



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Ti Hu, Inc.

File: B-284360

Date: March 31, 2000

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David H. Turner, Esq., Department of the Navy, for the agency.

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DIGEST

1. Agency reasonably determined that experience on full food service contracts was less relevant for purposes of evaluating past performance than experience on mess attendant services, which were the services being procured.
 2. New and independent protest contentions are untimely, where the contentions are based on the agency report but were raised more than 10 calendar days after receipt of the report.
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DECISION

Ti Hu, Inc. protests the award of a contract to Acorn Food Services, Inc. under request for proposals (RFP) No. N00140-99-R-3749, issued by the Department of the Navy for mess attendant services at Submarine Base Groton. The protester contends that the past performance evaluation was unreasonable.

We deny the protest in part and dismiss it in part.

The RFP provided for award on a best value basis, considering past performance and price, with past performance being more important than price. In evaluating past performance, the RFP stated that “greater consideration [would be given] to the contracts which the [agency] feels are more relevant to the RFP [work].” RFP § M(2). The possible past performance ratings were exceptional, satisfactory, and unacceptable. Agency Report, Tab 17, Contract Review Board Presentation, at 6.

Initial proposals were received from seven offerors, including Ti Hu and Acorn Food Services, Inc. The agency requested and received clarification from Ti Hu regarding its relationship with its subcontractor. Agency Report, Tab 8, Letter from Contracting Officer to Ti Hu (Oct. 15, 1999), and Tab 9, Letter from Ti Hu to Contracting Officer (Oct. 18, 1999). No discussions were held with any offeror.

In evaluating Ti Hu's past performance, the agency contacted the identified points of contact (POC) for two of the three Ti Hu contracts that appeared most relevant to the statement of work. The POCs indicated that Ti Hu deserved an exceptional rating for its full food service work, but only a satisfactory rating for its mess attendant work, which was considered by the agency to be more relevant to the instant RFP's requirements than the full food service work. Ti Hu's past performance proposal identified six contracts for its subcontractor, of which only one contract was for mess attendant services. In evaluating the past performance of Ti Hu's subcontractor, the agency contacted the POC for the mess attendant service contract, which gave the subcontractor a satisfactory rating, and a POC for one of the full food service contracts, which gave the subcontractor an exceptional rating. While considered satisfactory overall, Ti Hu's past performance was ranked sixth out of the seven proposals received. Agency Report at 5-8.

Acorn's past performance was found exceptional. Four of the five contracts identified in Acorn's past performance proposal were for full food services. Acorn's most relevant contract was the incumbent mess attendant service contract at Submarine Base Groton, for which the POC rated Acorn's performance exceptional. The agency contacted POCs for three of the four full food service contracts, for which Acorn received one exceptional and two satisfactory ratings, with positive comments about Acorn's corporate responsiveness and cleanliness. Acorn's past performance was rated first overall of the proposals received. Id. at 8-11.

The agency determined that the minimal price savings in Ti Hu's proposal were more than offset by the substantial differences in Ti Hu's and Acorn's past performance, particularly considering Acorn's exceptional performance as the incumbent contractor, and that Acorn's proposal therefore represented the best value to the government. Id. at 11-13. Award was made to Acorn on December 22. Id. at 13.

Ti Hu filed an agency-level protest, which was denied the same day. Agency Report, Tab 23, Agency-Level Protest (Dec. 28, 1999), and Tab 24, Denial of Agency-Level Protest (Dec. 28, 1999). This protest to our Office followed.

The protester argues in its initial protest, filed December 29, 1999, that the agency erred in evaluating the past performance of Ti Hu and its subcontractor because it gave less weight to the full food service contracts than to the mess attendant service contracts. Ti Hu argues that full food service contracts were substantially similar to mess attendant service contracts, and were "more labor intensive and more complex contracts than Mess Attendants Requirements." Ti Hu's Protest at 3.

In response, the agency acknowledges that, while “success under a full food services contract would appear to translate into a likelihood of success under less complex mess attendant services, this has not historically been the case.” The agency states that success under mess attendant service contracts requires the “additional ability to coordinate with the other service providers and/or government personnel that are responsible for the overall management of the facility.” It has been the agency’s experience that a contractor’s success in running an entire food service facility does not necessarily translate into success in providing mess attendant services in a facility in which that contractor does not have managerial control. Agency Report at 17-18.

Although Ti Hu responds that “a full food contract incorporates all the work required under a mess attendant contract,” Ti Hu’s Comments at 13, this amounts to mere disagreement with the agency’s judgment, which does not establish that the evaluation was unreasonable. See Correa Enters., Inc., B-241912, Mar. 5, 1991, 91-1 CPD ¶ 249 at 3. Based on our review, we find the agency’s evaluation in this area reasonable.

In its initial protest, Ti Hu also argued that it deserved a higher past performance rating than satisfactory based on the past performance of its subcontractor. In its report, the Navy stated how it considered the past performance of Ti Hu’s subcontractor in its evaluation and explained why the subcontractor’s experience did not result in Ti Hu’s past performance rating increasing beyond the satisfactory level. Agency Report at 18-21. Ti Hu’s comments on the agency report did not attempt to dispute or rebut the agency’s detailed explanation. Where, as here, an agency specifically addresses an allegation raised by the protester in its initial protest, and the protester fails to rebut the agency’s response in its comments, we consider the allegation to have been abandoned by the protester and will not consider it further. Battelle Memorial Inst., B-259571.3, Dec. 8, 1995, 95-2 CPD ¶ 284 at 2-3.

Ti Hu argues, for the first time in its agency report comments filed February 14, 2000, that Acorn received an “unfair advantage” on its past performance evaluation due to the fact that it was the incumbent contractor. Protester’s Comments at 15-17. The agency contends that this aspect of Ti Hu’s protest is untimely. We agree. Ti Hu was on notice as of the December 28 debriefing and denial of its agency-level protest of the fact that the agency had high regard for Acorn’s performance as the incumbent contractor and this was a significant factor in the evaluation. Agency Report, Tab 22, Memorandum for File (Dec. 28, 1999), and Tab 24, Denial of Agency-Level Protest at 2 (Dec. 28, 1999). Our Bid Protest Regulations require that a protest be filed within 10 calendar days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1999). Since Ti Hu’s allegation that Acorn enjoyed an unfair incumbent advantage was not raised in its initial protest, but was only raised in its comments, filed more than a month after it became aware of this basis of protest, this allegation is untimely and will not be considered.

Ti Hu's February 14 comments on the agency report also objected to certain specifics in the evaluation of its past performance that were not mentioned in its initial protest. For example, Ti Hu disputed the POC's concerns regarding its management of a mess attendant service contract in Niagara Falls, New York, and claims that it should have been allowed to respond to any negative past performance information concerning this contract. Protester's Comments at 3-10. Ti Hu also objected to the agency's characterization of a contract that it performed at the Vermont Air National Guard Base as a full food service contract, rather than a mess attendant service contract. *Id.* at 11-12. Here too, the agency contends that these allegations are untimely filed.

These protest allegations were each based on the detailed discussion of the evaluation of Ti Hu's past performance that was contained in the agency report, which was received by Ti Hu by telefacsimile on February 1, 2000, without the attached documents.¹ Each new protest ground must independently satisfy the timeliness requirements of our Regulations, which do not contemplate the piecemeal presentation or development of protest issues. *RAMCOR Servs. Group, Inc.*, B-276633.2 *et al.*, March 23, 1998, 98-1 CPD ¶ 121 at 9 n.9. Thus, Ti Hu's February 14 protest of these matters was untimely filed more than 10 days after being apprised of the bases for these supplemental protest grounds.

We are unpersuaded by Ti Hu's argument that these latter contentions were only "supporting arguments, proving that the Protester was improperly evaluated." Protester's Response to Motion to Dismiss at 5. As a general rule, the timeliness of specific bases of protest raised after the filing of a timely protest depends on the relationship the later-raised bases bear to the initial protest. Where the later-raised bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements; conversely, where the later-raised bases merely provide additional support for an earlier, timely raised protest basis, we will consider the later-raised arguments. *Vinnell Corp.*, B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271 at 7. Here, these supplemental contentions were independent of Ti Hu's initial protest, which asserted that its past performance was misevaluated because its subcontractor's past performance was not properly considered and full food service contract experience was given insufficient weight.

The protest is denied in part and dismissed in part.

Comptroller General
of the United States

¹ Given the detailed discussion of these matters in the agency report, the record simply does not support the protester's claim that these new protest grounds were actually based on the attachments to the report, which it received on February 2.