G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

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: Goode Construction, Inc.

File: B-288655; B-288655.2; B-288655.3

Date: October 19, 2001

Robert E. Korroch, Esq., Williams Mullen Clark & Dobbins, for the protester.
Keith A. Moore-Erikson, Esq., United States Coast Guard, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly converted technical evaluation process into responsibility determination is denied where record shows that award was based on a comparative evaluation of the relevant past performance of awardee and protester.

2. Protest that agency improperly failed to adjust protester's proposal evaluation score upward following discussions is denied where record shows that protester did not adequately respond to agency's request for additional information during discussions, and that increased score therefore was not warranted.

DECISION

Goode Construction, Inc. protests the award of a contract to Wren, Incorporated, under request for proposals (RFP) No. DTCG47-01-R-3EFK15, issued by the United States Coast Guard for replacement of the central steam plant with natural gas facilities at the Coast Guard Training Center in Cape May, New Jersey. Goode complains that the Coast Guard rejected the firm, a small business, as nonresponsible, and improperly failed to refer that determination to the Small Business Administration (SBA). Goode also challenges the past performance evaluation.

We deny the protest.

The RFP, issued as a HUB-Zone set-aside, required the successful contractor to decentralize the steam plant. The work involves 24 buildings and will take place while training for new recruits and operations at the center are ongoing. Contracting Officer's Statement (COS) at 1. The solicitation provided for a "best value" evaluation based on past performance and price, which were weighted equally. With

respect to past performance, the solicitation advised offerors to include information on relevant contracts performed within the past 3 years, and listed the following critical performance elements as those which the agency would evaluate:

> Projects that required management of construction at multiple sites with controlled phasing and multiple disciplines.
>
> Projects that required coordination of construction to accommodate continued operations by occupants.
>
> Projects that involved building hot water heating systems, in particular, conversion from steam to hot water.
>
> Projects that involved installation of gas-fired galley and laundry equipment.

RFP § M.4.

Goode, a small business and HUB-Zone contractor, submitted its proposal with a large business teaming partner, M&W Construction Corp. Wren, also a small business and HUB-Zone contractor, submitted its proposal pursuant to a mentor-protégé agreement with a large business, CBC Enterprises, Inc. The Source Evaluation Board (SEB) evaluated Goode's and Wren's past performance, and concluded that neither contractor had performed many contracts similar to the current solicitation. Consequently, the SEB decided to review and rely on the past performance of CBC and M&W. COS at 4; Source Evaluation Board Report (SEBR) at 4. The SEB found that CBC had an extensive past performance record on each of the critical performance elements, and had performed many projects that combined two or more of the critical elements. SEBR at 10; COS at 4. In addition, the references contacted for CBC rated the firm's performance satisfactory to above average. Id.[1] In contrast, the SEB found that M&W had only marginally relevant past performance for the first two critical elements, a moderately relevant reference for the third, and no references for the fourth. SEBR at 9-10; COS at 4. In addition, the SEB received a negative reference for one of the projects M&W submitted to demonstrate past performance under the first two elements. SEBR at 9-10; COS at 4.

The agency held discussions with both offerors and requested their final proposal revisions (FPR). The SEB evaluated the FPRs, but did not change the past performance ratings. SEBR at 9; COS at 5. With respect to price, Goode offered to

---

[1]CBC had received two interim ratings of [DELETED], but these later were upgraded to [DELETED].

perform for [DELETED] and Wren for [DELETED]. SEBR at 9, 8. The SEB determined that Wren's proposal offered the best value to the government, and thus made award to that firm.

RESPONSIBILITY

Goode asserts that, because the Coast Guard inquired into Goode's capacity and experience, it essentially converted the technical evaluation into a responsibility determination, and therefore actually rejected Goode as a nonresponsible contractor. Goode protests that, because it is a small business, the agency could not do this without referring the nonresponsibility determination to SBA. See Federal Acquisition Regulation (FAR) § 19.602-1(a).

This argument is without merit. As the protester concedes, a procuring agency properly may use traditional responsibility factors as technical evaluation factors in a negotiated procurement, where the agency is to perform a comparative evaluation of those factors. Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38 at 6. The RFP here reflected such a determination on the Coast Guard's part, expressly establishing past performance as an evaluation factor, and the record shows that, in evaluating the offers and making the award decision, the agency relied on the past performance information provided by the offerors. In this regard, the SEB supported its evaluation conclusions as follows:

> Successful and timely completion of this heating system conversion project is imperative if critical recruit training functions at the Coast Guard Training Center are to be maintained. One of the Contractors demonstrated past performance in managing similar construction work while keeping their customers in operation. The same Contractor has extensive past performance in coordinating and completing similar construction work on schedule. The same Contractor has successfully completed projects of this type that included critical time constraints. This is a time-critical and highly visible project and the risk of failure to select a firm with little or no experience poses a great risk. The board has determined that the price difference of 7 % outweighs the risk of failure.

SEBR at 1. This statement demonstrates that Wren was selected for award based on its mentor's superior past performance record, and not because Goode was considered nonresponsible.

PAST PERFORMANCE EVALUATION

Goode complains that the agency improperly failed to upgrade its past performance rating based on its responses to discussion questions. In this regard, Goode states that the agency requested more evidence that it had performed jobs involving

multiple units, and that Goode responded by referencing the Westbury project in Portsmouth Virginia; the conversion of 12 buildings from barracks to office space at Camp Pendelton; and the renovation of multiple residential units in Norfolk and Richmond. Goode believes this additional information warranted increasing its rating.

The evaluation in this area was reasonable. The agency reports, and Goode does not dispute, that it asked Goode during discussions to address a negative reference which reported that M&W had not managed its subcontractors and had experienced difficulty in managing a multi-site project. SEBR at 10. Rather than respond to these criticisms, Goode simply stated that the project had been completed on time. COS at 5. Further, Goode had already presented the Camp Pendelton and Portsmouth projects in its initial proposal. Thus, citing these projects again in response to the agency's request for additional evidence of past performance of multiple unit projects did not provide the requested additional evidence. Since the protester's response did not address the concerns specifically identified by the agency, there was no basis for the agency to change Goode's evaluation.

OTHER ISSUES

In Goode's September 20 comments in response to the agency report, Goode raises a number of additional arguments. Under our Bid Protest Regulations, to be timely, a protest that does not allege a solicitation impropriety must be filed within 10 calendar days after the protester knows or should know the basis for protest. 4 C.F.R. § 21.2(a)(2) (2001). All of these additional bases of protest were evident from evaluation documents Goode received from the agency on August 31. Since Goode did not raise these arguments by September 10--that is, 10 calendar days later--they are untimely and will not be considered. Goode also asserts in a September 26 supplemental protest that the Coast Guard improperly failed to provide Goode with preaward notice that an award had been made. However, Goode received notice of the award on August 16; thus, this argument, too, is untimely because it was not raised within 10 calendar days after Goode learned the basis of protest.

Goode also initially raised several other arguments--for example, it argued that the agency did not properly evaluate Wren's past performance. The Coast Guard explained in its agency report why it believed these arguments were without merit, and Goode did not substantively respond to the agency's position in its comments on the report. Under these circumstances, we consider the issues abandoned. See Madison Servs., Inc., B-278962, Apr. 17, 1998, 98-1 CPD ¶ 113 at 4 n.1.

The protest is denied.

Anthony H. Gamboa
General Counsel