



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: R.C.O. Reforesting

File: B-280774.2

Date: November 24, 1998

Roberto C. Ochoa for the protester.

Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Source selection official is not bound by the recommendations or evaluation judgments of lower-level evaluators, and notwithstanding protester's appeal of termination for default, contracting officer's reevaluation of proposal as acceptable rather than exceptional, based on termination for default, was reasonable and consistent with solicitation providing for consideration of past performance.
2. Where agency determined that it had only enough inspectors to administer two contracts and that there would be no value in awarding a third contract, with an additional minimum quantity guarantee, it had a reasonable basis for awarding only two contracts, rather than three, under solicitation providing for multiple awards.

DECISION

R.C.O. Reforesting protests the award of 5-year multitask contracts for reforestation work to Summitt Forests, Inc., and Redding Tree Growers Corp. under request for proposals (RFP) No. R5-14-98-039, issued by the Forest Service. R.C.O. alleges that the evaluation of proposals was improper and that the agency unreasonably declined to award a third contract, to the protester.

We deny the protest.

The agency issued the RFP for award of fixed-price indefinite-delivery, indefinite-quantity contracts for silviculture services--including tree planting, seeding, and precommercial thinning--within Six Rivers and Klamath National Forests. RFP §§ C.1(a), L.4; Determination for Award at 1. The RFP, §§ M.8, M.9, provided for consideration of technical factors, as well as price, which was to be "secondary to technical factors" in the selection decision. Technical factors included the following: record of past performance; technical approach; production capability and capacity; and organization/management. RFP § M.8(b). For the evaluation of past performance, section M.8(b)(1) of the solicitation required

offerors to list all contracts or work experience, completed in the last 5 years, with references which they felt qualified them to be successful in performance of the required effort.

Twelve firms submitted offers on June 11, 1998. An evaluation panel assigned a rating of "exceptional" to the proposals submitted by Summitt, Redding, and R.C.O. These three "exceptional" proposals were second (Summitt), third (Redding), and fourth (R.C.O.) low in price. The contracting officer reviewed the evaluation and ascertained that the evaluators had not considered the recent default termination of one of R.C.O.'s contracts. Determination for Award at 1. Taking the termination into account as part of the evaluation of R.C.O.'s proposal under the past performance factor, the contracting officer reduced the rating of R.C.O.'s technical proposal from "exceptional" to "acceptable." *Id.* Since Redding and Summitt had received the highest technical ratings and had submitted the lowest prices (except for one offeror not at issue here), she awarded them contracts on August 5, 1998. *Id.* R.C.O. received a debriefing on August 17 and filed this protest with our Office 2 days later.

The protester asserts that the agency discriminated against it by changing its technical rating from "exceptional" to "acceptable" and by awarding only two contracts under the RFP, instead of three. The protester asserts that the agency should not have considered the termination of a prior contract for default in the past performance evaluation, since R.C.O.'s appeal of the termination action is still pending; further, the protester asserts that the awardees are "presently involved in serious legal disputes," which the agency should have considered in its evaluation of the proposals of Redding and Summitt. Protest at 3.

The record here indicates that, on May 14, 1997, the agency terminated for default R.C.O.'s contract No. 52-9JNE-7-13, involving tree planting in the Sierra Cascade Province; the agency found that many of the trees to be planted had disappeared and that the protester had apparently buried some of them in holes next to trees actually planted. Forest Service letter, May 14, 1997 at 1. R.C.O. made reference to the termination in its proposal, noting that it had brought a challenge to the agency's action, which was still pending. The contracting officer here participated in an investigation conducted prior to the termination and, based on her personal knowledge of the default, considered it under the past performance evaluation of R.C.O.'s proposal. We find nothing improper or unreasonable in this; the recommendations or evaluation judgments of lower-level evaluators, who did not here take the default into account, are not binding on source selection officials, who may make their own judgments, subject to the tests of rationality and consistency with the stated evaluation factors. *Jason Assocs. Corp.*, B-278689 *et al.*, Mar. 2, 1998, 98-1 CPD ¶ 67 at 5-6. Further, consideration of the default was proper, notwithstanding the protester's pending appeal, since an agency may rely upon its

reasonable perception of inadequate past performance even where the contractor disputes the agency's position. MAC's Gen. Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 at 3-4.

The protester alleges that Redding was debarred from contracting in 1993 and that Summitt "has had several [Immigration and Naturalization Service (INS)] violations." Protester comments, Sept. 25, 1998 at 1. R.C.O. does not identify the contracts involved, or in the case of Summitt, whether government contracts were involved. There is no evidence of improper performance under any of the contracts referenced in the awardees' proposals, and no basis for concluding that the evaluation was improper, given that it was based on the contracts referenced in the proposal. See Morrison Knudsen Corp., B-280261, Sept. 9, 1998, 98-2 CPD ¶ 63 (apart from instances where information is so "close at hand" that it is unreasonable to ignore it, an agency may limit its past performance evaluation to contracts identified in the offeror's proposal). Redding and Summitt have submitted statements denying R.C.O.'s allegations--in the one case, that Redding was ever debarred, and in the other, that Summitt has ever been cited by the INS. Based upon our review of the record, we find the evaluations here reasonable and consistent with the provisions of the RFP.¹

In selecting the two awardees, the contracting officer determined that Redding and Summitt had sufficient capacity to meet the agency's needs, and that the agency would not have sufficient staff to administer any more crews than Redding and Summitt jointly employed. The contracting officer therefore concluded that there would be no value in a third award, with a guarantee of \$10,000 per year to a third contractor and additional administrative costs to the agency. Determination for Award at 2. While Federal Acquisition Regulation (FAR) § 16.504(c) contains a general preference for making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies, it contains no preference for any particular number of awards. The FAR requires only that, in making a determination as to whether multiple awards are appropriate, the contracting officer exercise sound business judgment; where the contracting officer determines that the cost of administration of multiple contracts may outweigh any potential benefits or that multiple awards would not be in the best interests of the government, the agency should not make multiple awards. FAR § 16.504(c)(1)(iii). Similarly, we see no basis for objection to the decision to make only two, rather than three, awards

¹Given our conclusion that the agency properly evaluated the Redding and Summitt proposals, R.C.O.'s allegation that the agency conducted a biased evaluation fails to state a valid basis of protest, since the same two lower-priced proposals would have been selected for award even if the agency had given R.C.O.'s proposal an "exceptional" rating. See Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 4 (protester alleging bias must demonstrate that the alleged bias translated into action that unfairly affected the protester's competitive position).

here. While R.C.O. disagrees with the contracting officer's decision, we see no basis to question her conclusion that there would be no benefit to the government from making more than two awards.²

The protest is denied.

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²R.C.O. argues that the two offerors do not have the capacity to meet all of the agency's requirements, given their commitment to other contracts. The determination whether offerors are capable of performing a contract concerns the contracting officer's affirmative determination of those offerors' responsibility, which our Office will not review absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.5(c) (1998); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177 at 2. There is nothing in the record to indicate that either of these exceptions is applicable here.