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## Decision

**Matter of:** Green Earthworks Construction, Inc.

**File:** B-410724; B-410724.2

**Date:** February 2, 2015

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### DIGEST

1. Protest challenging the reasonableness of an agency's past performance evaluation is denied where the record shows that the agency evaluated proposals reasonably and in accordance with the terms of the solicitation and applicable law and regulation.
  2. Protest challenging an agency's best-value tradeoff selecting a higher technically-rated, higher-priced proposal is denied where the decision was reasonable and consistent with the terms of the solicitation.
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### DECISION

Green Earthworks Construction, Inc., of Tacoma, Washington, protests the award of a contract to All Phase Services, Inc., of Delray Beach, Florida, by the Department of the Air Force under request for proposals (RFP) No. FA4620-14-R-B002 for demolition and hazardous materials abatement services. The protester challenges the agency's evaluation of offerors' past performance and best-value tradeoff.

We deny the protest.

### BACKGROUND

On August 1, 2014, the Air Force issued the RFP for demolition and hazardous materials abatement services within the munitions storage area at Fairchild Air

Force Base, Washington. RFP, Performance Work Statement (PWS) at 002.<sup>1</sup> The RFP was set-aside for historically underutilized business zone small business concerns. RFP at 001. The RFP contemplated the award of a fixed-price contract. See id. at 003-007. The base scope of work was to be completed within 120 calendar days, and four optional tasks were to be completed within 60 days of the agency's exercise of the options. Id. at 008.

For the purposes of award, the agency was to consider two factors, which were approximately equal in weight: past performance and price. Id. at 018. The RFP provided that the agency would first rank proposals from lowest to highest in total price, and then conduct a price analysis of the lowest-priced proposals. Id. at 019. After conducting its price analysis, the agency was to evaluate the past performance of the lowest-priced group of proposals. Id. at 020. If the lowest-priced proposal also received a "substantial confidence" past performance rating, then award was to be made to that offeror as the best-value to the government. Id. Otherwise, the past performance assessment would continue, beginning with the next lowest-priced proposal, until an offeror with a substantial confidence rating was identified. Id. In the event no offeror in the lowest-priced group of proposals received a substantial confidence rating for the past performance factor, the source selection authority (SSA) was to determine whether additional higher-priced groups of proposals should be considered and to conduct a best-value tradeoff. Id.

The RFP stated that proposals "must be complete, self-sufficient, and respond directly to the requirements of this solicitation." Id. at 015; see also id. at 020 ("Offerors are cautioned to submit sufficient information and in the format specified in the RFP preparation instructions."). In their past performance proposals, offerors were required to "describe and provide detailed references for 3 recent (past 3 years) projects of similar complexity to this project," and include specific information such as the relevant contract number and customer contact information. RFP at 015-017. The RFP defined relevant performance to include efforts involving the operation and performance of demolition services that were similar or greater in scope, magnitude, and complexity than the effort described in the RFP. Id. at 016, 019. If an offeror was proposing a teaming arrangement and the team was submitting a proposal as a first time joint effort, then each team member had to provide past performance information for three projects. Id. at 017.

The Air Force was to evaluate the quality of an offeror's performance, and the extent to which it was relevant to the requirements of the RFP. Id. at 016. The RFP stated that the agency would "use information submitted by the offeror and other sources such as other Federal Government offices and commercial sources, to assess performance." Id.; see also id. at 019 ("Using questionnaires, the

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<sup>1</sup> References to page numbers in this decision are to the Air Force's Bates numbering in the Agency Report (AR).

contracting officer shall seek relevant performance information on all offerors based on (1) the references provided by the offeror and (2) data independently obtained from other Government and commercial sources.”); id. at 019-020 (reserving the right to consult government and commercial sources).

The Air Force received six proposals in response to the RFP. AR, Tab 17, Source Selection Decision, at 001. In accordance with the terms of the RFP, the agency organized the proposals into groups based on total proposed prices. The first group included the three lowest-priced proposals, including those submitted by Green Earthworks and All Phase. AR, Tab 18, Proposal Analysis Report, at 006. The agency then evaluated the past performance of the three offerors in the first group as follows:

	<b>Offeror A</b>	<b>Green Earthworks</b>	<b>All Phase</b>
<b>Relevancy Rating</b>	Somewhat Relevant	Somewhat Relevant	Very Relevant
<b>Overall Confidence Rating</b>	Satisfactory	Limited	Substantial
<b>Price</b>	\$2,450,362.00	\$2,487,585.86	\$2,917,515.93

Id. at 013.

The SSA selected All Phase’s higher technically-rated, higher-priced proposal because the associated benefits of All Phase’s “substantial confidence” past performance outweighed the cost savings associated with the lower-priced proposals. AR, Tab 17, Source Selection Decision, at 005. This protest followed.

## DISCUSSION

Green Earthworks challenges the Air Force’s evaluation of the offerors’ past performance and best-value tradeoff. For the reasons discussed below, we deny the protest.

### Past Performance

Green Earthworks argues that the Air Force’s past performance evaluation was flawed and inconsistent with the terms of the RFP and applicable procurement laws and regulations. First, the protester alleges that the agency unreasonably excluded its proposal from the competitive range without engaging in communications. Next, the protester alleges that the agency violated the terms of the RFP by failing to make reasonable efforts to obtain additional past performance information about the protester and its teaming partner. Third, the protester alleges that the agency treated offerors disparately. Finally, the protester argues that the agency imposed an unstated evaluation criterion. We find no merit to these arguments.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. Fox RPM Corp., B-409676.2, B-409676.3, Oct. 20, 2014, 2014 CPD ¶ 310 at 3. A protester's mere disagreement with the agency's judgment is insufficient to establish that an evaluation was improper. Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10. Here, we find that the agency reasonably evaluated the offerors' past performance.

#### Requirement To Engage In Communications

Green Earthworks alleges that the Air Force violated Federal Acquisition Regulation (FAR) § 15.306(b)(1)(i) by not engaging in communications prior to excluding its proposal from the competitive range solely on the basis of its past performance. See Protest (Oct. 22, 2014) at 6. Pursuant to the cited provision, "if a competitive range is to be established," an agency must engage in communications with offerors whose past performance information is the determining factor preventing them from being placed in the competitive range, and whose exclusion from, or inclusion in, the competitive range is uncertain. FAR § 15.306(b)(1)(i), (ii) (emphasis added). The agency here, however, neither established a competitive range nor eliminated the protester's proposal from the competition. Rather, as discussed above, the agency, in accordance with the RFP's disclosed evaluation process, ranked the proposals by price and then evaluated the past performance of the lowest-priced proposals, including Green Earthwork's proposal, to make its award decision. Thus, this protest ground is unsupported by the record and fails to provide a basis on which to sustain the protest.

### Requirement To Seek Additional Past Performance Information

The Air Force found that four of the past performance projects identified for Green Earthworks were “somewhat relevant” because they primarily were for soil remediation, as opposed to demolition services, and a fifth project was “not relevant” because it involved the replacement of a water main. AR, Tab 18, Proposal Analysis Report, at 010. The agency also found that it could not reasonably match up the questionnaires to the project descriptions in the protester’s proposal because the protester listed on the questionnaires the information for the instant RFP, rather than identifying the relevant contract number or project name for the project being assessed. Id. at 009-010. Also, the Air Force could only glean that Green Earthworks’ partner may have had experience on large demolition projects because the partner failed to provide any detailed descriptions of the projects, as required by the RFP. Id. at 010. Based on these proposal inadequacies, the Air Force assigned a “limited confidence” rating to Green Earthworks’ past performance because it could not reasonably determine the relevancy of the cited projects. Id. at 011.

Green Earthworks does not contend that its proposal included all of the required past performance information or that the agency’s findings regarding the informational inadequacies were otherwise unsupported. Rather, the protester argues that the agency was required to seek additional information by, for example, contacting the protester or consulting the protester’s and its teaming partner’s websites. See Protest at 5-6, 7; Protester’s Comments (Dec. 4, 2014) at 3-5. Under the terms of the RFP, however, it was the responsibility of Green Earthworks to demonstrate in its proposal, past performance relevant to the instant procurement, including providing specifically requested information; it was not the Air Force’s obligation during the evaluation process to fill in the gaps. An offeror in a negotiated procurement acts at its peril when its proposal does not provide specific information requested by the solicitation’s instructions. Beretta USA Corp., supra, at 11; Forest Regeneration Servs., LLC, B-290998, Oct. 30, 2002, 2002 CPD ¶ 187 at 5. Because Green Earthworks’ proposal was incomplete or otherwise inadequately prepared, we do not find unreasonable the Air Force’s assessment that the proposal merited a “limited confidence” rating under the past performance evaluation factor.

Furthermore, the terms of the RFP did not mandate that the agency conduct its own investigation to secure missing, or correct inadequately prepared, information. The protester here specifically relies on the RFP’s provision that the agency “shall seek relevant performance information on all offerors” based on the offerors’ references and data independently obtained from other government and commercial sources as mandating that the agency conduct an independent investigation of commercial

sources. RFP at 019.<sup>2</sup> Our Office has interpreted similar solicitation provisions that the government “shall seek relevant past performance information” from other sources to mean that the government will consider the information provided by the offeror and additional information--not that the agency would necessarily, or be obligated to, solicit additional information from other sources. Veterans Elite, Inc., B-409233, Feb. 10, 2014, 2014 CPD ¶ 64 at 4-5. In any event, in addition to the information submitted by the offerors, the agency also consulted government past performance databases to obtain further information. AR, Tab 18, Proposal Analysis Report, at 010, 012. In the case of Green Earthworks and its teaming partner, the agency found no additional relevant projects, a finding not challenged by the protester. Id. at 010. Therefore, we find no basis to object to the scope of the Air Force’s supplemental investigation of offerors’ past performance here.

### Disparate Treatment

Green Earthworks also alleges that the Air Force engaged in disparate treatment by contacting one of All Phase’s past performance references, while not doing so with any of its references. See Protester’s Supp. Comments (Dec. 10, 2014) at 3-4. The protester also alleges that the agency disparately evaluated proposals by not downgrading the awardee’s proposal for failing to have at least three completed questionnaires, while downgrading the protester’s proposal for being incomplete. See Supp. Protest (Nov. 26, 2014) at 1-2. We find that neither objection provides a basis on which to sustain the protest.

Agencies are required to evaluate proposals on a common basis and in accordance with the terms of the RFP. Agencies may not engage in disparate treatment of offerors in the evaluation of past performance. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 17. It is an offeror’s responsibility, however, to provide to the agency relevant past performance information that is under its own control. Beretta USA Corp., supra, at 11. Here, we do not find that the Air Force’s contact with one of All Phase’s past performance references constituted disparate treatment.

The Air Force contacted both Green Earthworks and All Phase regarding the status of past performance questionnaires that had not been returned by their references. CO’s Statement at 14. The awardee notified the Air Force that its reference for two projects had represented that there were limitations on his ability to release the questionnaires to the Air Force. AR, Tab 30, Memorandum for Record (Dec. 5,

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<sup>2</sup> As addressed above, the RFP included three differently-phrased provisions regarding the agency’s use of other government and commercial sources as part of its past performance evaluation. Compare RFP at 016 (“will use”) with id. at 019 (“shall seek”) with id. (“reserves the right to use”).

2014) at 1.<sup>3</sup> In light of the awardee's notice, the agency contacted the reference to ascertain whether the reference would be submitting questionnaires for the two projects cited by the awardee. Id. The reference explained that for the referenced projects, contractor performance assessment reports (CPAR), which included ratings above "satisfactory," were still pending legal and upper-level agency review. AR, Tab 18, Proposal Analysis Report, at 012. The reference represented that pursuant to that agency's policies, that agency would not prepare past performance questionnaires while CPARs remained pending. Id. Thus, the agency's follow up with the awardee's reference concerned the reference's preparation of questionnaires.<sup>4</sup>

In contrast, the issues that the Air Force identified with the protester's questionnaires--which contributed to its lower past performance rating--stemmed not from a reference's questionnaire response, but, rather, from the protester's failure to provide adequate information in its proposal and to properly prepare the questionnaires. AR, Tab 18, Proposal Analysis Report, at 010-011. Thus, the circumstances surrounding the offerors' questionnaires, and the agency's need for additional information, were materially different. See Apptis, Inc., supra, at 17.

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<sup>3</sup> Green Earthworks suggests that the December 2014 Memorandum, authored during the protest, calls into question whether the agency's past performance evaluation was reasonably documented. See Protester's Supp. Comments at 3 n.1. The Air Force explains that the December 2014 Memorandum was prepared to replace a contemporaneous, August 20, 2014, Memorandum, which was referenced in ¶ 8.1.4.3.3 of the proposal analysis report (AR, Tab 18), that the Air Force could not locate. See AR, Tab 30, Memorandum for Record (December 2014), at 1. Our Office generally will consider post-protest explanations where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. SRM Grp., Inc., B-410571, B-410571.2, Jan. 5, 2015, 2015 CPD ¶ \_\_\_ at 6. Based on our review of the record, we conclude that the statements in the December 2014 Memorandum are consistent with, and provide a more detailed explanation of, the past performance evaluation discussed in the contemporaneous record.

<sup>4</sup> It also bears noting that after the Air Force contacted Green Earthworks regarding the absence of past performance questionnaires for its proposed team member, the agency subsequently received, and considered, two completed questionnaires for the team member. CO's Statement at 14 n.5. Under these circumstances, we do not believe that the agency unreasonably failed to contact additional references for the protester. See IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 6 (finding that although agencies are required to evaluate the past performance of all offerors on the same basis, there is no requirement that an agency contact all of an offeror's references or the same number of references for each offeror).

Therefore, we find no basis to find that the agency treated the offerors in a disparate manner.

We also do not find that the Air Force unreasonably waived a “requirement” for All Phase to have submitted three completed past performance references, while similarly not excusing Green Earthworks’ failure to provide all of the past performance-related information required by the RFP. Contrary to the protester’s argument, the RFP established a maximum, not a minimum, of three past performance references. RFP at 016. Absent an express solicitation provision to the contrary, which was not the case here, we have held that it is generally not objectionable to evaluate an offeror’s past performance based on fewer than the maximum possible number of references the agency could have received. Fox RPM Corp., *supra*, at 4; M&N Aviation, Inc., B-409048, Dec. 27, 2013, 2013 CPD ¶ 299 at 5. In this regard, we have also held that it is generally improper for an agency to downgrade an offeror’s past performance rating solely on the basis that a reference failed to complete and return a questionnaire. *See, e.g., Family Entm’t Servs., Inc.*, B-298047.3, Sept. 20, 2006, 2007 CPD ¶ 59 at 5-6. In contrast, the deficiencies in Green Earthworks’ past performance proposal, namely its failure to properly fill out the questionnaires and its teaming partner’s failure to provide required project details, were entirely within its control.

#### Unstated Evaluation Criterion

Lastly, Green Earthworks argues that the Air Force improperly used an unstated evaluation criterion by effectively ignoring the proposed role of its teaming partner, Wm. Dickson Company, and evaluating whether Green Earthworks could perform the entire project on its own. *See* Supp. Protest at 3. The protester bases its argument on an individual evaluator’s comment that, based on Green Earthwork’s lack of specific experience performing demolition work, the protester had the potential to become “overextended/overwhelmed” by the scope and scale of the project. *See* AR, Tab 19, Past Performance Evaluation Team Notes, at 003. As addressed below, we do not find that this argument provides a basis on which to sustain the protest.

Although agencies are required to identify in a solicitation all major evaluation factors, they are not required to identify all areas of each factor that might be taken in account in an evaluation, provided that the unidentified areas are reasonably related to or encompassed by the stated factors. Caduceus Healthcare, Inc., B-407791, Feb. 21, 2013, 2013 CPD ¶ 77 at 5.

Here, the RFP stated that the “purpose of the past performance evaluation is to allow the Government to assess the offeror’s ability to perform the effort described in the RFP, based on the offeror’s demonstrated present and past performance.” RFP at 019. Contrary to Green Earthworks’ allegations, the agency did not require evidence that Green Earthworks could perform the work on its own, or otherwise

ignored the past performance of its teaming partner. Rather, the individual evaluator's notes--and the consensus final proposal analysis report--reflect that the evaluators considered the performance of both the protester and its teaming partner, and the challenged concern was based on the limited, "somewhat relevant" past performance information provided by the protester and its partner. AR, Tab 19, Past Performance Evaluation Team Notes, at 003 (stating the challenged concern was "[b]ased on past performance of somewhat relevant projects including [a] recent contract [of] similar scope/scale (sub)"); AR, Tab 18, Proposal Analysis Report, at 011 ("The projects submitted by Green Earthworks appeared to be mainly for soil remediation. While some projects performed by Wm. Dickson were for large magnitude demolition work no narrative was given to substantiate the references provided."). Thus, the agency's concerns stemmed from Green Earthworks' and its partner's failure to provide sufficient information to allow the agency to assess the team's ability to perform based on recent, relevant past performance information, not on an unstated evaluation criterion relating to Green Earthworks' ability to perform the requirements of the contract alone.

We find that the agency's evaluation of offerors' past performance was reasonable and in accordance with the terms of the RFP and applicable law and regulation.

#### Source Selection Decision

Finally, Green Earthworks argues that the Air Force's selection for award of All Phase's higher technically-rated, higher-priced proposal was unreasonable. See Protest at 5. The RFP provided that if an offeror whose proposal was ranked in the lowest-priced group of proposals received a substantial confidence rating, that proposal would be selected for award. RFP at 020. All Phase's proposal was the only proposal among the lowest-priced group that received a substantial confidence rating. AR, Tab 17, Source Selection Decision, at 004. As discussed above, the SSA found that All Phase's higher-rated, higher-priced proposal merited award as compared to Green Earthwork's and another offeror's lower-rated, lower-priced proposals--notwithstanding the solicitation's provision that award was to be made to the offeror who submitted the lowest price and whose past performance received a significant confidence rating. Id. at 005. Because All Phase's proposal merited award under the stated terms of the solicitation, we find no basis to sustain the protester's challenge to the award decision.

Additionally, to the extent the SSA made a tradeoff decision, we find the source selection decision here to be reasonable. Source selection decisions must be documented, and include the rationale and any business judgments and tradeoffs made or relied upon by the source selection authority (SSA). FAR § 15.308. In the award decision, the SSA specifically determined that All Phase's "substantial confidence" past performance outweighed the cost savings associated with the lower proposed prices of other offerors. AR, Tab 17, Source Selection Decision,

at 005. Although Green Earthworks disagrees with that judgment, it has not shown it to be inadequately documented or unreasonable.

The protest is denied.

Susan A. Poling  
General Counsel