further stated that award would be made to the “responsible Seller whose offer conforming to the solicitation will be most advantageous to the Buyer on the basis of price, technical capability, delivery, and past performance.”³ Id.

The agency received nine bids on May 29, including bids from FitNet and Nationwide. AR at 2. FitNet submitted the lowest bid of \$15,839.15, and Nationwide submitted the second-lowest bid of \$15,840.37. AR, Tab 4, FedBid Summary of Sellers, at 1. After an initial review of FitNet’s bid, the agency’s contracting officer contacted the protester and requested photos of its proposed products. CO Statement at 5. FitNet responded to the contracting officer’s request. Id.

On June 12, FedBid suspended FitNet’s FedBid account for violating the FedBid Terms of Use. AR, Tab 11, FedBid Emails, at 3. On June 13, at 8:53 a.m., FedBid notified the contracting officer that the protester’s FedBid account had been suspended, and stated that, “[a]s always, we recommend that Buyers follow their Agency protocol in performing their due diligence prior to issuing an Order.” Id.

Also on June 13, FitNet received an alert from another agency, which was reflected on FitNet’s FedBid ActivityCard.⁴ AR, Tab 3, FitNet ActivityCard, at 2. FitNet’s

² FedBid, Inc., located in Vienna, Virginia, is a commercial provider of electronic commerce services, including online reverse auctions at Fedbid.com. Reverse Auctions: Guidance is Needed to Maximize Competition and Achieve Cost Savings, GAO-14-108 (Dec. 2013) at 1, n.2.

³ The solicitation refers to both bids and offers.

⁴ The FedBid ActivityCard is “a summary of your Seller activity on FedBid.” FedBid Website, available at: <http://fedbid.custhelp.com/app/answers/list/search/1/kw/activity/dym/1>.

ActivityCard stated that the alert type was “late delivery” (DLT) and, “unresponsive to buyer request” (UBR). Id. The FedBid ActivityCard also indicated that FitNet had previously received 66 awards through the FedBid website, for a total value of approximately \$1.5 million. Id. at 1.

DOI’s contemporaneous evaluation, as provided to our Office, consists of a single-page document, dated June 13, signed by the contracting officer. AR, Tab 6, Award Decision. In this document, the contracting officer stated that she “reviewed the bids from FitNet . . . and Nationwide . . . in FedBid” and decided not to select FitNet’s lower-priced bid “[b]ased on [a] FedBid alert for late delivery and unresponsiveness issues, and [her] past experience dealing with Fit[N]et over late delivery [and] unresponsiveness issues” Id. Specifically, the contracting officer stated that “Fit[N]et received a buyer alert in Fedbid for late delivery and [an] Unresponsive to Buyer Request from [another buyer agency] in 2014.” Id. The contracting officer also stated that, “[i]n addition to the Fedbid alert, . . . Fitnet was over 40 days late on delivery for a contract that I awarded in 2012,” and further stated that “I did not receive a response from [FitNet] until I terminate[d] the contract.” Id. As a result of these issues, the contracting officer awarded the contract to the next lowest bidder, Nationwide Supplies. Id. As discussed below, the evaluation does not mention Nationwide Supplies’ past performance, or otherwise indicate that the contracting officer considered Nationwide Supplies’ past performance in making the award decision.⁵ Id.

On June 13, the award was issued to Nationwide Supplies.⁶ CO Statement at 1. FedBid advised in response to the protest that “[t]he award for the Buy . . . was documented on FedBid on June 13, 2014 at 17:15 [ET],” and that “[f]rom this time on, sellers who participated on the buy are able to login to FedBid to view the results.” AR, Tab 8, Email from FedBid Senior Account Manager (Aug. 27, 2014),

⁵ In response to the protest, the contracting officer also states that her decision to select Nationwide Supplies, rather than FitNet, was based, in part, on FitNet’s failure to provide assurances of conforming goods. CO Statement at 3. To the extent the agency relied upon this rationale for not selecting the protester’s bid, however, we find that such reliance is not supported by the record. In this regard, there is no indication in the contemporaneous record or evaluation that the agency’s decision not to award the contract to FitNet was based on this rationale. AR, Tab 6, Award Decision. In fact, the contracting officer’s statement in response to the protest indicates that, after she received assurance from FitNet that it was providing the requested brand-name item, the contracting officer was satisfied with this response, and “continued her evaluation” of FitNet’s bid. See CO Statement at 3.

⁶ Nationwide delivered the purchased items to the government on July 30, and received payment for the items on August 6. CO Statement at 1.

at 1. Because the protester's FedBid account was suspended on June 12, which was the day before the results of the award were documented in FedBid, FitNet did not have access to FedBid, or otherwise receive notice of the award to Nationwide Supplies, until FitNet's FedBid account was reactivated. The protester's FedBid account was subsequently reinstated, and the protester was advised of the award. This protest followed.

DISCUSSION

FitNet argues that DOI's evaluation of the protester's past performance constituted a nonresponsibility determination, which the agency was required to refer to the SBA under its Certificate of Competency (COC) procedures. The protester also challenges the agency's substantive analysis of FitNet's past performance.⁷ For the reasons discussed below, we conclude that the DOI evaluated FitNet's past performance on a pass/fail basis, and therefore, that the agency's decision not to award the contract to FitNet amounted to a determination of nonresponsibility, which the agency should have referred to the SBA. We also find that the agency's past performance evaluation was unreasonable and constituted disparate treatment.

As an initial matter, we note that the protester and agency disagree regarding the solicitation's stated basis for award. The protester contends that the solicitation provided for award on a lowest-priced, technically acceptable basis, while the agency argues that the solicitation provided for a best value tradeoff analysis. For the reasons discussed below, we conclude that the solicitation was ambiguous regarding which evaluation process that would be used.

As discussed above, the solicitation included the following provision regarding the agency's basis of award:

⁷ FitNet also raises numerous other allegations, including that the agency refused to provide FitNet with copies of FedBid communications, and that the agency improperly failed to award the contract to FitNet based on the suspension of FitNet's FedBid account. Although we do not discuss all of FitNet's other allegations in detail, we have considered all of these other arguments, and find that none provides a basis to sustain the protest. For example, with regard to the protester's allegation that the agency improperly evaluated FitNet based on the suspension of FitNet's FedBid account, there is no indication in the record that the suspension impacted the agency's award decision. See AR, Tab 6, Award Decision. In this regard, the contracting officer states: "Even though I was aware of FitNet's suspension on FedBid, they still remained eligible for award of the contract." Supp. AR (Oct. 3, 2014), CO Statement at 5.

Sellers understand that FedBid ranks all Bids by price; however, . . . Buyers may use criteria other than price to evaluate offers. Accordingly, please note that . . . award will be made to the responsible Seller whose offer conforming to the solicitation will be most advantageous to the Buyer on the basis of price, technical capability, delivery, and past performance.

Solicitation at 2.

The agency argues that the solicitation did not provide for a lowest-priced, technically acceptable award because, “[p]er the evaluation criteria stated in the RFQ, the CO was permitted [to] take into consideration factors including technical capability, delivery, and past performance,” and that the “BIA reviewed the nine quotes to determine which was the most advantageous to the agency.” AR (Sept. 19, 2014), at 3-4.

The fact that the solicitation stated that agency would select the most advantageous bidder based on consideration of technical capability, delivery, and past performance factors, however, does not necessarily mean that the evaluation was to include a best-value tradeoff analysis, rather than be based on a lowest-priced, technically acceptable basis. For example, when making award on a lowest-priced, technically acceptable basis, the lowest-priced technically acceptable proposal is deemed to be the most advantageous to agency. Platinum Servs., Inc.; WIT Assocs., Inc., B-409288.3, Aug. 21, 2014, 2014 CPD ¶ 261 at 6; see also Duncan Sec. Consultants, Inc., B-290574, Aug. 8, 2002, 2002 CPD ¶ 144 at 2 (solicitation reference to award to most advantageous proposal did not require the agency to conduct a best-value tradeoff rather than make award under the lowest-priced technically acceptable criteria); FAR § 15.101 (both tradeoff process and lowest-priced, technically acceptable process are part of best value continuum).

In addition, an evaluation scheme that anticipates award on a lowest-priced, technically acceptable basis may involve consideration of a multitude of factors, such as delivery, that establish the acceptable standard for technical acceptability. See FAR § 15.101-2(b) (“[A]ward will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.”); see also, e.g., Platinum Servs., Inc.; WIT Assocs., Inc., supra (evaluation factors for lowest-priced, technically acceptable procurement included technical capability, past performance, and price). Finally the FAR specifically permits the consideration of past performance during a lowest-priced technically acceptable evaluation on a pass/fail basis. Id.

Here, although the solicitation did not specifically state that the evaluation would be conducted on a lowest-priced technically acceptable basis, we conclude that the solicitation language could be reasonably interpreted consistent with an evaluation on this basis. In this regard, the solicitation did not specify that the technical

capability, delivery, and past performance criteria would be evaluated on a comparative basis. Alternatively, however, the solicitation provision could also be interpreted as providing for a best value tradeoff under the simplified procedures of FAR § 13.106-3, to the extent that the solicitation did not expressly state that award would be made on a lowest-priced, technically acceptable basis. Accordingly, because the solicitation could be interpreted as providing for an evaluation on either basis, we conclude that the solicitation was ambiguous regarding the agency's intended basis for award. See Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 10 (a solicitation ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible).

Because, however, the terms of the solicitation were not challenged prior to the time for receipt of initial bids, any challenge to those terms is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014) (protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed prior to the time set for receipt of initial proposals). As a consequence, we think that bidders may not have known the basis on which award was to be made, and the agency effectively had discretion to award a contract on either basis.⁸ Nonetheless, for the reasons discussed below, we conclude that the agency's flawed evaluation of FitNet's past performance means that the award decision was improper, regardless of which selection method was used.

Past Performance Evaluation

FitNet argues that DOI's decision not to award the contract to FitNet, based solely on its evaluation of past performance, constituted a de facto nonresponsibility determination, which should have been referred to the SBA under its COC procedures. The agency contends that it conducted a comparative best value evaluation of the bidders' past performance, and that FitNet's proposal was not selected for award "based upon that seller's poorer showing based upon prior performance," which is a matter of relative merit, not nonresponsibility. CO Statement at 6. For the reasons discussed below, we conclude that the agency's past performance determination essentially resulted in a nonresponsibility determination, which the agency should have referred to the SBA.

Under the Small Business Act, agencies may not find a small business nonresponsible without referring the matter to the SBA, which has the ultimate

⁸ In this regard, we note that although the solicitation stated that the award would be made based on "price, technical capability, delivery, and past performance," the award decision only discusses price and past performance in making its award. See AR, Tab 6, Award Decision, at 1.

authority to determine the responsibility of small businesses under its COC procedures. 15 U.S.C. § 637(b)(7); FAR subpart 19.6; Federal Support Corp., B-245573, Jan. 16, 1992, 92-1 CPD ¶ 81 at 4. Past performance traditionally is considered a responsibility factor, that is, a matter relating to the offeror's ability to perform the contract. See FAR § 9.104-1(c); Sanford & Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266 at 2. Traditional responsibility factors may be used as technical evaluation factors in a negotiated procurement, but only when a comparative evaluation of those areas is to be made. See, e.g., Medical Info. Servs., B-287824, July 10, 2002, 2001 CPD ¶ 122 at 5; Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 3. Comparative evaluation in this context means that competing proposals will be rated on a scale, relative to each other, as opposed to a pass/fail basis. Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38 at 6. We have cautioned that an agency may not disqualify a small business under the guise of a relative assessment of responsibility-based technical factors in an attempt to avoid referral to the SBA. Federal Support Corp., supra, at 4; Sanford & Sons Co., supra, at 3.

