



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Acepex Management Corporation

File: B-283080; B-283080.2; B-283080.3

Date: October 4, 1999

James F. Nagle, Esq., and W. Gregory Guedel, Esq., Oles Morrison Rinker & Baker, for the protester.

J. Michael Morgan, Esq., Lohf, Shaiman & Jacobs, for Kleen-Tech Building Services, Inc., the intervenor.

Clarence D. Long, III, Esq., Department of the Air Force, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's present and past performance is denied where the record shows that the evaluation was reasonable; an agency has the discretion in evaluating present and past performance to determine the scope of the performance histories to be considered provided that all proposals are evaluated on the same basis and consistent with the terms of the solicitation.
2. The record of the agency's evaluation of the offerors' present and past performance was adequate where the documentation allowed our Office to review the agency's actions and determinations, and reach a reasoned conclusion as to the reasonableness of the agency's evaluation and source selection.
3. Agency's post-award, post-protest communications with the awardee were not discussions where the awardee was neither provided the opportunity nor did it attempt to modify its proposal.

4. Protest that the agency improperly permitted the assignment of the contract to the awardee's affiliate (where the awardee was merged into its affiliate) is a matter of contract administration because it involves a preexisting contract and there is no evidence that the agency awarded the contract with the intention of allowing for its assignment.

DECISION

Acepex Management Corporation protests the award of a contract to Kleen-Tech Support Services, Inc., under request for proposals (RFP) No. F04700-99-R-0014, issued by the Department of the Air Force, for custodial services at Edwards Air Force Base, California.

We deny the protest.

The RFP provided for the award of a fixed-price contract for a base period with two 1-year options. RFP at 2-7. The successful contractor is required to provide all personnel, equipment, tools, materials, vehicles, supervision and other items to perform the custodial services. RFP Performance Work Statement, at 1.

Offerors were advised that the agency would "utilize the Performance Price Tradeoff (PPT) technique" to arrive at a best value award decision under which the performance risk ratings were considered significantly more important than price. The application of this technique involves determining the acceptability of each offeror's proposal, ranking all acceptable proposals by evaluated price, and assigning the proposals a performance risk rating of exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. The RFP listed "types of information," such as "[q]uality of service" and "[t]imeliness of performance" that would be considered in determining the performance risk ratings. RFP at M-1, M-2.

The RFP included detailed instructions for the preparation of proposals. The instructions requested, among other things, that offerors complete the RFP's price schedule and include a statement detailing any exceptions taken to the terms of the solicitation. Offerors were also to submit a list of at least three "contracts or subcontracts performed for the same or similar kind of work described in [the] solicitation that have been issued within the last five (5) years." The RFP added here that the present and past performance information provided "may include data on services performed by other divisions, corporate management, critical subcontractors, or teaming subcontractors if such resources will be brought to bear or significantly influence the performance of the proposed service," and specified that the present and past performance information submission was limited to four pages in length. RFP at L-1, L-2.

The agency received 41 proposals by the RFP's closing date. Kleen-Tech's and Acepex's proposals were the lowest-priced (at \$2,131,190) and fifth lowest-priced (at \$3,072,546), respectively, of the 12 proposals that received performance risk

ratings of exceptional/high confidence. Agency Report, Tab 21, Price Competition Memorandum, attach. 1. Using the PPT technique, the agency determined that Kleen-Tech's proposal represented the best value to the government and made award to that firm.¹ Agency Report, Tab 17, Source Selection Decision Document.

Acepex (the incumbent contractor) contends that the agency's evaluation of the offerors' present and past performance and assessment of performance risk ratings were unreasonable, and that Kleen-Tech's past performance rating should have been less than exceptional/high confidence. Protest at 4; Supplemental Protest, July 16, 1999, at 2.

The evaluation of past performance is a matter within the discretion of the contracting agency. HLC Indus., Inc., B-274374, Dec. 6, 1996, 96-2 CPD ¶ 214 at 3. In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation. CDA Inv. Techs., Inc., B-272093, B-272093.2, Sept. 12, 1996, 97-1 CPD ¶ 102 at 7.

The present and past performance section of Kleen-Tech's proposal included information on three contracts, and in accordance with the RFP's instructions, was limited to four pages. Agency Report, Tab 12, Kleen-Tech's Present and Past Performance Proposal. The first contract was described as involving "[j]anitorial, rodent control, plutonium filter changing, lead and beryllium cleanup, & complete exposure control services" at Los Alamos National Laboratory with a contract value of \$28.8 million. The second and third contracts were described as involving

¹Prior to awarding the contract to Kleen-Tech, the agency notified the disappointed offerors that Kleen-Tech was the apparent awardee. Acepex and another offeror filed protests challenging Kleen-Tech's small business size status. The contracting officer forwarded these protests to the Small Business Administration (SBA). Agency Report, Tab 18, Acepex's Size Protest; Tab 19, Olympus Building Services, Inc. Size Protest; Tab 20, SBA Size Determination Memorandum. Both size protests claimed that Kleen-Tech exceeded the applicable small business size standards because of its affiliation with Kleen-Tech Building Services, Inc. (KTBS). For example, Acepex contended in its size protest that Kleen-Tech and KTBS were co-located, have identical ownership and management, and that KTBS would perform the "primary and vital requirements of the contract." The SBA agreed that Kleen-Tech (the apparent awardee) and KTBS were affiliated based upon their representation of affiliation, co-location, common ownership and management. Agency Report, Tab 20, SBA Size Determination Memorandum, at 2. The SBA noted that the receipts of Kleen-Tech and KTBS must be combined in determining their size because of their affiliation, and concluded that Kleen-Tech was a small business for the purposes of this procurement because the average receipts of Kleen-Tech and KTBS combined were less than the maximum amount permitted under the applicable size standard. Id. at 4.

“[j]anitorial and support services in high-density offices, computer areas, and medical and production facilities” at private corporations with a contract values of \$5.8 and \$6 million, respectively.

The agency evaluated the offerors’ present and past performance by sending to each point of contact (POC) identified in the proposals a present and past performance questionnaire to be completed and returned to the cognizant agency contracting officer. Contracting Officer’s Statement at 3; Agency Report, Tab 14, Completed Present/Past Performance Questionnaires--Kleen-Tech. The questionnaires listed eight separate evaluation areas, such as “[q]uality of service” and “[t]imeliness of performance,” that could be rated using the adjectival scheme provided and, if desired, commented on, as well as a separate space to provide an overall rating of the contractor’s performance.²

Questionnaires were sent to the three POCs listed in Kleen-Tech’s proposal, and each of the POCs returned a completed questionnaire to the agency. Agency Report, Tab 14, Completed Present/Past Performance Questionnaires--Kleen-Tech. Kleen-Tech’s performance was rated as exceptional under each of the eight evaluation areas and exceptional overall on two of the questionnaires, with one of the two responses including numerous positive comments regarding Kleen-Tech’s performance. The remaining questionnaire rated Kleen-Tech’s performance as exceptional under the majority of applicable evaluation areas, satisfactory under the remaining evaluation areas, and exceptional overall.

The completed questionnaires were reviewed by the agency, with the agency concluding, based upon the ratings and positive comments under each of the evaluation areas on the completed questionnaires, that Kleen-Tech’s proposal merited a performance risk rating of exceptional/high confidence. Agency Report, Tab 14, Memorandum of Agency Evaluator, Completed Present/Past Performance Questionnaires--Kleen-Tech.

Acepex complains that the agency’s evaluation of Kleen-Tech’s present and past performance was inadequate because the agency “merely looked at a contract which had some component of a related service in it and concluded that was sufficient” without “parsing of how large a portion of that contract janitorial services is.” Protester’s Comments, Aug. 6, 1999, at 10. That is, with regard to Kleen-Tech’s contract to perform “[j]anitorial, rodent control, plutonium filter changing, lead and beryllium cleanup, & complete exposure control services” at Los Alamos National Laboratory, the protester argues the agency could not “make an informed past performance rating” unless it determined how much of the services rendered (presumably by dollar amount) involved janitorial work and “as compared to the

²The questionnaires provided for ratings of exceptional, satisfactory, marginal, unsatisfactory, and not applicable.

environmental remediation aspect of cleaning up lead and beryllium or of changing plutonium filters.” Id. at 10-11. The protester similarly argues that in order to make an informed determination regarding the two contracts listed by Kleen-Tech involving “[j]anitorial and support services in high-density offices, computer areas, and medical and production facilities,” the agency was required to determine how much of the services involved janitorial work as opposed to support services. Id.

Where, as here, a solicitation requires the evaluation of offerors’ past performance, an agency has the 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 solicitations provisions. CDA Inv. Techs., Inc., supra.

The contracts described by Kleen-Tech had values so far in excess of the contract awarded under the subject RFP that even if the janitorial services components of the contracts did not constitute the majority of the work to be performed they would still have a greater value than that provided for by this RFP. Additionally, the agency could properly consider the fact that Kleen-Tech performed the contracts as a custodial and facility support services contractor (as opposed to environmental remediation services). We find, therefore, that the agency’s consideration of the contracts cited by Kleen-Tech, without the “parsing” advocated by the protester, to be reasonable.

Acepex also argues that the documentation provided by the agency is not sufficient to support the agency’s actions. The protester points out that the RFP stated that the performance risk rating would be based upon, among other things, “types of information” such as “quality of service,” “timeliness of performance,” and “effectiveness of quality control,” and complains that “[t]here is no evidence of these items being reviewed.” Protester’s Comments, Aug. 6, 1999, at 5.

An agency’s evaluation of proposals and source selection decision should be documented in sufficient detail to allow for the review of the merits of the protest. Matrix Int’l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5. An agency which fails to adequately document its evaluation runs the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations. Id.

The protester’s assertion that the agency failed to evaluate the types of information specified in the RFP is simply incorrect. As mentioned previously, the questionnaires sent to the POCs identified in the offerors’ proposals included eight questions, with each question asking for exactly the same information as that identified in the RFP. For example, the RFP noted that the performance risk rating would be based, in part, upon “quality of service,” and the first evaluation area set forth in the present and past performance questionnaires required the individual

completing the questionnaire to rate the “[c]ontractor’s quality of service.” RFP at M-1; Agency Report, Tab 14, Completed Present and Past Performance Questionnaires--Kleen-Tech.

Moreover, as indicated above, the record includes, among other things, the offerors’ proposals, Agency Report, Tabs 12 and 13; agency’s response to supplemental document request, questionnaires sent to and received from the POCs listed in the offerors’ proposals along with the relevant instructions for the questionnaires’ completion, Tabs 14 and 15, memoranda documenting the agency’s evaluation of the information contained in the completed questionnaires, Tabs 14 and 15, as well as a price competition memorandum, Tab 21, and a source selection decision document, Tab 17. These documents allowed our Office to follow, understand, and review the agency’s actions and determinations in this procurement, thus allowing our Office to reach a conclusion as to reasonableness of the evaluation and source selection.³

Based on our review, the record reasonably supports Kleen-Tech’s exceptional/high confidence rating, given its documented favorable references.

Acepex next argues that the agency acted improperly in awarding the contract to Kleen-Tech without first conducting discussions. In support of this contention, the protester refers to the following paragraph of the RFP (at M-1):

The government reserves the right to award without discussions to any offeror who submits a proposal compliant with the Terms and Conditions of the [RFP], has an exceptional/high confidence performance risk rating, and has the lowest evaluated price. The Government reserves the right to award to a different offeror, other than the offeror submitting the lowest evaluated price, compliant proposal, if that offeror is judged to have a greater performance/confidence risk rating.

Acepex contends that the agency was precluded from awarding the contract to Kleen-Tech without first conducting discussions because another offeror, whose proposal received a performance risk rating of “satisfactory/confidence,” submitted the lowest-priced proposal. Supplemental Protest, Aug. 2, 1999, at 4-5; Protester’s Supplemental Comments, Aug. 17, 1999, at 9-12. The agency refers to the paragraph quoted above as well as other statements set forth in the RFP, and argues that the solicitation can only reasonably be read as permitting an award without discussions if discussions are unnecessary. Agency Report, Legal Memorandum, Aug. 9, 1999, at 2.

³The protester also complains about the documentation surrounding the price evaluation, but does not assert that Kleen-Tech’s or Acepex’s prices were not properly evaluated. Thus, we will not consider this argument further.

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. American Native Med. Transport, L.L.C., B-276873, Aug. 5, 1997, 97-2 CPD ¶ 73 at 8. Here, Acepex has not claimed that it was prejudiced in any way by the lack of discussions; for example, it does not state how it would have changed its proposal if it had been accorded discussions. Accordingly, we will not consider this aspect of Acepex's protest further.

Acepex also contends that the agency conducted improper discussions with Kleen-Tech. In this regard, the protester points out that after it filed its protest with our Office challenging the agency's assessment of Kleen-Tech's present and past performance, the contracting officer contacted Kleen-Tech "for the purposes of confirming the relevancy of [Kleen-Tech's] performance record." Supplemental Protest, Aug. 2, 1999, at 5, quoting Contracting Officer's Statement, July 8, 1999, at 4.

In the context of a bid protest, an agency is permitted to obtain post-BAFO, post-award clarifications from an offeror which do not provide an opportunity to revise or modify a proposal. Sociometrics, Inc., B-261367.2, B-261367.3, Nov. 1, 1995, 95-2 CPD ¶ 201 at 4 n.2; Aquidneck Sys. Int'l, Inc., B-257170.2, Sept. 30, 1994, 94-2 CPD ¶ 122 at 5-6. The record reflects that here, in response to the protest, the agency contacted the awardee in order to assess the merits of the protest; the awardee was neither provided the opportunity nor did it attempt to modify its proposal. Contracting Officer's Statement, July 8, 1999, at 4; Agency Report, Tab 25, Intervenor's June 28, 1999 Response to the Protest. Accordingly, this ground of protest is also without merit.

Acepex finally argues that "the award cannot stand because the awardee no longer exists." Supplemental Protest, Aug. 2, 1999, at 2. The protester points out in this regard that according to the record Kleen-Tech was merged into its affiliate KTBS shortly after award. Id.

As noted previously, Kleen-Tech and KTBS were affiliates, with common ownership, location and management. Agency Report, Tab 20, SBA Size Determination Memorandum, at 2. According to the awardee, the principals of KTBS initially incorporated Kleen-Tech "to undertake government contracts while KTBS would continue to represent commercial contracts." Agency Report, Tab 25, Intervenor's June 28, 1999 Response to the Protest, at 1. The awardee explains that the "sole purpose for the creation of KTSS was to provide an administrative separation of the financial functions of Cost Accounting Practices associated with government procurements from General Accounting Procedures associated with commercial contracts." Id.

The awardee states that "[d]uring the past year . . . many vendors, customers, employees and various governmental agencies (including the SBA) experienced confusion with the corporate separation of KTBS and [Kleen-Tech]." Id. at 1-2. After

conferring with representatives of “the Department of Defense to ensure that appropriate facility clearances would not experience any detrimental impact and to obtain their approval,” and confirming that the accounting concerns that led to the incorporation of Kleen-Tech could be resolved, the principals of KTBS and Kleen-Tech (which were the same individuals) decided to merge Kleen-Tech into KTBS. Id. at 2. The awardee states that the Articles of Merger were filed with the Colorado Secretary of State on June 24 (6 days after the contract had been awarded to Kleen-Tech), and that KTBS now uses “Kleen-Tech Support Services as one of its trade names.” Id.

The agency argues that the assignment of the contract was permissible under the applicable statutory and case law, and that it was unnecessary to enter into a novation agreement with Kleen-Tech and KTBS because of the nature of the merger.⁴ Supplemental Report, Aug. 9, 1999, at 1-3.

When a contract has been awarded, we generally will not review a protest that the assignment of the contract to a different firm was improper. Bosma Mach. and Tool Corp., B-257443.2, B-257443.3, Oct. 17, 1994, 94-2 CPD ¶ 143 at 4. The propriety of an agency’s decision to enter (or not enter) into a novation agreement, or otherwise allow for or disapprove of the assignment of a contract is a matter of contract administration, and therefore not for consideration by our Office. 4 C.F.R. § 21.5(a) (1999); Bosma Mach. and Tool Corp., *supra*; JA & Assocs., Inc.; Son’s Quality Food Co., B-256280.2, B-256280.4, Aug. 19, 1994, 95-1 CPD ¶ 136 at 5 n.7. This case clearly involves a preexisting contract, and because there is no evidence that the agency awarded the contract to Kleen-Tech with the intention of allowing its assignment to KTBS, the assignment relates not to the award of the contract but to contract administration.

The protest is denied.

Comptroller General
of the United States

⁴A novation agreement is a “legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligation under the contract, and the government recognizes the transfer of the contract and related assets.” FAR § 42.1201.