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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: Kathpal Technologies, Inc.

File: B-291637.2

Date: April 10, 2003

Robert M. Nutt, Esq., for the protester.

Douglas Kornreich, Esq., Centers for Medicare & Medicaid Services, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly considered adverse past performance information in evaluating protester's proposal, even though the information had not been formally recorded during performance, where agency specifically identified adverse comments and provided protester an opportunity to respond during discussions.
 2. Evaluation of protester's past performance at level below highest possible ratings under the applicable criteria was unobjectionable where record establishes that agency followed stated evaluation criteria and rating had a reasonable basis.
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DECISION

Kathpal Technologies, Inc. (KTI) protests the failure to award it a contract under request for proposals (RFP) No. CMS-02-0003 issued by the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, for consulting services. KTI challenges the agency's evaluation of its technical proposal under the past performance factor.¹

We deny the protest.

The RFP sought proposals to provide a broad range of consulting services to support CMS and its 10 regional offices in the areas of analyzing management or operating

¹ For award purposes, the requirements were divided into two "bundles." KTI only submitted a proposal for one bundle and does not directly challenge the awards to the successful contractors.

processes, analyzing Medicare/Medicaid issues, researching alternatives, providing objective findings, and making concrete recommendations. The RFP contemplated multiple awards of indefinite-delivery/indefinite-quantity contracts for a base year, with four 1-year options. Task orders under the contracts would be awarded under a variety of pricing schemes, including fixed-price, cost-plus-fixed-fee, and time and materials.

Proposals were to be evaluated under three factors, listed in descending order of importance: technical proposal, small disadvantaged business (SDB) utilization plan, and business (cost) proposal. The technical proposal, evaluated under two equally weighted factors—past performance and management plan—was to be rated as outstanding, better, acceptable, or marginal.² Proposed costs were to be evaluated for reasonableness and realism. Non-cost factors were considered significantly more important than cost and awards were to be made to the offerors whose proposals were evaluated as providing the best value to the government.

Twenty-nine proposals, including KTI's, were received and were evaluated by a technical evaluation panel. The final evaluation results for the eight awardees and KTI, in order of technical merit, were as follows:

	Technical	SDB Plan	Business	Eval'd Cost
Booz Allen	Outstanding	Signif. Credit	Yellow	\$753.34
AdminiStar	Outstanding	Credit	Yellow	\$548.36
Peterson	Better	Credit	Yellow	\$1,053.46
RTI	Better	Signif. Credit	Green	\$746.99
CNA	Better	Signif. Credit	Green	\$794.69
AdvanceMed	Better	Credit	Green	\$601.86
Iowa Foundation	Better	Credit	Yellow	\$655.96/722.02
IPRO	Better	Credit	Yellow	\$809.32
Other Offerors ³				
KTI	Acceptable	Signif. Credit	Green	\$568.07

The contracting officer determined that awarding contracts to the top eight offerors would best meet CMS's needs, given the amount of work anticipated and the relative quality of the proposals. After receiving notice of the award and a debriefing, KTI filed a protest with our Office in November 2002. KTI asserted that the agency had improperly failed to provide it an opportunity to respond to allegedly negative

² The SDB plan was to be rated as significant credit, credit, or no credit. The business proposal, which included cost information, was to be rated as green (low risk), yellow (some risk), or red (substantial risk).

³ Seven proposals were ranked lower than IPRO's and higher than KTI's. These proposals are not relevant to the issues before us.

comments made by its past performance references. The agency took corrective action in the form of identifying which task orders were associated with the challenged comments and provided KTI the opportunity to submit additional information. KTI then withdrew the protest. The agency re-evaluated KTI's past performance and the contracting officer determined that no change in its rating of acceptable under this factor was warranted. After KTI received notice of the agency's decision, it filed this protest.⁴

PAST PERFORMANCE INFORMATION

KTI maintains that the agency's past performance evaluation was flawed because it was based on references' negative comments made long after some of the task orders to which they related had been performed. KTI asserts that, because it did not have the opportunity to respond to the negative evaluations at the time of performance, and because the agency did not provide it with sufficient information during discussions to respond to the negative comments, the agency was prohibited from relying on them in its evaluation.

The Federal Acquisition Regulation (FAR) requires that an agency indicate to, or discuss with, offerors still being considered for award, adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3). While agencies generally are required to conduct meaningful discussions by leading offerors into the areas of their submissions requiring amplification, Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75 at 9, the degree of specificity required in conducting discussions is not constant and is primarily a matter for the procuring agency to determine. Quality Elevator Co., Inc., B-271899, Aug. 28, 1996, 96-2 CPD ¶ 89 at 2.

Here, the agency provided KTI with past performance information sufficient to lead KTI into the areas requiring amplification. For example, as to task order No. 2003, CMS advised KTI that its performance was rated unsatisfactory to fair, and that the past performance respondent stated that KTI did not learn the subject matter; all its work had to be done over by a follow-on contractor; its work product was of low quality, though not over budget; it met its due dates, but with inferior work products; and the respondent was disappointed and would not hire KTI again. Agency Report (AR), Tab 11 at 723. Regarding task order Nos. 2008, 2009, and 2010, the agency advised KTI that the respondent indicated that KTI had walked away from the order

⁴ KTI raises a number of arguments in support of its protest. We have reviewed them all and find that none have merit. This decision addresses only the more significant assertions.

at one point; had overloaded every task with management fees and hours; and that the respondent had worked with 5 to 6 different people, none of whom worked out.⁵ Id.

We find that these comments conveyed to KTI the bases for the agency's concerns with its past performance, and provided KTI with a reasonable opportunity to respond to those concerns. In its response during discussions, KTI did not specifically address the comments but, rather, expressed general disagreement with them; it asserted its belief that CMS was satisfied with its performance, noted that no contemporaneous negative statements were documented, and, with regard to the specific comments on task order No. 2003, asserted only that they could not be true, without any additional substantive response.⁶ KTI asserts that it was hampered in its responses by the agency's failure to document any performance problems. However, notwithstanding the agency's failure to document problems contemporaneously, the fact remains that, during discussions, the agency provided KTI with very specific reasons for its concerns with KTI's past performance. We see no reason why the level of specificity the agency provided was not adequate to permit KTI to respond to the agency's concerns. KTI claims that its ability to respond also was hampered by CMS's failure to identify the references; however, the FAR actually prohibits agencies from providing such information. FAR § 15.306(e)(4).⁷

PAST PERFORMANCE EVALUATION

KTI asserts that, even if the negative comments about its past performance were properly taken into account in the evaluation, they should have been outweighed by its more favorable performance ratings under the other task orders. Specifically, it

⁵ The respondent also criticized KTI for failing to provide contracting officials with access to its subcontractors, and KTI did provide a specific response to this criticism. However, the contracting officer determined that this was not an appropriate criticism and disregarded it in his re-evaluation. AR, Tab 14, at 746.

⁶ We note that, while KTI states that it believed the agency was satisfied with its past performance on these task orders, it did not include them in the past performance information provided with its proposal. This suggests that KTI actually may have been aware of CMS's less than favorable view of its performance.

⁷ KTI asserts that the agency failed to comply with FAR § 42.1503, which calls for agencies to evaluate past performance at the time work is completed and to provide contractors with that information and an opportunity to submit responses. While it appears that KTI is correct, nothing in that provision, or elsewhere in the FAR, prohibits an agency from evaluating a proposal based on past performance information that was not recorded contemporaneously. Likewise, nothing in the RFP prohibited CMS from considering such information.

observes that, of the 11 task orders evaluated, it received excellent to outstanding ratings on 7 orders valued at approximately \$10 million, while it received poor, unsatisfactory, or fair to good ratings on only 4 task orders (2003, 2008, 2009, 2010) valued at only approximately \$2.9 million.

In reviewing an agency's evaluation of past performance, we will not reevaluate a firm's performance but, instead, will examine the evaluation to ensure that it was reasonable and consistent with the solicitation and applicable statutes and regulations. Kay & Assocs., Inc., B-291269, Dec. 11, 2002, 2003 CPD ¶ 12 at 4.

The RFP stated that the agency would evaluate "the quality of the offeror's past performance and the depth and breadth of [the] offeror's experience in similar, directly related work of similar scope and complexity of work described in the Statement of Work; including any relevant experience with the Medicare and/or Medicaid programs." RFP § M.3. KTI's acceptable rating was based on information obtained from relevant contracting personnel on 11 of KTI's prior task orders, 7 of which KTI identified in its proposal, and all of which KTI performed under a predecessor CMS contract with a scope very similar to that under the RFP.⁸ KTI's performance was rated outstanding to excellent for four task orders, excellent to good for two, good to fair for one, fair to unsatisfactory for one, and poor for three. AR, Tab 7, at 669-71, 674-81. In reviewing the references and KTI's rebuttals, the contracting officer concluded that KTI had provided the right team and successfully performed certain task orders, but had been unable to provide the necessary expertise on others. Contracting Officer's Declaration (CO Decl), ¶ 34-35. Based on the lack of expertise evidenced in the performance of some task orders, coupled with staff turnover on another, and problems in performance on three related task orders, the contracting officer concluded that, while KTI could "probably . . . do work of adequate quality[,] . . . the potential risks of delay, degradation of performance and lack of customer satisfaction still remain." CO Decl., ¶ 36-40.

We find nothing unreasonable in the agency's assessment. While KTI had better performance ratings in the majority of its task orders, and their combined value outweighed that of the remaining task orders, its poor and unsatisfactory ratings were not insignificant, and for the 11 task orders only four respondents gave an unqualified "yes" in response to the question whether they would contract with KTI

⁸ To the extent KTI believes it was improper for CMS to consider the four task orders not referenced in its proposal, it is incorrect. Agencies properly may consider evidence of past performance from sources not listed in the offeror's proposal, Lynwood Mach. & Eng'g, Inc., B-285696, Sept. 18, 2000, 2001 CPD ¶ 113 at 6, and may properly consider their own experience with an offeror's past performance. Quality Elevator Co., Inc., supra, at 3. Further, the RFP here specifically reserved the agency's right "to obtain information for use in the evaluation of past performance from any and all sources" RFP § M.3.

again. Three additional respondents indicated that they would contract with KTI again, but stated that this was dependent upon KTI's hiring of a good subcontractor or on the type of work required. AR, Tab 7, at 668. The respondents for the other four orders answered "no." In our view, KTI's mixed past performance on these directly relevant task orders reasonably supports the agency's conclusion that its past performance was not better than acceptable. KTI's position to the contrary constitutes mere disagreement with the agency's judgments, which does not establish that the evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel