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**United States Government Accountability Office  
Washington, DC 20548**

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## **Decision**

**Matter of:** American Environmental Services, Inc.

**File:** B-406952.2; B-406952.3

**Date:** October 11, 2012

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William E. Hughes III, Esq., Whyte Hirschboeck Dudek, S.C., for the protester.  
Steven Jay Katz, Esq., Tradebe Treatment and Recycling, LLC, for the intervenor.  
Reba M. Harrington, Esq., Defense Logistics Agency, for the agency.  
Cherie J. Owen, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### **DIGEST**

1. Protest of agency's determination that protester's and awardee's past performance was essentially equal is denied where agency's past performance evaluation record is consistent with solicitation's evaluation criteria and contains adequate contemporaneous documentation supporting the agency's assessments.
  2. Protest of source selection decision is denied where solicitation provided for only two evaluation factors--past performance and price; the past performance of awardee and protester was reasonably evaluated as essentially equal; and agency made award to the lower-priced proposal.
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### **DECISION**

American Environmental Services, Inc. (AES), of Sewickley, Pennsylvania, protests the Defense Logistics Agency's (DLA) award of a contract to Tradebe Treatment and Recycling, LLC, of East Chicago, Indiana, pursuant to request for proposals (RFP) No. SP4500-12-R-0010 for the removal, transportation and disposal of hazardous waste from designated locations in or around Norfolk, Virginia. AES protests that the agency improperly concluded that the past performance of AES and Tradebe were essentially equal and, accordingly, failed to perform a tradeoff between past performance and price.

We deny the protest.

## BACKGROUND

The solicitation at issue was published in December 2011, seeking proposals to provide removal, transportation and disposal of hazardous waste and related services for an 18-month base period and two 18-month option periods. The RFP provided for award to be made based on the proposal that was most advantageous to the government considering two factors: past performance and price. Agency Report (AR), Tab 4, RFP at 12. Past performance was significantly more important than price. *Id.* at 6. With regard to past performance, the solicitation explained that the contract requirements “demand[] that the offeror possess a proven record of past performance that promotes the probability of performance success and a low risk to the Government.” AR, Tab 4, RFP at 8. With regard to the past performance evaluation factor, the solicitation established the following equally-weighted subfactors: quality of product/service; schedule; business relations; management of key personnel; and utilization of small business (as applicable).<sup>1</sup> AR, Tab 1, RFP at 8-9.

On or before the January 26, 2012 closing date, initial proposals were submitted by various offerors, including AES and Tradebe;<sup>2</sup> the proposals were thereafter evaluated. In this regard, the contracting officer performed and documented a comprehensive evaluation of the offerors’ past performance. The agency summarized the requirements of each past performance reference and determined how relevant the work was in terms of: complexity of geographic region; coverage area and pickup points; types and number of waste streams; and performance time frames. *See e.g.*, Agency Memorandum for Record at 5, 7-8, 12-13, 14-15, 16, 18, 20, 22. The agency also analyzed the relevance of each past performance reference in terms of scope, examining the types of services provided, including a consideration of whether the offeror had performed services such as management services, tank cleaning, profiling, containers, waste disposal, and demilitarization. *See e.g., id.* at 5, 7, 14, 16, 18, 20. The agency also analyzed whether the past performance reference was relevant in terms of the magnitude of each reference, examining factors such as the number of task orders issued under the contract, the number of pounds of waste removed, duration of the contract, and contract dollar value. *See, e.g., id.* at 5, 7, 15, 16, 22. After assessing the relevance of each contract, the agency evaluated the quality of the past performance under each of the five past performance subfactors, providing commentary regarding the offerors’ performance under each subfactor.

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<sup>1</sup> The solicitation further advised offerors that, in assessing past performance, the agency would consider information that was current (that is, performed within the last three years) and relevant to the current requirements (that is, performance that was the same or similar with regard to location, complexity, scope, and magnitude). RFP at 9.

<sup>2</sup> AES is the incumbent contractor for these services.

For example, in evaluating one of Tradebe's references that was considered to be very relevant,<sup>3</sup> the agency's evaluation of the quality of service subfactor found that the firm's documentation was always accurate, successfully met program quality objectives, demonstrated continuous improvement in quality processes, and provided reliable leadership and control of all operations. Agency Memorandum for Record at 11. Under the schedule subfactor, the contracting officer noted that the firm adhered to performance timeframes, was responsive to government problems, and helped resolve issues in a timely, professional manner. Id. Under the business relations subfactor, the contracting officer found that the firm displayed reasonable and cooperative behavior in its business dealings, had a knowledgeable and professional staff that resolved problems promptly and flexibly, and provided outstanding customer service. Id. Under the small business subfactor, the agency found that the firm exceeded its small business goals. After evaluating each of the firm's past performance references under each subfactor, Tradebe's past performance was assigned an overall rating of substantial confidence. Id.

Similarly, in evaluating one of AES's references that was considered to be very relevant, the agency's evaluation of the quality of service subfactor found that AES kept up-to-date on laws and regulations, was innovative in setting up a color labeling scheme, and was accurate with documentation. Agency Memorandum for Record at 3. Under the scheduling subfactor, the contracting officer noted that AES stuck to schedules unless circumstances were beyond its control and provided clear communication about scheduling. Id. Under the business relations subfactor, the contracting officer noted that communication between the government and the firm was very professional and fluid, and that the staff was always professional, cooperative, and courteous with flexible problem solving techniques. Id. Under the management of key personnel subfactor, the agency found that the firm was extremely fluid in providing routine and non-routine services. Id. Under the small business utilization subfactor, the agency noted that AES did not meet any of its goals for this contract, but the firm did have subcontracts in each of the categories of small disadvantaged business concerns, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, and service disabled veteran-owned small business concerns. Id. at 4. After evaluating each of the firm's past performance references under each subfactor, AES's past performance was assigned an overall rating of substantial confidence. Id. at 1.<sup>4</sup>

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<sup>3</sup> In evaluating past performance, evaluators first assigned a relevancy rating to each past performance reference of: very relevant, relevant, somewhat relevant, or not relevant. Evaluators then assigned each offeror's past performance a rating of: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. AR, Tab 4a, DOD Source Selection Procedures, at 17-19.

<sup>4</sup> In its final evaluation, the agency noted that since the initial evaluation of this past performance reference:

(continued...)

Overall, the agency concluded that the past performance of Tradebe and AES was essentially equal. AR, Tab 11, Source Selection Document, at 4.

In May 2012, the agency conducted discussions with the offerors regarding various aspects of their price proposals, and subsequently requested submission of final revised proposals. Thereafter, the three competitive range offerors submitted FPRs which were evaluated as follows:

<b>Offeror</b>	<b>Price</b>	<b>Past Performance</b>
<b>Tradebe</b>	\$5,413,982	Substantial Confidence
<b>AES</b>	\$5,463,152	Substantial Confidence
<b>Third Offeror</b>	\$6,134,439	Satisfactory Confidence

AR, Tab 11, Source Selection Document, at 3.

Because the contracting officer concluded that AES and Tradebe's proposals were essentially equal with regard to past performance, she selected Tradebe for award on the basis of its lower evaluated price. AR, Tab 11, Source Selection Document, at 4. This protest followed.

#### DISCUSSION

AES challenges the agency's evaluation of past performance and contends that the agency's source selection decision was flawed.<sup>5</sup>

With regard to the evaluation of past performance, AES notes that it received a rating of exceptional on one of the five equally-weighted subfactors, quality of service, while Tradebe received a rating of very good under this subfactor. Because AES received a higher rating under one of the five past performance subfactors, the protester contends that its overall past performance rating should have been higher than Tradebe's. We disagree.

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(...continued)

AES's overage went from 0 lines of overage to 306 lines . . . [however,] the increase in overage for [the contract at issue was] not considered significant enough with other factors and very good processing of overage on the other referenced contracts; therefore, the initial rating of Substantial Confidence remains the past performance rating.

Agency Memorandum for Record at 1.

<sup>5</sup> In the protest it filed on July 5, 2012, AES asserted that the agency failed to consider certain aspects of Tradebe's past performance. Subsequently, AES withdrew all of its July 5 protest allegations. AES Supp. Protest, Aug. 16, 2012, at 6.

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. TPMC--EnergySolutions Environmental Services, LLC, B-406183, Mar. 2, 2012, 2012 CPD ¶ 135 at 11. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's mere disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. Short & Assoc., B-406799, B-406799.4, Aug. 31, 2012, 2012 CPD ¶ 251 at 4.

The record here confirms that the agency performed an extensive evaluation of the offerors' performance under each of the five past performance subfactors. As set forth more fully above, the agency conducted a detailed review of the relevance of each offeror's past performance information. This review of relevance considered the scope and complexity of the work. See Agency Memorandum for Record at 5, 7-8, 12-13, 14-15, 16, 18, 20, 22. After considering relevance, the agency examined the quality of the past performance under each of the five past performance subfactors, providing detailed commentary for the offerors' performance under each subfactor. Based on the record before us, we find that the agency's conclusion that the past performance of AES and Tradebe was substantially equal was reasonable. The mere fact that AES received a higher adjectival rating on one of the five equally-weighted subfactors does not preclude the agency's reasonable determination that, overall, the offerors' past performance was essentially equal. Accordingly, this protest ground is denied.<sup>6</sup>

AES also challenges the agency's source selection decision. Specifically, the protester notes that past performance was considered to be significantly more important than price; therefore, AES contends that because it received a higher rating on one of the five past performance subfactors, and its price was only slightly

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<sup>6</sup> AES also protests that the confidence assessment ratings used by the agency were defective because the descriptions of substantial confidence and satisfactory confidence contained in a guidance document were identical. Protest at 6 (*citing Agency Response to Document Request, Ex. 3, at 2*). However, the record shows that the guidance relied on by the agency evaluators contained the proper definitions for the respective ratings. See AR, Tab 26, Affidavit of Branch Chief, at 1. Specifically, the agency determined that when responding to the protester's request for documents during the pendency of this protest, an agency employee forwarded to the protester an electronic version of the guidance document that was currently being revised and contained incorrect definitions. This incorrect version was not the one used by agency evaluators. Because we find that the agency evaluators relied on the correct definitions of the two adjectival ratings in their evaluation, we deny this protest ground.

higher than that of Tradebe, the agency should have selected AES's proposal for award.

First, as discussed above, we have concluded that the agency reasonably determined that the past performance of AES and Tradebe past performance was essentially equal. Further, nothing in AES's protest challenges the agency's determination that AES's price was, in fact, slightly higher than Tradebe's. Finally, as noted above, the solicitation provided that the source selection would be based on only two factors--past performance and price. Accordingly, because the agency reasonably concluded that Tradebe's and AES's proposals were essentially equal with regard to past performance, and Tradebe proposed a lower price, we find no basis to question the agency's source selection decision.<sup>7</sup>

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>7</sup> In its protest submissions, AES has raised arguments that are in addition to, or variations of, those specifically discussed above. For example, the protester complains that the evaluation of past performance was flawed because the agency did not disclose in the solicitation that it planned to assign a "confidence assessment" rating to offerors' past performance. Protest at 5-6; Comments at 3. While agencies are required to disclose the evaluation criteria and their relative importance, they need not state in the solicitation the rating method to be employed in evaluating proposals. Federal Acquisition Regulation (FAR) § 15.304(d); Borders Consulting, Inc., B-281606, Mar. 10, 1999, 99-1 CPD ¶ 56 at 2 n.1. We have considered all of AES's various arguments and allegations and find no basis to sustain the protest.