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## Decision

**Matter of:** DA Defense Logistics HQ

**File:** B-411153.3

**Date:** December 2, 2015

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Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest challenging the agency's evaluation of the protester's past performance as lacking relevant past performance as a prime contractor, and therefore warranted other than the highest past performance confidence assessment, is denied where the record shows that the agency's evaluation was reasonable, adequately documented, and consistent with the solicitation's evaluation criteria.
  2. Agency's award to another vendor with a higher-priced proposal and a superior past performance confidence assessment was a comparative best-value evaluation, and not a nonresponsibility determination requiring referral to the Small Business Administration.
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### DECISION

DA Defense Logistics HQ, a small business, of El Paso, Texas, challenges the award of a task order to Marton Technologies, Inc., a small business, of Newport News, Virginia, under request for proposals (RFP) No. W52P1J-14-R-0154, which was issued by the Department of the Army, U.S. Contracting Command-Rock Island, for logistics support services at Fort Riley, Kansas, as part of the Enhanced Army Global Logistics Enterprise (EAGLE) program. DA Defense challenges the Army's past performance evaluation.

We deny the protest.

## BACKGROUND

The RFP was issued as a small business set-aside and sought proposals from EAGLE basic ordering agreement (BOA) holders for logistics support services, including maintenance, supply, and transportation services at Fort Riley, Kansas. RFP at 2.<sup>1</sup> The RFP anticipated the award of a cost-plus fixed-fee task order with a fixed-price contract line item for the transition requirements. Id. The RFP contemplated a 1-year base performance period and four 1-year options. Id.

For the purposes of award, the agency was to evaluate three factors: (1) technical; (2) past performance; and (3) cost/price. Id. Under the technical evaluation factor, the Army was to evaluate proposals for technical acceptability on effectively a pass/fail basis. Id. at 68. Under the past performance factor, the agency was to conduct a qualitative assessment based on the offeror's recent past performance on efforts involving similar scope and magnitude of effort and complexities as required by the RFP, and assign a confidence assessment. Id. at 68, 72. The Army was to assess the contract references provided in the offeror's EAGLE BOA proposal, the EAGLE BOA annual review process, and previous EAGLE task order procurements. Id. at 71. The agency also reserved the right to consider information available from other sources. Id. Offerors were not required or allowed, with exceptions not relevant here, to provide additional past performance references with their proposals. Id. at 57. The Army was to consider the recency, relevancy, source, and context of the past performance information, as well as general trends in performance, and demonstrated corrective actions. Id. at 71. The agency also was to evaluate the past performance of any proposed teammate or subcontractor that was expected to perform 20 percent or more of the offeror's total proposed cost/price under the resulting order. Id. Under the cost/price evaluation factor, the agency was to evaluate for cost realism and cost/price reasonableness. Id. at 68.

The RFP contemplated a modified best-value basis for award. Award was to be made to the responsible offeror whose proposal conformed to the RFP's requirements and was determined to be the lowest evaluated priced proposal that was also determined to be technically acceptable with substantial confidence in past performance. Id. In the event that none of the technically acceptable offerors were assessed to have a substantial confidence assessment in past performance, the Army reserved the right to award to an offeror with other than a substantial confidence assessment. Id. at 69. In such an event, the source selection authority was to consider all factors and make a best-value determination, where past performance was to be significantly more important than cost/price. Id. at 68-69.

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<sup>1</sup> References herein to the RFP are to the version conformed through amendment No. 3.

The Army received 37 timely submitted proposals in response to the RFP. Agency Report (AR), Tab 14A, Source Selection Evaluation Board Report to the Source Selection Authority (Aug. 17, 2015), at 1. Following a proposal compliance review and evaluation of technical proposals, 9 proposals were found to be technically acceptable. Id. at 14-15. Relevant here, DA Defense and Marton submitted the two lowest-priced, technically acceptable proposals, and were evaluated as follows:

	<b>DA Defense</b>	<b>Marton</b>
<b>Technical</b>	Acceptable	Acceptable
<b>Past Performance</b>	Satisfactory Confidence	Substantial Confidence
<b>Evaluated Cost/Price</b>	\$58,319,660.57	\$60,236,910.59

Id. at 15, 21.

In accordance with the terms of the RFP, the source selection authority selected Marton, who was the responsible offeror that submitted the lowest-priced, technically acceptable proposal with a substantial confidence past performance assessment, for award. AR, Tab 14B, Source Selection Decision (Aug. 19, 2015), at 6.

## DISCUSSION

DA Defense raises three primary challenges to the Army's evaluation of its past performance. First, the protester argues that the agency relied on an unstated evaluation criterion when it considered whether an offeror had past performance as a prime contractor. DA Defense next argues that the Army unreasonably relied on adverse past performance information regarding the protester's proposed major subcontractor. Finally, the protester argues, in light of the RFP's evaluation scheme, that DA Defense's satisfactory confidence past performance assessment was tantamount to a nonresponsibility determination that was required to be referred to the Small Business Administration (SBA) for consideration under the SBA's certificate of competency program. For the reasons that follow, we find no basis to sustain DA Defense's protest on any of these grounds.<sup>2</sup>

<sup>2</sup> DA Defense raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's arguments and find that none provides a basis on which to sustain the protest. For example, DA Defense alleges that the Army unreasonably credited Marton's proposal based on the unstated evaluation criterion of having relevant past performance as a prime contractor. See Protest (Sept. 8, 2015) at 10-11. As addressed herein, we find nothing objectionable with the agency's consideration of an offeror's relevant past performance as a prime contractor. Thus, we find no basis to conclude that the Army unreasonably evaluated the awardee's proposal in this respect.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. Fox RPM Corp., B-409676.2, B-409676.3, Oct. 20, 2014, 2014 CPD ¶ 310 at 3. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

#### Past Performance As A Prime Contractor

DA Defense first argues that the Army relied on an unstated evaluation criterion in assessing whether an offeror possessed past performance as a prime contractor. See Protest (Sept. 8, 2015) at 11-15. The protester further argues that the agency evaluated DA Defense's past performance unfavorably based on its lack of relevant past performance as a prime contractor in violation of Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), which states, in relevant part, that an offeror without a record of relevant past performance "may not be evaluated favorably or unfavorably." See Protester's Comments (Oct. 19, 2015) at 3. The agency responds, relying on prior GAO decisions, that it reasonably evaluated the protester's past performance, including DA Defense's lack of relevant past performance as a prime contractor. See AR at 7-9. We find that the Army reasonably considered whether an offeror possessed relevant past performance as a prime contractor.

It is axiomatic that in a negotiated procurement an agency must evaluate proposals based on the solicitation's enumerated evaluation factors. FAR § 15.305(a); RTI Int'l, B-411268, June 26, 2015, 2015 CPD ¶ 206 at 12. Agencies, however, properly may evaluate proposals based on considerations not expressly stated in the solicitation where those considerations are reasonably and logically encompassed within the stated evaluation factor, and where there is a clear nexus between the stated and unstated criteria. Straughan Envtl., Inc., B-411650 et al., Sept. 18, 2015, 2015 CPD ¶ 287 at 8. Relevant here, we have previously found that, even where an RFP does not expressly state a specific preference for past performance as a prime contractor, an agency properly may take such information into account in its past performance evaluation as it is reasonably predictive of the quality of contract performance. See CAE USA, Inc., B-404625, Mar. 16, 2011, 2011 CPD ¶ 75 at 9; PMC Solutions, Inc., B-310732, Jan. 22, 2008, 2008 CPD ¶ 20 at 3.<sup>3</sup>

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<sup>3</sup> DA Defense attempts to distinguish CAE USA, Inc. and PMC Solutions, Inc., which were cited by the Army, arguing that those decisions did not involve small business set-aside procurements. See Protester's Comments (Oct. 19, 2015)

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The RFP here contemplated that the Army would evaluate the relevancy of a past performance reference based on whether the reference was similar to the RFP requirements in scope, magnitude of effort, and complexities. RFP at 72. The Army found that DA Defense submitted relevant past performance demonstrating its prior experience as a subcontractor performing the performance work statement's maintenance, supply, and transportation requirements. AR, Tab 13B, Past Performance Evaluation for DA Defense (June 2, 2015), at 60, 63-64. The agency, however, found that DA Defense did not demonstrate relevant past performance with the overarching program management tasks that the protester, as the prime, would have to fulfill on the resulting order.<sup>4</sup> Id. at 63.

We find nothing unreasonable in the agency's consideration of DA Defense's lack of relevant past performance in managing contracts with similar scope and magnitude

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at 3-4. The protester's argument, however, is not persuasive, as we have previously reached similar determinations in protests involving small business set-aside procurements. See, e.g., MIRACORP, Inc., B-410413.2, Feb. 23, 2015, 2015 CPD ¶ 98 at 5; Insect Shield Mfg., LLC, B-408067.3, Aug. 8, 2013, 2013 CPD ¶ 235 at 3-4. The protester also contends that the decisions are distinguishable because those procurements, unlike this RFP, did not result in ineligibility for award for offerors with less than the highest past performance confidence assessment. See Protester's Comments (Oct. 19, 2015) at 4-5. Contrary to DA Defense's characterization, however, a satisfactory confidence rating did not render a proposal ineligible for award. Rather, the RFP's modified best-value basis for award provided that award would be made to the offeror whose proposal was the lowest-priced, technically acceptable with a substantial confidence rating. The RFP, however, provided that in the absence of any such proposal, the other technically acceptable proposals with lesser confidence assessments would be considered for award on a best-value basis. RFP at 68-69. Thus, we do not find this argument to provide an adequate basis for distinguishing our prior decisions.

<sup>4</sup> DA Defense also argued in its initial protest that the Army's evaluation was unreasonable because the protester had two past performance references where it performed as a prime contractor. Protest (Sept. 8, 2015) at 14-15. The agency report, however, specifically responded to the protester's allegation and identified where in the contemporaneous evaluation record the agency determined that the references were not relevant because they did not meet the solicitation's established average annual dollar values. AR at 6-7 (citing Tab 13B, Past Performance Evaluation for DA Defense (June 2, 2015), at 5-7). DA Defense did not contest or otherwise address in its comments this aspect of the Army's contemporaneous evaluation or response to the protest. Consequently, we consider this argument abandoned. Advanced Techs. & Labs. Int'l, Inc., B-411658 et al., Sept. 21, 2015, 2015 CPD ¶ 301 at 4-5 n.4.

of effort and complexities as those required by the RFP. Ultimately, the significance of, and the weight to be assigned to, a proposed prime contractor's experience or past performance--or lack thereof--is a matter of contracting agency discretion. See MIRACORP, Inc., supra.

Furthermore, we find no basis to conclude that the Army violated FAR § 15.305(a)(2)(iv) by "unfavorably" evaluating the protester based on its lack of relevant past performance as a prime contractor. The agency did not "unfavorably" evaluate the protester for its lack of relevant past performance as a prime contractor; rather, the Army reasonably determined that the protester had not demonstrated sufficiently relevant past performance to warrant the highest possible confidence assessment under the RFP's qualitative evaluation criteria. Nonetheless, the Army concluded that there was a "reasonable expectation" that DA Defense would successfully perform the required effort, and thus assigned a satisfactory confidence assessment. AR, Tab 13B, Past Performance Evaluation for DA Defense (June 2, 2015), at 63-64. On this record, we find no basis to sustain the protester's objection to the agency's evaluation of its past performance.

#### Evaluation of DA Defense's Major Subcontractor's Past Performance

DA Defense also argues that the Army placed unreasonable weight on adverse past performance information regarding [DELETED], a proposed major subcontractor to the protester. See Protest (Sept. 8, 2015) at 17. The agency responds that it reasonably considered the context of the adverse past performance information and determined that the adverse past performance information did not affect the confidence rating for the protester. AR at 13. The record demonstrates that DA Defense's past performance was not ultimately negatively affected by the adverse information regarding [DELETED].<sup>5</sup>

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<sup>5</sup> DA Defense also argues that the Army unreasonably considered [DELETED]'s past performance information submitted in [DELETED]'s own EAGLE BOA and associated submissions in the EAGLE program, arguing that "[n]othing in [the RFP] provides for the Agency to consider [DELETED]'s own BOA proposal." See Protest (Sept. 8, 2015) at 17. The protester's argument is without merit. The RFP unequivocally stated that "[t]he Government will include in its past performance evaluation any proposed teammate or subcontractor that is expected to perform 20% or more of the Offeror's total proposed price for this effort." RFP at 71. The RFP further states that "[i]f an Offeror proposes the use of . . . major subcontractors (who are expected to perform 20% or more of the Offeror[']s total proposed price for this effort) . . . the Offeror[']s past performance record will be assessed in its totality to determine the Offeror[']s past performance rating." Id. (emphasis added). Thus, DA Defense's argument that the Army could not consider relevant past performance information for the protester's major proposed subcontractor is contrary to the RFP's express terms. To the extent that the protester challenges the RFP's

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The RFP notified offerors that the Army would evaluate the past performance of proposed subcontractors that were anticipated to perform 20 percent or more of the required effort on the resulting order. RFP at 71. DA Defense identified [DELETED] as a major subcontractor. The past performance evaluators reviewed available Contractor Performance Assessment Reports (CPAR) for recent and relevant [DELETED] past performance references. The evaluators found that the majority of the references included positive past performance information, but identified adverse past performance in the CPARs for three of the references. AR, Tab 13B, Past Performance Evaluation Report for DA Defense (June 2, 2015), at 60-62. The Army subsequently engaged in two rounds of clarifications pursuant to FAR § 15.306(a)(2) with DA Defense to allow the protester and [DELETED] an opportunity to respond to the adverse past performance information. AR, Tab 13C, Past Performance Clarification Request (May 14, 2015); Tab 13E, Protester's Response to May 14, 2015 Clarification Request (May 18, 2015); Tab 13F, Past Performance Clarification Request (May 22, 2015); Tab 13H, Response to May 22, 2015 Clarification Request (May 27, 2015).

In the final consensus report, the evaluators found that: (1) "the positive feedback outweigh[ed] the negative feedback;" (2) the adverse information related exclusively to performance outside the continental United States (including in hostile environments), while the work under the RFP will be performed within the United States; and (3) due to the mitigating information provided by the protester and [DELETED], "[DELETED]'s adverse past performance [information] does not affect the confidence rating for DA-Defense." AR, Tab 13B, Past Performance Evaluation Report for DA Defense (June 2, 2015), at 62-63. On this record, the protester has failed to demonstrate that the agency unreasonably downgraded its past performance assessment based on adverse information regarding its major proposed subcontractor.

#### Certificate of Competency Requirement

Finally, DA Defense argues that, even assuming the confidence assessment assigned to its past performance was reasonable, under the solicitation's modified best value evaluation scheme, which required a substantial confidence rating to be eligible for award, the satisfactory confidence assessment was tantamount to a nonresponsibility determination. The protester contends that because the Army made a de facto nonresponsibility determination and the protester is a small business, the agency was required to refer the matter to the SBA for review under the SBA's certificate of competency program pursuant to 13 C.F.R. § 125.5 and

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express terms, any such challenge in this post-award protest is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1).

FAR subpart 19.6. See Protest (Sept. 8, 2015) at 8-10. The Army and Marton respond that no referral to the SBA was necessary because the agency did not make a responsibility determination with respect to the protester, and the protester was not otherwise the apparent successful offeror. See AR at 9 (citing Rice Servs., Inc., B-411540, B-411540.2, Aug. 20, 2015, 2015 CPD ¶ 260 at 4 n.2); Intervenor's Comments (Oct. 19, 2015) at 1-2.

We find no merit to DA Defense's argument that the Army was required, based on the protester's satisfactory confidence past performance assessment, to refer the matter to the SBA for a certificate of competency review. An agency may use traditional responsibility factors, such as past performance, as technical evaluation factors where, as here, a comparative evaluation of those areas is to be performed. Source Diversified, Inc., B-403437.2, Dec. 16, 2010, 2010 CPD ¶ 297 at 8 n.11; Zolon Tech, Inc., B-299904.2, Sept. 18, 2007, 2007 CPD ¶ 183 at 8; T. Head & Co., Inc., B-275783, Mar. 27, 1997, 97-1 CPD ¶ 169 at 3-4. No SBA referral is required where a small business offeror's technically-acceptable proposal is not selected for award because another offeror's proposal is evaluated as superior under a comparative analysis or because of a cost/technical tradeoff analysis. Zolon Tech, Inc., *supra*; CMC & Maint., Inc., B-292081, May 19, 2003, 2003 CPD ¶ 107 at 4.

There was no pass/fail evaluation of past performance here. The record shows that, consistent with the RFP's anticipated qualitative assessment of past performance, DA Defense's past performance was evaluated as satisfactory as part of a comparative, best-value evaluation, not a responsibility determination. AR, Tab 14A, SSEB Report (Aug. 17, 2015), at 21-25; Tab 14B, Source Selection Decision (Aug. 19, 2015), at 4-5. Moreover, the RFP did not preclude award to an offeror with a satisfactory confidence rating. Instead, as discussed above, the solicitation provided for award to the offeror that submitted the lowest-priced proposal that was technically acceptable, and had a substantial confidence rating for past performance; in the event no offeror had a substantial confidence rating, offerors who had satisfactory confidence ratings would be considered. On this record, we agree with the Army that it had no obligation to refer its qualitative assessment of DA Defense's satisfactory past performance to the SBA for a certificate of competency.

The protest is denied.

Susan A. Poling  
General Counsel