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

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Decision

Matter of: SWR, Inc.--Protest and Costs

File: B-294266.2; B-294266.3; B-294266.4

Date: April 22, 2005

Benjamin M. Bowden, Esq., Albrittons, Clifton, Alverson, Moody & Bowden, PC, for the protester.

J.R. Cohn, Esq., and Julius Rothlein, Esq., U.S. Marine Corps, for the agency.

Susan K. Chelsea, Esq., McCulloch & Associates, APC, for Starlight Corporation, Inc., an intervenor.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Determination that protester's technical proposal was unacceptable was reasonable where evaluation board found that protester's proposal included numerous weaknesses, including flawed plans for decentralized project management and tool accountability.
 2. Evaluation of protester's past performance was unobjectionable where agency reasonably concluded that more recent poor performance at one of the solicitation performance sites was more probative of protester's record than performance on other contracts more remote in time or of shorter duration.
 3. Request that GAO recommend payment of costs associated with prior successful protest is denied where claim was filed with contracting agency more than 60 days after protester's counsel received protected copy of protest decision; delay in receipt of publicly-releasable version of decision did not toll period for filing, and there is no evidence of compelling reason beyond protester's control that prevented it from timely filing the claim.
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DECISION

SWR, Inc. protests the award of a contract to Starlight Corporation, Inc. under request for proposals (RFP) No. M00146-04-R-9024, issued by the U.S. Marine Corps (USMC) for the washing of various aircraft at three Marine Corps Air Stations (MCAS) in North and South Carolina. SWR challenges the agency's technical

evaluation and seeks reimbursement of its costs incurred in pursuing an earlier protest concerning this requirement.

We deny the protest and the request for reimbursement.

The RFP contemplated the award of a fixed-price contract for a base year, with four 1-year options, to clean, wash, lubricate, and inspect various fixed and rotary-wing aircraft at three USMC installations--MCAS Cherry Point, North Carolina, MCAS New River, North Carolina, and MCAS Beaufort, South Carolina. SWR was the incumbent contractor at MCAS Cherry Point and its work there represented some five percent of the current requirement; the remaining 95 percent of the requirement was performed at all three installations by large businesses under two delivery orders. Prior to issuing the RFP, USMC performed market research as to whether to set the procurement aside for Historically Underutilized Business Zone (HUBZone) small business concerns. Based on its research, the agency decided to issue the RFP as a 100-percent small business set-aside. SWR challenged the agency's decision in a protest filed in our Office. We sustained the protest, finding that the agency had not reasonably considered whether a HUBZone set-aside was required, and recommended as corrective action that the contracting officer reasonably consider whether fair market price offers would be obtained from at least two capable HUBZone small business concerns. SWR, Inc., B-294266, Oct. 6, 2004, 2004 CPD ¶ 219. In response to our recommendation, the contracting officer conducted additional research and evaluated submissions from interested firms before determining to continue the requirement as a small business, rather than a HUBZone, set-aside. Agency Report (AR) Tab 29.

Proposals were to be evaluated under a price factor and three technical factors--management plan (40 points), corporate experience (40 points), and past performance (20 points). The technical factors, when combined, were approximately equal in weight to price. Award was to be made to the offeror whose proposal was found to be the "best value" to the government. Proposals were to be scored on a five-point scale for each technical factor, and these scores then were divided by five and multiplied by the individual factor weights to arrive at final scores.

Ten offerors, including SWR and Starlight, submitted proposals, which were evaluated by the technical evaluation board (TEB). In its initial evaluation, the TEB found five proposals, including Starlight's, to be technically acceptable; SWR's was among those evaluated as technically unacceptable. Based on these initial evaluations, the contracting officer determined not to conduct discussions. The results of the TEB's consensus evaluation, showing final calculated scores, are as follows:

	SWR	Starlight
Management Plan (40 points)	8	32
Corporate Experience (40)	16	40
Past Performance (20)	8	20
Total (100)	32	92
Price	\$4,087,663	\$5,810,580

Based upon her review of the TEB report and a detailed tradeoff analysis, the contracting officer, as source selection authority, concluded that Starlight’s proposal represented the best value to the government and made award to that firm. After receiving a debriefing, SWR filed this protest.

TECHNICAL EVALUATION

SWR challenges the evaluation of its proposal on numerous grounds. In reviewing a protest of an agency’s proposal evaluation, our review is confined to a determination of whether the agency acted reasonably and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. We have considered all of SWR’s arguments, and find that none has merit. This decision addresses SWR’s most significant arguments.¹

¹ One of SWR’s challenges to the technical evaluation is untimely. Under our Bid Protest Regulations, to be timely, a protest must be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2005). SWR asserts that the agency improperly evaluated proposals under the corporate experience factor based on offerors’ experience with aircraft washing contracts worth at least \$1 million. In SWR’s view, this aspect of the evaluation should have been disclosed in the RFP because it is allegedly inconsistent with the past performance criterion, which only calls for experience with contracts worth \$50,000. While SWR raised this issue in a supplemental protest, ostensibly based on its review of the agency report, the record shows that it was aware of this basis of protest prior to that time. In this regard, SWR’s debriefing letter attached a complete copy of its evaluation, including the stated weakness that SWR had no “documented corporate experience performing contracts that are both similar in scope (aircraft washing) and similar in size (at least \$1 million per year) to the solicitation.” Debriefing at 4. Since SWR knew that the TEB had evaluated its corporate experience on this basis, it was required to protest on this basis within 10 days; its supplemental protest, filed some 6 weeks later, was well beyond this time, making it untimely and not for consideration.

Management Plan

Under the management plan factor, the agency identified five weaknesses, including two based on SWR's proposal of autonomous project managers (PM) and alternates for each work site and the level of responsibilities for each. SWR asserts that these weaknesses are unfounded because SWR proposed multiple PMs in part due to the geographical separation of the worksites, which would prevent a single PM from being available to meet with contracting officials within 30 minutes, as required by the RFP. It also asserts that the agency ignored its proposal of administrative and overflow support from SWR's corporate headquarters.

The evaluation was reasonable. The TEB found that SWR's proposal of decentralized control provided flexibility for local management and decision making authority, but concluded that complete autonomy of the sites would not provide for coordination among sites and would not provide the benefits of having a single person supply oversight of all three sites. TEB Report, attach. 2 at 10 of 23. The TEB was primarily concerned with the excessive responsibilities placed on each PM. In this regard, each PM not only was responsible for human resources, finance, contract administration, safety, hiring, training, and scheduling of workflow, but was "dual-hatted" as the quality control manager, "fully equipped to monitor all technical aspects of program performance, including inspection of subcontractor efforts." SWR Proposal at 3-4; TEB Report, attach. 2 at 10 of 23. While SWR proposed "full corporate support" (SWR Proposal at 5), we note that its corporate headquarters is in Alabama and the performance sites are in North and South Carolina. Given the extent of each PM's responsibilities and SWR's proposed decentralized approach to management, the agency could reasonably conclude that there was some question whether the PMs could effectively ensure that requirements were met and provide supervision and oversight. TEB Report, attach. 2 at 10 of 23.

The agency also identified a management plan weakness concerning the failure of SWR's tool plan to mention how tools and equipment would be marked or identified for accountability. TEB Report, attach. 2 at 11 of 23. SWR asserts that this weakness was unwarranted because its tool plan in fact is "virtually" the same as Starlight's, and the agency did not assign a similar weakness to the awardee's proposal. Supplemental Protest at 2.

The evaluation in this area was unobjectionable. The RFP required offerors to include a plan for an "effective tool and equipment control program to preclude tools and equipment being left in or around aircraft." RFP at 22. While the two offerors' tool plans are similar in that neither specifically describes how tools will be marked or identified, it is plain that the agency was concerned with the issue of accountability for tools, and Starlight's plan is significantly more detailed in this regard. For example, while both plans call for use of [deleted] for each wash and [deleted], Starlight's plan includes additional layers of accountability. In particular,

[deleted]. In our view, the agency reasonably concluded, in essence, that SWR's proposal was weaker in the area of tool accounting than Starlight's.

Past Performance

SWR asserts that the past performance evaluation--under which its proposal was assigned a score of 2 of the 5 available raw points--was flawed because it was inconsistent with the agency's assessment that SWR's performance record was overall more favorable than unfavorable. In the protester's view, such a record warranted a rating of at least 3 points, since the source selection plan (SSP) indicated that 3 points was the appropriate score for proposals reflecting past performance that was more favorable than unfavorable. When multiplied by the appropriate weighting factor, this increased rating would result in a score of 12 (of the 20 available) points, and would make its proposal technically acceptable.

As with all evaluation challenges, we will review a challenge to a past performance evaluation to ensure that it was reasonable and consistent with the RFP's evaluation criteria. DGR Assocs., Inc., B-285428, B-285428.2, Aug. 25, 2000, 2000 CPD ¶ 145 at 11.

SWR's assertion that the agency deviated from the SSP, even if correct, does not provide a basis for sustaining the protest. This is because alleged deficiencies in the application of an agency's SSP--as opposed to deviations from the solicitation's evaluation scheme--do not alone provide a basis for questioning the validity of an evaluation; such plans are internal agency instructions and do not give outside parties any rights. Mandex, Inc.; Tero Tek Int'l, Inc., B-241759 et al., Mar. 5, 1991, 91-1 CPD ¶ 244 at 7.

In any case, we note that SWR's argument is based solely on the first sentence of the SSP's guidance for a 3-point rating and ignores the two other considerations in assigning a 3-point rating-- there is "little potential risk anticipated with timely performance of required services, or little expectation of degradation of performance," and "minor performance problems . . . were corrected." SSP at 6. While SWR's past performance overall was more favorable than unfavorable, the agency found that its most relevant past performance record ran afoul of these two considerations. In this regard, the TEB reviewed three of SWR's aircraft washing contracts, two of which reflected overall good to excellent performance. However, its work on the Cherry Point MCAS--one of the three RFP performance sites--was rated poor to marginal and the past performance respondents stated that they would not award SWR another contract.² AR, Tab 13. The TEB viewed the Cherry Point

² SWR asserts that this assessment is misleading given the agency's post-evaluation award of a sole-source contract to SWR based on its "satisfactory" performance. Protest at 5. We find nothing misleading or contradictory. The sole-source contract
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performance as more probative of SWR's likelihood of successful performance than SWR's other contracts since, at the time of the evaluation, one of the other contracts had been completed nearly 3 years before and SWR had been performing the other for less than 1 year. TEB Report, attach. 3, at 4 of 7. SWR's performance problems at Cherry Point amply support the TEB's assessment of increased performance risk. For example, the record showed SWR had failed to staff the wash rack on a number of occasions; failed to keep the contracting officer's representative informed of issues of concern; failed to communicate with the contracting office in a clear and businesslike manner or to be cooperative in negotiating contract modifications; billed the government for aircraft that were not washed; and placed charges against the contract specialist's credit card without authorization. Id. In view of SWR's poor to marginal performance at Cherry Point, the TEB reasonably assigned SWR a past performance rating of 2 instead of 3 points.

SWR denies the accuracy of the negative information in its Cherry Point performance history and asserts that it is based on exaggeration and misunderstanding.³ For example, with regard to the unauthorized use of the contract specialist's credit card, SWR notes that the agency admits that the use was "just premature." SWR Comments at 3. A past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts. PharmChem, Inc., B-292408.2, B-292408.3, Jan. 30, 2004, 2004 CPD ¶ 60 at 13. The agency reports, and SWR does not dispute, that SWR was told each month what credit card number to charge and what amount had been approved. Contrary to instructions, SWR retained the card number and placed charges on two occasions prior to obtaining approval. AR, Tab 10, at 4, Tab 21. We see nothing unreasonable in the agency's

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was awarded while SWR's prior protest was pending; SWR was selected because its contract was due to expire and there was insufficient time to locate another contractor, negotiate a price, and transition that contractor. USMC Urgency Determination. While the agency stated that SWR's performance was "satisfactory," this assessment was qualified by the agency's notation that SWR had "exhibited numerous performance problems under its [contract and] [i]n total, its overall performance . . . [was] marginal." Id.

³ SWR asserts that the agency's past performance respondents/evaluators were biased against it. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. SWR's disagreement with the evaluators' assessments do not establish bad faith or bias, and it has presented no other evidence supporting its claim.

determining that making charges to a government credit card prior to obtaining authority is a significant performance problem.

SWR asserts that it should have been provided an opportunity to respond to the negative past performance information. This assertion is without merit. Where, as here, an award is made on the basis of initial proposals, without discussions, offerors may be given the opportunity to clarify adverse past performance information to which the offeror has not previously had an opportunity to respond. Federal Acquisition Regulation (FAR) § 15.306(a)(2). Here, SWR was well aware of the agency's views on the quality of its past performance at Cherry Point and had discussed these matters with USMC officials prior to the closing date. Further, the RFP called for offerors to address past performance problems and corrective actions in their proposals. RFP at 19. While SWR acknowledged its problems, it suggested they were the result of a "communications breakdown" that SWR would take steps to alleviate; it did not provide a detailed rebuttal of the agency's views. SWR Proposal at 15. Given the permissive language of FAR § 15.306(a)(2) and the fact that, in any case, SWR was given ample opportunity to comment upon the past performance information, SWR's continued disagreement with the agency's assessment did not require the agency to provide an opportunity for SWR to provide still more information. Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 3-4.

REQUEST FOR REIMBURSEMENT OF COSTS

SWR requests that we recommend that the agency reimburse its protest costs, including attorneys' fees, incurred in filing and pursuing its protest in SWR, Inc., supra. As discussed above, in that decision we sustained SWR's protest of USMC's decision not to set the procurement aside for HUBZone small business concerns. Our decision—reflecting the requirements of our Bid Protest Regulations—directed SWR to submit its certified claim for costs to the agency within 60 days after receiving our decision. Id. at 8; see 4 C.F.R. § 21.8(f)(1).

SWR's counsel received a copy of our protected decision on October 6, 2004, but did not transmit its claim for costs until December 14; the claim was received by USMC on December 16. SWR concedes that the claim was not filed within the required 60 days, but requests that our Office nevertheless recommend payment because: the delay was due to counsel's mistake, the claim was presented less than 30 days after release of the redacted decision, and the agency was not prejudiced by the delay. Cost Claim at 2-3.

In requiring that a claim for protest costs be filed with the agency within 60 days, our Regulations warn that "[f]ailure to file the claim within that time may result in forfeiture of the protester's right to recover its costs." 4 C.F.R. § 21.8(f)(1). While forfeiture is not automatic, neither our Regulations nor our prior decisions recognize an exception to the 60-day filing requirement based on when a protester receives a

redacted version of the protest. Although we have indicated that an untimely claim may be considered where good cause is shown, we have construed that term to mean that some compelling reason beyond the control of the protester prevented it from timely filing the claim. Keeton Corrections, Inc.-Costs, B-293348.3, Oct. 25, 2004, 2004 CPD ¶ 213 at 3. Here, there is no evidence, and SWR does not assert, that SWR could not have filed a documented, substantiated claim within the required time period. We note, moreover, that when SWR received the redacted decision on November 17, it still had 18 days to file its cost claim. SWR has offered no explanation as to why it did not have sufficient time after receiving the redacted version to complete and timely file its claim with the agency.

The protest and request for reimbursement are denied.

Anthony H. Gamboa
General Counsel