



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Si-Nor, Inc.

File: B-292748.2; B-292748.3; B-292748.4

Date: January 7, 2004

Karen D. Powell, Esq., Petrillo & Powell, for the protester.
Henry F. Johnson for International Resource Recovery, Inc., an intervenor.
Robert Little, Esq., Naval Facilities Engineering Command, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency evaluation of protester's past performance is unobjectionable where protester's past performance record included adverse information, and the agency pointed out the areas of concern during discussions, considered the protester's explanations, and reasonably concluded that a [deleted] rating was warranted.
 2. In evaluating awardee's experience and past performance, it was unreasonable for the agency to consider a prior contract that was substantially smaller in terms of dollar value than the solicitation's requirements, given that the solicitation provided that the agency would evaluate an offeror's experience and past performance only under contracts similar in size, scope, and complexity to the solicitation requirements.
-

DECISION

Si-Nor, Inc. protests the award of a contract to International Resource Recovery, Inc. (IRRI) for family housing refuse and recycling collection services at various locations in Hawaii under request for proposals (RFP) No. N62742-03-R-2227, issued by the Naval Facilities Engineering Command (NAVFAC). Si-Nor principally alleges that the agency improperly evaluated its past performance, as well as the past performance and experience of IRRI.

We deny the protest in part and sustain it in part.

The RFP, which was issued as a Historically Underutilized Business Zone set-aside, contemplated the award of a fixed-price contract (with an indefinite-quantity component) for family housing refuse and recycling collection services at various

locations in Oahu, Hawaii, for a base year with four 1-year options. As a general matter, the RFP required “the collection, segregation, and disposal of refuse and recycled materials” to include curbside and bulk pick-ups of refuse, special pick-ups, and other refuse or recycling pick-ups as directed by the contracting officer. RFP § C at 1.1.

The agency was able to quantify a substantial portion of its refuse collection and recycling requirements. As a consequence, the RFP included a schedule of the agency’s quantifiable requirements for which the agency sought fixed prices. See Agency Report (AR), Tab 5, Pre-Negotiation Business Clearance Memorandum, July 10, 2003, at 6; RFP at Attach. J-B1. Services that the agency could not quantify (e.g., providing on-call collection for 40 cubic yard dumpsters) were listed under the indefinite-quantity portion of the RFP, which included an estimated quantity for various line items for which the agency sought unit prices. See AR, Tab 5, supra, at 6; RFP at Attach. J-B2. Under the indefinite-quantity portion, the RFP included a line item in the fixed amount of \$750,000, representing the estimated landfill/disposal costs for this portion of the contract. See RFP at Attach. J-B2.

The RFP provided that award would be made to the offeror whose proposal represented the “best value” based on an evaluation of two equally important evaluation factors: price and technical. The technical evaluation factor was comprised of two subfactors: past performance/experience and technical approach, which were of equal importance. As it relates to this protest, the past performance/experience subfactor was comprised of two elements, which were of equal weight: past performance (which was comprised of the following five subelements: quality of service, schedule, cost control, business relations, and management of key personnel) and experience. The RFP also provided that offerors would be assigned a risk rating for past performance/experience and for technical approach.

In order to evaluate proposals under the experience element, the RFP required offerors to submit a list of references. Specifically, the RFP stated:

Experience. Submit a list of contracts and subcontracts of residential curbside pickup, collection and disposal of recyclable materials, and collection of bulk refuse from 6 and 40 cubic yard dumpsters under contracts similar in size, scope and complexity completed during the past three years or currently in progress.

RFP § L.

Based on these references, the agency would assess an offeror’s experience using the following adjectival scale: substantial experience, adequate experience, little experience, and no experience. RFP § M.

Offerors were also required to submit completed past performance survey forms from at least three of their references. RFP § L.¹ The RFP stated that the agency would evaluate an offeror's past performance using the surveys provided "to determine the quality of work previously performed and to assess the relative capability of the offeror to effectively accomplish the requirements of this solicitation." RFP § M. Regarding the surveys, the RFP further stated that they should "reflect [the offeror's] competency to perform contracts similar in size, scope, and complexity completed during the past three years or currently in progress" RFP § M.

The scope of the agency's past performance evaluation, however, was not limited to the surveys submitted by the offerors. The solicitation informed offerors that the agency might "also obtain information from customers known to the Government, consumer protection organizations, and any other sources that may have useful and relevant information." RFP § M. With regard to any negative past performance information obtained by the government, the RFP indicated that offerors would have the opportunity to comment on the adverse information if they had not already had an opportunity to do so.

With regard to offerors that did not have a record of relevant past performance, the RFP stated that the "offeror shall submit references that can provide past performance information regarding predecessor companies, key personnel with relevant experience who will perform on this contract, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the acquisition." RFP § M.

According to the RFP, past performance was to be evaluated using the following adjectival rating scale: exceptional, very good, satisfactory, marginal, and unsatisfactory. Satisfactory was defined as:

Performance met contractual requirements. The contractual performance may have been accomplished with some minor problems for which corrective actions taken by the contractor were satisfactory.

Marginal was defined as:

Performance did not meet some contractual requirements. The contractual performance reflected a serious problem for which the contractor did not identify corrective actions. The contractor's

¹ If an offeror did not have a record of past performance on similar contracts or did not have "the minimum three references required," the offeror was required to make a statement to that effect and provide an explanation in its proposal. RFP § L.

proposed actions were only marginally effective or were not fully implemented.

RFP § M.

The RFP also indicated that, based on an offeror's past performance and experience, the agency would evaluate "PAST PERFORMANCE/EXPERIENCE RISK" in order to assess "potential future performance." RFP § M. Past performance/experience risk was to be evaluated using the following adjectival evaluation rating scale: low, moderate, high, and unknown.

As it relates to this protest, with regard to price evaluation, the RFP indicated that prices for the option years would be added to the price for the basic requirement, "[e]xcept when it is determined . . . not to be in the Government's best interests[.]" RFP § M (incorporating Federal Acquisition Regulation § 52.217-5).

By the June 19, 2003 closing date, the agency had received timely proposals from four offerors, including IRRI and Si-Nor. Si-Nor's initial proposal submission included information about seven contracts, which, according to Si-Nor, demonstrated its "good level of contract performance, under contracts similar in size, scope and complexity completed during the past three years or currently in progress." Si-Nor Proposal, Vol. II. Of these seven contracts, five were for work at military installations located in the continental United States (CONUS) and two were for work at military installations in Hawaii. Si-Nor also included past performance surveys from the five CONUS contracts. These customer surveys were generally positive and answered "yes" to the following question: "If given a choice, would you do business with this Contractor again for similar work?" Id.

In addition to the five past performance surveys provided by Si-Nor, the agency also solicited past performance surveys from the Coast Guard and all military activities which were known to have contracted with Si-Nor; as a result, the agency obtained five additional past performance surveys concerning Si-Nor contracts, all of which were performed in Hawaii. See AR, Tab 5, supra, at 11.

The five additional contractor past performance surveys were:

(1) an Air Force contract for refuse collection and disposal services for military family housing, industrial and medical facilities, Hickham, Air Force Base, HI, contract value approximately \$8 million, base year and 4 option years;

(2) an Army contract for pickup and disposal of refuse for Army family housing at various installations on Oahu, HI, contract value approximately \$2.9 million, base year and 2 option years;

(3) a Marine Corps contract for collection and disposal of refuse at Marine Corps Base Hawaii, Kaneohe Bay, Manana, and Camp H.M. Smith, HI, contract value approximately \$1.2 million, base year and 2 option years;

(4) a Coast Guard contract for collection and disposal of refuse, industrial waste and recycling activities at various Coast Guard sites on Oahu, HI, contract value approximately \$1.3 million, base period and 4 option years; and

(5) an Air Force contract for collection and disposal of refuse and collection, processing and marketing of recyclable material for COMNAVBASE Family Housing/Support Facilities and Bellows Air Force Station, Oahu, HI, contract value approximately \$4.2 million, base year and 4 option years.

These five additional surveys were generally less positive than the surveys provided by Si-Nor. For example, four of the five customers answered “no” to the question of whether they would want to do business with Si-Nor again, although one added the following comment: “Performance has improved dramatically. Present local management is fully aware of performance and maintains communication with corporate office. [The contracting activity] has taken the gamble that contractor will continue to perform satisfactory as evidenced from March 03.” AR, Tab 4, Contractor Performance Survey, Army Family Housing Refuse & Disposal, June 25, 2003, at 7. The one customer that answered “yes,” indicating that it would do business with Si-Nor again, qualified its statement by adding, “If the contractor continues to perform in a satisfactory manner with little or no discrepancies.” AR, Tab 4, Contractor Performance Survey, Refuse and Recycling Collection Services for COMNAVBASE Family Housing/Support Facilities and Bellow Air Force Station, Oahu, HI, June 25, 2003, at 8.

IRRI also submitted a list of contract references that it identified as relevant to the RFP’s requirements; from this list it provided four contractor performance surveys. The four surveys were for the following contracts:

(1) an Army contract for industrial refuse collection at various Army installations on the island of Oahu, Hawaii, contract value approximately \$3.8 million, base year and 4 option years;

(2) an Army contract for residential refuse collection service for various Army housing areas in Hawaii, contract value approximately \$2.2 million, base year and 1 option year;

(3) a commercial contract with Trammel Crow-Baxter for on-call refuse and recycling collection services at a 120,000 square foot medical warehouse, contract value \$691,200 for a term of approximately 6 years; and

(4) a contract with the California Department of Corrections for collection and disposal of refuse at various correctional facilities in Southern California, contract price of \$353,712 for a term of approximately 3-1/2 years.

The agency initially evaluated the proposals submitted by the four offerors to determine whether it could make award based on initial proposal submissions. Because all of the proposals were determined to be technically unacceptable, the agency decided to conduct written discussions with the four offerors and seek revised proposals after discussions.

During its initial evaluation of Si-Nor's proposal, the agency noted that Si-Nor had received generally negative ratings in the five Hawaii past performance surveys. Based on these surveys, the agency rated Si-Nor's past performance as [deleted] and its past performance/experience risk as [deleted]. Consequently, as part of its discussions with Si-Nor, the agency asked Si-Nor to "[r]espond to the following negative past performance evaluations":

- a. One accident during reporting period. Serious Damage, KR [Si-Nor] did not report. Contractor restored site to original state. (Coast Guard)
- b. [Department of Labor (DOL)] issued notice on non-compliance for violence in work area. (Army)
- c. Issues with KR's [Si-Nor's] worker's tossing the Govt-owned recycle bins off truck. (Air Force)
- d. BIG ISSUE. Does not submit weekly tonnage reports in timely manner. Most recent issue, June reports need continual revisions to correct tonnage and other errors. (Air Force) Also other activities also note that submittals are not timely.
- e. DEFINITELY a problem. High turnover in managers, QC [quality control], drivers, laborers, etc. (Air Force) Navy & Marines also noted high turnover.

AR, Tab 5, Attach. 8, Si-Nor Discussion Letter, July 17, 2003, Encl. 1, at 2.

The agency also asked Si-Nor to address how it planned "to resolve the high turnover problem experienced over the past year" and what actions it was taking to resolve its safety problems. Id.

In its revised proposal, Si-Nor addressed each question posed by the agency concerning its past performance. As to the accident reported under the Coast Guard contract, Si-Nor indicated that it had submitted a report of the damage, which

included a correction plan, and the plan was followed. Si-Nor also indicated that it repaired the damage. With regard to the DOL notice of non-compliance for violence in the work area under an Army contract, Si-Nor explained that after it had instituted a random drug and alcohol screening of its employees due to certain incidents and “poor contract performance,” it fired those employees that failed the drug testing. AR, Tab 3, Si-Nor Revised Proposal. According to Si-Nor, some of these dismissed employees then engaged in blackmail and vandalism, and filed “a rash of negative/allegations/reports against Si-Nor.” Id. Si-Nor indicated that it was “vigorously” contesting the allegations and added that in order to abate a concern raised by the Hawaii Occupational Safety and Health Division (HIOSH), it had relocated its office/yard to a secure facility. Si-Nor further asserted that it has shown remarkable improvement with its contract performance since hiring new managers and employees.

Si-Nor denied the allegation in connection with the Air Force survey that its workers were “tossing” government-owned recycling bins, and stated that if it had engaged in such activity, “there would have been a high turn over and replacement of those containers, [but] this is not the case.” AR, Tab 3, Si-Nor Revised Proposal. Si-Nor also denied the allegation that it had failed to submit tonnage reports in a timely manner or that its reports required continued revision.

As to the high turnover of its personnel, Si-Nor indicated that in April 2003, it began background checks and drug testing of new employees and this resulted in massive restructuring of its staff and its employment of a dedicated work crew, which has resolved “the turnover problem.” Id.

In response to the agency’s question about the actions it has taken to resolve safety concerns, Si-Nor stated that its employees “receive continuous work place safety instructions.” AR, Tab 3, Si-Nor’s Revised Proposal. Specifically, Si-Nor discussed the upgrading of its safety plan to address “crossing and parallel overhead cables and its posts at the base[,]” adding that it has instructed its refuse collectors to watch the truck drivers “retract and tuck in all moveable overhanging parts of the truck before signaling the driver to proceed.” Id. Si-Nor also reiterated the fact that it had relocated its office/yard to a protected and secure facility in response to the HIOSH concerns.

Based on its evaluation of the revised proposals, the agency decided to limit the competitive range to Si-Nor and IRRI and obtained final proposal revisions from these two firms. When the agency conducted its final cost/technical tradeoff, Si-Nor’s past performance rating remained as [deleted], its past performance/experience risk rating remained as [deleted], and it had a price of [deleted]. IRRI received a final past performance rating of [deleted] and its past performance/experience risk rating was evaluated as [deleted]. IRRI, however, had a higher evaluated price of \$10,370.689.40 Under the experience factor, both firms had

received a rating of [deleted]. Notwithstanding IRRI's higher price, the agency determined that IRRI's offer represented the best value and made award to IRRI.

After learning of the agency's decision and obtaining a debriefing, Si-Nor filed a protest arguing that the agency: (1) failed to consider the five CONUS past performance surveys submitted by Si-Nor; (2) improperly used negative past performance information in its evaluation; (3) improperly considered flawed information regarding a tax matter; (4) improperly failed to refer Si-Nor to the Small Business Administration (SBA) for a certificate of competency; (5) and conducted a flawed cost/technical tradeoff and best value determination based on issues 1-4.

In response to the protest, the agency indicated that it would take corrective action; specifically, the agency stated that it would: (1) consider the five CONUS past performance surveys; (2) allow Si-Nor to respond to negative past performance information to which it had not yet been allowed to respond; (3) disregard the "flawed" tax information; (4) if required, refer the question of Si-Nor's responsibility to the SBA for a certificate of competency; and (5) following a reevaluation, conduct a new cost/technical tradeoff and best value determination.

In its reevaluation of Si-Nor's proposal, the agency considered the five CONUS surveys submitted by Si-Nor, as well as the five Hawaii surveys it had obtained independently, since the contracts they related to were all determined to be similar in size, scope, and complexity to the RFP's requirements. AR, Tab 18, Business Clearance Memorandum, Sept. 18, 2003, at 5-6. Si-Nor's past performance rating of [deleted], and its past performance/experience risk rating of [deleted], nevertheless did not change as a result of the reevaluation. The agency noted that the five CONUS past performance surveys submitted by Si-Nor were all generally positive; however, the agency also noted that four out of the five Hawaii customer surveys answered "no" in response to the question of whether they would want to do business with Si-Nor again. The agency further explained that it considered the comments received from Si-Nor's Hawaii customers to be more relevant to the RFP's requirements, which are also to be performed in Hawaii. According to the agency, contractors performing work in Hawaii are faced with special challenges due to "Hawaii's unusually high labor and material costs, unique geographic situation, isolation from CONUS, and limited labor pool." AR, Tab 18, supra, at 7.

The agency also took issue with many of Si-Nor's responses to the negative past performance information gathered by the agency. Specifically, while Si-Nor denied that its employees had improperly tossed containers under the Air Force contract or that it had filed untimely and/or incorrect tonnage reports under contracts with the Coast Guard, Air Force, and Navy, the agency found Si-Nor's denials to be an insufficient response in light of documentation it had received concerning the cited contract problems.

Regarding safety problems, the agency noted that while Si-Nor’s response identified measures it had implemented to prevent accidents like the one under the Marine Corps contract, it did not address any measures to prevent the type of accident that had occurred under the Coast Guard contract. The agency also found Si-Nor’s response to the discussion question concerning the DOL notices for violence in the workplace to be insufficient. In this regard, Si-Nor conceded that there had been “inexplicable incidents and poor contract performance” but did not provide any further explanation. AR, Tab 3, Si-Nor Revised Proposal. The agency therefore concluded that it could only assume, based on Si-Nor’s discussion of its implementation of a new drug policy, that these problems may have been related to drug and alcohol use by Si-Nor’s employees. The agency also noted that Si-Nor did not explain how relocating its office would abate workplace violence.

With regard to the problems concerning employee turnover that were raised during discussions, the agency noted that Si-Nor’s performance had shown some improvement after Si-Nor assigned a new project manager and quality control manager to its Hawaii contracts. The agency discounted the value of this improvement for the purposes of predicting future success, however, noting that Si-Nor’s solutions had not “been shown to work over any extended period.” AR, Tab 18, supra, at 9.

The agency also reevaluated IRRI’s proposal and, after reviewing IRRI’s past performance surveys, revised IRRI’s past performance score from [deleted] to [deleted] but did not change IRRI’s experience rating of [deleted] or its past performance/experience risk rating of [deleted]. The agency noted that two of IRRI’s past performance surveys indicated that IRRI had not met some requirements, with one adding, however, that IRRI was able to “resolve the discrepancies.” AR, Tab 18, supra, at 10. The other survey was for a contract that had been terminated for default and later changed to a termination for convenience of the government. According to the agency, “IRRI adequately addressed all of the negative past performance information” Id.

The final overall evaluations of IRRI and Si-Nor were as follows:

Offeror	Past Performance	Experience	Past Performance/Exp. Risk	Technical Approach	Technical Approach Risk	Price
IRRI	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	\$10,370,689.40
Si-Nor	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Gov’t Estimate						[deleted]

Based on its reevaluation, the agency again determined that IRRI’s offer presented the best value to the government, and affirmed its initial award to IRRI. In its tradeoff analysis, the agency stated:

Based on both the technical ratings and price proposals of Si-Nor and IRR I, it is determined that IRR I is offering the Government the best value. The difference in price of less than [deleted] per year between Si-Nor's and IRR I's proposals is worth paying given IRR I's proven satisfactory performance, clear and concise technical approach, and better past performance/experience and technical approach risk.

AR, Tab 18, supra, at 12.

In addition, as a direct response to Si-Nor's earlier protest allegation that the agency had improperly considered flawed information regarding a tax matter in its initial evaluation and as part of the agency's best value determination, the agency expressly stated that the allegation was "false" and emphasized that the reevaluation and best value analysis were based "only on the evaluation criteria specified in the RFP, specifically, Price and Technical factors." AR, Tab 18, supra, at 12. The agency also added that because IRR I was the apparent successful offeror, there was no need to refer the matter of Si-Nor's responsibility to the SBA.

After receiving a debriefing, Si-Nor filed this protest alleging that (1) the agency had again disregarded its five positive past performance surveys and the agency's evaluation of its past performance was otherwise flawed; (2) the agency failed to provide Si-Nor with an opportunity to respond to negative past performance information; and (3) the agency again considered flawed tax information and other matters pertaining to responsibility as part of its technical evaluation and best value analysis.² After receipt of the agency report, Si-Nor also filed a supplemental protest challenging the agency's evaluation of IRR I's proposal, arguing that the agency improperly evaluated IRR I's past performance, experience, and past performance/experience risk.

When reviewing a protest of an agency's proposal evaluation, we will consider whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Preferred Sys. Solutions, B-291750, Feb. 24, 2003, 2003 CPD ¶ 56 at 2. Here, as discussed below, while we see no basis to question the agency's evaluation of Si-Nor's proposal, we conclude that the agency improperly evaluated IRR I's experience, past performance, and past performance/experience risk.

² Si-Nor also alleges that the agency failed to perform a new cost/technical tradeoff and that the agency did not consider option year prices when it made its best value determination. The record, however, clearly demonstrates that these arguments are both without merit. See AR, Tab 18, Corrective Action, Business Clearance Memorandum, at 11-12 (best value tradeoff analysis considering difference in prices to include option years).

REEVALUATION OF SI-NOR'S PROPOSAL

Several of the protest issues raised by Si-Nor concerning the agency's reevaluation of its proposal are based on mistaken assumptions stemming from the fact that the ratings for its proposal did not improve after the reevaluation. Specifically, Si-Nor assumes that the agency did not consider its five positive past performance surveys since its past performance rating of [deleted] did not improve. Si-Nor also assumes that the agency must have considered "flawed" tax information and matters concerning "financial responsibility" as part of its evaluation since its technical ratings did not improve.

With regard to Si-Nor's past performance surveys, the record clearly reflects the fact that the agency did consider all of the surveys pertaining to Si-Nor's past performance, which included the five positive surveys submitted by Si-Nor, as well as the five surveys obtained by the agency, four of which reflect negative assessments of Si-Nor's contract performance. Considering all of the surveys, the agency concluded that Si-Nor's past performance rating of [deleted] and its past performance/experience risk rating of [deleted] were justified in light of the four negative surveys, which concerned contracts that were performed in Hawaii. The record also clearly reflects that the agency did not consider any tax information or "financial responsibility" matters in its evaluation of Si-Nor's proposal or as part of the best value determination. In fact, the only reference to such information in the reevaluation is in the context of a brief paragraph expressly stating that the agency did not consider such information.

Si-Nor also argues that, to the extent the agency did consider its positive CONUS past performance surveys, the agency gave improper weight to the five Hawaii surveys solely because they involved contracts performed in Hawaii.³ According to Si-Nor, geographic location was not a proper basis for evaluating relevancy of past performance.⁴ The record reflects that the agency did in fact find the surveys

³ Si-Nor also argues that the agency should not have considered the negative past performance information in the Coast Guard contract survey, for work Si-Nor had performed in Hawaii, because the Coast Guard contract was smaller in size. We disagree. As the agency notes, Si-Nor's inability to satisfactorily perform a smaller contract logically casts doubt on its ability to perform a larger contract of the type contemplated by the RFP.

⁴ As additional support for its position that geographic location was not a basis for evaluating the relevance of an offeror's past performance, Si-Nor indicates that in another procurement the agency has specified that contracts performed in Hawaii are more relevant. Even if Si-Nor's contention is true, it is irrelevant to the question of whether, under the terms of this procurement, it was reasonable for the agency to have determined that Si-Nor's past performance surveys for its Hawaii contracts were more relevant than its CONUS surveys. Each procurement action is a separate
(continued...)

pertaining to Si-Nor's Hawaii contracts to be more relevant than its CONUS surveys. According to the agency, contractors performing in Hawaii face special challenges due to Hawaii's isolated location, high labor and material costs, and limited labor pool. We find nothing objectionable with the agency's determination in this regard.

Where detailed technical proposals are sought and technical evaluation criteria are used to enable the agency to make comparative judgments about the relative merits of competing proposals, vendors are on notice that qualitative distinctions among competing proposals will be made under the various evaluation factors. See National Health Labs., Inc., B-261706, Oct. 18, 1995, 95-2 CPD ¶ 182 at 2. In making such distinctions, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated evaluation criteria. Id.

In this case, the RFP required offerors to submit past performance surveys reflecting their competency to perform contracts of similar size, scope, and complexity; the agency thus was required to evaluate the relevance of the past performance information submitted by Si-Nor. Given the agency's articulated concerns about the challenges inherent with performance in Hawaii, the agency's greater emphasis on Si-Nor's negative past performance history under its Hawaii contracts was not unreasonable, particularly where several of the main problems raised in the surveys concerned labor issues (high personnel turnover, drug and alcohol abuse by Si-Nor employees, and work place violence), which were relevant to the agency's concerns about the special labor challenges experienced by contractors working in Hawaii.

Si-Nor further argues that the agency improperly evaluated the negative past performance surveys. Si-Nor asserts that in several instances the information in the references was disputed, that it had fully addressed the adverse past performance issues in its answers to the agency's discussion questions, and that the agency simply ignored the information provided by Si-Nor demonstrating that it had corrected the issues raised. Si-Nor also contends that the agency did not provide it with an opportunity to address various aspects of the negative past performance information considered by the agency.

The evaluation of past performance, like the evaluation of offeror's proposals, is a matter which our Office will review in order to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ViaSat, Inc., B-291152, B-291152.2, Nov. 26, 2002, 2002 CPD ¶ 211 at 7. An agency's past performance evaluation may be based on a reasonable perception of inadequate

(...continued)

transaction, and the acceptability or unacceptability of an offeror's proposal under one procurement has nothing to do with other similar procurements. See Gross Metal Prods., B-215461, Nov. 27, 1984, 84-2 CPD ¶ 577 at 4.

prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts. Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. ViaSat, Inc., supra at 7.

Based on our review of the entire record, we have no basis to object to the agency's determination that Si-Nor's past performance warranted a [deleted] rating or that its past performance/experience risk rating should have been other than [deleted]. Si-Nor correctly points out that its proposal included five surveys in which it received past performance assessments that were favorable or neutral in several respects. However, the record also clearly reflects that there were a number of past performance surveys obtained by the agency in which Si-Nor's past performance was evaluated as having posed relevant problems under contracts performed in Hawaii, which is where the subject requirements are to be performed.

While Si-Nor contends that it has addressed these issues, disputes the seriousness of several of the problems, or disputes whether the problems raised were legitimate issues at all, it is also apparent from Si-Nor's responses to the agency's discussion questions that it did in fact experience problems with several of its Hawaii contracts. These problems included significant employee turnover, drug and alcohol abuse by its employees, and workplace violence issues, as well as several accidents that caused damage to government property. Under these circumstances, we have no basis to question the agency's determination that Si-Nor's past performance was of some concern and warranted a rating of [deleted].

The record also reflects that the agency fully considered Si-Nor's responses to the negative past performance information as part of its reevaluation, but found them to be wanting in many respects. While Si-Nor has attempted to cast its performance under its Hawaii contracts in a more favorable light than the agency did, Si-Nor's answers in several respects actually serve to corroborate some of the evaluated problems.

For example, three of the negative past performance surveys indicated that Si-Nor had a significant problem with high personnel turnover, which had a negative impact on operations and services. Si-Nor essentially conceded this fact but explained that the problem had been "resolved" through background checks and drug and alcohol testing, which resulted in an improved and dedicated staff. The agency, however, reasonably questioned whether the issue of employee retention had been resolved, given the relatively short period of time, between March and September of 2003, during which Si-Nor's new staff had been working.

The agency's concern as to the limited period of improved performance was also echoed in several of the relevant surveys. For example, the one Hawaii past performance survey which indicated that the customer would do business with

Si-Nor again added “If the contractor continues to perform in a satisfactory manner with little or no discrepancies.” AR, Tab 4, Contractor Past Performance Survey, Refuse and Recycling Collection Services for COMNAVBASE Family Housing/Support Facilities and Bellow Air Force Station, Oahu, HI, June 25, 2003, at 8. This survey stated that Si-Nor’s previous “unsatisfactory performance” may have been caused by its having to replace its project manager and quality control personnel several times and explained that Si-Nor’s performance had improved during the preceding 3 months, after several meetings with Si-Nor’s corporate officers. In addition, one of the other surveys, which indicated that the customer would not do business with Si-Nor again, commented as follows: “If the contractor improves overall services, quality control and contract management over an extended period of time . . . we would consider doing business with this firm again.” AR, Tab 4, Contractor Past Performance Survey, U.S. Coast Guard Survey, June 25, 2003, at 10 (emphasis added).

