



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Oahu Tree Experts

File: B-282247

Date: March 31, 1999

Nancy O. Dix, Esq., Mary E. Shallman, Esq., Matthew C. Bernstein, Esq., Gray Cary Ware & Freidenrich, LLP, for the protester.

John E. Lariccia, Esq., Department of the Air Force,, for the agency.

Christine F. Davis, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office dismisses protest that an agency knowingly relied upon biased past performance information in a Contractor Performance Assessment Report (CPAR) in evaluating the protester's past performance, where the underlying issue in the protest--whether the CPAR was biased--is the subject of litigation before a court of competent jurisdiction.
2. Protest that an agency assertedly violated a solicitation requirement that all references be evaluated is legally insufficient, where the solicitation contains no such requirement.
3. Protest to General Accounting Office that agency failed to properly distribute answers to questions is untimely when filed more than 10 days after the denial of an agency-level protest of this same issue.

DECISION

Oahu Tree Experts protests the award of a contract to Maintenance Engineers under request for proposals (RFP) No. F64605-98-R-0035, issued by the Department of the Air Force, for ground maintenance services at Hickam Air Force Base, Hawaii.

We dismiss the protest.

Oahu was the incumbent contractor for the solicited services. Oahu listed the incumbent contract and five other relevant contracts as past performance references.¹ The agency rated Oahu's past performance as "poor" under a past

¹The RFP listed certain criteria for a contract to be considered relevant to the past performance evaluation. Protest at 4.

performance/experience factor. The agency allegedly based this rating on a Contractor Performance Assessment Report (CPAR) issued in connection with Oahu's incumbent contract, without contacting the other past performance references in Oahu's proposal. The CPAR included "marginal" ratings in two evaluated areas.

During the proposal evaluation period of the instant procurement, Oahu challenged the "marginal" ratings in its CPAR in federal district court. Charles R. Tasker d/b/a Oahu Tree & Stump Removal Experts vs. United States, No. CV99 00085 (D. Haw., Feb. 2, 1999). In its complaint, Oahu alleged that the CPAR reviewing official assigned the "marginal" ratings to retaliate against Oahu, which had reported him for ethical violations. Id. at 5. Oahu requested various forms of equitable relief to correct the allegedly improper CPAR. Id. at 12-13. The complaint did not mention the instant procurement.

The agency awarded the instant contract to Maintenance Engineers on March 1, 1999, and this protest was filed on March 10, five days after Oahu's debriefing.

Oahu protests the agency's reliance on the CPAR in its past performance evaluation. According to Oahu, the agency was aware that the reviewing official responsible for the CPAR was biased and that the "marginal" ratings were vindictive and did not accurately reflect Oahu's performance. Protest at 2-3.

We dismiss this allegation because it involves a matter that is the subject of litigation in federal court. 4 C.F.R. § 21.11(b) (1999). The matter involved in this protest is whether the contracting agency knew the "marginal" CPAR ratings to be motivated by bias, instead of an impartial assessment of the protester's performance. To answer this question, our Office must first determine whether bias did, in fact, taint the ratings -- the same question posed in Oahu's federal complaint. While Oahu correctly observes that its federal complaint does not mention the instant procurement and seeks different relief (i.e., the correction of the CPAR rather than the termination of the awardee's contract), these differences do not overcome the fact that Oahu has placed the same facts in issue before both our Office and the federal court. Compare Protest at 2-3 with Charles R. Tasker d/b/a Oahu Tree & Stump Removal Experts, supra at 3-5. We therefore dismiss Oahu's protest that the agency knowingly relied on biased CPAR ratings, inasmuch as the ratings have been challenged in federal district court. See 4 C.F.R. § 21.11(b); Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2.

The protester also claims that the agency violated the RFP by failing to contact all of the other five relevant past performance references listed in Oahu's proposal. Protest at 2. This protest contention is based on a mischaracterization of the RFP, which provides:

NOTE: The Government reserves the right to limit the number of references it decides to contact and to contract references other than those provided by the offeror.

RFP Attachment 3, Instruction to Offerors. Moreover, there is no requirement that an agency contact all of an offeror's references. OMV Medical, Inc.; Saratoga Medical Center, Inc., B-281387 et al., Feb. 3, 1999, 99-1 CPD ¶ __ at 4. Thus, this protest contention, as alleged, fails to state a legally sufficient basis for protest. See 4 C.F.R. §§ 21.1(f), 21.5(f). Furthermore, to the extent that Oahu protests that the agency should have contacted its other references because the CPAR did not provide an impartial basis for the past performance evaluation, this argument is another permutation of the issue before the federal court, and thus not for our consideration. See 4 C.F.R. § 21.11(b).

Oahu also argues that the Air Force should have amended the solicitation to incorporate the answers to various questions asked by Oahu. This allegation concerns an alleged solicitation impropriety, see Texnokpatikh, B-245835.2, Feb. 6, 1992, 92-1 CPD ¶ 153 at 2, and was not timely raised at our Office. The record reflects that Oahu filed a timely agency-level protest of this issue before initial proposals were due on February 2. See 4 C.F.R. § 21.2(a)(1). The agency denied this protest on February 26. To be timely, this issue should have been protested to our Office within 10 days of the agency's denial, or by March 8, but Oahu waited until March 10. See 4 C.F.R. § 21.2(a)(3). Although Oahu notes that it protested within 10 days of a requested and required debriefing, the debriefing exception to our timeliness rules does not apply to protests based upon alleged solicitation improprieties, such as this one.² See 4 C.F.R. § 21.2(a)(2).

The protest is dismissed.

Comptroller General
of the United States

²We decline Oahu's request to invoke the significant issue exception to our timeliness rules. This exception is limited to untimely protests that have not been considered on the merits in a prior decision and that raise issues of widespread interest to the procurement community. DynCorp, B-240980.2, Oct. 17, 1990, 90-2 CPD ¶ 310 at 2-4. The issue presented here--whether the agency's failure to amend the solicitation kept offerors from competing on a common basis--has been previously addressed by our Office and is not a significant issue. See United Telephone Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7.