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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Robert Clay, Inc.

File: B-292443

Date: August 14, 2003

Robert Clay for the protester.

Capt. Ryan Hendricks, Department of the Air Force, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest based on information learned in non-required debriefing is timely if filed within 10 days of the debriefing.
2. Agency reasonably determined that awardee and protester had equal performance risk ratings; because past performance and price were the sole evaluation factors, award was reasonably based on the awardee's lower-priced proposal.

DECISION

Robert Clay, Inc. protests the award of a contract for roof repairs to Platinum One Contracting, Inc., by the Department of the Air Force under request for proposals (RFP) No. FA4416-02-R-0016. Clay argues that past performance was unreasonably evaluated.

We deny the protest.

The RFP, issued as a Historically Underutilized Business Zone (HUBZone) set aside, contemplated award of an indefinite-delivery requirements contract for roof repairs. Award was to be made on a "best value" basis, considering past performance and price, with past performance being "significantly more important than" price. RFP at 33. The assessment of past performance was to result in an overall performance risk rating of either exceptional, very good, satisfactory, neutral, marginal, or unsatisfactory. Offerors without "relevant" past performance were to receive a neutral rating, meaning that the rating was to be treated neither favorably nor unfavorably. RFP, amend. 1, at 3. Relevant contracts were said to "include, but are not limited to, repair and/or replacement of standing seam metal roofing, of the

same magnitude of this project (between \$1,000,000.00 and \$3,000,000.00).” RFP, amend. 3, at 1.

Seven proposals were received in response to the RFP. Platinum submitted the lowest-priced offer. This offer was significantly lower priced than Clay’s second low offer. Both proposals were given overall performance risk ratings of very good, based on the offerors’ and their teaming partners’ past performance evaluations. Platinum’s and Clay’s own past performance was rated neutral because their listed contracts were not found to be relevant in scope and/or magnitude. However, these firms’ teaming partners’ past performance was rated exceptional because their listed contracts were found to be relevant with exceptional performance reports. The overall very good risk ratings for Clay and Platinum were determined to be the midpoint between their neutral ratings and the exceptional ratings of their teaming partners. Agency Report, Tab 6, Past Performance Evaluations for Platinum and Clay. The Air Force determined that “[s]ince both ratings were Very Good, there isn’t any risk reduction to the Government if we award to the higher priced offeror.” Accordingly, Platinum’s lower-priced proposal was found to represent the best value and was selected for award. Id., Integrated Assessment Best Value Decision, at 2.

A notice of award was “uploaded to the Electronic Posting System website”¹ on March 26, Contracting Officer’s Statement at 1, and provided by facsimile to Clay on March 28. This notice provided the name of the awardee, contract price, and the general basis for award. On March 28, Clay requested additional information concerning the procurement under the Freedom of Information Act. On March 29, Clay mailed a request for a debriefing to the contracting officer, which the Air Force received on April 2.

On April 1, Clay mailed an agency-level protest to the Air Force, asserting that its proposal “represented the lowest price and lowest risk to the government.” Clay complained that the Air Force had not responded to its information request so it did “not have sufficient information at this time to set forth all its[] grounds as to why the contract award is improper,” but stated that it was filing this protest “to preserve its[] right to make a complete bid protest and will supplement this letter after sufficient documentation has been produced.” Protester’s Comments, Tab F, Agency Protest, at 1. The protest was received by the Air Force on April 3.

On April 9, the Air Force provided Clay with a debriefing.

On April 14, Clay mailed a supplemental protest to the Air Force. This protest alleged that Platinum “was not the most qualified company offering the lowest price

¹ The RFP does not contain a provision notifying offerors that notice of award would be provided in this manner.

and lowest risk to [the] government.” With regard to this latter contention, Clay stated that, during the debriefing, the Air Force “incorrectly stated that Platinum is equally as qualified as [Clay]” because this “evaluation was flawed insofar as it was based on an inaccurate assessment of the company’s capability and history.” This protest also alleged that Platinum was merely a “pass through” for its teaming partner, and the principal of the teaming partner had an improper conflict of interest with unspecified agency officials. Protester’s Comments, Tab G, Supplemental Agency Protest, at 1-2. The Air Force received Clay’s supplemental agency-level protest on April 16.

On May 15, the Air Force dismissed both the initial and supplemental protests as untimely because Clay did not timely request a debriefing. The Air Force asserts that it attempted to deliver the dismissal to Clay via certified mail on May 21, 26, and June 5, and that the letter was returned as “unclaimed.” Contracting Officer’s Statement at 1. Clay states that it was unaware of these attempts. A copy of the dismissal was ultimately faxed by the agency to Clay on June 4, which is when Clay states that it first became aware of the dismissal. Clay filed a protest with this Office on June 13, incorporating the same grounds as raised in its agency-level protests.

Clay first contends that the Air Force performed a “flawed” and “inaccurate” assessment of past performance “capability and history.” The Air Force requests that we dismiss Clay’s protest as untimely because Clay did not timely request a debriefing.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2003). Further, our Regulations provide that a matter initially protested to the contracting agency will be considered only if the initial protest was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency’s time for filing will control. 4 C.F.R. § 21.2(a)(3).

As stated in the supplemental agency protest, the protester’s allegation was based upon information first learned at the debriefing, namely that the Air Force had rated Platinum and Clay the same for past performance and thus found them to be “equally as qualified.”² Protester’s Comments, Tab G, Supplemental Agency Protest, at 1-2.

² Clay’s initial agency-level protest based on its allegation that it offered the lowest price has turned out to be not accurate, so we need not consider the allegations made in that protest further.

Because this protest ground was received by the Air Force within 10 days of the debriefing, it was timely filed with the agency, and Clay's subsequent protest was timely filed at our Office because it was received here within 10 days of when Clay received notice of the Air Force's dismissal of its agency protests.³ The agency's argument that Clay's entire protest should be dismissed because it did not timely request a debriefing is meritless, given that non-required debriefings are permitted, see Federal Acquisition Regulation (FAR) § 15.506(a)(4)(i), and a protest based on information first revealed in a non-required debriefing, as here, is timely if filed within 10 days of the debriefing. Beneco Enters., Inc., B-283154, Oct. 13, 1999, 2000 CPD ¶ 69 at 6 n.6.

However, this protest ground has no merit. The evaluation of past performance is a matter of agency discretion, which we will review to ensure that it was reasonable and consistent with the stated evaluation criteria. Honolulu Shipyard, Inc., B-291760, Feb. 11, 2003, 2003 CPD ¶ 47 at 4. The record here does not support Clay's contention that it should have received a more favorable risk rating than Platinum. Rather, the record reveals that neither offeror had past performance that was of the same scope and/or magnitude of that required by the RFP, and therefore both offerors warranted only a neutral rating, and that these offerors' teaming partners, who had relevant past performance, warranted a rating of exceptional. While Clay contends that it has more experience in "indefinite quantity contracts" than Platinum, it does not allege that these contracts are of the same scope or magnitude as contemplated by the RFP, or that these contracts were even identified in its proposal for evaluation under past performance. In sum, Clay has not demonstrated that the Air Force's determination as to relevance of the offerors' listed contracts, or assessment of past performance, was unreasonable. Given that both offerors received an overall rating of very good, we find that the Air Force could reasonably conclude that there would be no reduction in risk from awarding to the higher-priced offeror.

Clay next contends that Platinum is a "pass through" for its teaming partner and that the principal of the teaming partner has an improper conflict of interest with unspecified agency officials. Clay has provided no supporting evidence of any improper conflict of interest and relies solely on inference and supposition; as a

³ While the agency suggests the protester should have been on notice of the dismissal of its agency-level protest because of the three attempts to deliver the certified mail copy of the dismissal, there is nothing in the record that suggests that the protester had actual or constructive notice of the dismissal of its agency-level protest until June 4, and it protested to our Office within 10 days of that date.

result, we will not consider this issue further.⁴ Integrity Mgmt. Enter., Inc., B-290193, B-290193.2, 2002 CPD ¶ 117 at 17 n.12.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Clay raises additional allegations for the first time in its comments to the agency report, including that Platinum is not a qualified HUBZone contractor, Platinum's teaming partner is not Section 8(a) certified and is not a small disadvantaged business, and a conflict of interest exists regarding the evaluation of past performance. These allegations are dismissed, as they were not raised in Clay's agency-level protests or initial protest to are Office and are now untimely. 4 C.F.R. § 21.2(a); Research Tech. Int'l, B-243844, Aug. 19, 1991, 91-2 CPD ¶ 165 at 2-3; see also Dial Page, Inc., B-256210, May 16, 1994, 94-1 CPD ¶ 311 at 4 (allegations raised for first time in comments are untimely).