



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: American Office Services, Inc.

File: B-290511

Date: July 5, 2002

Timothy L. McGarry, Esq., Chriszt McGarry Co., for the protester.
James J. Roby, Esq., Department of Justice, for the agency.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that awardee's quotation represented the best value where, although protester's price quote was lower than awardee's, its past performance references were not as strong, and agency determined that awardee's superior past performance was worth higher price.

DECISION

American Office Services, Inc. (AOS) protests the issuance of a purchase order to On-Site Electrostatic Painting, Inc. under request for quotations (RFQ) No. DOJ-FAS-2-02-04, issued by the Department of Justice (DOJ) for painting metal library shelving units and associated items at the Robert F. Kennedy Department of Justice Building, Washington, D.C. AOS contends that it should have received the purchase order because its quoted price was lower than On-Site's.

We deny the protest.

On March 29, 2002, DOJ posted a combined synopsis/solicitation (the RFQ) on the Internet calling for the electrostatic painting of approximately 1,200 linear feet of seven-shelf metal bookcases and approximately 2,000 square feet of metal decking. Agency Report (AR), Tab A, Synopsis/Solicitation, at 1-2. The solicitation, set aside for small business, stated that simplified acquisition procedures applied to the procurement, see Federal Acquisition Regulation (FAR) part 13, and that award would be made on a "best value" basis considering price, contractor experience completing similar projects within secure facilities, and references. AR, Tab A, Synopsis/Solicitation, at 2. The solicitation advised vendors to submit at least three references. Id.

Four quotations were received, including the protester's at \$29,950 and On-Site's at \$32,980. AOS furnished five references, including one from the current contracting officer's technical representative (COTR), who also had been the COTR under phase one of this project, for which AOS had been the painting contractor. On-Site listed three references. The agency contacted On-Site's three references, and four of AOS's references, including the COTR.¹ The agency found that "AOS's references were not as strong as what DOJ desired for performance under this contract," AR at 2, and that On-Site's were superior to AOS's.

Specifically, of the four AOS references contacted, the agency found that only one was very positive--this reference stated that he would recommend AOS again because the vendor was on time and within budget and provided "good quality" work. AR, Tab D, COTR's Summary of the AOS References, at 1. A second reference stated that he would recommend AOS but that, because AOS's work for this reference was narrow in scope, he had only limited knowledge of the vendor. *Id.* at 2. A third reference reportedly left a voice mail message with the COTR stating that, on a prior project involving cabinet painting, some of AOS's work arrived scratched and/or damaged, and that his company preferred to use another vendor. *Id.* Finally, the COTR rated AOS's performance on phase 1 of this project only "marginally acceptable," because AOS "left lines, and drips and swirls on the shelves . . . [and] overspray on some wood surfaces." AR, Tab B, Declaration of COTR, at 3-4.

In contrast, the COTR found that On-Site's three references "reflect uniformly very strong recommendations." AR, Tab B, Declaration of COTR, at 4. Specifically, one reference stated that she "absolutely would recommend" On-Site because the vendor worked within the schedule and budget, and provided good quality work. AR, Tab C, COTR's Summary of the On-Site References, at 1. The second reference stated that On-Site did "excellent work," worked within budget and showed up on time. This reference stated that On-Site was the only contractor he would use in the future. *Id.* The third reference, noting that On-Site was very professional and prepared, stated that he "highly recommended" On-Site because "they are the ones to do the job right." *Id.* Concluding that On-Site's references were sufficiently superior to AOS's to offset AOS's lower price, the agency selected On-Site as the best value vendor.

AOS challenges the agency's determination that On-Site's references were superior to its own. Specifically, it maintains that the COTR gave "false and misleading information" to the contracting officer concerning its references. Protester's May 14, 2002 Submission, at 1. AOS states that its third reference, when presented with the

¹ The agency was unable to reach AOS's fifth reference by telephone, and the reference did not return the agency's messages. AR, Tab D, COTR's Summary of AOS References, at 1.

COTR's account of his voice mail message, "adamantly" denied that he made negative comments regarding AOS's work, id., and told AOS that he had provided the agency a "glowing" recommendation. Protester's Comments at 2. As for the COTR's negative comments regarding AOS's work on phase 1 of this project, AOS notes that the agency admits that the alleged deficiencies in its performance were never discussed or communicated to AOS, id., and asserts that its work could not have been as deficient as alleged by the COTR, since DOJ awarded it additional work after its work on phase 1 was completed. Id. at 3. AOS concludes that it should have received the award based on its low price.

In reviewing protests against an allegedly improper simplified acquisition and selection decision, we examine the record to determine whether the competition was fair and consistent with the solicitation, and whether the agency exercised its discretion reasonably. Southeast Tech. Servs., B-289065, Dec. 20, 2001, 2001 CPD ¶ 206 at 3.

The agency's actions here were reasonable. As noted, all three references for On-Site "definitely recommended" or "highly recommended" the vendor; none made a negative comment regarding On-Site's work. In contrast, although AOS received one positive recommendation and another positive, but limited, recommendation, the other two references were not positive. While AOS disputes that the third reference raised concerns about the quality of AOS's performance, nothing in the record establishes that the COTR's account of the voice mail message is not correct. In this regard, AOS has recounted the reference's denial of having provided negative comments, but has provided no affidavit or other direct statement from the reference to support its contentions.² In contrast, the COTR has provided a declaration detailing the contents of the reference's voice mail message, including statements that some cabinets AOS had refinished "arrived with scratches and/or damage," and that the reference "preferred another company." AR, Tab B, Declaration of the COTR, at 3. Under these circumstances, there is no basis for us to question the COTR's account of the voice mail message.

Similarly, there is no basis to question the COTR's negative comments regarding AOS's performance under phase 1 of this project. The agency has submitted an August 2, 2000 memorandum from the contractor the agency states was used "to clean the paint residue left by AOS." Id. This memorandum is a punch list of items to be completed, and indicates that 10 bookshelf openings "need to have the wax removed, lightly sanded and refinished . . . to repair the damage that the painter caused when he over-sprayed the metal shelves." AR, Tab B, Declaration of COTR,

² AOS has provided only a statement from its president regarding his conversation with the reference.

attach. 1, at 2.³ This memorandum is consistent with the agency's explanation of the nature of the defects in AOS's performance, and AOS has provided no evidence refuting it. The fact that the agency did not bring these defects to AOS's attention during the contract, and subsequently ordered additional work from AOS, does not provide a basis for disregarding this clear evidence supporting the COTR's view of AOS's prior performance.

We conclude that there is no basis to question the agency's conclusion that On-Site's past performance was superior to AOS's, and that its quotation represented the best value to the government notwithstanding its higher price.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ To the extent AOS protests that the agency never communicated these deficiencies to it at the time of performance, the protest is untimely. Under our Bid Protest Regulations, protests based on other than apparent solicitation improprieties must be filed within 10 days of when the protester knew or should have been known the basis for protest. 4 C.F.R. § 21.2(a)(2) (2002). AOS was provided with the information that should have put it on notice of this protest ground on May 13, upon receipt of an agency e-mail in which the agency listed the deficiencies in AOS's performance under phase 1. Since AOS first raised concerns about these deficiencies in its June 7 comments, any protest on this ground now is untimely. In any event, we are aware of no requirement, in the context of a simplified acquisition for an agency to provide vendors an opportunity to attempt to rebut previously undisclosed adverse past performance information. Cf. FAR § 15.306(d)(3) (such a requirement in context of discussions conducted in a negotiated procurement).