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**Comptroller General
of the United States**

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

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Decision

Matter of: AC Technologies, Inc.

File: B-293013; B-293013.2

Date: January 14, 2004

J. Patrick McMahon, Esq., and William T. Welch, Esq., Barton, Baker, McMahon, Hildebrant & Tolle, for the protester.

Edward H. Kim, Esq., Whiteford, Taylor & Preston, for Ace Info Solutions, Inc., an intervenor.

Fred Kopatich, Esq., and Mark Langstein, Esq., Department of Commerce, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated quotations in the area of past performance is denied where record shows that agency reasonably downgraded protester based on [deleted], and reasonably credited awardee for performance of contracts performed by both it and its subcontractor where nothing in the solicitation prohibited the agency from considering subcontractor's prior contracts.

DECISION

AC Technologies, Inc. (ACT) protests the issuance of a task order to Ace Info Solutions, Inc. (AIS) under request for quotations (RFQ) No. AFJ6000-3-00630-I, issued by the Department of Commerce, Minority Business Development Agency, for information technology (IT) services. ACT principally maintains that the agency misevaluated quotations.

We deny the protest.

The RFQ, as amended, contemplated the issuance of a labor hours-based task order under the successful vendor's Federal Supply Schedule (FSS) contract. Firms were advised that their quotations would be evaluated using price and several non-price considerations. The non-price considerations (and their relative weights for evaluation purposes) were past performance (30 points), management approach (25 points), technical approach (25 points), and skill level of proposed staffing

(20 points). Agency Report (AR), exh. 4, at 19. Firms found to be within the competitive range would be required to make oral presentations, the quality of which could affect a firm's score under one or another of the non-price considerations. Id. Award was to be made to the firm submitting the quotation deemed to offer the "best value."

The agency received quotations from five vendors, three of which, including ACT and AIS, were found to be in the competitive range. These three firms received requests to make oral presentations, and thereafter were afforded an opportunity to submit revisions to their quotations. After the agency received and evaluated the revised quotations, it assigned a numeric score of 76.33 to the protester's quotation and a score of 87.17 to the awardee's. The protester quoted a price of \$2,881,128, and the awardee quoted a price of \$3,222,317. On the basis of AIS's superior technical rating, the agency found that its quote represented the best value to the government despite its higher price, and thus issued a task order to that firm.

PAST PERFORMANCE EVALUATION

ACT

The record shows that ACT's quotation listed [deleted] prior contracts--under all of which ACT's performance was rated excellent--and the agency assigned ACT an initial past performance score of 27 (of the possible 30) points. The agency noted, however, that although ACT was the incumbent contractor for this requirement, [deleted]. During ACT's oral presentation, the agency asked the firm whether it had any "lessons learned" in connection with its performance as the incumbent contractor. In response, ACT stated that [deleted]. AR, exh. 18 at 5. Based on this response, the agency lowered ACT's past performance score to 22 points.

ACT does not deny that its performance under the prior contract suffered from the deficiencies identified by it during its oral presentation and relied on by the agency in its evaluation. Rather, it maintains that downgrading its quotation for this reason was improper because, unlike under its prior contract, its quotation here was based on ACT's performing the contract with its own, rather than with subcontractor, personnel.

In reviewing protests of an agency's evaluation of proposals or quotations, we do not reevaluate the proposals or quotations. Rather, we consider only whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 2.

We have no basis to object to the agency's evaluation of ACT's past performance. The agency was not evaluating ACT's current technical approach when it evaluated its past performance; it was evaluating only the quality of ACT's performance on prior contracts. There simply is nothing improper or unreasonable in an agency's

downgrading a firm for acknowledged past performance deficiencies. Even though a firm's proposed performance approach may be different than an approach used under prior contracts, its failure to satisfactorily perform all or some aspects of a prior contract (for example, a firm's failure to diligently manage its subcontractor) reasonably may be viewed as relevant to predicting whether the firm will perform satisfactorily in the future. See Delco Industrial Textile Corp., B-292324, Aug. 8, 2003, 2003 CPD ¶142 at 4. (In the other areas of its evaluation—that is, where the agency was evaluating ACT's current technical approach—the record shows that the agency assigned the ACT proposal excellent ratings.)

AIS

ACT asserts that it was improper for the agency to rate AIS's past performance as high as or higher than ACT's. ACT asserts in this regard that AIS is a very small concern and that its past performance rating therefore must have been based on the past performance of one or more subcontractors. ACT maintains that giving weight to a subcontractor's prior contracts was improper because this is a small business set-aside, under which AIS will have to perform at least 50 percent of the value of the contract. See Federal Acquisition Regulation (FAR) § 52.219-14.

ACT's protest relies on two incorrect assumptions. First, nothing in the solicitation precludes the agency from considering the past performance of a prime contractor's subcontractor; in the absence of such a prohibition in the solicitation, the agency could properly evaluate and give weight to the past performance of AIS's subcontractor. The Paintworks, Inc., B-292982, B-292982.2, Dec. 23, 2003, 2003 CPD ¶ __ at 3. Second, the RFQ did not include a limitation on subcontracting clause, presumably because the acquisition was conducted as an FSS acquisition. See FAR § 8.404.¹ Under these circumstances, there was nothing improper with the agency evaluating and giving weight to the prior contracts performed by AIS's subcontractor in its evaluation of past performance. Accordingly, we find no merit to this aspect of ACT's protest.

¹ We note, moreover, that all of the prior contracts referenced in AIS's quotation, and evaluated by the agency, were performed by AIS or its proposed teaming partner, InDyne, Inc., which is also a small business. AR, exh. 6, at 1-2.

MANAGEMENT APPROACH

In its initial protest, ACT alleged that AIS's quote should have received a lower rating under the management approach criterion because the firm's resources in terms of its credit limit and number of employees were inadequate to effectively perform the requirement. ACT also asserted that the agency must have misevaluated the vendors' quoted prices. The agency responded to ACT's allegations in its agency report, but ACT made no mention of these arguments in its comments on the report. Accordingly, we find that ACT has abandoned these allegations. The Writing Co., B-284622.2, May 19, 2000, 2000 CPD ¶ 100 at 3.

ACT did raise new arguments in its comments. In particular, ACT alleges that the AIS proposal was given an unreasonably high score under the management approach criterion based on the agency's improperly relying on an unsupported "synergy" between the teaming partners of the AIS team, as identified by the evaluators, and also because the evaluators allegedly failed to notice that the AIS team had lost two of its proposed personnel prior to the oral presentation. ACT also challenges the agency's price/technical tradeoff, maintaining that five of the reasons identified by the agency as supporting award to AIS were erroneous.

Under our Bid Protest Regulations, protests must be filed in our Office no later than 10 days after the protest grounds were known or should have been known. 4 C.F.R. § 21.2(a)(2) (2003). Supplemental protests must independently satisfy our timeliness requirements. Saco Defense Corp., B-283885, Jan. 20, 2000, 2000 CPD ¶ 34 at 5-6, n.3. The record shows that ACT received its copy of the agency report—which contained the information on which ACT's additional arguments are based—on November 10, 2003, and that its comments on the report were not filed in our Office until November 21. By letter dated November 11, the protester's counsel advised us that, although he had actually been handed a copy of the report at 6:00 p.m. on November 10, this was after the firm's regular business hours; protester's counsel therefore asserted that the 10-day period for filing comments and for raising any new protest grounds based on the report did not begin to run until the next day, November 11, and that both ACT's comments and any supplemental protest grounds were due by November 21. By telephone, on November 17, we granted ACT's request to file its comments on November 21. Although ACT's counsel asserts to the contrary, we did not further state that the timeliness period for raising new protest grounds was extended. Nor do we believe it would have been appropriate to grant such an extension, since ACT's counsel concedes that he was in actual receipt of the agency report on November 10 (as opposed to November 11).² This being the case,

² The protester argues that, since our Office's time for filing documents extends only to 5:30 p.m., and since its counsel's law firm's business day also ends at 5:30 p.m., receipt of the agency report after that time should be treated in the same way as a submission to our Office—that is, receipt should be deemed to have occurred the

(continued...)

ACT was required to file any supplemental protest grounds within 10 days after November 10, that is, no later than November 20. Since the supplemental bases for protest were not filed until 11 days after ACT's receipt of the agency report, they are untimely and will not be considered.

The protest is denied.

Anthony H. Gamboa
General Counsel

(...continued)

next business day (here, November 11). We are unaware of any decision following the rule advocated by the protester, and we see no basis for doing so here. Instead, we believe that these matters need to be decided based on the specific factual context. Here, as explained in the text, protester's counsel was in his law firm's offices and received the relevant documents (those that ultimately formed the basis for the supplemental protest) shortly (here, 30 minutes) after what counsel advises was the close of the law firm's regular business hours. In that factual context, we see no basis for construing our timeliness rules so as to provide protester additional time by permitting a delay in filing new protest grounds.