



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wilderness Mountain Catering

File: B-280767.2

Date: December 28, 1998

R. Wade Curtis, Esq., Belnap, Curtis & Drozda, for the protester.
Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Settlement agreement resolving prior contract dispute did not preclude agency, in its evaluation of protester's past performance, from considering protester's performance under the contract that was the subject of the dispute where the settlement agreement did not require agency to disregard contractor's performance; a condition to a settlement agreement that is not clearly set out in the language of the agreement will not be inferred.

DECISION

Wilderness Mountain Catering protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 49-98-10, issued by the Forest Service, Department of Agriculture, for mobile food services.

We deny the protest.

The RFP, issued on March 11, 1998, provided for multiple awards of fixed-price, indefinite-delivery, indefinite-quantity, requirements contracts with 1-year base periods and four 1-year options. RFP at 2. The successful contractors under the RFP will be required to provide hot and cold meals and supplemental items at various locations during wildland fires and other activities throughout the contiguous western United States. RFP at 12.

The RFP stated that awards would be made to the offerors submitting the proposals determined to be most advantageous to the government, and listed the following evaluation factors in descending order of importance: (a) Past Performance, (b) Equipment, (c) Ability to Understand and Perform the Work, and (d) Experience.¹ RFP at 151. The RFP added that these "non-price factors" as

¹The "ability to understand and perform the work" evaluation factor included the following subfactors: organization, personnel, and capacity.

a whole would be considered more important than price in determining which proposals represented the best overall values. Id.

The RFP included detailed instructions for the preparation of proposals, and requested that the offerors' technical proposals consist of two parts. Part A was to address the equipment and ability to understand and perform the work evaluation factors, and part B was to address the past performance and experience factors. RFP at 139-41. With regard to past performance, the RFP specified that each offeror was to prepare a "Past Performance Chart." RFP at 141. The RFP required that each offeror's chart include "a brief description of their company's overall past performance in relation to the contract requirements and specifications," and stated that "the information must be presented so that the Agency may verify it." Id.

The agency received a number of proposals, including Wilderness's, by the April 24, 1998 due date. The proposals were forwarded to a technical evaluation team (TET). Upon completion of the TET's review, the proposals which failed to meet certain minimum requirements set forth in the solicitation were eliminated from the competition. The remaining proposals were subject to additional evaluation, which included "site visits to inspect the equipment offered." Contracting Officer's Report at 1.

The TET evaluated Wilderness's proposal as marginal overall, with ratings of red/unacceptable under the past performance factor, green/acceptable under the equipment factor, yellow/marginal under the ability to understand and perform the work factor, and green/acceptable under the experience factor. Agency Report (Tab O) Memorandum of Law at 25. The TET forwarded its conclusions to the contracting officer, who determined that Wilderness's proposal should be excluded from the competitive range as it was not among the most highly rated. Agency Report (Tab P5, Attachment 5) Mobile Food Service Solicitation Technical Consensus Summary at 7.

Wilderness was informed by letter dated July 17 that its proposal had been excluded from the competitive range. Agency Report (Tab I) Contracting Officer's notification to Wilderness of its exclusion from the competitive range. Wilderness requested a debriefing, and received an oral debriefing on July 30. Wilderness filed an agency-level protest on August 3. Agency Report (Tab M) Wilderness's protest to the Department of Agriculture. The agency denied Wilderness's agency-level protest on September 4, Agency Report (Tab L) Contracting Officer's response to Wilderness's agency-level protest, and Wilderness filed its protest with our Office on September 17.

Wilderness first argues that the agency improperly considered in the evaluation certain information regarding the protester's performance "prior to 1996." Wilderness's Protest, Exhibit A, Wilderness's August 3 protest to the Department of Agriculture at 2. The protester bases this argument on its understanding of the

terms of a settlement agreement, entered into by it and the agency, to resolve claims filed by the protester with the Department of Agriculture Board of Contract Appeals (AGBCA) in response to its suspension from, and termination of, a predecessor contract to those contemplated by this RFP.² Id. The settlement agreement provided, among other things, that the protester would enter into a new contract with the agency "on substantially the same terms" as the terminated contract, and would "not pursue a claim for attorneys fees or for payment of money or interest of any kind before the [AGBCA]." Id., Exhibit A, Settlement Agreement Between Agency and Protester at 1. The agreement also included the following language:

It is the express understanding and agreement between the parties that they will deal with each other in good faith and that the [Forest Service] will administer and [the protester] will perform under the contract according to its terms and conditions of the contract. [The Forest Service] agrees that it will not act in bad faith in exercising its rights under the Termination for Convenience clause, and in exercising its options to renew the contract after the initial contract period.

Id.

Wilderness contends that the language in the settlement agreement providing that the parties "will deal with each other in good faith" precluded the agency from considering "any of the accusations and allegations upon which the underlying suspension action was presented." Wilderness Protest, Exhibit A, Wilderness's August 3 protest to the Department of Agriculture at 2. Wilderness concludes that the settlement agreement precluded the agency from considering any of Wilderness's past performance information which resulted in its suspension from and termination of its prior contract.

Our bid protest jurisdiction is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552 (Supp. II 1996). Thus, we will not consider a protest concerning the enforceability of a settlement agreement unless it alleges that the agreement, if followed or breached, would result in a prejudicial violation of procurement law or regulation. Geonex Corp., B-274390.2, June 13, 1997, 97-1 CPD ¶ 225 at 5. Nor will our Office infer a condition to a settlement that is not clearly set out in the language of the settlement

²The settlement agreement was entered into by the protester's predecessor entity, Western Catering, and is undated. It appears from a letter forwarding a signed copy of the agreement to the protester that the agreement was accepted by the parties in late November or early December 1995. Protester's Comments (Tab 18) Letter from Forest Service to the protester.

agreement. L & M Mercadeo Internacional, S.A., B-250637, Feb. 11, 1993, 93-1 CPD ¶ 124 at 3; see Automaker, Inc., B-249477, Nov. 24, 1992, 92-2 CPD ¶ 372 at 4.

Here, the agreement settling the dispute between the agency and the protester provided, in relevant part, that the parties would enter into a new contract on substantially the same terms as the terminated contract, and that during this "new" contract, the parties would deal with each other in good faith and adhere to the contract's terms and conditions. The agreement, as indicated above, does not require the agency to disregard the protester's performance under the terminated contract. Moreover, as argued by the agency, the written correspondence of the protester and agency, exchanged prior to the parties' acceptance of the agreement, does not indicate or otherwise provide that it was the intent of the parties that the agreement preclude the agency from considering the protester's performance under the terminated contract in a subsequent procurement, such as the action contemplated by this RFP. See Wilderness Comments, Tabs 10, 12-15. Therefore, we do not find that the agency was precluded from considering the protester's performance under the predecessor contract prior to 1996 (that is, prior to the execution of the settlement agreement).

Wilderness also asserts that the agency failed in its obligation to properly debrief Wilderness because the agency excluded Wilderness's attorney from the July 30 debriefing. According to the record, the agency excluded Wilderness's attorney from the debriefing on the basis that the attorney had participated, earlier that day, in the preaward debriefing of another offeror.³ Because the conduct of debriefings is a procedural matter which has no effect on the evaluation of proposals or the validity of the agency's determinations, this basis of protest will not be considered.⁴ See Continental Technical Servs. of Georgia, Inc., B-259681, B-259681.2, Apr. 19, 1995, 95-1 CPD ¶ 204 at 8.

In its protest to our Office, Wilderness argues for the first time that "the RFP unfairly and arbitrarily discriminated against [Wilderness]" because it provided that offerors who had no past performance would receive a neutral rating, contending that "[s]uch a practice gives an unfair competitive advantage to offerors who have never come under the scrutiny of the [contracting officer]." Wilderness Protest

³The agency explains that it was "concerned about the release of procurement sensitive information to the attorney who had learned sensitive procurement information at the debriefing of the competitor," and the possibility of the attorney's "conflict of interest." Agency Report (Tab O) Memorandum of Law at 11-12.

⁴As the contracting agency points out, there does not appear to be any statute or regulation that expressly grants a right to have an attorney present at an oral debriefing or one that authorizes the exclusion of an attorney from an oral debriefing.

at 5-6. Wilderness also contends for the first time in its protest to our Office that the agency should have held discussions to allow Wilderness "to rebut or explain the alleged adverse information regarding past performance," and that the agency's evaluation of its past performance was unreasonable. Wilderness Protest at 6.

The agency contends that these arguments are untimely. The agency points out here that the protester's argument regarding the availability of a neutral rating for past performance involves an alleged solicitation impropriety, and that the remainder of Wilderness's arguments raised for the first time in its protest to our Office could have been but were not raised in Wilderness's agency-level protest. We agree.

Wilderness's contention that the RFP was defective because it provided that offerors without a record of past performance would receive a neutral rating involves an alleged solicitation impropriety that the protester should have raised prior to the closing date for receipt of proposals.⁵ Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1998).

With regard to the remainder of the protester's assertions, our Bid Protest Regulations provide that where, as here, a protest has been filed initially with the contracting agency, we will consider a subsequent protest if the initial protest to the agency was timely filed. 4 C.F.R. § 21.2(a)(3). Since our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues, where a protester initially files a timely agency-level protest, and subsequently files a protest with our Office which includes additional grounds, the additional grounds must independently satisfy our timeliness requirements. Research Tech. Int'l, B-243844, Aug. 19, 1991, 91-2 CPD ¶ 165 at 2-3; Armstrong Motorcycles Ltd., B-238436, B-238436.2, June 5, 1990, 90-1 CPD ¶ 531 at 3-4.

The record reflects that Wilderness was informed at its oral debriefing that its proposal was evaluated as being "very weak" under the past performance and ability to understand and perform the work evaluation factors, and "weak" under the equipment factor. Agency Report (Tab J), Wilderness Preaward Debriefing Summary at 2. The agency explained, among other things, that the past performance information considered by the agency was from 1994 forward. Id. The agency added that in its view Wilderness's proposal included limited information addressing the ability to understand and perform the work evaluation factor, and that certain issues regarding the protester's personnel and financial

⁵In any event, the agency's approach here is consistent with Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), which expressly provides that "[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance."

capability were unclear or confusing. Id. The agency also explained that it had evaluated Wilderness's proposal as "weak" under the equipment evaluation factor because it was unclear from the proposal what was being offered. Id. The agency finally summarized the results of its evaluation of Wilderness's proposal.

Wilderness should have been aware from the debriefing of the evaluation factors under which the agency had concluded that Wilderness's proposal was weak or very weak as well as the general reasons why the agency had reached these conclusions. Thus, Wilderness's protest that the agency's evaluation of its proposal was unreasonable, or that the agency should have held discussions with Wilderness to allow it explain the information regarding its past performance, was required to be filed within 10 days of the debriefing.⁶ 4 C.F.R. § 21.2(a)(2). Since Wilderness did not raise these issues in its agency-level protest, its protest to our Office of these matters is untimely.

Wilderness also raises various additional arguments in its comments on the agency report concerning the agency's evaluation of its proposal and contends that they should be considered timely because, for example, it was not until Wilderness received the agency's report that it was aware that its proposal was actually rated as "unacceptable" or "marginal," rather than "very weak" or "weak." As stated previously, the agency's debriefing put Wilderness on notice of the areas in its proposal which were not evaluated favorably by the agency, regardless of the exact terms used, as well as the agency's reasons for the less than favorable evaluations. As such, the arguments raised by Wilderness for the first time in its comments regarding the evaluation of its proposal are untimely.

The protester also argues in its comments on the report that it was unaware until the receipt of the agency's report that its proposal was excluded from the competitive range because it "was not highly rated and for purposes of efficiency," even though the RFP did not inform offerors that "efficiency" would be considered in establishing the competitive range. Wilderness points out here that, while FAR § 15.306(c)(1) authorizes the agency to exclude "highly rated proposals" from the

⁶Wilderness requests that we consider the untimely aspects of its protest under the "good cause" exception to our timeliness requirements. Under that exception, we may consider an otherwise untimely protest where some compelling reason beyond the protester's control prevents it from timely submitting its protest. 4 C.F.R. § 21.2(c); Cornet, Inc.; Datacomm Management Servs., Inc., B-270330, B-270330.2, Feb. 28, 1996, 96-1 CPD ¶ 189 at 10 n.13. The agency informed Wilderness at the debriefing of the factual bases and reasoning underlying its evaluation and determination to exclude Wilderness's proposal from the competitive range. Accordingly, the matter of whether to raise protest issues regarding the agency's evaluation and related actions was entirely within Wilderness's control, and there is no basis to invoke the good cause exception.

competitive range "for purposes of efficiency," FAR § 15.306(c)(2) requires that offerors be notified in the solicitation that the agency may do this.

The contracting officer's July 17 letter to Wilderness informing it that its proposal had been excluded from the competitive range cited to FAR § 15.306(c), and specifically quoted the portion of this regulation which refers to the exclusion of highly rated proposals from the competitive range for purposes of efficiency. Agency Report (Tab I) Contracting Officer's notification to Wilderness of its exclusion from the competitive range. As such, Wilderness knew or should have known of this basis of protest upon its receipt of the July 17 letter. Accordingly, its protest on this basis, raised for the first time in its November 3 comments on the agency report, is untimely.⁷ 4 C.F.R. § 21.2(a)(2).

The protest is denied.

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⁷In any event, the record reflects that Wilderness's proposal was excluded from the competitive range because it was not among the most highly rated proposals, not for reasons of efficiency. Agency Report (Tab P5, Attachment 5) Mobile Food Service Solicitation Technical Consensus Summary at 7.