



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: IGIT, Inc.

File: B-275299.2

Date: June 23, 1997

Darcy V. Hennessy, Esq., Moore, Brower, Hennessy & Freeman, P.C., for the protester.

Lynn Hawkins Patton, Esq., and Christopher Solop, Esq., Ott & Purdy, for Penn Enterprises, Inc., an intervenor.

Col. Nicholas P. Retson and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that agency conducted an unreasonable evaluation of past performance is denied where the record shows that the agency evaluation was fair, comprehensive and generally in accordance with the solicitation's stated evaluation criteria. In instance where evaluation appeared to deviate from the stated criteria, the result of the deviation was minimal and protester was not prejudiced.

2. Protester's claim that agency failed to advise it during discussions of perceived problems with its past performance is denied where the record shows that the protester was clearly aware of the agency's concerns and shows that the agency expressly asked about protester's alleged poor performance of the earlier contract during written discussions.

DECISION

IGIT, Inc. protests the decision of the Department of the Army to award a contract to Penn Enterprises, Inc., pursuant to request for proposals (RFP) No. DABT31-95-R-0017, for laundry and dry cleaning services at Fort Leonard Wood, Missouri. IGIT argues that the Army's decision to award to Penn is based on bias against IGIT, which translated to an unreasonable evaluation of the past performance portion of each offeror's proposal. IGIT also claims that the Army failed to hold meaningful discussions with it regarding its proposal.

We deny the protest.

BACKGROUND

This protest is the third challenge by IGIT to the Army's procurement of laundry and dry cleaning services at Fort Leonard Wood. A brief history of the procurement is set forth below.

IGIT was the incumbent contractor performing these services under a contract awarded January 31, 1995, pursuant to sealed bidding procedures. Although IGIT's initial contract was awarded for a period of 1 year with four 1-year options, the Army decided shortly after award to refrain from exercising the options. Instead, the Army issued an RFP for the services on December 10, 1995.

IGIT concluded that the decision not to continue its contract after the base year period was based on improper racial bias and sought to bring the matter to the attention of its congressional representative. When the Fort Leonard Wood contracting officials became aware that IGIT had furnished its congressman an entry from the facility's internal solicitation register--showing a lump-sum government estimate for the cost of the laundry and dry cleaning services--the Army concluded that IGIT had an unfair competitive advantage over other offerors and barred the company's proposal from further consideration. IGIT protested the Army's exclusion of its proposal and claimed that the exclusion was in retaliation for IGIT's efforts to pursue its discrimination claim. While our Office did not reach the issue of racial bias, we concluded that, under the circumstances, excluding IGIT from the competition was unreasonable. We recommended that the lump-sum estimate be provided to all offerors and that IGIT be permitted to compete. IGIT, Inc., B-271823, Aug. 1, 1996, 96-2 CPD ¶ 51.

After reinstating IGIT to the competition, the Army held written and oral discussions with the company, and permitted it to submit a best and final offer (BAFO). The competition to which IGIT was reinstated was conducted in accordance with the terms of the RFP issued on December 10, 1995. Section M of the RFP, as modified by amendment 0006, advised offerors that proposals would be evaluated for past performance, technical merit, and price. The RFP explained that the past performance evaluation factor would be significantly more important than the technical and price factors, which would be weighted equally. At the conclusion of the evaluation, both IGIT's and Penn's proposals--the only two in the competitive range--received very favorable technical scores and were viewed as essentially equal with respect to technical and price, but Penn's proposal was evaluated significantly higher under the past performance factor.¹ On October 18, 1996, Penn received

¹The Army's conclusion that the two offers were essentially equal with respect to technical merit and price is based on the fact that IGIT received [deleted] of 25 available points under the technical factor, while Penn received [deleted] points.
(continued...)

award of the contract after the source selection official at Fort Leonard Wood determined that Penn's proposal offered the best value to the government.