Here, as the agency acknowledges, and the record reflects, the agency based its award decision on a single technical factor--past performance--which as discussed above, is a traditional responsibility factor. See AR, Tab 6, Award Decision; Supp. AR (Oct. 3, 2014) at 2 n.2 (stating that no basis existed to distinguish between the quotes with respect to technical capability and delivery). The agency asserts that the contracting officer made a comparative assessment of the offerors' past performance and considered the "clear difference in past performance." Supp. AR at 2. There is no indication in the agency's evaluation or elsewhere in the record, however, that the agency performed a "comparative evaluation." See AR, Tab 6, Award Decision, at 1. In fact, there is no evidence that the agency evaluated the past performance of the awardee or of any of the other bidders, much less that the agency "rated [the competing proposals] on a scale, relative to each other."

Instead, it appears that the agency evaluated FitNet's past performance for the sole purpose of making an assessment of FitNet's ability to perform, i.e., to deliver. As the agency explains, the contracting officer decided not to award to FitNet because "the CO was reasonably concerned about FitNet's past performance," that is, concerned about "late delivery and unresponsiveness." Supp. AR (Oct. 3, 2014) at 2; CO Statement at 6. The contracting officer stated in the award decision: "I selected Nationwide Supplies . . . [b]ased on the Fedbid alert for late delivery and unresponsiveness issues, and my past experience dealing with Fitnet over late delivery [and] unresponsiveness issues." AR, Tab 6, Award Decision, at 1. In response to the protest, the contracting officer states: "FitNet's own history of late deliveries and unresponsiveness is what led to my decision to award to [Nationwide Supplies]." Supp. AR (Oct. 3, 2014), CO Statement, at 5-6.

We think the record, as supplemented by the agency's report on the protest, demonstrates that DOI evaluated FitNet's past performance on a pass/fail basis

with regard to the protester's ability to meet the delivery requirements.⁹ Under these circumstances, the agency's decision not to award to FitNet amounted to a determination of nonresponsibility, which required referral to the SBA for a COC determination.¹⁰

Next, FitNet challenges the agency's substantive analysis of its past performance. For the reasons discussed below, we conclude that the agency's past performance evaluation was unreasonable and constituted disparate treatment.

As a general matter, the evaluation of an offeror's past performance is within the agency's discretion. We will question the evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Env'tl. Servs. Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. The critical questions are whether the evaluation was conducted fairly, reasonably, and in accordance with the stated evaluation terms, and whether it was based on relevant information sufficient to make a reasonable determination of the firm's overall past performance. Id. It is fundamental that the contracting agency must treat all offerors equally, and

⁹ The result would be the same had the agency evaluated the bids on a lowest-priced technically acceptable basis. Where an agency utilizes a lowest-priced technically acceptable source selection process, the FAR provides that past performance need not be an evaluation factor at all. However, when it is included, it cannot be utilized for the purpose of making a "comparative assessment"; rather, past performance is to be determined solely on a pass/fail basis. FAR § 15.101-2. Our Office has long held that pass/fail evaluations of capability issues, such as past performance, are tantamount to responsibility determinations, with the result that a rating of "unacceptable" in these areas is the same as a determination of nonresponsibility. See, e.g., Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 6. Consistent with this premise, in the context of a lowest-priced technically acceptable evaluation scheme, where the contracting officer determines that a small business' past performance is not acceptable, "the matter shall be referred to the Small Business Administration for a Certificate of Competency determination." FAR § 15.101-2(b)(1). Although the agency states that this procurement was conducted under the provisions of FAR part 13, we think that the COC requirements apply here as well. In this regard, the COC referral requirements of FAR part 19 require agencies to make a referral whenever an agency finds an apparently successful small business offeror nonresponsible. FAR § 19.602-1. As discussed above, our Office views past performance as a responsibility criterion where it is used as a pass/fail factor.

¹⁰ At our request, SBA submitted comments on this issue; SBA agrees that the agency should have referred the matter to SBA for a COC determination, and argues that the protest should be sustained. SBA Comments at 5.

therefore it must evaluate offers evenhandedly against common requirements and evaluation criteria. Tidewater Homes Realty, Inc., B-274689, Dec. 26, 1996, 96-2 CPD ¶ 241 at 3.

Here, with regard to past performance, the solicitation stated only that “award will be made to the responsible Seller whose offer conforming to the solicitation will be most advantageous to the Buyer on the basis of price, technical capacity, delivery, and past performance.” Solicitation at 2. As stated above, in evaluating FitNet’s past performance, the contracting officer relied upon a FedBid ActivityCard alert for FitNet, which listed “Late Delivery” and “Unresponsive to the Buyer Request,” as well as the contracting officer’s personal experience with FitNet from 2012. AR, Tab 6, Award Decision; Tab 3, FitNet’s Activity Card Report, at 2. With regard to FedBid’s ActivityCards, FedBid’s website explains that an alert is “a flag placed by a Buyer on a Seller’s account,” and that “[a] Buyer can place these alerts if they are dissatisfied with an aspect of the Seller’s performance on a particular buy on FedBid.”¹¹ FedBid website, available at: http://fedbid.custhelp.com/app/answers/detail/a_id/42. In addition, it states that the alerts “are active on the Seller’s account for 18 months, unless removed by the Buyer.” Id.

Based on our review of the record, we conclude that the agency’s reliance on the ActivityCard alert was unreasonable. FitNet’s ActivityCard showed a summary of 66 FedBid awards for a total value of approximately \$1.5 million, one of which was marked with an alert. AR, Tab 3, FitNet Activity Card, at 1-2. The alert stated only: “Alert Type: DLT, UBR.” Id. at 2. The contracting officer acknowledges that she did not investigate the basis for the alert, but rather, simply relied upon the fact that there was an alert, stating: “I relied upon the alerts¹² and did not investigate

¹¹ FedBid’s website also provides the following examples of the types of alert codes and what they represent:

DNO (Non-Delivery); DIN (Incomplete Delivery); DLT (Late Delivery);
DNC (Delivery of Non-Conforming Items); UBR (Unresponsive to the
Buyer); ONC (Other Non-Compliance with Solicitation); . . . OTH
(Other).

FedBid website, available at: http://fedbid.custhelp.com/app/answers/detail/a_id/42. It further explains that: “These alerts are located on a Seller’s Activity Card . . . [and] are active on the Seller’s account for 18 months, unless removed by the Buyer. FedBid cannot remove these alerts from Sellers’ accounts and any concerns regarding a Performance Alert should be addressed with the Buyer directly. Buyer contact information can be found next to the Performance Alert.” Id.

¹² In responding to the protest, the contracting officer refers to two alerts because the alert listed two alert codes: DLT, and UBR. Supp. AR (Oct. 3, 2014) at 4. The
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further.” Supp. AR (Oct. 3, 2014), CO Statement at 4. The agency also acknowledges that the alerts “do not include subjective determinations.” Id. Accordingly, although the contracting officer may have known the broad category of the alert code (e.g., unresponsive to the buyer), the contracting officer clearly did not know the basis for the alert.¹³

Moreover, the contracting officer does not state, nor does the record reflect, that she considered any of the 65 other awards cited for FitNet; instead, the agency simply found the alert identified “late delivery and unresponsiveness issues.” AR, Tab 6, Award Decision, at 1. On this record, we find the contracting officer’s reliance upon the alert to be unreasonable.¹⁴

With regard to the contracting officer’s personal experience with FitNet from 2012, FitNet contends that the delay referenced by the contracting officer was caused by the government end-user, not FitNet, and that based on this, the DOI’s Office of Small and Disadvantaged Business Utilization required that the contracting officer reinstate FitNet’s contract. Protester’s Comments (Oct. 7, 2014), at 4. The agency did not dispute these statements, and in fact, the contracting officer’s summary of the incident in the evaluation states that, after the contracting officer terminated the contract, FitNet responded that it “was unaware [the item] was not delivered [by the manufacturer],” and that the contracting officer thereafter offered to rescind her

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record indicates, however, that there was only one alert. AR, Tab 3, FitNet ActivityCard, at 1.

¹³ We note that during the course of this protest FitNet submitted evidence that the alert had been removed from FedBid by the other buyer agency. Email from NAF Procurement Analyst (Oct. 8, 2014).

¹⁴ We also note that the alert relied upon by the contracting officer was entered into FedBid’s system on June 18, 2014--the same date the contracting officer awarded the contract to Nationwide Supplies. AR, Tab 3, FitNet Activity Card, at 2. The contracting officer contends that reliance upon the alerts was reasonable because “[t]he vendor is aware of the FedBid alerts and can challenge them if they believe they are untruthful.” Supp. AR (Oct. 3, 2014) at 4. In this case, however, FitNet would not have had time to challenge the alert prior to the agency’s award decision. Regardless of the timing, however, to the extent the contracting officer believed the alert itself was proof of negative performance based on the contracting officer’s assumption that any inaccurate alerts would already have been resolved, this assumption was unreasonable.

decision to terminate the contract on the condition that FitNet “provided a delivery date [for] the [item].” AR, Tab 6, Award Decision. The contracting officer also stated that ultimately, delivery was confirmed, and “[t]he [item was] delivered to Riverside Indian School on 10/1/12.” Id. On the record before us, it is not clear that FitNet was at fault for the late delivery in the manner discussed by the contracting officer in the award decision. As such, the contracting officer’s reliance on this incident was not reasonable.

Finally, as previously discussed, there is no indication in the record that the agency conducted the same evaluation of the awardee’s past performance as it did of FitNet’s past performance.¹⁵ It is fundamental, however, that the contracting agency must treat all offerors equally, and therefore, must evaluate offers evenhandedly against common requirements and evaluation criteria. Tidewater Homes Realty, Inc., supra, at 3. The agency’s failure to do so here constituted disparate treatment. We sustain the protest on this basis.

SUMMARY AND RECOMMENDATION

We find that the agency in effect evaluated FitNet’s past performance on a pass/fail basis regarding the protester’s ability to meet the delivery requirements, and therefore, the agency’s decision not to award the contract to FitNet amounted to a determination of nonresponsibility, which the agency should have referred to the SBA for a COC determination. In addition, the agency unreasonably relied on the FedBid alert without knowing the basis of the alert, relied upon personal experience that is not supported by the record, failed to consider FitNet’s positive past performance, and did not evaluate the awardee’s past performance in the same manner as it evaluated FitNet’s past performance. Accordingly, the agency’s past performance evaluation was unreasonable and constituted disparate treatment. On this record, we sustain the protest.

The agency reports that Nationwide Supplies has already delivered all of the required equipment. AR at 3. Under these circumstances, corrective action is not available. See Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 4. In this regard, because the contract has already been performed, there is no purpose served in recommending that DOI refer the protester to the SBA for a Certificate of Competency review. We therefore recommend that FitNet be reimbursed for the costs of preparing its bid, as well as the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d).

¹⁵ Although the agency, in response to the protest, asserts that the contracting officer reviewed Nationwide Supplies’ past performance and performed a “comparative assessment,” Supp. AR (Oct. 3, 2014), at 2, there is no indication in the contemporaneous record that any such evaluation was conducted.

FitNet should submit its certified claims for costs directly to the contracting agency within 60 days after receipt of this decision. Id. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel