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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Choctaw Staffing Solutions, Inc.

File: B-412152.3

Date: August 24, 2016

Nathaniel R. Cox, and Sarah L. Beams, Choctaw Staffing Solutions, Inc., for the protester.

Col. Matthew J. Mulbarger, and Jason R. Smith, Esq., Department of the Air Force, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated protester's past performance less favorably because it involved performance by predecessor company whose key employees would be involved in the protester's performance is dismissed as untimely where solicitation expressly provided that performance by offeror itself would be viewed more favorably than performance by predecessor, and protester did not challenge those express terms of solicitation until after award.

2. Protest that agency misevaluated past performance and made an unreasonable source selection decision is denied where contemporaneous record of evaluation demonstrated reasonable evaluation judgments and reasonable basis for selection of awardee's lower-priced proposal.

DECISION

Choctaw Staffing Solutions, Inc., of Durant, Oklahoma, a small business, protests the award of a contract to 1st American Systems and Services, LLC (1A), of Falls Church, Virginia, by the Department of the Air Force under request for proposals (RFP) No. FA8052-15-R-0017, to provide services to carry out the Air Force family advocacy program (FAP) at locations in Europe. Choctaw argues that the Air Force misevaluated the proposals under the past performance factor, and made an unreasonable source selection decision.

We deny the protest.

The Air Force issued the RFP on September 4, 2015, as a set-aside competition for participants in the Small Business Administration's (SBA) section 8(a) program. RFP at 1, 16, 50-51.¹ The solicitation anticipated the award of a single commercial item indefinite-quantity personal services² contract for a 5-year ordering period. Id. at 1, 48-49, 51-52. The RFP indicated that services consistent with an accompanying performance work statement (PWS) were required for Air Force bases in Italy, Turkey, the United Kingdom, and Germany. RFP appx. A at 1. The contractor was required to supply staffing for 53 full-time equivalents, organized in six categories: family advocacy intervention specialist, family advocacy treatment manager, family advocacy outreach manager, family advocacy nurse, family advocacy program assistant, and domestic abuse victim advocate. RFP at 3-8 & RFP appx. A at 1 (estimated staffing pattern).

Proposals were to be evaluated under three factors: technical capability, past performance, and price. Id. at 23. The technical capability factor was to be evaluated on an acceptable/unacceptable basis. For proposals that were rated technically acceptable, the agency would evaluate past performance qualitatively, and then select an awardee using a past performance/price tradeoff where past performance was to be significantly more important than price. Id. at 23-24.

The RFP provided several provisions relating to the evaluation of past performance. First, the RFP specified that "[r]elevancy for this solicitation is defined as behavioral health experience in Outside the Continental United States (OCONUS) locations with contract value of at least \$10 Million." RFP at 16. Accordingly, the RFP went on to urge offerors to "include all of these aspects." Id. Next, the RFP stated that "[c]ontracts performed by the company submitting the proposal are viewed more favorably than those performed by predecessor companies and/or key personnel." RFP at 28. Finally, the RFP provided that offerors could submit a maximum of three past performance references, and that "[p]ast performance references for an individual task order count as a contract; multiple task orders under a contract count as separate contracts." Id. at 16.

Choctaw's proposal identified only past performance by its corporate predecessor, Choctaw Professional Resource Enterprise, under three task orders for FAP services at three overseas locations. AR, Tab 8, Choctaw Past Performance Proposal, at 3. Choctaw explained that the past performance was relevant because it involved essentially the same services, and was performed by a predecessor

¹ Except where identified specifically, citations in this decision to the RFP (and its appendices) are to the consolidated RFP found at Tab 4 of the agency report (AR) submitted to our Office.