On October 28, IGIT again protested to our Office, arguing that the Army failed to conduct adequate discussions regarding certain areas of its past performance and failed to permit it to submit a revised proposal after allowing it an opportunity to comment on other areas. The protest also renewed IGIT's claim that Fort Leonard Wood contracting officials were biased against the company. In response, the Army agreed to conduct a new round of discussions concerning past performance only, and agreed to transfer responsibility for evaluating the past performance of IGIT and Penn to another facility--i.e., Fort Knox, Kentucky. Since the Army's corrective action rendered the protest academic, our Office dismissed the case. IGIT, Inc., B-275299, Dec. 3, 1996.

By identical letters dated January 23, 1997, Fort Knox contracting officials invited IGIT and Penn to submit new past performance packages for review. The letters explained that the offerors could include any information previously submitted, plus any additional information the offerors might want to submit, including any further response to discussion questions asked by the Fort Leonard Wood evaluators. The letters also advised that the technical and price evaluations performed by Fort Leonard Wood--wherein the offers were viewed as essentially equal--would not be revisited.

After conducting discussions with both offerors, and permitting each offeror to submit additional information in response to evaluator concerns, the Fort Knox evaluators assigned IGIT a past performance score of [deleted] points, out of 50 possible points, and assigned Penn a score of [deleted]. The past performance scores together with the technical ratings were used to calculate a risk assessment. Penn received a risk assessment of [deleted], with 1.00 being the maximum possible score.² IGIT received a risk assessment of [deleted]. Using the past performance score and the numerical risk assessment, the Fort Knox selection official decided that Penn's proposal represented the best value to the government, given the relative equality between Penn and IGIT in technical scores and prices. By letters dated February 26, both offerors were advised of the agency's findings, and this protest followed.

¹(...continued)

With respect to price, IGIT's total price of [deleted] million was slightly lower than Penn's total price of \$5.589 million, a difference of approximately [deleted].

²The Fort Knox evaluators explain that a risk assessment of 1.00 is equal to a 100 percent certainty that the contract will be performed as stated without problems.

ANALYSIS

IGIT's primary criticism of this procurement is that the Army is biased against it. Essentially, IGIT argues that the Army's ongoing bias in this case resulted in an unreasonable evaluation of proposals and in a failure to hold meaningful discussions with it regarding its proposal. IGIT also complains that our two prior decisions failed to reach the issue of bias, and it resubmits the claims of bias presented in those two earlier cases--one of which was sustained on other grounds, one of which was dismissed as academic after the Army took corrective action.

As a preliminary matter, we note that, at this juncture, the issues before our Office related to bias are limited. First, in response to IGIT's second protest--most of which focused on the evaluation of past performance--the Army elected to permit IGIT and Penn to submit new past performance packages which would be evaluated afresh by contracting officials from another Army installation. For the portion of the review related to the other two evaluation factors--*i.e.*, technical merit and price--the Army's letters of January 23, 1997, expressly advised both offerors that the existing evaluation would remain intact. If IGIT disagreed with that decision, it was required to protest within 10 days of its receipt of the Army's letter. Any complaint related to the evaluation of technical merit or price is now untimely.³ 4 C.F.R. § 21.2(a)(2) (1997).

In addition, we note that IGIT's remaining claim of bias has been largely addressed by the Army's decision to move the evaluation of past performance from Fort Leonard Wood to Fort Knox. Since IGIT expressly states that it is not accusing the Fort Knox evaluators of bad faith or racial bias, IGIT Comments on the Agency Report, Apr. 30, 1997, at 1, its only remaining concern is that the Fort Knox evaluators relied on allegedly tainted information when they solicited the views of Fort Leonard Wood officials familiar with IGIT's performance of the contract there. We will discuss this issue after reviewing the specific challenges to the Army's reevaluation.

Although IGIT challenges nearly every facet of the Army's past performance review, its complaints generally raise the following issues: (1) the Army unfairly performed a more detailed review of its past performance than it did of Penn's, including placing undue reliance on problems in IGIT's past performance; (2) the evaluators unreasonably concluded that IGIT lacked financial stability, and wrongly made several negative evaluation comments about staffing changes despite IGIT's high ratings for proposed staff; and (3) the Fort Knox evaluators deviated from the

³For the record, it is difficult to see how IGIT was treated unfairly under the technical evaluation factor, given the evaluators' conclusion that IGIT should receive the maximum number of available points for its technical proposal.

stated evaluation weight of certain elements of the past performance evaluation plan enunciated in the solicitation as issued by Fort Leonard Wood.⁴

We review an agency's evaluation of proposals to ensure that it is fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124 at 3. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Federal Envtl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398 at 12.

IGIT's first general complaint is that the Fort Knox evaluators used different levels of scrutiny in reviewing the two proposals. In this regard, IGIT claims that the Army inappropriately contacted its creditors and suppliers, in addition to its prior customers, but performed a more limited review of Penn, focusing just on that company's named references. IGIT also claims that the Army failed to contact more than 50 IGIT references who would have provided favorable reports, although IGIT concedes that none of those references are associated with contracts of the size and magnitude of the prior Fort Leonard Wood contract. In response, the Army concedes that its review of IGIT's past performance led it to contact more sources of information than it did in its review of Penn, but explains that IGIT's submission, on its face, required a more thorough review because of the significant negative information included therein. The Army also argues that it appropriately focused on IGIT's prior performance of the Fort Leonard Wood contract and on its

⁴In addition to these general challenges, IGIT alleges--in its final protest filing dated May 21, 1997--that Penn's BAFO was not received by the closing time for receipt of BAFOs--i.e., by 12:30 p.m. on September 12, 1996. IGIT's allegation is based on an affidavit from a contract specialist at Fort Leonard Wood who states that there is no entry in the Bid/Proposal Logbook maintained by a receptionist at the facility. Although there are serious questions about the timeliness of this allegation--for example, IGIT does not explain why it first raises this question some 8 months after the incident, when the information was known to the affiant at closing time, and the record shows that the affiant and IGIT are sufficiently close that the affiant has disqualified himself from any matter involving IGIT because of a conflict of interest--we have nonetheless reviewed this allegation. The record includes statements from Penn and other contracting officials explaining that Penn's BAFO was hand-delivered directly to the contracting shop and was not received by the receptionist. In addition, the record includes a copy of the cover of the BAFO wherein the contracting officer has handwritten the date and time of receipt. Under these circumstances, we have no basis to conclude that Penn's BAFO was received late.

subcontract with ITT Federal Services Corporation because those contracts were most analogous to the contract here.

The record shows that in their new past performance submissions, both offerors provided references and in the case of IGIT, the package included a substantial amount of negative financial information. Upon receipt of the submissions, the Fort Knox evaluators began a new and independent review of each offeror's past performance. To implement the evaluation, the evaluators prepared their own past performance questionnaire and contacted references with respect to each contractor's performance of its prior contract, payment of suppliers, and any general problems or difficulties encountered. For Penn, the references contacted provided the kind of information sufficient to support a conclusion that Penn's past performance had been relatively smooth and without incident. For IGIT, even its own submission showed otherwise. Specifically, IGIT's own submission included financial statements showing substantial losses, and revealed that there had been difficulties meeting payroll obligations, late supplier payments, and a failure to pay utility bills.

With respect to IGIT's claim that the agency's review of its past performance was more thorough than its review of Penn's, we see nothing unreasonable in the Army's approach to investigating the past performance history of these two offerors. First, although agencies are required to evaluate the past performance of all offerors on the same basis, Federal Envtl. Servs., Inc., *supra*, there is no requirement that an agency contact all of an offeror's references, Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8, and we are aware of no requirement that an agency contact the same number of references for each offeror. In fact, given that the performance controversies at Fort Leonard Wood involve the same facility and the same services, we fail to see how the Army could have reasonably overlooked the matter. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

With respect to IGIT's claims that the agency overlooked numerous other past contracts in order to investigate controversies that arose during IGIT's performance of the previous Fort Leonard Wood contract and a major subcontract IGIT performed for ITT, IGIT itself concedes that its other contract references did not involve contracts as large as this one, and that the Fort Leonard Wood and ITT contracts were the ones most similar to the contract at issue here. It is hard to imagine information more relevant than IGIT's previous performance of these same services for the same installation. See Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407 at 3-4. In addition, we see no basis for IGIT's complaint that the agency placed undue reliance on problems that arose during performance of these two contracts. While IGIT might dispute the cause for the performance problems, it does not deny that the problems arose, or that they should be part of a valid past performance assessment. Id.

IGIT's second general complaint is that the agency wrongly concluded the company lacked financial stability and wrongly made several negative comments about its staffing changes even though the proposal received high marks for proposed staff.

As stated above, IGIT's own submission highlighted numerous problems, including unfavorable profit and loss statements, and difficulties in meeting ongoing financial commitments. Consideration of these issues as set forth by IGIT, together with the responses generated from those contacted by the Fort Knox evaluators, were clearly sufficient to support the Army's conclusions about IGIT's financial stability. In addition, during the course of this protest, the record shows that IGIT had received a tax levy from the Internal Revenue Service (IRS) for payroll taxes unpaid since March 1996, a levy from the Department of Labor for unpaid unemployment insurance, and additional written complaints from union employees regarding bounced paychecks. Further, in its final submission, IGIT itself advised our Office that it had filed for chapter 7 bankruptcy, and that the future of the company was uncertain.⁵ Under these circumstances, we see no basis to conclude that the agency unreasonably expressed concerns about IGIT's financial stability.

IGIT's next contention--that the evaluators wrongly made several negative comments about IGIT's staffing changes even though the proposal received high marks for proposed staff--confuses the technical review with the review of its past performance. Under the technical review, IGIT's proposed staff received the highest possible rating; however, in the review of past performance, references stated that IGIT had, in some instances, not provided the personnel proposed, and had substituted less qualified individuals. Since the technical assessment focused on the proposal as written, while the past performance assessment focused on IGIT's actions during performance, there is nothing about the Army's criticism on this point that is inconsistent with the technical review.

IGIT's third contention is that the Fort Knox evaluation of past performance deviated in two ways from the evaluation set forth in the solicitation. For the reasons below, we agree with IGIT that there may have been some small differences between Fort Knox's approach and the solicitation's approach, but we conclude that any deviation was de minimis, and that the company was not prejudiced by the agency's actions. As an example, we discuss below the stronger of IGIT's two arguments in this area.

⁵On the subject of the IRS lien, the final submission from IGIT's counsel states that "IGIT informs me that the IRS has removed the tax lien imposed by IRS upon IGIT's contract payments, according to what Mr. Reeves understands from a meeting held with IRS representatives last week." IGIT's Final Reply, May 21, 1997, at 3.

IGIT correctly points out that the solicitation as issued by Fort Leonard Wood provided that the agency would consider the offeror's financial statements in its past performance assessment, but the Fort Knox evaluation worksheets instead contain a category titled "financial history." While we are aware that the Fort Knox evaluators reviewed IGIT's financial statements--for example, the conclusions on financial stability discussed above included a review of the financial statements--there is no specific place on the evaluation worksheets to consider financial statements, and the record shows that the financial history evaluation element entailed a slightly broader review than consideration of financial statements alone. Nonetheless, even if we assume that this represents a slight deviation from the stated solicitation criteria, we cannot see how IGIT was prejudiced by the deviation, nor does IGIT attempt to establish any prejudice. Instead, IGIT claims that it is impossible to calculate the harm springing from either this or the other alleged deviation. IGIT Comments on the Agency Report, Apr. 30, 1997, at 5.

