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**Comptroller General
of the United States**

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

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Decision

Matter of: American Floor Consultants, Inc.

File: B-294530.7

Date: June 15, 2006

David M. Kupsky, Esq., for the protester.

Michael J. O'Farrell, Jr., Esq., and Capt. Joseph F. Pera, Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's evaluation of protester's past performance record is denied where agency reasonably determined that the past performance references were incomplete or not relevant.

DECISION

American Floor Consultants, Inc. (AFCI), a small business, protests the award of a contract to FloorPro, Inc. by the Department of the Air Force under request for proposals (RFP) No. FA4861-04-R-A014 for application of chemically resistant urethane (CRU) on floors at various Air Force facilities. The protester contends that the agency improperly evaluated its past performance record and that AFCI's proposal should have been selected for award because it was the lowest-priced acceptable proposal. The protester also contends that the agency failed to take adequate corrective action in response to a prior protest.

We deny the protest.

BACKGROUND

The RFP sought proposals for application of CRU coating on floors at Nellis Air Force Base and Indian Springs Air Force Auxiliary Field, Nevada. The RFP required offerors to propose all labor, supplies, materials, supervision, transportation, and equipment for application of the coatings and subsequent floor maintenance. The RFP anticipated award of an indefinite-delivery, indefinite-quantity contract, with fixed unit price task orders. The base performance period was 1 year, with four

1-year option periods. The RFP stated that proposals would be evaluated on the basis of two factors, past performance and price, and that “[a]s a basis for award, price is of secondary consideration.” RFP at 56. The RFP provided that award would be based on a determination of which proposal offered the “best value” to the government and further stated that the government reserved the right to award to other than the lowest-priced proposal. *Id.*

The agency received three proposals in response to the RFP. As relevant to this protest, the agency evaluated the offerors as follows:

	Price	Past Performance/ Performance Confidence
AFCI	\$4,337,500	Neutral/Unknown Confidence
FloorPro	\$16,072,907	Exceptional/High Confidence
[deleted]	\$18,120,844	Exceptional/High Confidence

Agency Report (AR), Tab 17, Initial Source Selection Decision (SSD), at 1.

The agency initially awarded the contract to FloorPro on September 21, 2005. The record shows that the agency had concluded that AFCI’s proposed price was too low, and that the company could not perform the work at its proposed price. AR, Tab 17, Initial SSD, at 1. AFCI then filed a protest of the award with our Office, challenging the evaluation of its proposal and award to FloorPro. In a series of questions submitted in writing to the agency by our Office, the agency was advised to address whether it may have excluded AFCI from award consideration based on what was effectively a determination of non-responsibility. The agency subsequently determined that it would take corrective action by referring the matter to the Small Business Administration (SBA) for a possible certificate of competency (COC) determination.¹ Contracting Officer’s Statement at 7-8. The agency then requested that our Office dismiss the protest based on its decision to take corrective action; we did so on November 28, 2005.

During the corrective action, however, the SBA refused to accept the agency’s COC referral because it was not clear that a determination that AFCI was a responsible

¹ Under the FAR, a contracting officer must make an affirmative determination of an offeror’s responsibility before making award to the firm. Federal Acquisition Regulation (FAR) § 9.103(b). A COC referral is required when an agency determines that a small business offeror would be otherwise in line for award, but for a determination of non-responsibility. See 13 C.F.R. § 125.5 (2006); Tenderfoot Sock Co., Inc., B- 293088.2, July 30, 2004, 2004 CPD ¶ 147 at 3. Where SBA issues a COC, agencies are to make award to the concern, without requiring it to meet any other responsibility or eligibility requirement. 15 U.S.C. § 637(b)(7)(C) (2000); FAR § 19.602-4.

offeror would result in the award of a contract. Id. The agency subsequently conducted a new source selection process that reviewed the existing technical and price evaluations. Id. at 9. In its revised SSD, the agency conducted a tradeoff, concluding that, AFCI's low proposed price and "neutral/unknown confidence" rating for past performance did not provide the best value to the government as compared to the offerors whose proposals were rated "exceptional/high confidence" for past performance. AR, Tab 17, Revised SSD, at 3. The protester now contends that the agency improperly evaluated its past performance record, made an unreasonable source selection, and failed to take adequate corrective action in response to the earlier protest.² For the reasons discussed below, we find the protest lacks merit.

PAST PERFORMANCE EVALUATION

The protester contends that the agency unreasonably evaluated its past performance record. Our Office examines an agency's evaluation of offerors' past performance records to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Prudent Techs., Inc., B-297425, Jan. 5, 2006, 2006 CPD ¶ 16 at 4.

Offerors were required to demonstrate past performance by identifying contracts that were recent, i.e., performed within the past 3 years, and relevant, i.e., "similar to requirements outlined in this solicitation to include, but not limited to, projects involving CRU floor applications, maintenance and repair work on flooring projects in the range of \$10,000 to \$300,000." RFP at 56. Offerors were required to provide a list of their most recent contracts for federal, state and local governments for the past 3 years, and to provide their references the past performance questionnaire contained in the RFP. RFP at 50. The RFP explained that "[o]fferors are responsible to ensure that their reference sources receive, complete, and return the questionnaires on time to the issuing office." Id. The RFP also stated that "[t]he most weight will be given to relevant past performance in the field of maintaining, repairing and applying CRU flooring." RFP at 56. As part of the past performance

² The protester also alleges that the proposal submitted by the awardee exceeded the maximum contract values identified in the solicitation and therefore should have been rejected. This issue was raised for the first time, however, in the protester's comments on the agency report. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Because the protester knew of the awardee's proposed price prior to filing its protest of the agency's revised source selection decision, the issue could not be timely raised in its comments on the agency report.

evaluation, offerors were assigned a confidence rating that addressed the likelihood of successful performance. Id.

The protester submitted a list of ten contracts in its proposal. AR, Tab 12, AFCI Proposal, Attach. 4. The agency, however, received only three questionnaires regarding AFCI's past performance. AR, Tab 13, AFCI Past Performance Information. The first reference, from the Metropolitan Atlanta Rapid Transit Authority, concerned a subcontract for removing hazardous materials performed in 2000. The agency determined that this contract was not within the 3-year period specified by the RFP, and did not involve relevant CRU flooring work. AR, Tab 16, Proposal Analysis Report (PAR), at 7. The next reference, from [deleted], concerned an undated contract for epoxy flooring. The final reference, from [deleted], was for CRU maintenance, but was also undated. The agency determined that the [deleted] and [deleted] references were incomplete because there was no information regarding the contract performance dates. Id. The agency attempted to contact the three references to obtain additional information by voicemail or email, but did not receive responses or updated references. Contracting Officer's Statement at 10.

In evaluating AFCI's proposal, the agency determined that "[t]he past performance information submitted by this offeror was incomplete and/or not relevant/not recent." AR, Tab 13, AFCI Past Performance Evaluation, at 1. The agency determined that "[b]ecause the government did not receive and could not obtain any evidence that AFCI had recent, relevant past performance history in regards to the type of work required by this solicitation, the PCAG [performance confidence assessment group] evaluated this offeror's performance as neutral and assign[ed] a performance confidence rating of 'unknown.'"³ AR, Tab 17, Revised SSD, at 3.

The protester contends that the agency unreasonably limited its consideration of AFCI's past performance to the three references because the list of contracts identified in its proposal demonstrated a history of relevant performance. As explained in the RFP, however, offerors were required to submit information demonstrating their past performance records, including the relevance and recency of the contracts, and that past performance would be evaluated on the basis of ratings provided in the references. RFP at 50. The record shows that the agency received three references, none of which was recent or relevant. AR, Tab 16, PAR, at 7. The protester also argues that the evaluation was unreasonable because the agency did not make adequate efforts to verify the references. The RFP stated, however, that offerors were responsible for ensuring that their past performance

³ Under the RFP's evaluation scheme, an "unknown confidence" rating was a "neutral" rating, consistent with the guidance of the FAR § 15.305(a)(2). RFP at 56. FAR § 15.305(a)(2)(iii) states that "an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be rated favorably or unfavorably on past performance."

references received, completed and returned the questionnaires. RFP at 50. The fact that the agency attempted to contact three references, but was unsuccessful in doing so, did not render the evaluation unreasonable. Further, in our view, the agency made reasonable attempts to contact the three references.

In sum, we believe that the agency's evaluation of AFCE's past performance here was reasonable. The agency based its evaluation on the past performance questionnaires received, in accordance with the terms of the RFP. Because AFCE did not meet its obligation to ensure that past performance questionnaires were completed and received by the agency, the protester provides no basis to challenge the agency's determination that its proposal warranted a rating of "neutral/unknown confidence."

SOURCE SELECTION DECISION

The protester next argues it should have been selected for award because it submitted the lowest-priced, technically acceptable proposal. The RFP, however, provided that award would be made on the basis of a price-technical tradeoff, and not necessarily to the proposal with the lowest price. RFP at 56. In any event, the record indicates that the agency's source selection was reasonable.

The SSD compared the two proposals that were rated "exceptional/high confidence" to the protester's proposal, which was rated "neutral/unknown confidence." AR, Tab 17, Revised SSD, at 3. The agency concluded that, even though the two "exceptional/high confidence" offerors were higher in price, the higher ratings were worth the tradeoff: "The extremely high risk of awarding a contract to an offeror with no identifiable relevant performance record does not justify the cost savings." Id. The agency then compared the two "exceptional/high confidence" offerors and concluded that the lower price of FloorPro merited award. Id.

Although agencies may not rate an offeror that lacks relevant past performance favorably or unfavorably with regard to past performance, an agency may in a price/technical tradeoff determine that a high past performance rating is worth more than a neutral past performance rating. See CMC & Maint., Inc., B-292081, May 19, 2003, 2003 CPD ¶ 107 at 4. We believe that the agency's source selection was reasonable and consistent with the RFP award criteria, which stated that past performance was less important than price. The protest provides no reasonable basis to challenge the agency's determination.

CORRECTIVE ACTION

Because we believe that the agency's evaluation of AFCI's past performance record was reasonable, and that the source selection decision was reasonable, we conclude that there is no basis to challenge the agency's corrective action. Although the agency did not obtain SBA's input regarding AFCI's responsibility, such input was not needed because the agency's evaluation and source selection decision did not conclude that AFCI was other than a responsible offeror.

The protest is denied.

Anthony H. Gamboa
General Counsel