



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Continental Service Company

File: B-274531

Date: December 17, 1996

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DIGEST

Protest of agency's evaluation of protester's past performance is denied where evaluation was reasonably based on past performance reference surveys received by agency.

DECISION

Continental Service Company protests the award of a contract to Akima Corporation under request for proposals (RFP) No. SP0600-96-R-0046, issued by the Defense Fuel Supply Center, Defense Logistics Agency, for operation, maintenance, security, and protection services for the government-owned/contractor-operated petroleum storage terminal at the Defense Fuel Support Point (DFSP), Searsport, Maine. Continental, the low-priced offeror, principally challenges the agency's evaluation of its firm's and the awardee's past performance; the protester contends that the agency improperly rated its firm's past performance low and unreasonably rated Akima's past performance high, and that the agency is paying a disproportionate price premium in violation of RFP provisions.

We deny the protest of the evaluation of Continental's past performance and dismiss the protest of the evaluation of Akima's proposal.

Clause L201(c) of the RFP required all offerors to provide past performance data for the "three most recent contracts and subcontracts held, to include those in progress, that are related to the proposed contract." Clause M100 of the RFP provided that:

"[o]ffers that meet the minimum qualifications will . . . be evaluated based on price and past performance. . . . Past performance will be evaluated using reference data provided by the contractor under Clause L201(c). The Government reserves the right to consider any additional information on the offeror obtained through other means. . . . The Government is more interested in obtaining superior performance than lowest price. However, the Government will not pay a price premium that it considers disproportionate to the benefits associated with the superior performance. . . . Award will be made to the offeror who represents the best value combination of performance and price."

The agency received eight proposals by the May 28, 1996, closing date, including Continental's and Akima's. A past performance survey was distributed to each of the references provided by each offeror in its proposal. The 20-question survey was divided into two parts. The first part of the past performance survey included 12 questions regarding the contractor's compliance, responsiveness, ability, willingness, training, technical expertise, safety, pollution prevention, provision and treatment of equipment, cooperation, as well as overall performance, in meeting the contract's requirements; each question in this first part of the survey was to be answered with a numerical score of 1 through 3 to represent a rating of unsatisfactory, satisfactory, or good, respectively.¹ The second part of the survey included eight questions, requiring a yes/no response, regarding any statutory violations, issuance of corrective action requests or cure notices, failure to correct, termination for default, equitable price adjustment requests, financial problems, and whether the reference would award similar contracts to the contractor.²

¹The survey requested completion "by the person most knowledgeable of the contractor's day-to-day operations and overall quality of the provided services" and noted that "additional information may be obtained from others within your organization possessing further knowledge about the contractor." The following descriptions were provided in the survey instructions as guidance in providing element ratings: "good" (3 points) was defined as performance which exceeds some contractual requirements, while meeting other contractual requirements; "satisfactory" (2 points) was defined as performance which meets all contractual requirements; "unsatisfactory" (1 point) was defined as performance which meets some contractual requirements but does not meet other contractual requirements.

²For the questions in the second part of the survey, 2 points were to be added for every "no" response and 2 points were to be subtracted for every "yes" response, except that 4 points were to be either added or subtracted for the last question, regarding whether the reference would award a similar contract to the contractor.

Continental, the incumbent contractor of the services to be provided under the RFP, provided as its past performance references the firm's incumbent (then current) contract at DFSP Searsport, Maine, its current contract at DFSP Cincinnati, Ohio, and a previous contract at DFSP Charleston, South Carolina. Akima provided past performance references regarding an Air Force fuels management contract at Reese Air Force Base, a commercial plane refueling contract at Prudhoe Bay, Alaska, and a construction contract in Anchorage, Alaska. In evaluating Akima's past performance, the agency also independently obtained and considered past performance information regarding contracts held by Akima at three other DFSP locations under which Akima had recently started performing similar petroleum storage services.

During discussions, each offeror was given the opportunity to respond to the reference survey responses, and best and final offers were received and evaluated.³ In rating past performance, the contracting officer reviewed the surveys, the relevant contract files, and the offerors' explanations of the perceived performance deficiencies. Continental's proposal, which offered the lowest monthly price (at \$39,375), was rated [deleted] out of the eight proposals--for past performance; Akima's proposal, which offered the [deleted] monthly price (at \$42,662), was rated [deleted] for past performance. Finding that the combination of past performance and price of the Akima proposal offered the best value to the government, the contracting officer awarded a contract under the RFP to that firm on August 30. Subsequent to a debriefing held with the protester on September 6, Continental filed this protest with our Office on September 9. Continental protests the agency's evaluation of its past performance as unreasonable and based upon erroneous information.

The evaluation of technical proposals, including the evaluation of past performance, is primarily the responsibility of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any difficulties resulting from a defective evaluation. Federal Envtl. Servs., Inc., B-260289; B-260490, May 24, 1995, 95-1 CPD ¶ 261. In reviewing protests challenging an agency's evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and applicable statutes and

³The protester contends that the agency failed to hold meaningful discussions with Continental regarding the past performance evaluation. The record shows, however, that Continental was given an opportunity in discussions to meaningfully address its past performance ratings and, as discussed in this decision, that its responses were appropriately considered by the contracting officer in her evaluation of the protester's past performance.

regulations. Honolulu Marine, Inc., B-245329, Dec. 27, 1991, 91-2 CPD ¶ 586. A protester's mere disagreement with the agency's evaluation does not render it unreasonable. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454.

