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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: NMS Management, Inc.

File: B-286335

Date: November 24, 2000

Nancy O. Dix, Esq., and Matthew C. Bernstein, Esq., Gray Cary Ware & Freidenrich, for the protester.

James F. Nagle, Esq., Oles Morrison Rinker & Baker, for Acepex Management Corporation, an intervenor.

Wilson J. Campbell, Esq., and V. Paul Clay, Esq., Department of the Navy, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation provided for award on the basis of initial proposals without conducting discussions, the agency reasonably determined not to communicate with the protester or its team member regarding adverse past performance information reported by one of the team member's contract references since there was no inconsistency between the reference's narratives and the overall rating assigned for the team member's performance of the particular contract.

DECISION

NMS Management, Inc. protests the award of a fixed-price contract to Acepex Management Corporation under request for proposals (RFP) No. N68711-00-R-7604, issued by the Department of the Navy for custodial and janitorial services at various facilities in San Diego County, California.

We deny the protest.

The RFP provided that in determining the proposal most advantageous to the government, the technical evaluation factors (experience/past performance and management/administration plan), when combined, would be approximately equal in importance to price. In addition, the RFP provided that if technical differences between proposals were insignificant, but price differences were significant, then price would be the most important factor. The RFP also advised offerors that award

could be made on the basis of initial proposals without conducting discussions. RFP at 156-58.

In its proposal, NMS stated that “[d]ue to the size of this contract, [it] ha[d] decided to team with another local . . . firm--MC Contracting.” NMS Proposal at 1. NMS listed in its proposal three full service custodial contracts performed by it and three janitorial service contracts performed by MC. *Id.* at 1-3. The record shows that in evaluating the experience/past performance of NMS, the agency received and considered completed past performance questionnaires for five of the contracts listed in the NMS proposal. More specifically, the contract references provided the following ratings for NMS: “highly acceptable” on two contracts valued at approximately \$[deleted] and \$[deleted] per year, and “acceptable” on a contract valued at approximately \$[deleted] per year. The contract references provided the following ratings for MC: “highly acceptable” on a contract valued at approximately \$[deleted] per year, and “marginal” on a contract valued at approximately \$[deleted] per year. Contracting Officer’s (CO) Statement at 5. (In contrast, Acepex received three “highly acceptable” ratings for contracts valued at approximately \$[deleted], \$[deleted], and \$[deleted] per year, and one “acceptable” rating on a contract valued at approximately \$[deleted] per year. *Id.*)

As relevant here, with respect to the above-referenced “marginal” rating assigned to MC, the MC reference from the [deleted], supported her overall adjectival assessment with detailed narratives. For example, she reported that MC’s performance of custodial services was “marginal” in terms of quality (“[MC] has not met requirements under services for class ‘A’”); timely performance of work (“paperwork not timely”); understanding of the contract terms and scope of work (“owner understands, but fails to train and monitor employees”); and responsiveness to technical direction and contract changes (“slow to contract changes”). The MC reference also reported that the firm’s performance of custodial services was “unacceptable” in terms of responsiveness in meeting schedules and time constraints (“lags in paperwork and new work assigned”); effort to provide high quality services versus just meeting minimum requirements (“effort only meets minimum . . . preparing cure notice [for schedule of work]”); stability and quality of contractor’s workforce (“[MC] let go on-site supervisor two months ago. Since then, services have been lousy. No control. [MC] depended too much on this person. Now [MC] can’t handle contract services”). MC’s reference reported that she would not award another contract to MC because the firm “[d]oes not manage employees well.” Agency Report (AR), Tab 6, MC Past Performance Questionnaire from [deleted].

The record shows that Acepex’s proposal received an overall “exceptional” technical rating, while the proposal of NMS received an overall “very good” technical rating.¹

¹ Technical proposals could receive one of the following adjectival ratings: exceptional, very good, acceptable, marginal, or unacceptable.

The NMS price was approximately 11 percent (*i.e.*, almost \$2 million) higher than Acepex's price. Acepex's proposal was ranked first, and the NMS proposal was ranked second. The agency determined to award a contract without conducting discussions to Acepex, the firm submitting the highest technically rated, lowest priced proposal. CO Statement at 6-7.

NMS complains that the procurement was flawed because the agency failed to provide it and its team member, MC, an opportunity to comment on the adverse past performance information reported by the MC reference, as detailed above. We disagree.

Federal Acquisition Regulation (FAR) § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where, as here, an award will be made without conducting discussions, "offerors may be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors." Pursuant to this provision, an agency has broad discretion to decide whether to communicate with a firm concerning its performance history. A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5. We will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement. Id.

With regard specifically to clarifications concerning adverse past performance information to which the offeror has not previously had an opportunity to respond, we think that for the exercise of discretion to be reasonable, the agency must give the offeror an opportunity to respond where there clearly is a reason to question the validity of the past performance information, for example, where there are obvious inconsistencies between a reference's narrative comments and the actual ratings the reference gives the offeror. In the absence of such a clear basis to question the past performance information, we think that, short of acting in bad faith, the agency reasonably may decide not to ask for clarifications. Id.

Applying this standard here, we think the agency reasonably exercised its discretion in deciding not to communicate with NMS and MC regarding the adverse past performance information reported by one of MC's contract references. As evident from the narratives quoted above, there is no inconsistency between the reference's narratives and the overall "marginal" rating assigned for MC's performance of the particular contract. While NMS claims that MC "was not even aware of certain questionable performance evaluations in the record," Protester's Comments, Nov. 6, 2000, at 2, neither NMS nor MC disputes the substantive comments made by

the reference.² Given the permissive language of FAR § 15.306(a)(2), the fact that NMS and its team member, MC, may wish to respond to the comments made by the MC reference does not give rise to a requirement that the agency give these firms an opportunity to do so. A.G. Cullen Constr., Inc., *supra*, at 5-6.

In any event, 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). Here, even if we were to agree that the one "marginal" rating for MC should be disregarded because NMS and MC were not afforded an opportunity to address the adverse past performance information reported by the MC reference, NMS would have the same past performance ratings as Acepex, that is, one "acceptable" and three "highly acceptable" ratings. Moreover, even if we were to assume that the proposals of Acepex and NMS were essentially technically equal, that is, both proposals were "exceptional," NMS is not prejudiced by any possible error in the conduct of this procurement. In this respect, it is undisputed that NMS submitted a price that was significantly higher than that submitted by Acepex.³ Consistent with the terms of the RFP, where proposals are essentially technically equal and price becomes the most important factor, Acepex, which submitted a

² In assigning an overall "very good" technical rating to the NMS proposal, in which NMS listed only one high dollar value contract performed by it (approximately \$[deleted]), the record shows that the agency favorably credited NMS with MC's "highly acceptable" performance rating on a contract valued at approximately \$[deleted]. CO Statement at 5.

³ In its initial protest, NMS raised a number of other issues, for example, that Acepex's lower price was based on significantly understated staffing levels and that the agency did not evaluate Acepex's experience/past performance in accordance with the terms of the RFP. In its administrative report, the agency addressed these, as well as all of the other, issues raised by NMS in its initial protest. In its comments on the agency report, NMS did not rebut the agency's position on any of these issues. Protester's Comments, Nov. 6, 2000. Accordingly, we deem these matters to be abandoned. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520 at 4 n.2. Moreover, to the extent NMS attempts in its supplemental comments on the agency's supplemental report to resurrect its previously abandoned argument that the agency did not evaluate the awardee's experience/past performance consistent with the terms of the RFP, this attempt to resurrect and reargue a previously abandoned issue is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2000).

significantly lower price than NMS, still would reasonably and properly receive the award based on its significantly lower price. Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 at 3-4.

The protest is denied.

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Acting General Counsel