In response to the agency’s concerns about the DOL and HIOSH reports, Si-Nor conceded that it had experienced “sudden inexplicable incidents and poor contract performance” as well as employees resorting to blackmail and vandalism. AR, Tab 3, supra. With regard to safety concerns, Si-Nor admitted to two accidents during its contract performance. While Si-Nor attempted to explain away these issues, and denied other past performance issues raised by the agency, the record reflects that the agency gave these issues, as well as Si-Nor’s responses, due consideration, and that the agency’s concerns about Si-Nor’s past performance record were reasonable.⁵

Regarding the past performance issues that Si-Nor denied were problems (incidents of container tossing and improper and untimely tonnage reports), Si-Nor maintains that the agency’s negative impressions were improperly colored by additional negative past performance information to which it did not have the opportunity to

⁵ Si-Nor argues that the agency failed to consult the Contractor Performance Assessment Review System (CPARS) in its review of Si-Nor’s past performance and, as a result, the agency did not consider Si-Nor’s rebuttal to the concerns raised in the Coast Guard contract survey. In support of its argument, Si-Nor relies heavily on the fact that the solicitation included a CPARS form as an attachment and the fact that the source selection plan contemplated that the agency would consider CPARS information. The agency, however, was not required to consult the CPARS systems despite having included a CPARS form with the solicitation because the solicitation expressly stated that, in addition to the past performance information provided by the offerors, “The Government may also obtain information from . . . other sources that may have useful and relevant information.” RFP § M (emphasis added). In addition, Si-Nor’s reliance on statements in the source selection plan is misplaced. Source selection plans merely provide internal agency instructions and do not give rights to outside parties. Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213 at 9-10.

respond. The record reflects that the agency did in fact obtain further information about these incidents after Si-Nor, in answering the agency's discussion questions, denied that the problems identified in the surveys existed. Because, however, the additional information merely elaborated on the negative past performance issues to which Si-Nor had been afforded a full opportunity to respond, we see no basis to conclude that the agency was required to provide Si-Nor with yet another opportunity to address these same issues.

Si-Nor also argues that the agency should not have attributed any weight to the additional information because it was flawed in various respects. However, as indicated above, an agency's evaluation properly may be based on its reasonable perception of inadequate performance, whether or not the offeror disputes the agency's interpretation of the facts. In this case, the agency's perception of Si-Nor's problems clearly was reasonable. Si-Nor presented no information, other than its own statements denying allegations about container tossing and problems with its tonnage reports, establishing that the information in the surveys was incorrect. Moreover, the information before the agency tended to corroborate the concerns raised by the surveys.

REEVALUATION OF IRRI'S PROPOSAL

Si-Nor challenges the agency's reevaluation of IRRI's proposal in several respects. Si-Nor first argues that it was unreasonable for the agency to give IRRI a past performance rating of [deleted]--higher than Si-Nor's rating of [deleted]--because IRRI's performance record was actually worse than or no better than Si-Nor's record. In this regard, Si-Nor contends that the agency disregarded the fact that IRRI defaulted on one of its relevant past contracts for work performed for the Army in Hawaii.⁶ The record, however, reflects otherwise.

The Army survey at issue indicated that IRRI's performance under the contract had been terminated for default soon after the government had exercised the first option. The survey further indicated that the termination for default was then changed to a termination for the convenience of the government. In Si-Nor's view, the agency should have looked behind the termination for convenience and, in effect, treated the termination for convenience as one for cause. Given that the default termination

⁶ Si-Nor also argues that IRRI should not have been credited with this Army contract under the evaluation of experience because, according to Si-Nor, IRRI had essentially subcontracted the entire performance of this contract. We disagree. IRRI was the prime contractor under the Army contract at issue and was therefore solely responsible for contract performance. To the extent IRRI may have used a subcontractor, that fact does not detract from the experience it gained in managing and completing that contract, especially given that the RFP here implicitly recognizes that subcontractors may be used in performance. RFP § C, at 1.8.01.

was disputed, and then settled in a more favorable light for IRRI, the agency did not act unreasonably in deciding to look only to the final disposition of IRRI's termination in its evaluation of IRRI's past performance record.

Si-Nor also argues that the agency disregarded other performance problems identified by IRRI's surveys that were more significant than the problems experienced by Si-Nor. In fact, the record shows that the agency did consider the performance problems reflected in IRRI's surveys. However, where performance problems were identified in the surveys, either the surveys themselves indicated that IRRI had satisfactorily addressed the issues, or IRRI sufficiently explained in its proposal, or in response to discussion questions, how it had addressed the problems. While Si-Nor may ultimately disagree with the agency's assessment of these responses, there is nothing in the record to suggest that the agency's assessments were unreasonable.

In addition to arguing that the agency's assessment of IRRI's past performance was in error, Si-Nor alleges that IRRI's experience rating of [deleted], and IRRI's past performance/experience risk rating of [deleted], were in error. As explained below, we agree and sustain the protest on this ground.

For purposes of evaluating an offeror's experience, the RFP required firms to submit a list of contracts "similar in size, scope, and complexity." RFP § M. While IRRI listed a total of six contracts as evidence of its experience, and from this list submitted four past performance surveys, the record reflects that when the agency evaluated IRRI's experience, it looked only to the "3 most relevant surveys."⁷ AR, Tab 17, Corrected Rating Sheets, Attach 3, IRRI Ratings, at 1. Based on these three surveys, the agency concluded that IRRI's experience was [deleted]. When the agency combined IRRI's experience rating with its past performance rating of [deleted], the agency concluded that IRRI's past performance/experience risk was [deleted].

One of the three surveys (the Trammel Crow contract survey) considered by the agency was for a contract in the amount of \$691,200 over a period of approximately 6 years, substantially less than the dollar value of the requirements under the RFP here, which has a dollar value of approximately \$10 million for a base period plus 4 option years. In answer to a question by our Office regarding the extent to which the Trammel Crow contract was determined to be relevant to the RFP requirements, the agency stated that it "was considered relevant only to the extent it demonstrated evidence of the awardee's experience with work like the [indefinite-quantity] portion of the solicited effort." Agency Response to Questions for the Record, Dec. 16, 2003,

⁷ The contract survey determined to be less relevant was IRRI's contract with the California Department of Corrections at a price of \$353,712 for a term of approximately 3-1/2 years.

at 2. The agency further indicated that the indefinite-quantity portion of the RFP and the Trammel Crow contract were of comparable value since much of the cost of the indefinite-quantity portion under the RFP is composed of tipping fees, which are much higher than those experienced by IRRRI under the Trammel Crow contract.⁸

As an initial matter, there is nothing in the record to suggest that the agency engaged in any contemporaneous analysis concerning the relative value of the RFP's indefinite-quantity requirements and the value of the Trammel Crow contract. More importantly, however, the RFP was not limited to the indefinite-quantity portion of the RFP. Therefore, in order for a reference to be relevant for purposes of determining a contractor's experience in completing contracts of similar "size, scope, and complexity," offerors had to submit references that were similar to the RFP's requirements as a whole. Given the relatively low dollar value of the Trammel Crow contract when compared with the total value of the RFP's requirements, as well as the agency's admission that the Trammel Crow contract was only relevant to a limited portion of the RFP's requirements, it was unreasonable for the agency to regard the Trammel Crow contract as similar "in size, scope, and complexity" to the RFP requirements such that it properly could be considered in evaluating IRRRI's experience. As a result, based on the current record, the agency's conclusion that IRRRI had [deleted] experience with relevant contracts lacks a reasonable basis, given that it is based in part on consideration of the Trammel Crow contract.⁹

⁸ The agency notes that due to the scarcity of land in Hawaii, Hawaii's charges for the use of public landfills, referred to as tipping fees, are much higher than they are in California (where the Trammel Crow contract was performed). Thus, according to the agency, if the indefinite-quantity effort called for under the RFP were to take place in California instead of Hawaii, the total value would be approximately \$230,137 for the base period. While the agency points to this recalculation as evidence of the equivalency of the RFP's indefinite-quantity effort to the Trammel Crow contract, in fact the latter contract still appears to be substantially smaller in dollar value, i.e., approximately \$115,000 per year, based on a total contract value of \$691,200 over 6 years.

⁹ As noted above, the Trammel Crow contract was one of only three contracts considered by the agency in evaluating IRRRI's experience; thus it is reasonable to assume that it formed a material part of the agency's evaluation. To the extent the agency now asserts that IRRRI's [deleted] performance rating should stand based solely on IRRRI's performance under the two contracts considered, we give this post hoc rationalization little weight. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Moreover, we question whether such a rating would be justified based on IRRRI having performed only two relevant contracts, particularly where the RFP required offerors to submit a list of relevant contract references and from this list to submit a "minimum of three" relevant past performance surveys. RFP § L.

Similarly, IRRI's past performance rating [deleted] is flawed to the extent that it too is based on consideration of the Trammel Crow contract since, as with offerors' experience, the RFP required the past performance evaluation to be based only on contracts of similar size, scope, and complexity. Finally, since the agency's assessment of IRRI's past performance/experience risk was dependent upon its evaluation of IRRI's past performance and experience, the agency's evaluation of IRRI's proposal in this regard is necessarily flawed as well.

We recommend that the agency reevaluate IRRI's proposal, and document this evaluation. If the agency determines as a result of this evaluation that IRRI is no longer in line for award, it should terminate the contract awarded to IRRI and award a contract to Si-Nor. We further recommend that the Navy reimburse Si-Nor for the costs of filing and pursuing its supplemental protest allegations, including reasonable attorney's fees, to the extent that the costs were incurred in connection with Si-Nor's assertions that the agency unreasonably evaluated IRRI's proposal for the experience and past performance/experience factors. Si-Nor's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2003).

The protest is denied in part and sustained in part.

Anthony H. Gamboa
General Counsel