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**Comptroller General
of the United States**

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

Decision

Matter of: Hughes Group Solutions

File: B-408781.2

Date: March 5, 2014

Floyd Driver, Hughes Group Solutions, for the protester.
Michael G. McCormack, Esq., Department of the Air Force, for the agency.
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is dismissed where the protester is essentially challenging the awardee's 8(a) status, because our Office has no jurisdiction to hear challenges to an offeror's size status under the Small Business Administration's (SBA) 8(a) program.
2. Protest of evaluation of proposals is denied where record shows agency's evaluation was reasonable and consistent with the solicitation's evaluation factors and applicable procurement rules.

DECISION

Hughes Group Solutions, of Tacoma, Washington, protests the award of a contract to G&E Technologies, LLC, of Albuquerque, New Mexico, under request for proposals (RFP) No. FA9401-13-R-0009, issued by the Department of the Air Force for transient aircraft/alert services at Kirtland Air Force Base, New Mexico.¹ Hughes challenges the awardee's 8(a) status, and also contends that the agency unreasonably credited G&E with the experience and past performance of its subcontractor, C2G, Ltd. Co.

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

¹ G&E is a joint venture between Galactic Network Integrators, Inc., an 8(a), service-disabled, veteran-owned small business (SDVOSB), and Entereza, Inc., a small business. G&E's proposed subcontractor is C2G, Ltd. Co., an SDVOSB firm. Agency Report (AR), Tab 5, G&E's Past Performance Proposal, at 3.

BACKGROUND

The solicitation, which was issued May 22, 2013, requires the contractor to perform all transient aircraft/alert services at Kirtland Air Force Base, New Mexico, which receives over 1,500 transient aircraft per year. The competition was set aside for participants in the Small Business Administration's (SBA) 8(a) program, and contemplated the award of a fixed-price contract for a base period of one year, with four 1-year option periods and one 6-month extension. RFP at 3-9; Contracting Officer's Statement at 2. Evaluations were conducted using the streamlined commercial item acquisition procedures of Federal Acquisition Regulation (FAR) part 12.6.

The solicitation advised that proposals would be evaluated based on past performance and price, with past performance being "significantly more important than Price when being evaluated." RFP at 110 (emphasis in original). For the purposes of evaluation under the past performance factor, offerors were to provide a list of no more than ten relevant contracts performed for federal agencies and commercial customers within the past three years. RFP at 101-102. The solicitation specifically provided that the evaluation of past performance would take into account various information regarding "subcontractors that [would] perform major or critical aspects of the requirement." RFP at 102. In assessing past performance the RFP included the following provision:

Past performance regarding predecessor companies, key personnel who have relevant experience, or sub-contractors that will perform major or critical aspects of the requirement will be considered as highly as past performance information for the principal offeror.

RFP at 111.

For purposes of award, the RFP stated that the agency would rank all offers by price, and then evaluate the past performance of the various offerors until an offeror received a "substantial confidence" performance assessment rating, or until all offerors were evaluated. RFP at 110-112.² The lowest-priced offeror evaluated to have a "substantial confidence" performance confidence assessment rating, and

² The solicitation advised offerors that the assessment process would result in an overall performance confidence assessment rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. RFP at 111. The solicitation also stated that past performance information would receive the following ratings of very relevant, relevant, somewhat relevant, and not relevant, and that the agency reserves the right to give greater consideration to information deemed most relevant. RFP at 112.

whose price was also considered reasonable would be “considered to be the most advantageous proposal to the government.” RFP at 112.

As relevant here, the RFP provided the following instructions with regard to the acceptance of joint venture agreements:

JOINT VENTURE AGREEMENTS-Joint Ventures are allowable on competitive 8(a) set-asides, however, the joint venture agreement must be received by SBA prior to proposal due date and approved before award of any resulting contract. If you are contemplating a joint venture on this project, you must advise your assigned SBA Business Opportunity Specialist (BOS) as soon as possible. It is also recommended that the agreement be submitted as soon as practicable to ensure compliance with established regulations. Any corrections and/or changes needed can be made only when your BOS has adequate time for a thorough review before the proposal due date. NO CORRECTIONS AND/OR CHANGES ARE ALLOWED AFTER TIME OF SUBMISSION OF PROPOSAL OR BIDS.

RFP at 104.

The Air Force received ten proposals by the due date of June 28. Ten proposals were received and ranked according to price. AR, Tab 6, Past Performance Evaluation Report, at 5. G&E was the lowest-priced offeror at \$1,997,959, and Hughes was the fourth lowest-priced offeror. The agency then evaluated the past performance of G&E, the lowest-priced offeror. Contracting Officer’s Statement at 5.

G&E submitted ten past performance contract efforts, nine of which were found to be not relevant, and one was determined to be very relevant. AR, Tab 6, Past Performance Evaluation Report, at 9-15. The agency found that none of the references for Galactic or Entereza (the joint venture members) were relevant; the one very relevant contract identified was for a contract performed by C2G, a proposed subcontractor for G&E. Based on the strength of that contract performance, G&E received a “substantial confidence” past performance assessment rating. Id. at 15. Because G&E was the lowest-priced offeror, and received a satisfactory or better rating for past performance, the agency did not evaluate any other offeror’s past performance. Contracting Officer’s Statement at 5.

The agency verified that G&E represented itself as a small business under the appropriate North American Industry Classification System (NAICS) code (488190). AR, Tab 7, G&E NAICS Verification, at 8. The agency then found, however, that G&E was not registered or certified as an 8(a) joint venture, and, therefore, sought clarification from G&E, with regard to this matter. AR, Tab 9, Notification of Registration Error. The agency also sought clarification

from the SBA as to G&E's status and eligibility to receive this contract award under the 8(a) program. The SBA responded that G&E filed a joint venture application in November 2012, but further advised that the SBA does not approve joint ventures for actual contract award under the 8(a) program until an offer for contract award is actually made by a contracting agency to the SBA 8(a) program. Contracting Officer's Statement at 6; AR, Tab 10, SBA Notice (Aug. 23, 2013).

On August 22, the agency advised Hughes of the award to G&E. AR, Tab 8, Initial Notification of Award (Aug. 22, 2013). Hughes protested the award to our Office, arguing that G&E was not an eligible 8(a) firm, that it was not small under the applicable NAICS code, and that the agency deviated from the evaluation plan because it failed to evaluate its past performance despite the fact that Hughes provided eight excellent past performance references. AR, Tab 12, Hughes Initial GAO Protest (Aug. 26, 2013). Hughes subsequently filed a nearly identical protest with the SBA. AR, Tab 13, Hughes' SBA Protest (Aug. 28, 2013).

As the contracting officer acknowledges, her initial notice of award to the unsuccessful contractors was premature because the SBA does not "approve" joint ventures for actual contract award under the 8(a) program until an offer for contract award is made by a contracting agency to the SBA 8(a) program.³ Contracting Officer's Statement at 6.

Following consultation with the SBA, the Air Force sent an offer letter to the SBA for the requirement. AR, Tab 15, Agency Offer Letter (Aug. 30, 2013). The contracting officer also rescinded the initial notice of award and sent a clarifying "Notice of apparent successful offeror for solicitation FA9401-13-R-0009" to all offerors. AR, Tab 16, Rescinded Notice of Award (Sept. 4, 2013). The SBA then issued an Offer Acceptance Letter on behalf of G&E. AR, Tab 17, SBA Acceptance Letter (Sept. 4, 2013).

On September 9, our Office dismissed Hughes' argument that G&E was not an eligible 8(a) firm because the SBA had conclusive authority over such issues. AR,

³ The SBA explains that the procedures for award of an 8(a) set-aside contract to a joint venture is as follows: (1) an offer is made to the SBA by a contracting agency after they determine through evaluations that an award should be made to potential 8(a) joint venture; (2) once the offer is made, the SBA reviews the joint venture package to ensure that the proposed 8(a) joint venture is in compliance with all program participation restrictions and regulations; (3) if the joint venture package is approved, the SBA accepts the contracting agency's offer; and (4) after acceptance of an offer, the contract agency may move forward and award the contract to the 8(a) joint venture. AR, Tab 29, Correspondence from SBA to Air Force Re: 8(a) Joint Venture Approval Process (Dec. 3, 2013), at 2.

Tab 19, GAO Ruling (Sept. 9, 2013). In response to Hughes' size protest, the SBA issued a size determination on September 17, concluding that "G&E Technologies, LLC, is a small business for the \$30 million size standard and is eligible for award of the subject contract, from a size standpoint." AR, Tab 20, SBA Size Determination, at 5. The SBA issued a further communication to Hughes affirming that the solicitation stated that "Joint Ventures are allowable on competitive 8(a) set-asides, however, the joint venture agreement must be received by SBA prior to proposal due date and approved before award of any resulting contract." AR, Tab 21, SBA Response to Hughes (Sept. 30, 2013), at 1. For this reason, the SBA explained, the award to the G&E joint venture was proper. Id.

On September 17, Air Force requested that our Office summarily dismiss Hughes' remaining protest arguments concerning the evaluation of proposals regarding past performance as academic because it intended to take corrective action to reevaluate the offerors' past performance. AR, Tab 22, Agency Request for Dismissal (Sept. 17, 2013). Our Office dismissed Hughes' initial protest on September 19.

The Air Force reevaluated G&E's proposal, based on the input of the original evaluators as well as the input of a new evaluator. Contracting Officer's Statement at 12. Based on the reevaluation, the agency again found that G&E was the lowest-priced offeror and merited a performance confidence assessment rating of "Substantial Confidence." AR, Tab 6, Past Performance Evaluation Report, at 15. Because G&E's joint venture agreement had by then been approved by the SBA, and the SBA had also already indicated acceptance of such an offer on behalf of G&E, the agency made award to G&E on November 20. AR, Tab 24, Contract Award (Nov. 20, 2013). Following a debriefing, this protest to our Office followed.

