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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:** JACO & MCC Joint Venture, LLP

**File:** B-293354.2

**Date:** May 18, 2004

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Charles R. Lucy, Esq., Holland & Hart, for the protester.

Johnathan M. Bailey, Esq., Bailey & Bailey, for Vistacon, Inc., an intervenor.

Capt. Fansu Ku, Department of the Army, and Kevin R. Harber, Esq., Small Business Administration, for the agencies.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

1. Agency may consider the experience and past performance history of individual joint venture partners in evaluating the joint venture's proposal where solicitation does not preclude that and both joint venture partners will be performing work under the contract.
  2. Protest that the evaluation and source selection decision were flawed is denied where the record shows that the evaluation and source selection were reasonable and consistent with the evaluation factors, and the protester's contentions represent only its disagreement with the agency's judgment.
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### **DECISION**

JACO & MCC Joint Venture (JACO/MCC), a mentor-protégé joint venture, protests the award of a contract to Vistacon, Inc., under request for proposals (RFP) No. DABK05-03-R-0010, issued by the Department of the Army, for construction and repair projects. JACO/MCC protests the evaluation of proposals and the selection of

Vistacon's higher-priced, higher-rated proposal for award.<sup>1</sup>

We deny the protest.

The RFP, issued April 16, 2003 as a competitive section 8(a) set-aside, provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity "job order contract" for a base year, with four 1-year options, for a contractor to provide maintenance, repair, and minor construction services at various Army facilities in Texas and New Mexico.<sup>2</sup> The value of the resulting contract is expected to be \$17.5 million over the 5-year period, with a guaranteed minimum of \$500,000 for the base year and \$350,000 for each option year exercised. RFP at 5.

As amended, the RFP provided that award would be made to the offeror whose proposal was determined to represent the best value to the government, price and other factors (experience and past performance) considered. The RFP stated that the experience factor was comprised of two subfactors: (1) list of similar work and (2) history of continuous business. The past performance factor was comprised of three subfactors: (1) quality of service, (2) timeliness of performance, and (3) customer satisfaction.<sup>3</sup> The experience and past performance factors were of equal importance, and collectively, were more important than price. RFP at 89-92.

The RFP required offerors to submit certain specific types of information with their proposals. Among other things, for the evaluation of experience, offerors were

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<sup>1</sup> JACO General Contractors, Inc., a small disadvantaged business, is the protégé of MCC Construction Corp., a large business mentor to JACO under the Small Business Administration's (SBA) mentor-protégé program. This SBA program is designed to encourage approved mentors to provide various forms of assistance (*i.e.*, technical and contract management assistance, financial aid in the form of equity investments and/or loans, and subcontract support) to eligible protégé participants in order to enhance the capabilities of the protégés and to improve their ability to successfully compete for federal contracts. The amount of work performed by a protégé under this type of arrangement is governed by a written agreement between the protégé and mentor, which is approved by the SBA. For a detailed discussion of this program, see <http://www.sba.gov/8abd/indexmentorprogram.html>.

<sup>2</sup> The RFP included the clause at Federal Acquisition Regulation (FAR) § 52.219-18, which restricted the competition to firms certified under the SBA's section 8(a) program. RFP at 45.

<sup>3</sup> According to the RFP, proposals would receive one of the following adjectival ratings under each non-price factor: excellent, good, fair, poor, and unsatisfactory. Offerors with limited or no relevant experience or past performance history were to be assigned a neutral rating. RFP at 91.

directed to describe their experience with the same or similar type contracts of complexity similar to the solicited requirements which were either completed within the past 5 years or are currently in progress. The RFP further required that at least five of these contracts be valued at \$500,000 or more. In addition, offerors were to provide written evidence that they had at least a 5-year history of conducting continuous business as a general contractor. RFP at 79.

The solicitation contained, as an attachment, past performance surveys that offerors were to provide to personnel capable of evaluating their performance under those contracts identified in their experience proposal. The contract references were to complete and return the past performance survey to the designated Army personnel. The RFP stated that the agency, in its past performance evaluation, would consider the information provided in the survey responses and could also obtain information from sources other than those identified by the offeror. The RFP stated that the evaluation would be a subjective assessment based on consideration of all relevant facts and circumstances associated with the offeror's performance over the past 5 years. RFP at 90-91. The RFP further stated that the agency reserved the right to verify any information provided by offerors, and indicated that:

[p]erformance risk assessment will be an integral part of the evaluation process, particularly in regards to the past performance and experience evaluation factors. Surveys or subsequent discussions that uncover significant to high-level performance risk will impact the past performance and experience ratings for that offeror.

RFP at 78. Performance risk was to be evaluated using the following adjectival evaluation rating scale: low, moderate, high, and unknown. Id. at 81.

As to price, offerors were instructed to complete a price schedule that included, for each period of the contemplated contract (base, 1<sup>st</sup> option, 2<sup>nd</sup> option, etc.), contract line item numbers (CLIN) that set forth the required scope of work. Except for one CLIN, offerors were to submit percentage factors (i.e., coefficients) that were a net "decrease from" or "increase to" the unit prices listed in the Job Order Contract Unit Price Book that generally provides unit prices for construction work. RFP at 4-5. Price proposals would be evaluated for reasonableness and, for evaluation purposes only, each offeror's proposed coefficient would be evaluated on the following assumptions: (1) that 95% of the work would be performed during normal working hours, with 5% accomplished during other than normal working hours; and (2) that 85% of the work would be performed in Texas and 15% performed in New Mexico. Id. at 89-90.

Eight offerors, including JACO/MCC and Vistacon, submitted proposals by the June 24, 2003 extended closing date.<sup>4</sup> The proposals were evaluated by the agency's source selection evaluation board (SSEB), and the consensus ratings, which were supported by written evaluation narratives, were as follows:

	Experience	Past Performance	Performance Risk	Proposal Risk <sup>5</sup>
Vistacon	Excellent	Excellent	Low	Low
Offeror A	Excellent	Excellent	Low	Low
JACO/MCC	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror B	Good	Fair	Moderate	Moderate
Offeror C	Poor	Fair	High	High
Offeror D	Poor	Neutral	Moderate	High
Offeror E	Fair	Fair	Mod-High	Moderate
Offeror F	Poor	Fair	High	High

Agency Report (AR) exh. 21, SSEB Consensus Evaluation Summary, at 1. Price proposals were evaluated using price analysis techniques and were compared to the independent government estimate.

The agency reported that in evaluating the JACO/MCC proposal, the SSEB evaluated the experience and past performance history only for JACO because JACO was the managing partner of the joint venture. In assigning [DELETED] rating to the JACO/MCC proposal under the experience factor, the agency concluded that JACO's experience was primarily derived as a subcontractor under contracts that were not similar in magnitude or complexity to the current procurement. The agency assigned a [DELETED] past performance rating to the protester's proposal because [DELETED]. AR exh. 23, SSEB Consensus Evaluation Summary.

The initial evaluation of proposals resulted in the Army establishing a competitive range consisting of the two most highly rated proposals; those proposals submitted by Vistacon and Offeror A. Discussions were held with these two competitive range offerors and final revised proposals were requested and received. The source selection authority (SSA) subsequently determined that Vistacon's offer represented the best value to the government and awarded the contract to Vistacon on September 3, 2003. AR exh. 17, SSA Source Selection Decision.

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<sup>4</sup> The record shows that proposals were submitted by five joint venture entities, including JACO/MCC. Vistacon was one of three firms that submitted individual proposals.

<sup>5</sup> Proposal risk was defined in the source selection plan as the risk associated with the offeror's proposal. This rating is not at issue here.

After learning of the agency's decision and obtaining a debriefing, JACO/MCC filed a protest arguing that the agency: (1) failed to evaluate the experience and past performance of its joint venture partner, MCC; (2) violated the SBA's mentor-protégé guidelines by ignoring the experience and past performance of MCC, the mentor partner; (3) applied an unstated evaluation factor in evaluating the joint venture proposal by considering the management structure of the joint venture; and (4) misevaluated the proposals submitted by the joint venture and the awardee under the price and experience evaluation factors.<sup>6</sup> AR exh.14, Initial Protest, at 4-7, Nov. 26, 2003.

In response to the protest, the agency decided to take corrective action. Specifically, the agency stated that it would: (1) reevaluate the protester's proposal taking into consideration the experience and past performance information for MCC; and (2) if an offeror other than Vistacon was selected for award, the agency would terminate the contract previously awarded to that firm. AR exh. 13, Contracting Officer's Memorandum for the Record, Dec. 17, 2003. In light of the proposed corrective action, we dismissed JACO/MCC's protest as academic.

Thereafter, the agency performed various reevaluation activities, including an evaluation of the experience and past performance information submitted by MCC in the joint venture proposal. The SSEB concluded that MCC's experience warranted a rating of [DELETED]. Under the past performance factor, the SSEB reviewed the completed past performance surveys, considered information contained in the Construction Contractor Appraisal Support System (CCASS) (a centralized, automated database of performance evaluations on construction contractors maintained by the Army Corps of Engineers), and obtained updated information from government and commercial personnel who had oversight of the various contracts identified by MCC. The SSEB considered all of the above information in arriving at a rating of [DELETED] for MCC's past performance history, which was supported by evaluation narratives identifying strengths, weaknesses and deficiencies based on past performance information furnished by the contract references. AR exh. 11, SSEB Evaluation Report, at 17-20; AR exh. 2, Protester's Written Debriefing, at 5-6, Mar. 11, 2004. The evaluators did not reevaluate the ratings previously assigned to JACO under these same evaluation factors.

Upon completion of MCC's evaluation, the SSEB met to discuss and determine the basis upon which both joint venture partners' experience and past performance would be considered to assign a consensus reevaluation of the joint venture's proposal. Based on the joint venture agreement and the management structure set forth in the JACO/MCC proposal, the SSEB chairman prepared an analysis of the

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<sup>6</sup> The proposals of the other offerors, and the agency's evaluation of those proposals, are not relevant to this protest and are not further discussed.

partners' responsibilities; the SSEB then determined which responsibilities in the resulting contract were most important to the agency. Based upon this analysis, the SSEB concluded that "the ratio for responsibility" of the resulting contract work was 50/50; therefore, a consensus rating was assigned to the joint venture based on that ratio. Contracting Officer's Statement of Facts at 2-3.

The results of the consensus reevaluation of the JACO/MCC proposal were as follows:

	JACO	MCC	Overall Rating for JACO/MCC
Experience	[DELETED]	[DELETED]	[DELETED]
1. List of Similar Work	[DELETED]	[DELETED]	[DELETED]
2. History of Continuous Bus.	[DELETED]	[DELETED]	[DELETED]
Past Performance	[DELETED]	[DELETED]	[DELETED]
1. Quality of Service	[DELETED]	[DELETED]	[DELETED]
2. Timeliness of Performance	[DELETED]	[DELETED]	[DELETED]
3. Customer Satisfaction	[DELETED]	[DELETED]	[DELETED]
Performance Risk	[DELETED]	[DELETED]	[DELETED]
Proposal Risk	[DELETED]	[DELETED]	[DELETED]

AR exh. 8, Revised SSEB Evaluation Report, at 9.

The SSEB then summarized the reevaluation of the protester's proposal *vis-à-vis* the original competitive range offerors, and reported its findings to the SSA as follows:

	JACO/MCC	Offeror A	Vistacon
Experience	[DELETED]	Excellent	Excellent
1. List of Similar Work	[DELETED]	Excellent	Excellent
2. History of Continuous Bus.	[DELETED]	Good	Excellent
Past Performance	[DELETED]	Excellent	Excellent
1. Quality of Service	[DELETED]	Excellent	Excellent
2. Timeliness of Performance	[DELETED]	Excellent	Excellent
3. Customer Satisfaction	[DELETED]	Excellent	Excellent
Performance Risk	[DELETED]	Low	Low
Proposal Risk	[DELETED]	Low	Low

Id.

On January 28, 2004, the SSA reviewed the reevaluation findings and, consistent with the relative importance of the evaluation factors, the SSA again determined that the JACO/MCC proposal was not among the most highly rated proposals and would not be considered for award. AR exh. 7, SSA Source Selection Document.

In documenting that decision, the SSA specifically referenced JACO/MCC's proposal in the context of each of the evaluation factors, noting that under the most important factors--experience and past performance--[DELETED]. Although JACO/MCC's proposed coefficients were [DELETED] initially submitted by Offeror A and Vistacon, the SSA concluded that the JACO/MCC proposal was not among the most highly rated proposals. *Id.* at 2. On February 3, the agency notified JACO/MCC that its proposal was not among the most highly rated proposals and that the agency had again selected Vistacon's proposal for award. This protest followed.

JACO/MCC first challenges the evaluation approach used by the Army in the reevaluation of its proposal under the experience and past performance factors. The predicate to all of JACO/MCC's evaluation arguments is its view that the evaluation of the joint venture's proposal should have been limited to consideration of the mentor partner's experience and past performance history. As such, the protester claims that it was improper for the agency to separately evaluate the mentor and protégé under these evaluation factors, and then to simply average the mentor and protégé ratings to arrive at a combined rating for the joint venture. It is JACO/MCC's position that in doing so, the agency effectively diluted MCC's experience by combining its [DELETED] rating with [DELETED] rating for JACO, thereby frustrating the purpose and intent of the mentor-protégé program, which is to allow small disadvantaged firms that lack experience to gain it through contract awards. Protest at 4-7, Protester's Comments at 3-6, Mar. 26, 2004.<sup>7</sup> We conclude that the agency's actions were reasonable.

Where an agency is evaluating the experience and past performance of a joint venture, there is nothing improper in the agency considering the specific experience and past performance of the entity that would actually perform the work so long as doing so is not expressly prohibited by the RFP. *Base Techs., Inc.*, B-293061.2, B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31 at 10. Moreover, the SBA regulations governing the mentor-protégé program do not provide otherwise,

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<sup>7</sup> At the request of this Office, the SBA provided an advisory opinion on the issues presented in the protest. The SBA concluded as follows:

While the Army's decision to consider the experience and past performance qualifications of both JACO and MCC in evaluating the joint venture's bid proposal appears to be permissible under current GAO case law, it is SBA's contention that, on policy grounds, awarding agencies should look only to the qualifications of a mentor firm in such circumstances. However, in this instance, it does not appear that JACO/MCC was actually prejudiced by the Army's chosen method of evaluation.

SBA Response at 6.

see 13 C.F.R. § 124.520, and we find no other basis for precluding the agency from considering the experience and past performance of both partners in such an arrangement. Urban-Meridian Joint Venture, B-287168; B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 3.

It is undisputed that the RFP does not indicate how joint venture proposals would be evaluated.<sup>8</sup> However, the record shows that, consistent with the terms of the RFP, the agency evaluators determined that it was important to consider the experience and past performance of the individual joint venture partners since each would perform major or critical aspects of the solicited requirements. Such a determination should, in our view, be considered a matter of contracting agency discretion, and the protester has not shown that the agency abused its discretion in this regard. The fact that the protester disagrees with the agency does not establish that the evaluation approach was unreasonable. The Paintworks, Inc., B-292982, B-292982.2, Dec. 23, 2003, 2003 CPD ¶ 234 at 3.

With respect to the protester's specific allegation that the agency based the consensus evaluation ratings for the joint venture by simply averaging the individual joint venture partners' ratings, the record reflects otherwise. As explained previously, the JACO/MCC consensus ratings were the product of an SSEB meeting at which the evaluators discussed their assessments in order to develop a consensus rating for each factor. Contracting Officer's Statement of Facts at 2-3. The record further shows that the SSEB reviewed and analyzed the joint venture agreement and the SSEB chairman prepared a table listing the individual partners' and the joint venture's responsibilities under the contract. For example, while the joint venture would provide [DELETED], MCC would review [DELETED] and JACO would direct [DELETED]. Similarly, while the joint venture would provide [DELETED], MCC would establish [DELETED] procedures subject to JACO's approval. The SSEB also noted that under the joint venture agreement, JACO was [DELETED]. AR exh. 8, Revised SSEB Evaluation, at 15; AR exh. 30, JACO/MCC Joint Venture Agreement, at 2. The protester argues that the agency's conclusion that the individual joint venture partners' responsibilities under this contract would be 50/50 impermissibly ignored the clear weight of responsibility that resided with the mentor partner. Protester's Comments at 3, Mar. 26, 2004. Given the respective roles of the partners as identified by the SSEB from the joint venture agreement, we have no basis to question the SSEB's conclusion that both joint venture partners' experience and past performance should be evaluated and given equal weight.

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<sup>8</sup> To the extent JACO/MCC alleges that the RFP should have disclosed how joint venture proposals would be evaluated, or should have provided that protégé experience and past performance would not be evaluated, the allegation is untimely since it concerns an alleged defect in the RFP that should have been raised prior to the proposal due date. 4 C.F.R. § 21.2(a)(1) (2004).

JACO/MCC next complains that the agency was required to give MCC a higher past performance rating because MCC is an established construction company that has extensive past performance history performing similar complex construction projects and job order contracts, and that any negative performance assessments were minor problems that should not be given much weight. Protest at 11. In reviewing protests against allegedly improper evaluations and source selections, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and consistent with the RFP factors and applicable procurement statutes and regulations. Base Techs., Inc., *supra*, at 7.

The record shows that the JACO/MCC past performance proposal listed 12 contracts that MCC had identified as representative of the work it had performed. In evaluating MCC's past performance, the agency considered the five completed survey responses it received. Of these, MCC's past performance was rated as [DELETED] by two references and [DELETED] by another reference. A fourth reference indicated that no past performance history was available, and a fifth past performance reference from [DELETED] rated MCC's overall performance as [DELETED]. AR exh. 11, SSEB Evaluation Report, at 17; AR exh. 25, MCC Past Performance Surveys. In addition, the agency obtained and reviewed additional past performance information for MCC on six other contracts--two were rated [DELETED], three were rated [DELETED], and one was rated [DELETED]. AR exh. 8, Revised SSEB Evaluation Report, at 17. These ratings are supported by narrative surveys submitted by individuals familiar with MCC's performance on these various contracts.<sup>9</sup> AR exh. 9, Additional MCC Past Performance Surveys. We have reviewed the substantial contemporaneous evaluation record and find nothing unreasonable in the agency's assessment that based on the past performance information it reviewed--which ranged from [DELETED]--MCC rated a [DELETED] under the past performance factor. Although the protester believes that MCC's past performance should have been rated [DELETED] rather than [DELETED], we view its arguments as reflecting mere disagreement with the agency's judgments.<sup>10</sup>

Finally, to the extent that the protester contends that the agency failed to consider price, we disagree. The SSA specifically noted that the experience and past

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<sup>9</sup> The past performance survey responses, when totaled, show that MCC's past performance received four [DELETED] ratings, five [DELETED] ratings and one [DELETED] rating.

<sup>10</sup> JACO/MCC objects in particular to the [DELETED] rating assigned to MCC's past performance under the [DELETED]. We need not address the reasonableness of this rating because, even if the [DELETED] rating is ignored, we would have no basis to question the overall [DELETED] rating assigned to MCC under the past performance factor.

performance factors were more important than price and basically concluded that the better experience and past performance ratings of Vistacon and Offeror A outweighed the price difference between their proposals and that of the protester's. AR exh. 7, SSA Source Selection Document.

The protest is denied.<sup>11</sup>

Anthony H. Gamboa  
General Counsel

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<sup>11</sup> We have considered other arguments the protester presented and find them to be without merit.