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## Decision

**Matter of:** Recreation Resource Management of America, Inc.

**File:** B-406072

**Date:** February 1, 2012

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F. Morgan Brown, Esq., Brown & Brown Law Offices, P.C., for the protester.  
Lawrence A. Kahn for Thousand Trails Management Services, Inc., the intervenor.  
Elin M. Dugan, Esq., Department of Agriculture, for the agency.  
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### DIGEST

In a competition for the award of a concession special use permit for operation and maintenance of government-owned recreation facilities, protest challenging the agency's evaluation of applications is denied, where the evaluation was reasonable and consistent with applicable statutes and regulations.

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### DECISION

Recreation Resource Management of America, Inc. (RRMA), of Lakeside, Arizona, protests the award of a concession special use permit to Thousand Trails Management Services, Inc., of Federal Way, Washington, under a prospectus issued by the Department of Agriculture, U.S. Forest Service, for operation of the Rim Lakes Recreation Complex in the Apache-Sitgreaves National Forests.

We deny the protest.

### BACKGROUND

The Forest Service issued a prospectus in May 2011 to conduct a competition for the issuance of a concession special use permit for operation and maintenance of recreation facilities at the Rim Lakes Recreation Complex for 5 years with an option for another 5 years. Deciding Official's Statement at 1; Prospectus at 5. The complex, located in the Apache-Sitgreaves National Forest in east-central Arizona, includes ten campgrounds and one day-use picnic area. Prospectus at 5, 6. The prospectus invited applications for the special use permit and stated that the agency

would select the application that offered the best value considering the following evaluation factors listed in descending order of importance:<sup>1</sup>

- Proposed annual operating plan
- Fee to the government
- Business plan, experience and references
- Fees charged to the public
- Financial resources

Prospectus at 43. Applicants were informed that the proposed annual operating plan and fee to the government factors were the most important. Id. The prospectus also advised that the Forest Service “reserve[d] the right to select the successful applicant based on a trade-off between the fee to the Government and technical merit.” Id. at 39.

With respect to the proposed annual operating plan factor, applicants were informed that the agency would evaluate, among other things, the realism of an applicant’s plan to meet required standards and the adequacy and appropriateness of proposed labor, logistical support, and quality control. Id. at 43. Additional requirements for the operating plan, such as for water systems, were identified in appendix 10, “Sample Annual Operating Plan and Required Annual Operating Plan Outline,” to the prospectus. Applicants were instructed to address in their plan the operating season (the time period for operation of the prospectus sites), staffing, supervision and management, and uniforms and vehicle identification. Id. at 40.

The prospectus encouraged applicants to propose additional, “creative and innovative services or recreation enhancements to provide a broader base for income and public service.” Id. at 36. However, applicants were advised that not all additional revenue-producing sales, services, and activities would be approved, where it created “undesirable competition with local businesses, long standing agreements or other concerns.” Prospectus, append. 10, Sample Annual Operating Plan and Required Annual Operating Plan Outline, at 21.

With respect to the business plan, experience and references factor, the prospectus encouraged applicants to contact their local small business development center for assistance in completing the business plan, but also advised that all business plans

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<sup>1</sup> Applicants were informed that the agency would evaluate each application using a non-fixed weight method of evaluation. Prospectus at 43. According to the agency, under a non-fixed weight evaluation method, the agency assigns adjectival ratings, without assigning specific points or percentages, although a point total may still be assigned to each permit application. See Agency Report (AR), Tab 13, Campground Concession Desk Guide, at 4-1.

would be independently reviewed by a small business development center. Prospectus at 40-41. The prospectus also informed applicants that if the business plan had already been reviewed by a small business development center or the Forest Service for the current fiscal year, a copy of the review report could be submitted. Id. at 41. Applicants were also informed that the proposed fee to the government must be included in the business plan as an expense item. Id. at 42.

With respect to the fee to the government factor, the prospectus informed applicants that the agency would evaluate the applicant's proposed fee to the government for the permit. In this regard, applicants were informed that the government was obligated to obtain fair market value for the use of its land and improvements, and the prospectus identified an annual minimum fee of \$36,010. The prospectus provided that applicants could propose a larger or smaller fee, but that, if an applicant proposed less than the identified annual minimum fee, it must document why the proposed amount reflected fair market value. Id. Applicants were also informed that the fee to the government could be offset in whole or in part by the value of maintenance, reconditioning, renovation, and improvement (MRRI) work the permit holder performed on behalf of the government. Id. at 36, 42.

The Forest Service received proposals from 5 applicants, including RRMA (the incumbent permit holder) and Thousand Trails. Deciding Official's Statement at 2. Subsequently, on August 26, the Forest Service advised applicants to review the prospectus appendix identifying government furnished property and permitted applicants to revise their applications with respect to waste water collection and treatment systems no later than September 12. AR, Tab 9, Letter Requesting Revisions.

The applications were evaluated by a panel of seven Forest Service employees. One panel member reviewed all proposals for the business plan, experience and references factor and the financial resources factor. Two other panel members evaluated the drinking water and waste water sections of the operating plan, while operation and maintenance (O&M), the remaining portion of the operating plan, was evaluated by the entire panel. Deciding Official's Statement at 2. The three highest-rated applications were point scored as follows:

<b>Factor (max. possible pts.)</b>	<b>Thousand Trails</b>	<b>Firm A</b>	<b>RRMA</b>
<b>Operating Plan (301.2)</b>			
O&M (150)	122.5	120.4	130.9
Drinking Water (92.4)	77	92.4	92.4
Waste Water (58.8)	39.2	58.8	58.8
<b>Fees to the Government (300)</b>	<b>247</b>	<b>207</b>	<b>124</b>
<b>Business Plan (200)</b>	<b>144</b>	<b>146</b>	<b>176</b>
<b>Fees Charged to the Public (100)</b>	<b>75</b>	<b>75</b>	<b>75</b>
<b>Total (901.2)</b>	<b>704.7</b>	<b>699.6</b>	<b>657.1</b>

AR, Tab 7, Prospectus Applicant Score Summary, at 1. The agency also evaluated proposals under the financial resources factor, but did not include these point scores in its calculation of the firms' total point score. Deciding Official's Statement at 3. RRMA's application received 75 points under the financial resources factors, and Thousand Trails' and firm A's applications each received 66 points.<sup>2</sup> See AR, Tab 8, Scoring of Business Plan and Financial Resources Factors, at 1.

As relevant here with regard to the operating plan factor, the Forest Service credited RRMA for offering additional revenue-producing activities to occur within the permit area, such as selling firewood, ice, and souvenirs, and providing coin-operated air compressors, and tent and recreational vehicle rentals. Supp. AR, exhib. A, Debriefing Notes, Operating Plan Section, Question & Response No. 6. However, the Forest Service did not credit RRMA for offering additional services that would be performed outside the permit area, such as toilet cleanings on trails and other locations within the national forests, and general trail maintenance. Id.

The Forest Service also evaluated the applicants' offered fees to the government. The agency calculated an adjusted return to the government by taking into consideration the percentage gross return to the government based on expected revenues under the concession and the overhead rate the applicant offered to charge in connection with MRRM activities. Deciding Official's Statement at 2-3. RRMA offered a gross return to the government of [Deleted] percent, compared to Thousand Trails' [Deleted] percent proposed rate of return. AR, Tab 7, Prospectus Applicant Score Summary, at 3. With regard to overhead rates, RRMA proposed a rate of [Deleted] percent, compared to [Deleted] percent overhead proposed by Thousand Trails. Id. at 5. The agency calculated that Thousand Trails offered an adjusted return to the government of [Deleted] percent, and RRMA offered an adjusted return of [Deleted] percent. Id. at 3.

Because Thousand Trails received the highest overall point score (RRMA's overall point score was ranked third), Thousand Trails' application was selected for award of the special use permit.

Following an oral debriefing, RRMA filed this protest.

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<sup>2</sup> Adding the applicants' evaluated point scores under the financial resources factor would result in the following final total scores for the parties: Thousand Trails--771 points, and RRMA--732 points.

## DISCUSSION

RRMA raises numerous objections to the Forest Service's evaluation of proposals and selection decision. For example, RRMA argues that the Forest Service applied unstated evaluation criteria in evaluating proposals. RRMA also argues that the Forest Service failed to evaluate the additional services that it offered in its proposal. Although we discuss only the more significant arguments in resolving the protest, we have considered all of RRMA's arguments.

### Jurisdiction and Standard of Review

The Forest Service does not dispute the authority of our Office, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2006), to review this protest. In this regard, where an agency invites firms to compete for a business opportunity, the performance of which also involves the delivery of goods or services to the government, the resulting contract is one for the procurement of property or services within the meaning of CICA and, therefore, is encompassed within our Office's bid protest jurisdiction. Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 6. Here, the prospectus requires permit holders to perform specific tasks to maintain the campgrounds, such as repairing and painting signs, benches, and fences; identifying and removing hazardous trees; and removing trash, all of which the Forest Service would otherwise have to perform. See Prospectus, Append. 12, Sample Holder Maintenance, Reconditioning, Renovation (MRR) and Government MRR Plan; Agency Jurisdiction Letter, Nov. 17, 2011, at 3.

While the portions of CICA regarding our Office's bid protest jurisdiction thus apply here, the CICA provisions governing the conduct of procurements do not. This is because CICA exempts "procurement procedures [that are] otherwise expressly authorized by statute." 41 U.S.C. § 3301(a). Here, the agency is provided with authority under 16 U.S.C. § 580d to issue special use permits, under such regulations as the agency may prescribe. This authority also authorizes the agency to require concessionaires to, at their expense, renovate, recondition, maintain, and improve Forest Service facilities in the offered areas. As authorized, the Forest Service has issued regulations governing the competition and issuance of special use permits. See 36 C.F.R. § 251.58(c)(3)(iii). Where, as here, CICA and the Federal Acquisition Regulation do not apply to procurements that are within our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with the solicitation and any statutes and regulations that do apply. Starfleet Marine Transp., Inc., supra, at 9-10.

### Technical Evaluation

RRMA raises a number of objections to the evaluation of applications under the technical evaluation criteria.

As an initial matter, we find that RRMA's challenge to the use of point scoring in its evaluation is untimely. In its comments, RRMA for the first time complained that the Forest Service improperly evaluated proposals based on a fixed-weight method, rather than the non-fixed-weight method identified in the prospectus.<sup>3</sup> See Comments at 6-7. The record shows, however, that RRMA was informed in its debriefing that the agency had assigned points to each evaluation factor. Supp. AR, Exhib. A, Debriefing Notes, Operating Plan Section, Question & Response No. 3. In this regard, the Forest Services states that it informed RRMA in its oral debriefing that it had used a point scoring methodology in evaluating proposals. Although RRMA complains that it received a copy of the agency's debriefing notes after receipt of the agency's report, RRMA does not claim that the debriefing notes do not accurately reflect what was discussed during its oral debriefing. Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2011). Because RRMA did not assert this objection within 10 calendar days of the date of its debriefing (when RRMA knew, or should have known, the basis for this protest ground), this ground of protest is untimely and will not be considered.

The protester also complains that the Forest Service unreasonably failed to credit RRMA for additional services, such as toilet maintenance along trails, which RRMA

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<sup>3</sup> In response to the agency's request for dismissal of this ground of protest, RRMA asserted that it raised this objection in its initial protest. We disagree. None of the statements in its protest, to which RRMA directs our attention, raises this protest ground. For example, page 6 of its protest, identified by RRMA as raising the protest ground, merely complains that the Forest Service did not provide it a copy of the agency's written notes from the debriefing, and raises the arguments concerning the financial resources evaluation factor, evaluation of the water systems and wastewater subfactors separately from the operating plan, and permitting applicants to revise proposals to address sewage lagoons. Also, RRMA points to a sentence in its initial protest which is part of a larger section that argued that the Forest Service placed undue importance on the fee to the government factor in making its selection decision. Supp. Comments at 2 (citing Protest at 17). This language, however, actually concerns the agency's use of evaluated total points for its best value decision, and not to its later objection, that the agency was not permitted to point score the evaluation factors. To the extent that RRMA challenged the agency's cost/technical tradeoff analysis in its protest, the protester abandoned this objection when it did not further address it in its comments. See Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4.

offered to perform outside the area covered by the permit.<sup>4</sup> Protest at 12-14, 19. RRMA states in this regard that the prospectus encouraged applicants to propose such services and that Forest Service “routinely” accepted these services in the past.<sup>5</sup> Comments at 8.

The Forest Service explains that it did not give RRMA credit for additional services to be performed outside the permit area because if a permit holder performs a service for the agency outside the permit area, then the permit holder must pay the higher wages required by the Service Contract Act. AR at 5.

We find reasonable the Forest Service’s explanation as to why it decided to exclude from the evaluation proposed services to be performed outside the permit area. The prospectus informed applicants that not all services offered would be considered. Specifically, the prospectus stated that certain activities would be considered, while others would not be considered due to “creation of undesirable competition with local businesses, long standing agreements or other concerns.” Prospectus, Append. 10, Sample Annual Operating Plan and Required Annual Operating Plan Outline, at 21. Additionally, the prospectus steered applicants toward revenue-producing options. For example, the prospectus encouraged applicants to propose additional services or rentals to provide to the public, including proposed fees to charge for the services, “to provide a broader base for income and public service.” Prospectus at 36. The prospectus also included a list of revenue-producing sales, services, or fees, such as the sale of firewood, ice, and souvenirs; charging fees for electricity, showers, and public phone service; and bicycle rentals. *Id.*, Append. 21, Optional Sales, Services and/or Fees. While the list of options was not all-inclusive, the outside permit area services proposed by RRMA clearly were neither revenue-producing, nor of a type envisioned by the Forest Service.

Although RRMA contends that the requirement in the prospectus to perform maintenance in the day use area and amphitheater area of the Spillway Campground also results in performance of services outside the permitted fee

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<sup>4</sup> The record shows that the Forest Service credited RRMA’s proposal for additional services offered that were within the permit area. Supp. AR, Exhib. A, Debriefing Notes, Operating Plan Section, Question & Response No. 6.

<sup>5</sup> To the extent that RRMA contends that the Forest Service was required to credit it for these services because it had accepted them in the past, we note that each procurement stands alone, and an action taken under a prior procurement is not necessarily relevant to the reasonableness of the action taken under the present procurement. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 4.

area,<sup>6</sup> Comments at 8-9, the record refutes this contention. The prospectus specifically includes the amphitheater and the day use area in the permit area for the Spillway Campground. See Prospectus at 15-16.

RRMA also complains that the Forest Service did not evaluate applications under the operating plan factor in accordance with the prospectus. Specifically, the protester complains that the Forest Service assigned separate point scores for three subfactors (including drinking water and wastewater). RRMA contends that its proposal would have received a higher point score under this factor if the subfactors were not separately scored. Protest at 6, 11.

We fail to see how the protester was prejudiced by the agency's action. Prejudice is an element of every viable protest, and we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving award. See Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5. Here, the record demonstrates that, although the Forest Service separately evaluated, and assigned points for, each of the subfactors under the operating plan factor, the total points assigned equaled the points allotted by the agency for that factor. See AR, Tab 7, Prospectus Applicant Score Summary, at 1, 2. RRMA simply does not demonstrate how its overall point score under the operating plan factor would improve, or change in any regard, by not separately scoring the subfactors.<sup>7</sup>

RRMA also complains that the Forest Service failed to evaluate applications in accordance with the prospectus, where the agency's evaluation of applicants' financial resources was considered under the business plan factor, rather than under the financial resources factor. Protest at 6, 22. The Forest Service states that its evaluation panel separately evaluated and assigned point scores to applications under the financial resources factor, but concedes that the panel did not include the applicants' financial resources point scores in its calculation of the applicants' total point scores. AR at 8.

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<sup>6</sup> Although RRMA cited to a map of the Spillway Campground to support its contention, the map provides no indication of what is located within the permit area.

<sup>7</sup> RRMA also argues that the Forest Service improperly allowed applicants an opportunity to revise their applications to better address the issue of sewage lagoons. Protest at 6-7, 11-12. This post-award challenge is untimely. By letter dated August 26, 2011, the Forest Service requested application revisions by September 12. AR, Tab 9, Letter Requesting Revisions. To be timely, RRMA's challenge to the agency's decision to conduct discussions was required to be filed by the due date for revisions. See 4 C.F.R. § 21.2(a)(2).

Here, the record shows that the Forest Service did evaluate and assign point scores for the applicants' financial resources, although this was done under the business plan factor, rather than under a separate financial resources factor. See AR, Tab 8, Scoring of Business Plan and Financial Resources Factors, at 1, 2 n.4. The record also confirms that the agency neglected to include the financial resources scoring in its calculation of the applicants' total point scores. Nevertheless, the record also shows that RRMA was not prejudiced, because the applicants' relative competitive positions would not change. That is, after the addition of the applicants' evaluated point scores for their financial resources Thousand Trails would continue to be the highest rated applicant (771 points), and RRMA would be the third highest rated applicant (732 points).

RRMA also complains that the Forest Service did not use a small business development center to evaluate the applicants' business plans, as provided for by the prospectus. Protest at 5, 19-20. The Forest Service concedes that it did not have a small business development center review the applicants' business plans. The agency states that it instead relied on an evaluation panel member, who had over 30 years of experience in accounting and financial matters. AR at 7; Deciding Official's Statement at 2.

Although the protester complains that its business proposal was not reviewed by a small business development center, the record shows that the protester's application was scored significantly higher than other applications under this factor (176 points as compared to Thousand Trails' 144 points).<sup>8</sup> See AR, Tab 7, Applicant Score Summary, at 1; Tab 8, Scoring of Business Plan and Financial Resources Factors, at 1. We fail to see any possible prejudice to RRMA for the agency's failure to have the business plans reviewed by a small business development center, and refuse to credit RRMA's speculative arguments as to how such a review could change the applicants' competitive positions.<sup>9</sup> See Innovative Builders, Inc., B-402507.2, Sept. 15, 2010, 2010 CPD ¶ 214 at 5 n.3.

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<sup>8</sup> To the extent that RRMA challenges the qualifications of Forest Service personnel to evaluate proposals under the business plan factor, we will not review allegations concerning the qualifications of evaluators absent a showing of possible fraud, conflict of interest, or actual bias on the part of the evaluation officials, none of which has been shown here. Eggs & Bacon, Inc., B-310066, Nov. 20, 2007, 2007 CPD ¶ 209 at 4.

<sup>9</sup> RRMA suggests without any support that Thousand Trails' point score under the business plan factor would have been lower if the awardee's business plan had been reviewed by a small business development center. See Comments at 6.

## Evaluation of the Fee to the Government Factor

RRMA also challenges the agency's evaluation of applications under the fee to the government factor. RRMA first argues that the Forest Service unreasonably considered the firm's overhead rate in evaluating its application under this factor, and argues that the prospectus did not provide for consideration of applicants' overhead in calculating proposed fees to the government.<sup>10</sup> Protest at 16.

We disagree. The prospectus informed firms that applications would be evaluated under the fee to the government factor for the proposed return to the government for offset maintenance. Prospectus at 43. In this regard, applicants were informed that the fee to the government may be offset in whole or in part by the value of MRRI activities performed by the permit holder on behalf of the government, and that any indirect, or overhead, costs associated with the MRRI activities could be used to offset the fee to the government. Id. at 36, 42. Thus, although the evaluation section of the prospectus made reference only to offset maintenance, the prospectus read as a whole informed firms that applicants' overhead costs were logically related to the stated evaluation criteria. See Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 6.

RRMA also objects to the Forest Service's assumption that 70 percent of the gross revenue to the government would be subject to overhead charges for MRRI activities performed by the permit holder. Comments at 4-5. RRMA argues that the agency "failed to take into account that contractors working on projects for the agency will also add in overhead and profit" and implies that 100 percent of the work would be subject to overhead. The protester also argues that "RRMA as an applicant could choose to do many of the projects in-house thus reducing the fees to the government as no contractor overhead or profit would need to be paid." Id. RRMA additionally argues that the other applicants would contract out work for greater expense where RRMA would perform the work in-house. Protest at 18.

The Forest Service responds that its assumption was based on historical data that 70 percent of the work would be performed by the applicant and the remaining 30 percent would be work contracted out. Deciding Official's Statement at 3. Presumably, the Forest Service's assumption was based on its experience with RRMA, the incumbent permit holder. In any event, even if the Forest Service had only considered the applicants' unadjusted rates of return to the government,

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<sup>10</sup> To the extent that RRMA is complaining that the prospectus did not identify the agency's methodology for evaluating proposals under the fee to the government factor, RRMA is challenging the terms of the prospectus and is untimely. Under our Bid Protest Regulations, a protest of alleged apparent solicitation improprieties must be filed prior to the deadline for receipt of offers. 4 C.F.R. § 21.2(a)(1).

RRMA's fee would still not be as favorable as Thousand Trails'. In this regard, Thousand Trails offered a rate of return of [Deleted] percent, compared to [Deleted] percent offered by RRMA. In other words, based on average gross revenue data from the past three years, Thousand Trails offered an annual gross rate of return (before MMRI offset charges) that was over [Deleted] more than that offered by RRMA.

The protest is denied.

Lynn H. Gibson  
General Counsel