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**Comptroller General
of the United States**

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

Decision

Matter of: Rebecca Ryan d/b/a Flyaway Farm and Kennels

File: B-404132

Date: January 10, 2011

Rebecca Ryan for the protester.

Nicholas B. Carter, Esq., Birdstrike Control Program, Inc., for the intervenor.

Christopher S. Cole, Esq., and Capt. Catherine M. Tornberg, Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the agency reasonably evaluated the awardee's past performance and, in accordance with the solicitation, selected the awardee's proposal as the lowest-priced offer with a substantial confidence rating.

DECISION

Rebecca Ryan d/b/a Flyaway Farm and Kennels (Flyaway), of Chadbourne, North Carolina, protests the Department of the Air Force's award of a contract to Birdstrike Control Program, Inc. (Birdstrike), of Willis, Texas, under request for proposals (RFP) No. F1Q0WS0228A001, for a comprehensive bird and wildlife management control program at Dover Air Force Base (AFB), Delaware. Flyaway challenges the evaluation of proposals.

We deny the protest.

The RFP was issued as a small business set-aside for commercial items in accordance with Federal Acquisition Regulation Part 12.6. The RFP contemplated the award of a fixed-price contract to implement the Bird Airstrike Hazard (BASH) Program, the purpose of which is to provide bird and wildlife management and control services to protect flying operations and rid the arrival/departure corridors of all potential hazards to flight operations. RFP at 1, 12-13.

A detailed performance work statement (PWS) was provided to describe the required wildlife control services. Id. at 11-19. According to the PWS, Dover AFB is

an area of high BASH potential, with specific hazards from waterfowl, birds of prey (hawks, owls, and vultures), blackbirds, and other wildlife (deer, fox, turkeys, groundhogs, and rabbits). Id. at 2. The contractor was required to provide a comprehensive bird and wildlife management and control program to reduce the attraction of birds to the airfield. According to the PWS, the required measures

”may include, but are not limited to, the use of Border Collie(s), radio controlled model airplanes (RCs), harassment, trapping, relocation, depredation [ie., killing wildlife], airfield/airdrome and arrive/departure corridor patrol, and perimeter fence monitoring and land management use.”

Id. at 12-13. While the PWS “encouraged” the contractor to “use innovative approaches to effectively and efficiently accomplish the requirements of this PWS in a timely manner,” it specifically cautioned that the “contractor will be required to perform depredation activities on Dover AFB property at the request and coordination of the . . . Pest Management Shop.” Id. at 13.

Award was to be made on a “best value” basis, considering past performance and price, with past performance significantly more important than price. Id. at 3. Offerors were instructed to provide references for no more than three of their most relevant contracts performed for the government or commercial customers within the last 3 years. Id. The solicitation provided that the agency would send performance surveys seeking past performance information to the references identified by the offerors and to other sources identified by the agency. Id. at 4. The solicitation advised that the agency would assign an overall past performance rating of “substantial confidence,” “satisfactory confidence,” “limited confidence,” “no confidence,” or “unknown confidence.”¹ Id. The solicitation further provided that if the lowest-price offer is judged to have a substantial confidence past performance rating, and the offeror is determined to be responsible, that offer will be considered to represent the best value for the government and award will be made to that offeror without further consideration of any other offers. Id. at 4. The government reserved the right to award to other than the lowest-priced offeror based on an integrated “best value” determination if the lowest-priced offeror were judged to have a performance assessment rating of only satisfactory confidence. Id.

The Air Force received proposals from Flyaway and Birdstrike. Flyaway submitted references for contracts at Dover AFB and Andrews AFB, and its proposal received a substantial confidence past performance rating. Birdstrike submitted references for contracts at McConnell AFB and Hurlburt Field AFB, as well as with the Israeli Air

¹ “Substantial confidence” was defined as “a high expectation that the offeror will successfully perform the required effort.” RFP at 3. “Satisfactory confidence” was defined as “an expectation that the offeror will successfully perform the required effort.” Id.

Force (IAF), and its proposal likewise received a substantial confidence past performance rating. AR, Tab 2, Contracting Officer Statement at 2; AR, Tab 7, Source Selection Decision Document at 1. Since Birdstrike was the lowest-priced offeror, its substantial confidence past performance rating led the agency, in accordance with the solicitation, to determine that its proposal represented the best value; thus Birdstrike received the award.

Flyaway questions the past performance rating for Birdstrike on a number of grounds. As a general matter, the evaluation of an offeror's past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, 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; Yang Enter., Inc., Santa Barbara Applied Research, Inc., B-294605.4 et al., April 1, 2005, 2005 CPD ¶ 65 at 5. Where a protester challenges the past performance evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6.

Having considered all of Birdstrike's challenges to the past performance evaluation, we find that the agency's evaluation of Birdstrike's past performance was reasonable and consistent with the terms of the solicitation.

For example, Flyaway generally asserts that Birdstrike colluded with contracting personnel at Hurlburt AFB to obtain false past performance surveys under this solicitation. Government officials, however, are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. K9 Operations, Inc., B-299923, Aug. 6, 2007, 2007 CPD ¶ 146 at 3.

Here, the Air Force reports that it not only reviewed the past performance questionnaires, which were submitted on behalf of Birdstrike directly from personnel from Hurlburt AFB (and McConnell AFB), but in addition, it also contacted contracting personnel to confirm that the past performance ratings submitted were accurate. AR at 7; AR, Tab 2, Contracting Officer's Statement, at 3. Further, the past performance questionnaire completed by the chief of safety at Hurlburt AFB rated Birdstrike's performance of bird and wildlife management there as "exceptional" on all aspects of performance, including Birdstrike's ability to provide experienced managers with the technical expertise to meet contract requirements, hire and maintain qualified personnel, provide effective quality control and inspection procedures, identify problems as they occur, and display initiative in solving problems. AR, Tab 6, Past Performance Questionnaires for Birdstrike, at 2-3. The chief of safety specifically noted in his written remarks that "damaging bird

strikes in the terminal area have been reduced to zero” and “our pigeon control problem has been solved. . . .” *Id.* at 4. Additionally, the reviewer advised that Birdstrike offered “an exceptionally well-rounded program that takes a full-spectrum approach to wildlife control,” and he gave Birdstrike’s overall performance the highest “exceptional” rating. *Id.* at 3-4. Flyaway has offered no support for its allegation, nor does the record in any way indicate, that Birdstrike’s relationship with contracting officials at Hurlburt AFB resulted in false or improperly elevated past performance ratings.

Furthermore, we note that the overall substantial confidence past performance rating for Birdstrike was further supported by the past performance ratings for its bird and wildlife management contract at McConnell AFB. In this regard, the contract specialist at McConnell AFB completed a past performance questionnaire in which he rated Birdstrike’s overall performance as “exceptional,” “not only meet[ing] contractual requirements but exceed[ing] many to the Government’s benefit.” AR, Tab 6, Past Performance Questionnaires, at 8. According to the McConnell contract specialist, Birdstrike “provides a comprehensive service that . . . includes a comprehensive analysis of environmental factors that attract or discourage the presence of wildlife on the airfield.” *Id.* at 7. The contract specialist further noted that Birdstrike had recommended inexpensive methods to eliminate various problems. *Id.* In summary, the significant confidence past performance rating for Birdstrike was consistent with the past performance information furnished to the agency regarding Birdstrike’s performance at Hurlburt AFB and McConnell AFB.²

Flyaway also asserts that the RFP requires the use of depredation as a wildlife control method, but that Birdstrike will not satisfy this requirement because it does not provide depredation services. Protest at 8; Protester’s Response to Dismissal Request, at 2-3. While the PWS generally allows the contractor to choose appropriate wildlife control methods, the PWS further provides that the contractor must be willing and able to use all the control methods listed in the solicitation, including depredation, and that depredation may be required at the request of the agency. RFP at 12-13. Offerors, however, were not required to submit technical proposals demonstrating compliance with the PWS, and Flyaway cites nothing in Birdstrike’s proposal, or in the past performance information received by the agency for this procurement, that would call into question Birdstrike’s willingness to comply with all of the PWS requirements. Further, whether Birdstrike is able to perform

² Flyaway also asserts that Birdstrike submitted past performance information from the IAF which cannot be authenticated or verified, and therefore should not have been considered. The Air Force, however, reports that the contracting officer did not consider the questionnaire submitted by the IAF in the past performance assessment or award determination because verbal communication with the contracting office in Israel was difficult. AR at 13. Flyaway offers no basis for questioning the agency’s account in this regard.

consistent with the PWS is a matter of Birdstrike's responsibility. United Seguranca, Ltda., B-294388, Oct. 21, 2004, 2004 CPD ¶ 207 at 4. In this regard, our Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2010), generally preclude our review of a contracting officer's affirmative determination of responsibility, except in circumstances not present here. Ultimately, whether Birdstrike complies with the PWS requirements is a matter of contract administration, which we will not review. 4 C.F.R. § 21.5(a).

Having considered all of Flyaway's challenges to the award, we find that none furnish a basis for questioning the agency's selection of Birdstrike for award under this solicitation.

The protest is denied.

Lynn H. Gibson
Acting General Counsel