



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

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Matter of: Rohmann Services, Inc.

File: B-280154.2

Date: November 16, 1998

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DIGEST

Protest of the evaluation of protester's past performance is denied where the contracting agency reasonably assigned a moderate risk rating to the protester's past performance as a result of customer complaints about the protester's performance and staff and manager turnover on the incumbent contract.

DECISION

Rohmann Services, Inc. protests the award of a contract to WP Photographic Services, Inc. under request for proposals (RFP) No. F41650-98-R-0002, issued by the Department of Air Force for visual information services at Kelly Air Force Base. Rohmann argues that the agency improperly evaluated its past performance and failed to communicate to the firm the agency's concerns about its performance of the incumbent contract.

We deny the protest.

BACKGROUND

The solicited services include advice and assistance on visual information materials, methods, equipment and facilities, graphics services, studio and location photography, film processing, visual information library services, and equipment maintenance. RFP § C-5. The RFP stated that the agency would evaluate offers on the basis of past performance and price and contemplated award to the offeror whose proposal met the terms of the solicitation and contained the best overall value to the government. *Id.* at 21. According to the RFP, the agency was to consider past performance significantly more important than price and evaluate offerors' past performance for the same or similar work assigning performance risk

ratings of high, moderate, low, or not applicable.¹ Id. The RFP advised that, although the agency reserved the right to conduct discussions if necessary, the agency planned to award on the basis of initial proposals, without discussions. Federal Acquisition Regulation (FAR) § 52.212-1 (April 1998) (incorporated by reference). RFP at 1.

The agency received six proposals. Rohmann, the incumbent contractor, submitted the lowest-priced proposal, at \$1,291,649.40, and WP's proposal was the third lowest priced, at \$1,351,302.27. Agency Report, Enclosure 5 at 1, 3. Based on information submitted by the offerors and information provided by references contacted by the agency, Rohmann was assigned a moderate past performance risk rating and WP was assigned a low rating. Rohmann's moderate rating primarily was due to concerns about Rohmann's performance on the incumbent contract. Supplemental Agency Report at 2; Agency Report, Enclosure 11 at 21-55. Award was made to WP based on the conclusion that WP's offer was the most advantageous to the government. Agency Report, Enclosure 5 at 5.

PROTEST ALLEGATIONS

Rohmann primarily argues that the agency improperly evaluated its performance on the incumbent contract. According to Rohmann, the marginal rating which it received for its performance as the incumbent is not supported by the record and is a result of the bias of the agency's quality assurance evaluator (QAE) on that contract. Comments at ¶¶ 9, 27 and 39-40. Rohmann argues that the QAE solicited complaints against Rohmann and, as a member of the evaluation panel, manipulated the past performance evaluation and influenced other evaluators to harm Rohmann. Id. at ¶ 40. Rohmann also argues that the agency's record of its performance is

¹The RFP defined these ratings as follows:

High: Significant doubt exists, based on the offeror's performance record, that the offeror can satisfactorily perform the work.

Moderate: Some doubt exists, based on the offeror's performance record, that the offeror can satisfactorily perform the work.

Low: Little doubt exists, based on the offeror's performance record, that the offeror can satisfactorily perform the work.

Not Applicable: The offeror has no record of relevant past performance, or information on the offeror's past performance is not available. The offeror will not be evaluated favorably or unfavorably on past performance.

poorly organized, with duplicate copies of some documents, partial documentation of some events, and many documents that have no bearing on the determination that Rohmann performed poorly at Kelly and, in some cases, show acceptable performance. Id. at ¶ 36.

Rohmann also argues that the agency failed to communicate to the firm the agency's concerns about its performance of the incumbent contract. Comments at ¶¶ 23, 26, and 30; Supplemental Comments at ¶¶ 25-28. According to Rohmann, during the evaluation, it was entitled to an explanation of the agency's concerns about the firm's performance on the incumbent contract and an opportunity to respond to those concerns. Comments at ¶¶ 23, 26, and 30.

ANALYSIS

Evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for a reasonably based past performance rating. PMT Servs., Inc., B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98 at 6. An agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts. Quality Fabricators, Inc., B-271431, B-271431.3, June 25, 1996, 96-2 CPD ¶ 22 at 7. However, we will question such a conclusion where it is not reasonably based or is undocumented. Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108 at 4; SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320 at 10-12.

Here, a price negotiation memorandum that served as the source selection document indicates that Rohmann's overall moderate risk rating was based on its performance on the incumbent contract. Agency Report, Exhibit 5 at 3. In that memorandum, the contracting officer stated:

Incumbent[] shows documented adverse performance at Kelly [Air Force Base] for the past year. The documentation, not following [contracting officer] direction, non-compliance with contract requirements, customer complaints and fraudulent work orders, [is] attached to the past performance questionnaire. Has had ample time to remedy the situation. The incumbent's contract performance at Kelly Air Force [Base] has been rated as marginal by the QAE and the Contract Administrator.

The record of Rohmann's performance as the incumbent includes four separately tabbed sets of documents which correspond to the four concerns raised in the above-quoted statement of the contracting officer: not following the contracting officer's advice, non-compliance with contract requirements, customer complaints and fraudulent work orders. While each of those sets of documents raises concerns about Rohmann's performance, each of those sets also includes material that

reflects positively upon Rohmann and other material the significance of which is simply unclear and which is not otherwise explained by the Air Force.

For example, under the "Not Following CO Advice" tab, the record includes two letters from Rohmann to Air Force officials concerning a plan by Rohmann to move part of its operation under the contract. In those letters, Rohmann requests information concerning local regulations that it may need to be aware of concerning the move and requests a "safety impact be performed prior to the move." Agency Report, Enclosure 12, Apr. 9, 1997. Each of those letters includes a handwritten notation by the Air Force's contract administrator stating that Rohmann is not to send letters directly to the addressee offices and that all such letters should go through the contracting office. While this may be a violation of some provision of Rohmann's contract and Rohmann may have been advised of this problem previously, this is not clear from the evaluation record and the Air Force has not otherwise explained these notations. Thus, we have no basis to conclude that these letters, or the notations on these letters, establish that Rohmann violated a provision of the contract or failed to follow contracting officer advice.²

Nonetheless, in spite of some anomalies in the record, based on our review, we conclude that, the marginal rating assigned to Rohmann's performance as the incumbent, and the overall moderate risk rating assigned to Rohmann, were supported by the record. Among other problems, the record includes customer complaints that support the ratings assigned to Rohmann's performance. In a May 12, 1997 complaint, Rohmann's photo lab manager is described as

²In another example, although the contracting officer's statement refers to "fraudulent work orders" under the heading "Work Orders," the record does not demonstrate that "fraudulent" is a fair characterization of the orders presented. Among the documents under that heading are a number of orders which have handwritten notations indicating that Rohmann produced more photographs or slides than were ordered. Although the Air Force argues that these documents show that Rohmann "overcharged" the agency, Agency Report, Memorandum of Law at 2, as Rohmann points out, this was a fixed-price contract under which Rohmann was paid a fixed amount each month. Comments at ¶ 14. Rohmann also notes that there are only 44 extra units in the questioned work orders--an insignificant number in relation to the total contract, Supplemental Comments at ¶ 35--and that many of the additional photographs are explained by the fact that the camera used for passport photographs takes four photographs simultaneously. Comments at ¶ 19. We note that the agency may have had legitimate concerns about these orders since the incumbent contract provided for a price adjustment based on workload fluctuations and since negotiation of future contracts was to be based on the agency's experience under that contract. Supplemental Agency Report, Attachment 1. The characterization of these orders as "fraudulent," however, is not supported by the record.

"discourteous/rude" during a call to inform a customer that no order had been submitted for a requested photographer. Although, in his contemporaneous response to the complaint, the manager denied being rude, he conceded that he "may have been abrupt. I will attempt to be less abrupt in the future." Agency Report, Enclosure 12, Customer Complaint Record, May 12, 1997.

In another complaint, dated April 7, 1998, a customer stated that the Rohmann audio-visual library failed to provide adequate customer service because a Rohmann employee informed the customer that he would have to return a projector early and that the customer may not be able to use the projector on dates that previously had been approved. Agency Report, Enclosure 12, Customer Complaint Record, April 7, 1998. In a subsequent memorandum, the Air Force's QAE stated that Rohmann's employee had been uncooperative and discourteous and that the customer had been treated in an unprofessional manner. Id., Attachment 2.

A customer complaint dated April 22, 1998, states that a Rohmann employee was "non-supportive and non-customer oriented but also very rude." Id., Attachment 1. The Air Force's QAE concluded that the complaint showed a "lack of concern for good customer relations at the film library" and that "[c]ustomer service at the film library has been a problem for some time." Id., Attachment 2. In addition, the QAE concludes that "[t]his incident clearly shows a lack of adequate interpersonal skills and an attitude of indifference which is very detrimental to effective customer service." Id.

Finally, concerning a customer complaint dated May 11, 1998, the QAE concludes:

This is the third customer complaint against the [Rohmann] contract manager for verbal abuse in about a month. [Visual information services] customers should not have to accept this type of service from anyone. His unwillingness to provide customer service in a courteous manner is incomprehensible, especially after the two recent customers who complained about his abusive behavior and his lack of concern for customer needs.

There is a disturbing pattern of the [Rohmann] contract managers negative behavior towards [visual information services] customers, civilian and military, here at Kelly [Air Force Base]. Some customers who have encountered this type of abusive behavior have complained orally but have been reluctant to submit a formal complaint for fear of some type of retaliation. Unfortunately, many customers have been conditioned to accept mediocre or even poor service as the norm. Since 1995 three out of four [Rohmann] contract managers have had complaints submitted against them for verbal abuse or unsatisfactory

customer services. Having four contract managers in less than three years is an area of concern. The employee turn-over is also of equal concern. In the last two and a half years the [visual information services] contractor has lost six employees and has replaced only two of the six who quit or resigned.

Agency Report, Enclosure 12, Customer Complaint Record, May 11, 1998, Attachment 1.

The documents under the heading "Not Complying With Contract Requirements," include records of Rohmann opening the film library late, failing to vacate the graphics shop on time, using equipment for nongovernment work, and using an unauthorized entrance during a base exercise. Agency Report, Enclosure 12, Memorandum, March 14, 1997 and Memorandum, April 26, 1998. Also under the heading "Not Complying With Contract Requirements," the record of Rohmann's performance includes a May 2, 1997, memorandum prepared by the contract administrator concerning Rohmann's failure to provide notice that it was relocating the graphic shop to the visual information library. Agency Report, Enclosure 12, Memorandum, May 2, 1997. That memorandum notes that Rohmann had already relocated a large piece of equipment without the permission of government representatives and that Rohmann had failed to provide proof, in the form of a receipt, that certain property it had moved belonged to the contractor. Id.

We conclude that these performance problems, combined with the customer complaints described above and the staff and manager turnover on the contract, provide support for the moderate risk rating assigned to Rohmann. While Rohmann offers explanations and interpretations of the record that provide a more favorable picture of its performance history than drawn by the agency, the protester has not addressed many of the agency's allegations concerning the firm's performance, and we conclude that the evaluation was based on the Air Force's reasonable perception of inadequate prior performance.³

Rohmann contends that the QAE was biased against the firm and attempted to influence the other evaluators to think that Rohmann was a poor performer.

³Rohmann argues that it cannot respond to the record of its performance on the incumbent contract because, as Rohmann's counsel states, the firm cannot see much of that record since it is subject to the protective order issued in this protest. Comments at ¶ 8. Upon the request of an attorney admitted to a protective order, we frequently have permitted information subject to the order to be released from the order so that such information can be reviewed by a protesting firm. The information in question here, which concerned Rohmann's performance of the incumbent contract, would have been appropriate for release from the protective order. We received no such request in this case.

Comments at ¶¶ 11, 39-40. According to Rohmann, the marginal rating which it received for its performance as the incumbent at Kelly is not supported by the record and is a result of the bias of the agency's QAE on that contract. Comments ¶¶ 8, 27. In addition to conducting an unfair evaluation, Rohmann argues that the QAE solicited complaints against Rohmann, and, as a member of the evaluation panel, manipulated the past performance evaluation process and influenced other evaluators to harm Rohmann. Comments at ¶¶ 40-1.

Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of mere inference or supposition. Lancaster & Co., B-254418, Dec. 14, 1993, 93-2 CPD ¶ 319 at 7. Where, as here, a protester alleges bias or bad faith on the part of a procurement official, our focus is on whether the official exerted improper influence in the procurement on behalf of the awardee or against the protester. Prose, Inc., B-259016, Feb. 28, 1995, 95-1 CPD ¶ 123 at 3. To show bad faith, a protester must show that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Robertson Leasing Corp., B-275152, Jan. 27, 1997, 97-1 CPD ¶ 49 at 4.

Here, the record does not support Rohmann's allegation of bias. While the QAE's criticisms of Rohmann's performance on the incumbent contract are stated in strong terms and the QAE indicated that he would not do business with Rohmann again, see Agency Report, Attachment 11, Request For Past Performance Evaluation Information Questionnaire at 2, we do not assume, as Rohmann apparently does, that the QAE's judgment was based on unfair or prejudicial motives. Rather, we conclude that his opinion was based on his experience as an agency official responsible for oversight of Rohmann's performance on the incumbent contract. Moreover, although Rohmann focuses on the QAE's involvement in the evaluation, the record shows that a number of other agency officials, including customers and contracting officials, expressed concerns about Rohmann's performance. In fact, contrary to Rohmann's contention that the QAE negatively influenced the views of other agency officials, in many cases, the QAE's negative view of Rohmann was directly based on the input of these other officials.⁴

Rohmann also argues that it should have been given an opportunity, either through discussions or clarifications, to respond to the Air Force's concerns about its

⁴Rohmann notes that the selection decision stated: "In addition, WP was the low offeror (best price)." Agency Report, Enclosure 5 at 5. Rohmann argues that, based on this statement, it is not clear what the contracting officer understood the prices to be. We do not agree. The document referenced by Rohmann included the prices of Rohmann, WP, and all other offerors. Of the five offerors that received "Low" risk ratings, WP's price was the lowest. Read in context, we have no basis to conclude that the contracting officer's statement indicated that she misunderstood the prices offered.

performance at Kelly Air Force Base. Comments at ¶¶ 23, 26, 30, 33, and 59. According to Rohmann, since it was not given such an opportunity, the records of these alleged performance problems should not have been considered in the evaluation. Comments at ¶¶ 33, 35, 38, 45, 54, and 61.

There generally is no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. Robotic Sys. Tech., B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 at 11. While the contracting officer's discretion in deciding not to hold discussions is not unfettered, it is quite broad and has been expanded in recent years. Id. Our Office will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement. Id.

Here, the agency had received several other technically acceptable proposals from firms with better past performance records than Rohmann. Although Rohmann argues that it should have been given the opportunity to respond to agency concerns about its performance record, the concerns related to the predecessor contract, where Rohmann was the incumbent, and agency officials were therefore directly aware of the performance history. Under the circumstances, the decision to award on the basis of initial proposals, without discussions, was reasonable.

Rohmann also argues that the Air Force should have communicated with the firm concerning its performance, even without conducting discussions. Supplemental Comments at ¶¶ 25-27. In this regard, Rohmann refers to FAR § 15.306(a), which was amended by the Federal Acquisition Circular No. 97-02, which includes the Part 15 rewrite. FAR § 15.306(a)(2) which concerns "Clarifications and award without discussions," states:

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

Apparently, it is Rohmann's position that this provision requires a contracting officer to conduct "clarifications" with any offeror where the agency intends to rely on adverse past performance information on which the offeror has not previously had an opportunity to respond. Supplemental Comments at ¶ 27.

We read no such "requirement" into FAR § 15.306(a)(2), which states that "offerors may be given the opportunity to clarify certain aspects of proposals" including past performance information (emphasis added). Similar to the decision whether or not to hold discussions, under the above-quoted language, we think a contracting officer has broad discretion to decide whether to communicate with a firm concerning its

performance history. We will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement.

In this case, since the adverse past performance information concerned Rohmann's incumbent contract, there is no question the information was relevant. Although Rohmann argues that it has not had the opportunity to respond to the adverse information concerning its performance, the record indicates that Rohmann was aware of much of that information, including customer complaints and some of the allegations that it had failed to comply with contract requirements. Under the circumstances, since past performance was significantly more important than price under the RFP and Rohmann's price was not so low as to be considered advantageous, the contracting officer's decision not to communicate with Rohmann during the evaluation concerning the firm's performance history was reasonable.

Rohmann also notes that the contracting officer acknowledged that Rohmann "can satisfactorily perform the requirement," Agency Report, Enclosure 13 at 1, and argues that, under the circumstances, it is unreasonable to award to WP at a five percent premium over an award to Rohmann. Comments at ¶ 10-11. In a negotiated procurement, the government is not required to make award to the lowest cost, technically acceptable offeror unless the RFP specifies that cost will be the determinative factor for award. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44 at 9. Award to offerors with higher-rated proposals and higher prices are unobjectionable, so long as the result is consistent with the evaluation criteria, and the agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Id. Consistent with that standard, the agency concluded that WP, with its superior performance history, represented the best value despite its higher price. We see nothing unreasonable with that conclusion.

Finally, Rohmann challenges the agency's evaluation of its alternate proposal under which Rohmann offered a lower price that would be achieved by consolidating services under the contract into one building, allowing the firm to streamline its operation and personnel, while returning cost savings to the government. Agency Report, Enclosure 9 at 1. Rohmann notes that its alternate proposal was evaluated by the QAE and argues that the QAE did not consider the merits of the proposal but instead merely repeated the charges of adverse performance by Rohmann on the incumbent contract. Comments at ¶¶ 47-52.

In an April 22 memorandum, the QAE concluded that Rohmann's alternate proposal was unacceptable and should not be considered. Agency Report, Enclosure 10. That memorandum states that the alternate proposal would involve electrical work in an historical building, which may have to be performed by government personnel and at government expense and that the move might not result in any cost savings to the agency. Agency Report, Enclosure 10. The memorandum also questions Rohmann's performance on the incumbent contract and, noting that two complaints

had recently been submitted concerning Rohmann's performance, argues that the agency is already not receiving the service that it needs from Rohmann. Id. We have reviewed the record, including the agency's evaluation materials and the protester's submissions in this regard. The record shows that the agency was not convinced that Rohmann's alternate proposal would offer any advantages to the government, even with its lower price. Based on our review, we find no basis to question the agency's decision to award to WP. Rohmann's mere disagreement with the agency does not render the evaluation of its alternate proposal unreasonable. Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 13, n.19.

The protest is denied.

Comptroller General
of the United States