Continental specifically challenges its past performance ratings received from the DFSP Searsport reference. This individual rated the protester's past performance as [deleted] under nine survey questions, but [deleted] under three survey questions (awarding [deleted] point for each of the three questions).⁴ First, the Searsport reference rated the firm [deleted] for the contractor's compliance with contract terms. The contracting officer subsequently reviewed the Searsport past performance survey and confirmed the rating. The contracting officer found that the Searsport contract file included documentation regarding several instances in which the firm failed to meet stated contract requirements. For instance, the firm had been reported for [deleted] minimum of 15 days, and for failing to ensure [deleted] by the Quality Surveillance Representative (QSR) of [deleted] as required under the contract.

The contracting officer states that she considered the protester's explanations (for example, the protester contended that previous agency personnel had allowed a shorter [deleted] contrary to contract requirements, and that the QSR mistakenly had been omitted from the [deleted] reports) and also recognized that the contractor eventually corrected its performance deficiencies but did so only after the failures to comply were pointed out by the agency, and, in several instances, only after repeated communications on the deficiency matters. The contracting officer also found that after the Searsport past performance survey was completed, but prior to award, the protester was reported for its failure to [deleted] or less, as contractually required. Again, the contracting officer considered Continental's explanation for the deficiency, *i.e.*, Continental contended that 4 months earlier the agency had prohibited the use of [deleted] and the [deleted] to be maintained was difficult [deleted] and found that although the protester did eventually propose a reasonable [deleted] method to correct the deficiency, the documentation showed that there had been a clear failure to comply with the contract's [deleted] requirement. The contracting officer consequently accepted the score of [deleted] (*i.e.*, defined in the past performance survey as performance which [deleted] for the survey question regarding the contractor's compliance with contract terms. We find from our review that the documentation supports the contracting officer's finding that in a number of significant instances--*e.g.*, [deleted], submission of [deleted]

⁴The agency refutes the protester's contention that the contracting officer agreed to increase the Searsport reference ratings, but states that even if the DFSP Searsport [deleted] scores for Continental were increased to [deleted], the agency still would not have awarded the contract to Continental since its overall past performance ranking would not have improved.

reports and [deleted]--the protester failed to comply, at least initially, with clear contract requirements. Accordingly, we have no reason to question the contracting officer's decision to accept the unfavorable rating.

Second, the Searsport evaluator rated Continental's performance [deleted] for contractor preparation and training of personnel. The contracting officer reviewed the Searsport contract file and found documentation supporting the [deleted] training rating--for example, the file included correspondence regarding the contractor's failure to show that the terminal superintendent had successfully completed required environmental protection/hazardous waste management training in a timely manner. The QSR had reported the deficiency to Continental after the contract's required training deadline had passed and requested compliance or a waiver request. After a review of the individual's training certificates, which were determined to fall short of regulatory requirements, the protester's waiver request was denied. Although the contracting officer considered the contractor's explanation (*i.e.*, that it intended to seek a waiver), the contracting officer concluded that the contract's required time period for compliance clearly had not been met. Noting the agency's interest in safety and the contractor's delay in meeting the mandatory training requirement, the contracting officer accepted as reasonable the [deleted] rating for this survey question. Our review of the full evaluation record confirms that since the contract's time requirements for completion of the training were not met, the challenged rating assigned by the Searsport past performance reference and adopted by the contracting officer is reasonably supported; accordingly, we have no reason to object to the propriety of the past performance evaluation on this basis.

Third, the Searsport reference also rated the firm's performance as [deleted] for contractor compliance with required contractor-furnished equipment. The contracting officer, in evaluating the reasonableness of this reference response, found that the contract file contained--among reports of other equipment provision deficiencies that were resolved over time after the issuance of a series of communications with the contractor--documentation that the contractor failed to provide computer equipment required under the contract. The contracting officer states that she considered the contract file documentation and the contractor's explanations regarding each reported deficiency for failure to furnish required equipment. Regarding the QSR's deficiency report for Continental's failure to provide the required computer equipment (which report was prepared because the computer equipment still had not been provided more than 1 year after the start of contract performance), the protester explained, among other things, that the contract's computer specifications were obsolete, that the contract was modified to upgrade the specifications, and that Continental did provide the computer equipment shortly thereafter. The contracting officer, noting the contractor's unwarranted delay (more than 1 year from contract start) in satisfying the contract requirement, accepted the reasonableness of the Searsport reference score of

[deleted] for the contractor equipment requirement. Given the contractor's inadequately explained delay, we find nothing unreasonable with the contracting officer's decision.⁵

In sum, while the record contains Continental's explanations and interpretations of events that provide a more favorable view of the protester's past performance and possible mitigating circumstances for certain of Continental's shortcomings, there are legitimate bases for the contracting officer's acceptance of the Searsport past performance ratings. An agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, regardless of the contractor's disagreement with the agency's interpretation of the facts. Executive Closers, Inc., B-259848, Apr. 6, 1995, 95-1 CPD ¶ 184.

The protester also challenges the contracting officer's acceptance of the past performance scores received from the firm's two other DFSP references on the basis that individuals at those reference sites months earlier had rated the protester's past performance higher on reference surveys completed for another procurement. Regarding the DFSP Cincinnati reference survey, the protester contends that the survey should have been completed by the on-site QSR and not his supervisor who is stationed at a distant location. The record shows that for a prior DFSP procurement, the QSR at DFSP Cincinnati rated Continental's overall

⁵The other [deleted] past performance ratings by the Searsport reference involve a [deleted] answer ([deleted] to the question of whether there had been [deleted]). The protester challenges the reasonableness, and the consideration by the contracting officer, of the latter survey response. The record provides no reason, however, to question the contracting officer's consideration of this evaluator's response--as the contracting officer had told Continental during the procurement, this survey question requires a subjective response to be made within the reference's discretion and the reasonableness of the reference's opinion was to be assessed in terms of the information in the contract file. In light of the reasonably supported adverse information in that file, including the need for repeated communications in some instances to resolve contract compliance issues, we cannot find that the reference's subjective opinion in this matter is not reasonably based, and we believe the contracting officer acted properly in considering it. Contrary to the protester's allegations, there is no showing of intentional bias by the Searsport evaluator against Continental's interests. Further, although the protester contends that the Searsport reference has unreasonably exaggerated "trivial" noncompliances, as we stated above, the record contains support for the challenged ratings, and we do not agree with Continental that each referenced requirement was trivial. In its legitimate interests of safety and the proper, efficient operation of the terminal, the agency included those requirements in the contract--Continental fell short of some of those requirements and was rated accordingly.

performance higher than his supervisor did here. The record also shows, however, that in her distribution of the current reference surveys, the contracting officer attempted to contact the QSR at DFSP Cincinnati, but that she was told he was to be away from his office for several weeks. Consequently, the contracting officer requested that his supervisor--who was the individual ultimately responsible for quality matters on the contract and to whom the QSR reported, who traveled to the DFSP Cincinnati site several times each year and who was a knowledgeable and appropriate reference--complete the survey in the QSR's absence. Continental was rated by the QSR's supervisor as [deleted] for each of the survey questions in the first part of the survey.

We see nothing objectionable here; each procurement is a separate transaction and the prior past performance evaluation data need not govern the current evaluation process where the current evaluation information was obtained from a reasonable and appropriate source. See Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155. The fact that there is a disparity in scores given by the two reasonably knowledgeable evaluators at issue here is not a basis to object to the propriety of the more recent evaluation; completion of the reference survey clearly involves some degree of subjectivity which logically could produce a difference in point scores.⁶ See Integrated Microcomputer Sys., Inc., B-239126.4, Sept. 11, 1990, 90-2 CPD ¶ 195. (The protester also provides no basis for us to question the slight disparity in its current past performance score from the DFSP Charleston site compared to that received during the prior procurement.)⁷

⁶Although the protester correctly contends that an additional [deleted] points should be added to its DFSP Cincinnati past performance score for that reference's failure to answer a question regarding any equitable adjustment requests (which should have been answered in the negative warranting an addition of [deleted] points), the addition of the [deleted] points does not materially affect the protester's overall past performance evaluation score or ranking. Further, the agency states that even if each of the higher DFSP Cincinnati past performance scores from the prior procurement were considered here, it would not have affected the protester's past performance ranking among the offerors.

⁷The protester contends that the agency's evaluation of its past performance effectively constitutes a nonresponsibility determination which should have been referred to the Small Business Administration (SBA) for review. The record does not support this contention. Rather, the record shows that the agency conducted a comparative evaluation of past performance which is different from determining responsibility and which is not a matter subject to SBA referral and which also, contrary to the protester's characterization of it, did not constitute a de facto debarment of the firm. See JCI Envtl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299.

Continental next protests that the agency's evaluation of Akima's past performance was unreasonable, that Akima failed to meet certain alleged definitive responsibility criteria in the RFP, and that the award is improper because the agency is paying a disproportionate price premium on the basis of an improper evaluation. Continental is not an interested party entitled to raise these issues.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), as amended by Pub. L. No. 104-106, §§ 4321(d), 5501, 5603, 110 Stat. 186, 674, 698, 700 (1996), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, section 21.0(a), 61 Fed. Reg. 39,042 (July 26, 1996) (to be codified at 4 C.F.R. § 21.0(a)). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Here, the agency's written source selection decision clearly states that even if Akima were not considered for award, the contract would not have been awarded to Continental because another firm's proposal [deleted] and was ranked next in line for award. Since there has been no challenge to the eligibility for award of the intervening offeror that would precede the protester in eligibility under this solicitation, the protester lacks the direct economic interest required to maintain a protest of the evaluation of Akima's proposal and the award which was based on that evaluation; accordingly, these protest contentions are dismissed.

Comptroller General
of the United States