DISCUSSION

Hughes argues that award to G&E was improper because the solicitation required offerors to be approved 8(a) firms at the time of proposal submission, and that the awardee did not meet this requirement. The protester also contends that G&E has no experience with transient aircraft/alert services, and, thus, does not warrant a past performance rating of substantial confidence. For the reasons discussed below, we find no basis to sustain the protest.⁴

⁴ Additionally, the protester argues that the fact that Entereza, Inc., a partner in the G&E Technologies JV, has been awarded an "unusual" amount of contracts at Kirkland AFB in various fields over an eight year period, evidences that the firm is being "favored" by the Air Force. Protest at 4. The agency responds that simply stating that an unusual number of contracts involving eight different contract types have been awarded to Entereza over the course of an eight year period does not provide any evidence or support its claim of alleged favoritism. Our Office will not
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First, Hughes argues that G&E was not a certified 8(a) company at the time of proposal submissions and that the Air Force deviated from the solicitation requirement that offerors must be 8(a) certified at the time of the submission of proposals. As the agency notes, however, the solicitation did not require offerors to have an approved 8(a). Instead the solicitation specifically allowed for joint ventures to submit a proposal prior to their approval by the SBA so long as they had already submitted their joint venture agreement to the SBA prior to the proposal due date. RFP at 104. In this regard the SBA explained that firms participating in the 8(a) program are permitted to enter into joint venture agreements for the purpose of performing an 8(a) contract, and may submit proposals for such contracts despite the fact that the joint venture itself has not been approved as a 8(a) joint venture at the time of the submission of proposal--provided that the managing member is an 8(a) participant and has submitted a joint venture package to the SBA in accordance with solicitation requirements. AR, Tab 10, SBA Notice (Aug. 23, 2013). In this case the solicitation specifically allowed for joint ventures to submit a bid prior to their approval by the SBA so long as they had already submitted their joint venture agreement to the SBA prior to the proposed due date. RFP at 104. For these reasons, we find no merit to the protester's argument that G&E's proposal should have been rejected.

Similarly, to the extent that Hughes is challenging G&E's 8(a) status, we dismiss this portion of the protest because our Office has no jurisdiction to hear challenges to an offeror's size status under the SBA's 8(a) program. The Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2013); Carpetmaster, B-294767, Nov. 4, 2004, 2004 CPD ¶ 226 at 4.

Next, Hughes challenges the agency's evaluation of G&E's past performance. The protester argues that the agency unreasonably credited G&E with the experience and past performance of its subcontractor, C2G.⁵

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consider allegations based on mere inference, supposition, or unsupported speculation regarding allegations of bias or bad faith on the part of contracting officials. See, e.g., Operational Support & Servs., B-299660.2, Sept. 24, 2007, 2007 CPD ¶ 182 at 3; Midwest Metals, B-299805, July 17, 2007, 2007 CPD ¶ 131 at 3 n.2. Hughes' allegation fails to meet these threshold requirements for consideration and will not be considered further. See International Garment Processors, B-299674 et al., July 17, 2007, 2007 CPD ¶ 130 at 4-5 n.6.

⁵ Hughes also appears to argue that G&E could not propose C2G as a subcontractor, and therefore receive credit for C2G's past performance, without SBA's approval because a populated 8(a) joint venture may not enter into a

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The evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a solicitation calls for the evaluation of past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. Divakar Techs., Inc., B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5.

As discussed above, G&E submitted ten past performance contract efforts, nine of which were found to be not relevant. AR, Tab 6, Past Performance Evaluation Report, at 9-15. The agency also found, however, that G&E's proposed subcontractor, C2G, had extensive experience with transient aircraft/alert services. Id. at 10-11. We find no basis to object to the agency's evaluation in this regard. The FAR states that agencies should take into account past performance information regarding predecessor companies, key personnel, and major subcontractors, when such information is relevant to an acquisition. FAR § 15.305(a)(2)(iii). Based on this provision, we have found that the past performance of a proposed subcontractor properly may be considered in evaluating an offeror's past performance, where it is not expressly prohibited by the RFP. MCR Fed., LLC., B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 9. Here, the RFP expressly provided that the agency would consider the past performance of proposed subcontractors. RFP at 110. In fact, the RFP provided that the past performance for subcontractors who will perform major or critical aspects of the requirement "will be considered as highly as past performance . . . for the principal offeror." Id. at 111.

Given the fact that the RFP expressly anticipated consideration of a subcontractor's relevant experience in evaluating the awardee's ability to perform the RFP's requirements, we find that it was reasonable for the agency to favorably consider C2G's experience in evaluating the awardee's ability to perform the RFP's requirements.

The protest is dismissed in part, and denied in part.

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subcontract with a non-8(a) joint venture partner or affiliate. See Protest at 4 (citing 13 C.F.R. § 124.513(d)(2)(ii)); Protester's Comments at 1. The record here, however, does not show that C2G was a member of the G&E joint venture, and the protester does not otherwise explain why a subcontract to that firm by G&E was improper.

Susan A. Poling
General Counsel