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# Decision

**Matter of:** AnderCorp, LLC

**File:** B-419984

**Date:** October 14, 2021

Samuel C. Kelly, Esq., Brunini, Grantham, Grower & Hewes, PLLC, for the protester. Douglas Yokomizo, Esq., Nida & Romyn, P.C., for Roy Anderson Corporation, the intervenor.

Jonathan Pomerance, Esq., and José Otero, Esq., Department of Labor, for the agency. Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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**DIGEST**

Protest challenging the reasonableness of a technical evaluation is denied: The agency reasonably rated the protester's proposal as unacceptable under an evaluation factor considering prior experience where the protester did not submit any projects demonstrating prior experience as required by the solicitation.

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**DECISION**

AnderCorp, LLC, of Gulfport, Mississippi, protests the award of a contract to Roy Anderson Corporation, also of Gulfport, Mississippi, under request for proposals (RFP) No. 1605AE-21-R-00014, issued by the Department of Labor (DOL) for construction services. This protest concerns an agency's evaluation of the protester's proposal under an evaluation factor considering prior experience and a separate factor considering past performance. It is undisputed that the protesting firm has no prior experience; AnderCorp is a recently formed company.<sup>1</sup> Protest at 3. The issue is whether it was proper for the agency to evaluate the protester's proposal negatively, rather than neutrally, under the solicitation's experience factor, due to the firm's lack of experience. We conclude that the agency's evaluation was reasonable and therefore we deny the protest.

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<sup>1</sup> AnderCorp explains that it is managed and operated by individuals with "significant experience in the construction industry[.]" Protest at 3, and was organized by a former chief executive officer of Roy Anderson Corporation. Comments at 1.

## BACKGROUND

DOL issued the solicitation on April 29, 2021, under the procedures of Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. Agency Report (AR), Exh. 1, RFP at 1, 72.<sup>2</sup> The solicitation sought proposals for construction services for the agency's redevelopment project at the Gulfport Job Corps Center. *Id.* at 1. The solicitation contemplated the award of a fixed-price contract to the offeror submitting the lowest-priced, technically acceptable proposal, considering the following non-price evaluation factors: (1) project experience; (2) past performance; (3) technical approach and risk; (4) management and organization; (5) safety program; and (6) quality control program. *Id.* at 82-84.

The RFP contained the following instructions to offerors regarding the project experience factor:

Submit three (3) examples of relevant projects, either substantially complete or completed within the past five years, demonstrating the Offeror's technical capabilities to perform the Project. If the offeror submits more than the required number of project examples, DOL will evaluate only the stated number of projects, in the order presented in the Offeror's submittal.

*Id.* at 78. The RFP advised that under the project experience factor the agency would "evaluate the Offeror's technical project experience in executing relevant projects." *Id.* at 83. The RFP also advised that the agency would evaluate "the Offeror's record of project completion and close-out, its approach to problem and change resolution, and its responsiveness to issues and problems." *Id.*

As for the past performance factor, the RFP required offerors to submit information about projects they have previously performed so the agency could evaluate the offeror's relevant past performance. *Id.* at 79. The RFP stated that "[a]n [o]fferor who has no record of past performance or for whom information on past performance is not available will receive a neutral rating for this factor." *Id.* Proposals were due on June 1. *Id.* at 1.

The agency received five proposals in response to the solicitation. COS at 10. The proposals submitted by AnderCorp and Roy Anderson Corporation were evaluated as follows:

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<sup>2</sup> The RFP was amended five times over the course of the procurement. Contracting Officer's Statement (COS) at 3-4. The language relevant to this decision remained unchanged through each amendment.

	<b>AnderCorp</b>	<b>Roy Anderson Corp.</b>
<b>Project Experience</b>	Unacceptable	Acceptable
<b>Past Performance<sup>3</sup></b>	Acceptable	Acceptable
<b>Tech. Approach &amp; Risk</b>	Acceptable	Acceptable
<b>Management &amp; Org.</b>	Acceptable	Acceptable
<b>Safety Program</b>	Acceptable	Acceptable
<b>Quality Control</b>	Acceptable	Acceptable
<b>Price</b>	\$41,559,000	\$42,989,000

AR, Exh. 9, Source Selection Decision Document (SSDD) at 6.

AnderCorp's proposal was rated as unacceptable under the project experience factor because the firm did not submit any project examples as required by the RFP. *Id.* at 10; Protest, exh. 2, AnderCorp Proposal at 61. Based on this rating, AnderCorp's proposal was found technically unacceptable overall. SSDD at 17; COS at 12. On June 22, DOL selected Roy Anderson Corporation for award. COS at 12.

AnderCorp timely requested a debriefing which the agency provided on July 9. *Id.* The debriefing letter stated that because AnderCorp did not submit three examples of relevant projects, the agency was unable to evaluate AnderCorp under the project experience factor. AR, Exh. 11, Debriefing at 2-4. The debriefing letter explained that AnderCorp's proposal was rated technically unacceptable overall because it was rated as unacceptable under the project experience factor. *Id.* On July 13, AnderCorp filed this protest with our Office.

## DISCUSSION

AnderCorp argues that the agency committed a prejudicial error by finding its proposal technically unacceptable. Protest at 1-2; Comments at 1-2, 5 n.4. The protester asserts that when an offeror does not have a record of relevant past experience or performance, agencies may not evaluate that offeror favorably or unfavorably based on the lack of performance history. *Id.* Further, AnderCorp suggests that since its proposal received a neutral rating under the past performance factor, it should have received a similar rating under the prior experience factor since it submitted the same information in response to both factors. Comments at 2. The protester thus alleges that DOL violated procurement law by evaluating its proposal negatively, rather than

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<sup>3</sup> In a lowest-priced, technically acceptable procurement--such as here--we have found that assigning an acceptable past performance rating to offerors without relevant past performance is, effectively, no different than assigning a neutral rating. *Y&K Maint., Inc.*, B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 7; *see also Phoenix Mgmt., Inc. v. United States*, 127 Fed. Cl. 358, 367-368 (Fed. Cl. 2016) (finding GAO's rationale persuasive).

neutrally, under the project experience factor, based on AnderCorp's lack of prior experience.<sup>4</sup> Protest at 1-2; Comments at 1-2.

The agency responds that its evaluation of AnderCorp's proposal was reasonable and consistent with procurement law and the solicitation. MOL at 3-4, 9. DOL explains that the solicitation clearly notified offerors that the agency would evaluate prior experience, and to do this, the agency would review examples of prior work. *Id.* at 6-7. DOL asserts that because AnderCorp did not submit any examples of prior work, the agency evaluators were unable to evaluate AnderCorp under the project experience factor, and thus the negative assessment under the project experience factor was reasonable. *Id.*

In reviewing a protest challenging an agency's evaluation of proposals, our Office will not reevaluate proposals or substitute our judgment for that of the agency. *Kiewit Infrastructure West Co.*, B-415421, B-415421.2, Dec. 28, 2017, 2018 CPD ¶ 55 at 5. The evaluation of proposals is generally a matter within the agency's discretion. *Id.* Our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation factors set forth in the RFP. *Id.* A protester's disagreement with the agency's evaluation, without more, does not establish that the agency acted unreasonably. *REEL COH Inc.*, B-418095, B-418095.2, Jan. 10, 2020, 2020 CPD ¶ 55 at 8.

Generally, an agency's evaluation under an experience factor is distinct from its evaluation of an offeror's past performance.<sup>5</sup> *Weston-ER Fed. Servs., LLC*, B-418509, B-418509.2, June 1, 2020, 2020 CPD ¶ 311 at 14 (*citing Commercial Window Shield*, B-400154, July 2, 2008, 2008 CPD ¶ 134 at 3). Experience factors focus on the degree to which an offeror has actually performed similar work, whereas past performance factors focus on the quality of the work performed. *Id.* As relevant here, the FAR provides that "[i]n the case of an offeror without a record of relevant past performance . . . the offeror may not be evaluated favorably or unfavorably on past performance." FAR 15.305(a)(2)(iv); see also 41 U.S.C. § 1126 (where there is no past performance information, or that information is unavailable, "the offeror may not be

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<sup>4</sup> To the extent that AnderCorp challenges the terms of the solicitation, such a challenge, filed after the time set for receipt of proposals, is untimely. 4 C.F.R. § 21.2(a)(1). Here we note that the RFP included language under the past performance factor stating that offerors without a record of relevant past performance or for whom information on past performance is unavailable would receive a neutral rating. RFP at 79. There was no such language under the prior experience factor. *Id.* at 78-79.

<sup>5</sup> The FAR also recognizes this difference and identifies past performance and prior experience as two distinct evaluation factors: "The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as **past performance**, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and **prior experience**." FAR 15.304(c)(2) (emphasis added).

evaluated favorably or unfavorably on the factor of past contract performance.”). There is no such provision in the FAR regarding the evaluation of an experience factor where the offeror has no record of prior experience.

Here, under the project experience factor, offerors were required to submit three examples of relevant projects, either substantially complete or completed within the past five years, which demonstrated the offeror’s technical capabilities to perform the work described in the solicitation. RFP at 78. The RFP informed offerors that the agency would evaluate proposals under this factor by considering the submitted project examples. *Id.* at 83. AnderCorp did not submit any project examples to satisfy the project experience factor. The only information in AnderCorp’s proposal addressing this factor was a statement which reads as follows:

AnderCorp does not have any directly related experience in the last five (5) years. However, as noted in Factor 4, Subfactor 2,<sup>6</sup> our proposed project team has a wealth of individual relevant experience which will allow AnderCorp to successfully execute this project.

Protest, exh. 2, AnderCorp Proposal at 60-61. AnderCorp included this same statement in its proposal to address the past performance factor. *Id.*

Under the project experience factor, the agency’s technical evaluation panel (TEP) rated AnderCorp’s proposal as unacceptable because it did not include any examples of relevant projects. AR, Exh. 8, TEP Report at 4-5. Under the past performance factor, the TEP rated AnderCorp’s proposal as acceptable, noting that no past performance information on AnderCorp was available. *Id.* at 5-6. The TEP assigned AnderCorp’s proposal an overall technical rating of unacceptable. *Id.* at 2.

The source section authority (SSA) concurred with the TEP’s findings. AR, Exh. 9, SSDD at 1. As to the project experience factor, the SSA stated that AnderCorp’s lack of relevant projects “shows that the offeror does not have [] technical project experience,” and that AnderCorp’s “record of project completion and close-out, its approach to problem and change resolution, and its responsiveness to issues and problems could not be evaluated.” *Id.* at 7. Under the past performance factor, because AnderCorp had no record of past performance, the SSA considered AnderCorp’s proposal to be neutral and concurred with the TEP’s rating of acceptable. *Id.* The contracting officer explains that AnderCorp’s proposal received an overall technical rating of unacceptable based on its unacceptable rating under the project experience factor. COS at ¶ 28.

Based on our review of the record, we find no basis to question the agency’s evaluation of AnderCorp’s proposal. As explained above, the solicitation required offerors to include examples of prior work with their proposals and AnderCorp failed to do this. Since the agency had nothing to review when evaluating AnderCorp’s proposal under

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<sup>6</sup> Factor 4, subfactor 2 of the solicitation covered AnderCorp’s staffing approach and key personnel resumes. Protest, exh. 2, AnderCorp Proposal at 82-95.

the project experience factor, the evaluators concluded that AnderCorp's proposal represented a high degree of risk, and that it did "not present a probability of successful performance." AR, Exh. 8, TEP Report at 4. The agency's rating of acceptable under the past performance factor was consistent with the FAR and the terms of the solicitation, which, as noted above, both state that offerors lacking past performance information would be rated as neutral. We find the agency's evaluation of AnderCorp's proposal to be reasonable and in accord with the terms of the solicitation.

While AnderCorp contends that it should have been rated as neutral under the project experience factor, as it was under the past performance factor, this argument is based on a mistaken understanding of the law. The protester correctly explains the law as it pertains to the evaluation of past performance, however it attempts to apply that rule to the evaluation of prior experience. As noted above, the FAR (and applicable statute) state that an offeror with no past performance "may not be evaluated favorably or unfavorably on past performance" but there is no such provision addressing the evaluation of prior experience. FAR 15.305(a)(2)(iv). Accordingly, there is no requirement for the agency to evaluate AnderCorp as neutral under the project experience factor, as there is for the evaluation under the past performance factor. We therefore find that the agency's evaluation of AnderCorp's proposal was reasonable, in accord with applicable procurement law and regulation, and appropriately followed the solicitation's terms. Thus, there is no basis to sustain AnderCorp's challenge.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel