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

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Decision

Matter of: Falcon Environmental Services, Inc.

File: B-402670; B-402670.2

Date: July 6, 2010

Thomas W. Plimpton, Esq., Stafford, Piller, Murnane, Plimpton, Kelleher & Trombley PLLC, for the protester.

Nicholas B. Carter, Esq., Birdstrike Control Program, the intervenor.

Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the agency reasonably evaluated the awardee's past performance and, in accordance with the solicitation, selected the awardee's proposal as the lowest-priced offer with a substantial confidence rating.

DECISION

Falcon Environmental Services, Inc., of Plattsburgh, New York, protests the award of a contract to Birdstrike Control Program, of Willis, Texas, under request for proposals (RFP) No. FA4484-10-R-0008, issued by the Department of the Air Force for wildlife control services.

We deny the protest.

BACKGROUND

The RFP was issued as a commercial item acquisition set aside for small business concerns. The solicitation sought proposals for wildlife control services at Joint Base McGuire-Dix-Lakehurst (JB MDL), New Jersey, to prevent animal-aircraft collisions. The McGuire airfield consists of two fenced runways which operate 24 hours per day, and the Lakehurst airfield consists of two unfenced runways and an assault landing strip. Wildlife around JB MDL includes waterfowl, gulls, blackbirds, starlings, birds of prey, deer, groundhogs and foxes, and includes seasonal bird migrations of approximately 30,000 birds per month. Contracting Officer's (CO) Statement at 1, 9; see RFP at 48.

A detailed performance work statement (PWS) was provided to describe the required wildlife control services. See PWS at 48-58. Offerors were informed that the contractor would be required to mitigate and/or eliminate risks from wildlife at JB MDL by establishing and maintaining a controlled territory. Id. at 48. Wildlife control was defined to be the removal of wildlife as directed, and the PWS described control methods as including, but not limited to, falconry, canines, harassment, pyrotechnics, trapping, relocation, depredation, egg treatment, airfield/aerodrome patrol, and perimeter fence monitoring. Id. Offerors were also informed that the contractor would be required to provide and maintain all equipment necessary for any trapping, relocation, depredation or harassment.¹ Id. at 51.

The RFP provided for award on a best value basis considering past performance and price. RFP at 46. The past performance factor was stated to be significantly more important than price. Id. Offerors were instructed to provide a price proposal and references for up to five relevant contracts performed within the last 3 years. Id. at 44. The RFP informed offerors that, for the lowest priced five to seven offerors, the agency would send questionnaires seeking past performance information to the references identified by the offerors and to sources identified by the agency. Id. at 46. In addition, the RFP included the standard Federal Acquisition Regulation (FAR) clause 52.212-1, "Instructions to Offerors--Commercial Items," which instructed offerors to provide a technical description of the items being offered in sufficient detail to allow evaluation of compliance with the solicitation requirements. That clause also stated that the technical description may include product literature or other documents. Id. at 14.

With regard to the past performance factor, the RFP provided that the agency would assign a rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence, in assessing an offeror's past performance.² Id. at 46. Offerors were informed that the agency would more favorably rate past performance where the offeror used a number of the PWS wildlife control methods, as opposed to past performance using a single control method. See id. at 44. The

¹ The PWS requires that all contractor personnel bearing firearms be certified. PWS at 51. The PWS also states that "[w]hen the contractor uses depredation to control wildlife, the contractor is required to comply" with all applicable federal and state laws and regulations and Air Force Instructions "in effect at the time of performance," for example, obtaining a depredation permit from the U.S. Fish and Wildlife Service. Id. at 50; see Legal Memorandum at 9.

² "Substantial confidence" was defined as "a high expectation that the offeror will successfully perform the required effort," while "satisfactory confidence was defined as "an expectation that the offeror will successfully perform the required effort." See RFP at 46, citing Air Force Mandatory Procedure 54315.3, Source Selection, Jan. 2008, Table 3, at 13.

RFP also stated that the agency would consider more relevant past performance at airfields with seasonal migrations of at least 30,000 birds per month and having a deer population and deer incursions. See id. at 48. The RFP stated that the contract would be awarded to the lowest-priced, responsible offeror whose past performance received a substantial confidence rating.

The Air Force received proposals from four offerors, including Birdstrike and Falcon. See CO's Statement at 2. Falcon, the incumbent contractor, provided a detailed technical proposal that stated that falconry was its primary method of bird control, that firearms primarily would be used to aid in controlling gull and deer problems, and that firearms would be used only "if extreme control methods are warranted."³ See Protester's Proposal, at 1, 3, 8, 11, 21. Birdstrike did not submit a technical proposal but provided a descriptive "client guide," which generally described the firm's offered services. The client guide stated that Birdstrike used border collie dogs and falconry as its primary method of wildlife control, but that other methods were "employed as necessary, [including thermal imaging] systems, pyrotechnics, remote-control vehicles, traps, lasers, etc."⁴ See Awardee's Client Guide at 123.

The CO conducted the past performance evaluations herself and was also the source selection authority for this procurement. The proposals were evaluated as follows:

	Past Performance	Price
Birdstrike	Substantial Confidence	\$934,920
Falcon	Substantial Confidence	\$2,139,990
Offeror A	Satisfactory Confidence	\$3,174,012
Offeror B	Unknown Confidence	\$3,298,701

AR, Tab 9, Source Selection Decision (SSD), at 2.

The CO received past performance questionnaires from four respondents for Birdstrike, including one from the Israeli Air Force (IAF). The CO's overall substantial confidence rating for Birdstrike was based primarily upon the questionnaire received from the IAF. SSD at 2, 4. In this regard, the CO assigned an overall past performance rating based upon the highest rating given on the past performance questionnaires received for an offeror. See Audio Recording

³ As noted above, offerors were not required to submit technical proposals. See RFP at 14, 44-45.

⁴ Birdstrike's client guide does not reference depredation as a wildlife control method. Awardee's Client Guide at 121-28.

(Intervenor) at 6:15-6:18, 12:10-13:04;⁵ see also SSD at 2-6. With respect to the IAF questionnaire, the CO determined that Birdstrike’s past performance was relevant, that the contractor had controlled all of the types of wildlife identified in the solicitation, and that the contractor had used multiple wildlife control methods. Id. at 2. The CO also noted that past performance questionnaire respondents had assigned substantial confidence ratings for “[a]ll of the relevant work [that Birdstrike] performed” and had provided their “highest recommendations” and “praise” for services “above and beyond their contractual requirements.”⁶ See id. at 4. The CO concluded that Birdstrike’s past performance surveys show that Birdstrike “has the ability to provide service of a magnitude well above the instant procurement.” Id.

The CO also received four past performance questionnaires for Falcon, including one for performance at McGuire Air Force Base (AFB), which the CO rated substantial confidence. As she did with Birdstrike’s past performance, the CO assigned an overall substantial confidence past performance rating to Falcon, based upon the highest rating given on any of the questionnaires received for Falcon.⁷ See id. at 4-6.

Birdstrike’s and Falcon’s proposals were included in the competitive range, and the two firms were informed of their overall past performance ratings, asked to verify their prices, and invited to submit revised proposals. Agency Report (AR), Tab 10, Air Force Letters to Birdstrike and Falcon. Neither firm submitted a revised price proposal. CO’s Statement at 7.

Because Birdstrike’s proposed \$934,920 price was below the independent government estimate of [DELETED] the CO performed a price analysis comparing

⁵ We conducted a telephone hearing to receive testimony from the CO to explain her contemporaneous past performance evaluation and selection decision. Because the intervenor’s in-house counsel did not apply for admission to the protective order issued in connection with this case, the hearing was conducted in two parts, the first of which addressed the intervenor’s past performance (and in which the intervenor’s counsel participated) and the second of which addressed the protester’s past performance (from which the intervenor’s counsel was excluded).

⁶ Past performance questionnaire respondents were not asked to assign overall confidence ratings. Rather, respondents were asked for narrative comments and adjectival ratings for each type of control method and wildlife identified in the PWS. See RFP at 84-87; AR, Tab 7, Past Performance Questionnaires. Respondents were also asked about the magnitude of any bird migrations, and about deer population and the frequency of deer incursions at their airfields. Id.

⁷ The CO assigned lower past performance ratings for the other questionnaires received for both Birdstrike and Falcon.

Birdstrike's offer here to contracts awarded to the firm under other competitive AFB acquisitions for wildlife control. See id. The CO found that, per airfield, Birdstrike's proposed price was comparable to its prices under contracts at three other AFBs. Id. The CO concluded that Birdstrike could perform at its proposed price and, in accordance with the RFP, selected Birdstrike's proposal for award as the lowest-priced offer with a substantial confidence past performance rating. SSD at 7-8. Following a debriefing, Falcon protested to our Office.

DISCUSSION

Falcon contends that the RFP requires the use of depredation as a wildlife control method and that Birdstrike will not satisfy this requirement because it does not provide depredation services. See Protest at 3-4; Protester's Comments at 2-8. In this regard, the protester cites Birdstrike's client guide, past performance questionnaires, and website, to assert that Birdstrike does not provide depredation services. See Protester's Comments at 5-6. Falcon also questions whether Birdstrike has the experience or firearm permits necessary to carry out depredation. Protest at 3. Further, the protester complains that, unlike Falcon's detailed technical proposal, Birdstrike did not provide specific information about the services that it would provide. See Protester's Comments at 8.

The agency contends that the PWS allows the contractor to choose an appropriate wildlife control method, which could include depredation. Legal Memorandum at 5, 8. The agency also states that it reasonably determined that Birdstrike could effectively perform wildlife control services at JB MDL. Id. at 5.

Where a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the issue by reading the solicitation as a whole. Romer Labs., Inc., B-243027, June 25, 1991, 91-1 CPD ¶ 602 at 3. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a manner that gives effect to all provisions of the solicitation. Id.

Here, the solicitation, read as a whole, reasonably informed offerors that the contractor would be allowed to choose the appropriate method to control wildlife at JB MDL. See PWS at 48 (control methods are not limited to the ones identified in the solicitation). Reasonably read, the solicitation advised that, in some circumstances, the appropriate control method might be depredation.⁸ In this regard, the PWS referenced a "policy letter" of the 305th Air Mobility Wing Commander, which states

⁸ As noted above, the PWS requires that the contractor comply with applicable laws and regulations when the contractor uses depredation and have valid firearms permits. In response to the protest, the intervenor submitted copies of rifle permits and other documents apparently issued to the firm by the New Jersey Division of Fish and Wildlife. See Intervenor's Comments, exh. C.

that there is “zero tolerance for deer on the airfield” and that when notified of deer “on or around the airfield, authorized personnel will depredate them in accordance with Air Force and local operating instructions.”⁹ See RFP, append. 3, Letter of Air Mobility Wing Commander, June 10, 2009. Under the PWS, if the contractor maintained a controlled territory and its control method kept deer, groundhogs or foxes away from the airfield, then deprecation would not be required.¹⁰ See PWS at 48.

With respect to Falcon’s complaint that Birdstrike did not provide a proposal demonstrating its compliance with the PWS, the RFP simply did not require the submission of technical proposals.¹¹ In accordance with the solicitation’s instructions, and FAR clause 52.212-1 (technical description may include product literature or other documents), Birdstrike provided a client guide that generally described its wildlife control methods. Nothing in that guide, or elsewhere in Birdstrike’s past performance and price proposals, states that Birdstrike will not use deprecation, if required. In this respect, one of Birdstrike’s past performance questionnaires (from Hurlburt Field AFB) provided a very favorable assessment (“substantial confidence”) of Birdstrike’s past performance with regard to deprecation. See AR, Tab 7, Past Performance Questionnaires, at 8. Accordingly, we find that the agency reasonably found that Birdstrike’s proposal was technically acceptable.

The protester also challenges the agency’s past performance evaluation and argues that Birdstrike should not have received the same rating as Falcon because Birdstrike’s past performance was not of the same scale as Falcon’s and, in Falcon’s view, did not include deprecation. See Protest at 2-3. In this regard, the protester questions Birdstrike’s overall substantial confidence rating, given the CO’s assignment of lower ratings for Birdstrike’s other past performance questionnaires. Protester’s Comments at 7.

The agency responds that its past performance evaluations were reasonable and consistent with the terms of the RFP, which provided for past performance

⁹ The 305th Air Mobility Wing is headquartered at JB MDL.

¹⁰ In this regard, the protester, whose own proposal indicates a preference for harassing wildlife before using more extreme measures, has not shown that wildlife risks cannot be mitigated or eliminated using control methods other than deprecation.

¹¹ To the extent that Falcon believes that the RFP should have required the submission of proposal describing an offeror’s proposed approach to performing the contract work, this protest to the solicitation requirements was required to be filed before the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2010).

evaluation based on recency, relevant types of wildlife and control methods, relevant magnitude of bird migrations, and deer incursions. See Memorandum of Law at 5-8.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a protester challenges the past performance evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6; S4, Inc., B-299817, B-299817.2, Aug. 23, 2007, 2007 CPD ¶ 164 at 9. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals, and its judgment as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable. Wackenhut Servs., Inc., supra, at 6.

We find from our review of the record that the agency's evaluation of Birdstrike's past performance was reasonable and consistent with the terms of the RFP. Birdstrike's questionnaire from IAF for a current contract showed that Birdstrike used multiple methods of wildlife control (all but depredation) for all of the types of wildlife identified in the RFP, including deer and groundhogs. In addition, the IAF reported seasonal migrations of 500 million birds passing over and landing near its airbases. AR, Tab 7, Past Performance Questionnaires, at 5-6. The CO found this questionnaire demonstrated recent and highly relevant past performance of a "magnitude substantially more than the requirements of the" RFP, which justified a substantial confidence rating. AR, Tab 9, SSD, at 2. Falcon has not shown this judgment to be unreasonable.

In this regard, the RFP did not require, as Falcon believes, that an offeror show performance of depredation to obtain a substantial confidence rating. Instead, the RFP informed offerors that past performance of a number of control methods identified in the PWS would be considered relevant and would receive an overall higher rating than those of a single control method. RFP at 46. We think that the CO's more favorable consideration of past performance that included the use of multiple control methods, as compared to performance that included few control methods, was consistent with this provision. In any event, Birdstrike's questionnaire for Hurlburt Field AFB does show performance using depredation. Although Falcon disagrees with the overall substantial confidence rating assigned to Birdstrike's past

performance, this disagreement does not show that the CO's judgment in this regard was unreasonable.¹²

In short, the record shows that the Air Force reasonably assigned overall substantial confidence ratings to both Birdstrike's and Falcon's past performance. The record also shows that, in accordance with the RFP, award was made to Birdstrike, as the firm submitting the lowest-priced proposal that had received a substantial confidence past performance rating.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

¹² The protester also argues that Birdstrike's price was so unreasonably low, particularly with regard to staff coverage, that the awardee will not be able to perform at the price offered. Protest at 3-4. This argument is without merit. A protester's claim that a bidder or offeror submitted an unreasonably low price--or even that the price is below the cost of performance--is not a valid basis for protest. A bidder or offeror, in its business judgment, properly may decide to submit a price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4.