² The RFP references legal authority for personal service contracting in Defense Federal Acquisition Regulation Supplement § 237.104.

company using the same key personnel. Id. Choctaw also identified each order as having a “contract value” of over \$10 million. Id. at 4. 1A’s proposal identified its incumbent indefinite-delivery/indefinite-quantity (IDIQ) contract for FAP services as relevant past performance. AR Tab 9B, Proposal Analysis Report, at 11.³

The Air Force received proposals from three offerors, including Choctaw and 1A. Contracting Officer’s Statement at 4. After evaluating the proposals, the Air Force selected Choctaw’s proposal for award, on the basis that the firm’s better past performance justified paying a higher price. 1A filed a timely protest with our Office challenging the agency’s evaluation that resulted in the award to Choctaw. The Air Force decided to take corrective action by reevaluating 1A’s and Choctaw’s proposals and making a new source selection, so our Office dismissed the protest as academic.

After reevaluating both firms’ proposals, the Air Force again concluded that both Choctaw’s and 1A’s technical approaches were acceptable. AR, Tab 9B, Performance Assessment Report, at 10, 21.

In evaluating past performance for Choctaw, the Air Force considered the three task orders identified in the firm’s proposal and independently sought information about the IDIQ FAP contract with Choctaw Professional Resource Enterprise, under which the orders had been issued. Id. at 21-22. The agency noted that although Choctaw had identified each order as having a “contract value” of over \$10 million, each order actually had a value below \$4 million. Id. at 24. Nevertheless, the evaluators decided that the three orders should each be evaluated as somewhat relevant, and the IDIQ contract should be evaluated as very relevant (since its value exceeded \$10 million). Id. at 24. The evaluators then determined that the performance of Choctaw’s predecessor under all four references was positive, but they assigned a rating of satisfactory confidence, which was lower rating than they had assigned in the initial evaluation. Id. at 25. The evaluators determined that since Choctaw’s past performance had all been by a predecessor company (and key personnel), rather than by Choctaw itself, a rating of satisfactory confidence reasonably represented the agency’s confidence in Choctaw based on its predecessor’s past performance. Id. at 25-26.

³ The contents of 1A’s proposal are discussed here only to the extent that they were included in the redacted version of the agency report provided to Choctaw. Since Choctaw was not represented by counsel who could review proprietary and source selection sensitive information under a protective order, only our Office reviewed unredacted agency report exhibits. This decision is based on our review of the unredacted record, even though our discussion of the record is necessarily limited to information in the redacted documents.

With respect to 1A's past performance, the evaluators considered the IDIQ FAP contract, identified in the firm's proposal, and also independently sought information about the firm's performance under one task order that had been issued to 1A under that contract. Id. at 11. As they had in evaluating Choctaw, the evaluators found the task order to be somewhat relevant (because its value was below \$10 million), but found the IDIQ FAP contract to be very relevant. Id. The evaluators considered both positive and negative aspects of 1A's performance, and concluded that, as a whole, 1A's past performance merited a rating of satisfactory confidence. Id. at 14.

The agency then proceeded to evaluate each offeror's price. After the reevaluation, the overall ratings for the protester and awardee were as follows:

Offeror	Technical	Past Performance	Evaluated Price
Choctaw	Acceptable	Satisfactory Confidence	\$28.0 million
1A	Acceptable	Satisfactory Confidence	\$27.2 million

Id. at 13-14; 25-26; AR Tab 11B, Source Selection Decision, at 5.⁴

The source selection authority (SSA) considered the results of the reevaluation and discussed the reasons for each firm's past performance rating, including specific consideration of the fact that Choctaw's past performance had been performed by a predecessor whose key personnel would nevertheless be involved in the firm's performance. Id. at 5-6. The SSA also considered 1A's performance issues, corrective actions, and the fact that 1A itself was responsible for the past performance. Id. at 6-7. The SSA then considered each firm's evaluated price, and concluded that Choctaw's past performance, when compared to 1A's, did not provide a basis for the agency to pay a 3 percent higher price to award the contract to Choctaw. Id. Accordingly, the SSA selected 1A's proposal for award. Id. at 7-8.

Following notice of the award and a debriefing, Choctaw filed this protest.

ANALYSIS

Choctaw argues that the Air Force miscalculated both firms' past performance and departed from the source selection criteria in the RFP. The protest argues that the agency improperly diminished the significance of Choctaw's past performance, improperly considered past performance in multiple task orders for 1A, and departed from the solicitation's best value criteria in selecting 1A for award due to its lower evaluated price. Protest at 3-5. We address each argument in turn below,

⁴ The protest does not challenge the price evaluation.

and conclude that the agency's evaluation and source selection decision were reasonable.

Evaluation of Choctaw's Past Performance

Choctaw argues that, despite the language of the solicitation expressly providing that past performance of the offeror would be viewed more favorably than past performance by a predecessor company, Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iii) prohibited the Air Force from viewing past performance in the manner set out by the solicitation. Protest at 3; Protester's Comments at 2-3.

In response, the Air Force notes that the RFP specifically provided that "[c]ontracts performed by the company submitting the proposal are viewed more favorably than those performed by predecessor companies and/or key personnel," RFP at 28, and points out that the firm's only past performance was by its predecessor, Choctaw Professional Resource Enterprise. AR at 4. Accordingly, the Air Force argues, Choctaw is raising an untimely challenge to the express terms of the RFP, and should be dismissed on that basis. *Id.* Even if the protest were timely in this regard, the Air Force argues, the evaluation was reasonable because FAR § 15.305(a)(2)(iii) merely advises an agency to "take into account" the past performance by predecessors and key personnel, and does require an agency to give it the same status as past performance of the offeror itself. *Id.* at 5-6.

We agree with the Air Force. The solicitation here expressly disclosed how the Air Force would view past performance by the offeror versus the past performance of a predecessor firm. An argument that this solicitation language violates the FAR is a challenge to the terms of the solicitation and is, thus, untimely. See Liebert Fed. Sys., Inc., B-274823, Jan. 8, 1997, 97-1 CPD ¶ 45 at 9 (untimely post-award challenge that price evaluation using estimates provided in solicitation was unreasonable); Blue Rock Structures, Inc., B-287960.2, B-287960.3, Oct. 10, 2001, 2001 CPD ¶ 184 at 5 n.5 (untimely post-award challenge that past performance evaluation scheme was disadvantageous to protester). To be timely, a challenge to the terms of a solicitation must be filed before the closing date for the submission of proposals. 4 C.F.R. § 21.2(a)(1); e.g., Logistics Mgmt. Int'l, Inc., B-412837, June 6, 2016, 2016 CPD ¶ ____ at 3-4 (timely pre-proposal protest of solicitation provision that past performance of key personnel would not be considered relevant). Choctaw's protest was filed after award, making it untimely.

In its comments, Choctaw argues that its protest should nevertheless be considered under the significant issue and good cause exceptions to timeliness. Protester's Comments at 1.⁵ The good cause exception to GAO's timeliness rules is limited to

⁵ We also note that FAR § 15.305(a)(2)(iii) expressly permits an agency to conclude that key personnel experience (which is addressed in the same provision as
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circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest, while the significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision. Baldt Inc., B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3. Choctaw has shown no reason why it could not have challenged the terms of the solicitation before the award, nor has it demonstrated the presence of a significant issue; indeed, as cited above, our Office has addressed FAR § 15.305(a)(2)(iii) in previous decisions.⁶

Evaluation of 1A Past Performance

Next, Choctaw argues that the Air Force misevaluated 1A's proposal under the past performance factor by considering 1A's IDIQ contract for family advocacy program services as a whole. Choctaw argues that the RFP required the agency to limit its consideration to individual task orders under that contract. Protest at 4. Evaluating the IDIQ contract itself, rather than the individual order, improperly allowed the Air Force to credit 1A with broader past performance than separate analyses of individual task orders would have justified because each task order was at a single location, was valued under \$10 million, and the RFP limited offerors to no more than three past performance references. Id. at 4-5. Choctaw argues that an evaluation of 1A's past performance on individual task orders could only result in a past performance rating of somewhat relevant, placing it on par with the rating of Choctaw's task order past performance. Id. at 5.

(...continued)

predecessor company past performance) is not relevant to an offeror's past performance. Blue Rock, supra, at 5.

⁶ Choctaw also argues in its comments that the Air Force should have independently obtained other past performance information for contracts that Choctaw itself was performing, and that the information was "readily available." Protester's Comments at 3-4. However, Choctaw does not show that the past performance was so close at hand that the agency reasonably could not have overlooked it, nor does its argument show that the past performance (which Choctaw itself did not list in its proposal) would have improved the firm's past performance evaluation. While we have recognized that in certain limited circumstances involving past performance information, an agency has an obligation (as opposed to the discretion) to consider information that is "too close at hand," no part of this concept is intended to remedy a vendor's failure to include information in its own quotation. Affordable Eng'g Servs., Inc., B-407180.4 et al., Aug. 21, 2015, 2015 CPD ¶ 334 at 13. Accordingly, the argument does not provide a basis to sustain the protest.

The Air Force responds that the evaluation of 1A's past performance complied with the terms of the RFP because the agency evaluated the IDIQ contract, and the RFP language did not preclude doing so. According to the Air Force, the RFP statement that "references for an individual task order count as a contract; multiple task orders under a contract count as separate contracts" did not apply to the past performance information that 1A submitted about its IDIQ contract. AR at 7. The agency explains that the RFP provision "d[id] not prohibit offerors from providing past performance information on IDIQ contracts instead of task orders; rather it simply explain[ed] how the task orders w[ould] be treated." Id. Further, the agency argues that its decision to obtain and evaluate the IDIQ FAP contract held by Choctaw Professional Resource Enterprise benefited the protester as well. In particular, while none of the task orders identified by Choctaw met the \$10 million threshold in the RFP for being considered highly relevant, the IDIQ FAP contract was valued over \$10 million, and thus was deemed highly relevant (similar to 1A's evaluation). Id. at 7-8.

Even if the agency's decision to consider 1A's past performance under the IDIQ contract was contrary to the terms of the RFP, as Choctaw alleges, we nevertheless conclude that the protester has not shown that it was prejudiced by the alleged error. The Air Force evaluators considered both the IDIQ contract and order(s) under it for both firms, in assessing past performance.⁷ In each case, the evaluators found the IDIQ contract to be very relevant, and each order to be somewhat relevant. Accordingly, we see no prejudice to Choctaw from the agency's decision to evaluate 1A's IDIQ FAP contract. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Accordingly, we deny Choctaw's challenges to the evaluation of 1A's past performance.

Best Value Tradeoff

Finally, Choctaw argues that the Air Force placed greater weight on price than past performance in selecting 1A's proposal for award, contrary to the criteria in the RFP. Protest at 5. Choctaw bases this allegation on the alleged superiority of its own past performance. Id. Choctaw argues that 1A's past performance was not as extensive as Choctaw's past performance, and therefore should have been considered inferior. Id.

⁷ The RFP specifically noted that the agency could obtain and evaluate past performance information for contracts that the offeror had not listed. RFP at 19.

The Air Force argues that the contemporaneous record reflects careful consideration, first by the evaluators and then by the SSA, of the differences in the past performance records for Choctaw and 1A, as well as a reasoned explanation for why both companies received the same overall past performance rating. The Air Force also argues that the SSA set forth a reasoned judgment that Choctaw's past performance did not justify paying its higher evaluated price, that the SSA's conclusion was consistent with the RFP's evaluation criteria, and that the protester's objection provides no basis to sustain the protest. AR at 9-10.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of the technical (including past performance, as here) and price results, subject only to the tests of rationality and consistency with the RFP's evaluation factors. Brisk Waterproofing Co., B-276247, May 27, 1997, 97-1 CPD ¶ 195 at 3. The contemporaneous record here demonstrates the reasonableness of the agency's evaluation judgment: the SSA considered the basis for each firm's past performance evaluation and reasonably concluded that the past performance supporting Choctaw's proposal did not justify paying its price, when compared to 1A's past performance and price. Accordingly we have no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel