



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Birdstrike Control Program

File: B-404986

Date: July 15, 2011

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Col. Mark S. Teskey, Christopher S. Cole, Esq., and Amanda M. Willis, Esq.,
Department of the Air Force, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest that agency should have assigned the highest evaluation rating to the protester's past performance is denied, where the solicitation provided that past performance in the Mid-Atlantic region would be considered most relevant and where the protester identified one contract in the Mid-Atlantic region, which it had been performing for only 1 month.

DECISION

Birdstrike Control Program, of Willis, Texas, protests the award of a contract to Flyaway Farm and Kennels, of Reidsville, North Carolina, under request for proposals (RFP) No. FA2860-11-T-0013, issued by the Department of the Air Force for bird/wildlife aircraft strike hazard services at Joint Base Andrews Naval Air Facility (NAF) in Maryland.

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside under the commercial item acquisition procedures of Federal Acquisition Regulation Part 12, provided for the award of a fixed-price contract for bird/wildlife control and management services at Andrews NAF for a 6-month base period and 4 option years. See RFP at 1-5; RFP amend. 3, at 1-4. A performance work statement (PWS) was provided that, among other things, required compliance with Joint Base Andrews Instruction 91-212, Bird/Wildlife Aircraft Strike Hazard (BASH) Program, Nov. 1, 2010. RFP, PWS, at 1. This

instruction explains that Andrews NAF has a high bird strike potential because it is located near several wildlife refuges, wetlands (including within the air base), and the Potomac and Patuxent Rivers, which serve as stopovers for birds in the Atlantic Migratory Flyway. See Instruction 91-212, at 2-3.

Offerors were informed that award would be made on a best value basis, considering past performance and price, and that past performance was more important than price. See RFP amend. 3, at 2. The RFP provided for the assignment of the following adjectival ratings for past performance: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence.¹ Id. at 3. The RFP also provided that the agency would evaluate offerors' technical capability to perform the work on an acceptable/unacceptable basis considering how well the offeror's technical capability proposal met or exceeded the agency's requirements. See id.

With respect to determining which proposal reflected the best value to the agency, the RFP informed offerors that the agency would first rank offers based upon their total proposed price for the base and option years. Id. at 2. Then, the agency would evaluate the past performance of the lowest-priced five offerors based on surveys received and any other data independently obtained by the agency from the government and commercial sources. Id.

The RFP provided detailed instructions for the preparation of proposals, that among other things, required offerors to submit separate technical capability, past performance, and price proposals. See RFP amend. 1, at 5. With regard to the technical capability proposal, offerors were instructed to respond to various questions, including, among other things, whether they had a wildlife biologist on staff who could answer in-depth questions from customers regarding all bird/wildlife aircraft strike hazard issues. See id. at 6.

With regard to past performance, offerors were instructed to identify at least three relevant contracts performed within 3 years of the closing date for submission of proposals.² See RFP amend. 1, at 5-6. The RFP required certain information for each

¹ A substantial confidence rating reflects a high expectation based upon the offeror's past performance record that the offeror will successfully perform the required effort. A satisfactory confidence reflects the agency's expectation that the offeror will successfully perform the required effort. See Agency Report (AR), Tab 7, Source Selection Decision, at 4.

² Offerors were advised with respect to ongoing projects that the agency would only consider portions of projects that were completed as of the closing date for submission of proposals and would only give credit for work actually completed. RFP amend. 3, at 2.

reference contract, such as, the contracting agency/customer, product/service, contract number, contract dollar value, and period of performance. Id. Offerors were also required to have their references submit surveys to the agency evaluating the contractors' overall job performance and quality, as well as explaining any performance problems and corrective actions taken. Id. Offerors were advised that relevant past performance information for predecessor companies, key personnel, or subcontractors performing major or critical aspects of the requirement would be treated as if it were the offeror's own past performance. See RFP amend. 3, at 3.

The RFP defined relevant and somewhat relevant contracts as follows:

Relevant	Present/past performance effort that meets the following: (1) Bird/Wildlife Aircraft Strike Hazard program(s) that have been performed in the Mid-Atlantic Region of the United States; (2) The effort(s) were performed at a Department of Defense Installation; (3) The total value of the effort(s) is at least \$300,000.00.
Somewhat Relevant	Present/past performance effort that meets the following: (1) Bird/Wildlife Aircraft Strike Hazard program(s) that have been performed in regions other than the Mid-Atlantic Region of the United States; (2) Performed at a Department of Defense installation, public entity (i.e. federal, state, county, or local municipalities) location, or commercial entity location. (3) The total value of the effort(s) is less than \$300,000.00

See id. at 2-3.

The solicitation was amended to include offeror questions and answers. RFP amend. 2, Questions and Answers, at 2-4. Among other things, Birdstrike questioned why the agency considered past performance in the Mid-Atlantic region more relevant than past performance in other regions with major migratory flyways. Id.; see AR, Tab 8, E-Mail to Contract Specialist from Birdstrike, Mar. 11, 2011, at 4-5. Birdstrike stated that, although it “underst[ood] the foundations” and “the thought process” behind such criteria, namely, “the presence of the airfield in the Eastern migratory bird flyway,” the requirement was unreasonably restrictive. See id. The agency answered that it had determined that past performance in the Mid-Atlantic region more closely reflected the agency's needs and would be considered more relevant than performance elsewhere. See RFP amend. 1, at 2.

The Air Force received four proposals by the March 11, 2011, closing date for submission of proposals, including that of Flyaway (the incumbent contractor) and Birdstrike, which were evaluated as follows:

	Past Performance	Technical Capability	Price
Flyaway	Substantial Confidence	Acceptable	\$439,530
Birdstrike	Satisfactory Confidence	Acceptable	\$420,900

AR, Tab 7, Source Selection Decision, at 14.

Birdstrike's proposal identified the following four contracts (and contract values) for its past performance references: Hurlburt Field, Florida (\$753,324); McConnell Air Force Base (AFB), Kansas (\$484,043); Dover AFB, Delaware (\$486,356); and the Israeli Air Force (\$4,000,000). Birdstrike Proposal, Part II, Past Performance References, at 2-3. With regard to the Dover AFB contract, Birdstrike identified performance before October 2002 and from February 2011 to the present. *Id.* at 3. Birdstrike also included copies of commendations and client recommendation letters from some of its references and from two entities that were not identified as references, *i.e.*, Kirtland AFB in New Mexico and the International Civil Aviation Organization. In its separate technical capability proposal, Birdstrike stated that its director and principal ecologist was responsible for BASH programs at a number of airfields, including McGuire AFB and Lakehurst Naval Air Station in New Jersey.³ *Id.*, Part III, Technical Capabilities, at 3-4.

Birdstrike's satisfactory confidence rating by the agency's past performance evaluation team (PPET) reflected the evaluators' judgment that, although all of Birdstrike's references reported excellent past performance, Birdstrike's performance in Kansas, Florida, and Israel was only somewhat relevant, because it was outside the Mid-Atlantic region.⁴ AR, Tab 7, Source Selection Decision, at 6-8.

³ McGuire AFB and Lakehurst Naval Air Station, as well as Dover AFB, appear to be located in the Mid-Atlantic region.

⁴ The agency evaluated six past performance surveys for Birdstrike, including surveys from Hurlburt Field; Dover AFB; MacDill AFB, Florida; and the Israeli Air Force; and two surveys from McConnell AFB. AR, Tab 5, Birdstrike's Past Performance Surveys, at 1-41; Tab 7, Source Selection Decision Document, at 6. The surveys from MacDill and Dover AFBs did not identify contract dollar values. AR, Tab 5, Birdstrike's Past Performance Surveys, at 19, 26. Birdstrike did not identify MacDill AFB as a reference in its proposal. Birdstrike Proposal, Part II, Past Performance References, at 2-3. The PPET did not evaluate the various commendations or letters of recommendation submitted by Birdstrike in its proposal because this information had not been submitted by the references, as specified in the RFP. *See* Supp. AR at 2-3; RFP amend. 3, at 2.

The PPET also rated Birdstrike's performance at Dover AFB as satisfactory confidence, because although Dover AFB was in the Mid-Atlantic region (and considered relevant) and reported excellent past performance, Birdstrike had only been performing at Dover AFB for 1 month at the time of the closing date for submission of proposals.⁵ See id. at 7.

The PPET's evaluation of past performance was provided to the agency's source selection authority (SSA), who decided that only the proposals of Birdstrike and Flyaway would be considered for award, as the two highest-rated and lowest-priced offerors.⁶ Id. at 15. The SSA concluded that Flyaway's slightly higher-priced proposal (\$18,630 higher than Birdstrike's price, or 4.23 percent) reflected the best value to the agency, because of the firm's higher, substantial confidence past performance rating. Id. Specifically, she noted that, given Andrews NAF's high-visibility and demanding mission of airlifting the highest-ranking civilian and military leadership (including the President and foreign dignitaries), it was critical that the agency have the highest confidence in the successful offeror's experience and skill in dealing with the types of birds and wildlife found in the Mid-Atlantic region. Id. at 15-16.

Award was made to Flyway and this protest followed.

DISCUSSION

Birdstrike challenges its evaluation, complaining that the agency did not evaluate all of its past performance. Comments at 4. Specifically, the protester contends that in rating its past performance as only satisfactory confidence, the PPET failed to consider the dollar value of Birdstrike's past performance, the past performance of its key personnel, and its contracts at McGuire AFB and Lakehurst Naval Air Station in New Jersey. Id. at 2-7; Protest at 26-27.

The Air Force responds that it evaluated all past performance information that the agency received on Birdstrike's behalf consistent with the RFP's evaluation criteria. See AR at 13, 21-25. With respect to Birdstrike's contracts at McGuire AFB and Lakehurst Naval Air Station, the agency points out that the protester did not identify or provide any past performance information for these contracts and the agency did not receive surveys regarding this performance. See id. at 24; CO's Statement at 13.

⁵ Initially the PPET viewed the Dover AFB contract as "somewhat relevant" because the survey for this contract did not identify a dollar value; following consensus deliberations, the PPET determined that the past performance was relevant. See CO's Statement at 6.

⁶ The protester did not challenge the agency's evaluation of Flyaway's proposal.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a protester challenges an agency's past performance evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Falcon Env't'l Servs., B-402670, B-402670.2, July 10, 2010, 2010 CPD ¶ 160 at 7. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals, and its judgment as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6.

Here, offerors were specifically informed that the agency would consider past performance in the Mid-Atlantic region more relevant than performance outside this region. RFP amend. 3, at 2-3. In this regard, the record shows that only one of the five Birdstrike contracts was performed in the Mid-Atlantic region. Moreover, contrary to the protester's argument, the record does not show that the agency failed to evaluate the past performance of Birdstrike's key personnel.⁷ Rather, the agency evaluated all past performance surveys that it received on Birdstrike's behalf, which included the respondents' ratings and comments on Birdstrike personnel.⁸ AR, Tab 5, Birdstrike's Past Performance Evaluation and Surveys, at 1-41. Indeed, one respondent identified a Birdstrike employee by name and commented on her superior expertise. Id. at 30. Furthermore, as we discuss above, Birdstrike's past

⁷ Neither does the record support the protester's argument that the agency ignored the dollar value of Birdstrike's past performance at Dover and MacDill AFBs. Although the respondent from Dover AFB did not provide a contract price in his response, the agency recognized that Birdstrike provided the dollar value for its Dover AFB contract in its proposal, and concluded that the effort was relevant. See AR at 10; CO's Statement at 6. The respondent from MacDill AFB (which, as we state above, the protester did not identify in its past performance proposal) also did not provide a contract price in his response; the agency found that effort somewhat relevant because it was not performed in the Mid-Atlantic region. AR, Tab 7, Source Selection Decision Document, at 6.

⁸ In fact, contrary to the protester's suggestion, and consistent with the RFP's statement that the agency would consider any other data independently obtained, the record shows that the agency evaluated additional past performance surveys from two individuals, and one AFB, that were not identified by Birdstrike in its past performance submission. AR, Tab 5, Birdstrike's Past Performance Evaluation and Surveys, at 1-2, 4, 7-8, 10, 13-14, 16 (evaluating additional past performance surveys received from McConnell and MacDill AFBs).

performance submission did not provide information regarding key personnel with relevant experience. Insofar as the protester complains that the agency should have evaluated its contracts with McGuire AFB and Lakehurst Naval Air Station, Birdstrike's proposal neither identified those contracts, nor provided any past performance information or references for them.

The protester also complains that the PPET evaluators' individual ratings were averaged to determine Birdstrike's overall performance confidence rating. See Protest at 10; Comments at 8-11. We find that this argument is without merit. The overriding concern in the evaluation process is that the final score assigned accurately reflects the actual merits of the proposal, not that it be mechanically traceable back to the scores initially given by individual evaluators. Resource Applications, Inc., B-274943.3, Mar. 5, 1997, 97-1 CPD ¶ 137 at 5; see also DUAL, Inc., B-252953.3, Aug. 31, 1993, 93-2 CPD ¶ 190 at 7-8 (overall assessment determined by averaging evaluators' adjectival ratings); Air Prods. Healthcare, B-298293, B-298293.2, Aug. 11, 2006, 2006 CPD ¶ 123 at 8 (consensus rating determined by averaging evaluators' and CO's letter ratings). Here, as we discuss above, the record shows that the agency evaluated the protester's past performance consistent with the RFP's past performance criteria, and assigned overall confidence ratings accordingly.⁹

Birdstrike also suggests that the agency's past performance evaluation was motivated by bad faith and prejudice, and that the award to Flyway was predetermined. Protest at 17, 28; Comments at 18-19. Government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Rebecca Ryan d/b/a Flyaway Farm & Kennels, B-404132, Jan. 10, 2011, 2011 CPD ¶ 17 at 3. Apart from Birdstrike's unsupported allegations, it has provided no evidence, and there is none in the record here, showing bias in favor of the awardee.

In sum, although Birdstrike disagrees with the agency's evaluation of its past performance, the protester has not shown that the evaluation was unreasonable or

⁹ Birdstrike also complains that it was not given an opportunity to respond to a comment made by a respondent (and noted by an evaluator), which the protester considers to be adverse past performance information. Comments at 15-19, citing AR, Tab 5, Birdstrike's Past Performance Evaluation and Surveys, at 9, 28. We do not consider this isolated comment to be adverse past performance information because the record shows that the comment did not affect the respondent's excellent rating, the PPET's overall confidence assessment rating, or the agency's selection decision. See AR, Tab 6, Past Performance Survey Evaluation Tally Sheets, at 1; Tab 7, Source Selection Decision Document, at 7.

inconsistent with the solicitation's evaluation scheme; the protester's disagreement with the agency's judgment does not show that the agency acted unreasonably.

The protest is denied.¹⁰

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General Counsel

¹⁰ Birdstrike also argues that the RFP did not provide offerors enough time to submit proposals, attend a scheduled site visit, and obtain past performance surveys. See Protest at 13-16, 23; Comments at 21, 25. We dismiss these post-award challenges to the solicitation as untimely. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2011).