Despite IGIT's claim that the Army failed to follow the solicitation's evaluation criteria, 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 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). Nothing in the record here suggests that the evaluation results would have been different had the agency limited its past performance review to financial statements rather than financial history.

In addition to its challenge to the evaluation itself, IGIT argues that the Army held inadequate discussions with it regarding its prior contract with ITT. In this regard, IGIT disputes the Army's conclusion that its contract with ITT was terminated for poor performance, claims instead that the contract was terminated for convenience, and argues that it would have addressed this issue if the agency had properly identified its concerns during discussions.

Our review of the record shows that IGIT's own submission to Fort Knox included a substantial amount of material exchanged with Fort Leonard Wood officials on the subject of whether IGIT's contract with ITT was terminated for poor performance. IGIT Past Performance Submission, January 31, 1997, at 7, 14, 31-34, 83-84, 87-88. Presumably this information was presented because IGIT knew that there was an issue about its performance of that contract. After reviewing the submission, the Fort Knox evaluators forwarded the following question to IGIT by letter dated February 11, 1997:

"Notwithstanding your letter from ITT dated 5 Oct 93, do you have anything from ITT that specifically states that your subcontract for alterations and repairs was not terminated for poor performance?"

This question was clearly sufficient to put IGIT on notice that the Army was considering a conclusion that IGIT's prior contract with ITT was terminated for poor performance. See Rockwell Int'l Corp., B-261953.2; B-261953.6, Nov. 22, 1995, 96-1 CPD ¶ 34 at 12-13.

As a final matter, we turn to the question of whether the Army took sufficient steps to eradicate the bias that IGIT says exists on the part of Fort Leonard Wood contracting officials. As explained above, given the steps already taken in response to IGIT's earlier protests, the only remaining unaddressed allegation of bias is that the current evaluation was tainted by the reliance on comments by Fort Leonard Wood officials about IGIT's performance of the prior contract.

The current posture of this procurement reflects unusual and extraordinary steps by the Army to address the protester's earlier-stated concerns regarding its acrimonious relationship with officials at Fort Leonard Wood. While we appreciate IGIT's remaining concern, we conclude that the decision of the Fort Knox contracting officials to review the performance issues that arose in the prior Fort Leonard Wood contract was appropriate, and we agree that obtaining the views of those officials was a requisite part of that process. In this regard, even if we assume the protester could present credible evidence of bias on the part of Fort Leonard Wood officials, our review of the past performance evaluation performed by the Fort Knox contracting officials must focus on whether the limited input of Fort Leonard Wood officials unfairly affected the protester's competitive position. Executive Sec. & Eng'g Tech., Inc., B-270518 et al., Mar. 15, 1996, 96-1 CPD ¶ 156 at 4.

The record here shows that after receiving the views of the Fort Leonard Wood officials, and after performing their own evaluation, the Fort Knox contracting officials gave IGIT significantly lower scores for past performance than they gave Penn, and concluded that Penn had submitted the proposal offering the greatest benefit to the government. All of the materials that formed the basis of this decision--including the remarks of the Fort Leonard Wood officials--were provided to IGIT's counsel, under a protective order issued by our Office, and IGIT was given every opportunity to point out inaccuracies or errors in those materials. While IGIT may disagree with many of the conclusions in the record, it has not shown that statements provided there were inaccurate or false. Since we generally presume that contracting officials act in good faith, Indian Affiliates, Inc., B-243420, Aug. 1, 1991, 91-2 CPD ¶ 109 at 5, and since IGIT has been given every reasonable opportunity to demonstrate that it was harmed by unfair or improper bias--and has

failed to make that showing--we conclude that the protester was treated fairly by the Army in this procurement. Telestar Int'l Corp., B-247557.2, June 18, 1992, 92-1 CPD ¶ 530 at 3.

The protest is denied.

Comptroller General
of the United States