



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability 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: J.A. Farrington Janitorial Services

File: B-296875

Date: October 18, 2005

Michael A. Gordon, Esq., and Fran Baskin, Esq., Holmes & Gordon, for the protester. Clarence D. Long III, Esq., and Bradford L. Buchanan, Esq., Department of the Air Force, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's rejection of fixed-price proposal submitted by HUBZone small business because the price was determined unrealistically low was improper, where the solicitation contains no evaluation criterion pertaining to price realism or understanding; such a determination concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price, and must be submitted to the Small Business Administration for a possible certificate of competency.
2. Agency determination that the protester's past performance was only entitled to a "confidence" rating was reasonable and gave appropriate consideration to the considerable relevant and successful past performance of protester's mentor and major subcontractor, where the protester had no relevant past performance.
3. Protest challenging the past performance evaluation of the awardee is sustained where the record fails to explain why the contracts, on which the past performance rating was based, were relevant, given their relatively low dollar value compared to the estimated dollar value of the solicited contract.

DECISION

J.A. Farrington Janitorial Services (JAF) protests the award of a contract to Roberts Treescaping, LLC (RTS) under request for proposals (RFP) No. FA2543-04-R-0003, issued by the Department of the Air Force for integrated grounds management at Buckley Air Force Base (AFB), Colorado.

We sustain the protest.

The RFP, issued on July 26, 2004 as a Small Business Historically Underutilized Business Zone (HUBZone) set-aside, contemplated the award of a fixed-price contract for a 2-month base period, four 1-year options, and a 10-month option, to the offeror whose proposal represented the “best value” to the government, price and past performance considered. The solicitation provided that “Past Performance is approximately equal to Price.” RFP amend. 3, at 177. The RFP also provided that “any offer could be rejected if it is unreasonable as to price.” *Id.* (emphasis supplied).

The RFP provided that past performance was to be evaluated by making a “relevancy” determination of the offeror’s present and past performance,¹ and then rating the past performance based on the following adjectival rating system: exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, and unsatisfactory/no confidence. The RFP also provided, “In evaluating past performance, the Government reserves the right to give greater consideration to information on those contracts deemed most relevant to the effort described in this solicitation.” The solicitation also provided that “Past performance regarding predecessor companies, key personnel who have relevant experience, or sub-contractors that will perform major or critical aspects of the requirement will be rated as highly as past performance information for the principal offeror.” RFP amend. 3, at 176.

Five offerors, including JAF and RTS—all HUBZone firms—submitted proposals prior to the September 9 closing date. JAF’s “teaming partner” and major subcontractor was Joppa Maintenance Company, Inc., a large business and the incumbent contractor for Buckley AFB’s grounds maintenance requirement, who, according to JAF’s proposal, was to perform 49 percent of the work under the contract.²

¹ The RFP included the following definitions:

Relevant. Past/present performance effort involved much of the magnitude of effort and complexities this solicitation requires.

Not Relevant. Past/present performance effort did not involve any of the magnitude of effort and complexities this solicitation requires.

² A JAF/Joppa teaming agreement was formed under the Small Business Administration’s (SBA) mentor-protégé program. See 13 C.F.R. § 124.520 (2005). Agency Report (AR), Tab 5G, JAF/Joppa Teaming Agreement, at 6-10.

The agency issued several amendments, engaged in several rounds of discussions and requested two final proposal revisions (FPR) from the offerors. During discussions, JAF was repeatedly advised that the agency considered its price to be unrealistically low. In response to the agency's notices, JAF increased its pricing somewhat. The evaluators ultimately assigned the following ratings:

Offeror	Proposed Price	Past Performance Confidence Rating
JAF	[DELETED]	Confidence
Offeror A	[DELETED]	Confidence
RTS	\$14,458,683.40	High Confidence
Offeror B	[DELETED]	Significant Confidence
Offeror C	[DELETED]	Confidence

AR, Tab 5AD, Source Selection Document, at 1. After reviewing JAF's response to the last FPR, the agency determined that JAF's proposed price continued to be unrealistically low and that the discussions with JAF indicated that it did not understand the requirement. For this reason the Air Force rejected JAF's proposal. Id. at 7. The agency then determined that the proposal of RTS represented the best value to the government and awarded a contract to that firm on July 5, 2005. This protest followed.

The protester contends that the agency improperly rejected its proposal for being unrealistically low.³ We agree.

Before awarding a fixed-priced contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted, and the results of the analysis may be used in negotiating reasonable prices. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although

³ The Air Force argues that JAF is not an interested party to protest under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), inasmuch as it is not eligible for this HUBZone small business award because Joppa, its subcontractor and mentor, is not a HUBZone small business. We disagree. The Air Force does not challenge JAF's status as an eligible HUBZone small business concern. JAF is permitted to subcontract with other than HUBZone small businesses consistent with applicable SBA regulations, see 13 C.F.R. § 126.700, and nothing in the record suggests that JAF's proposed subcontracting arrangement with Joppa is inconsistent with SBA regulations. Thus, the Air Force has provided no basis for us to consider JAF as anything other than an interested party.

agencies are required to perform some sort of price or cost analysis on negotiated contracts to ensure that proposed prices are fair and reasonable, where, as here, the award of a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. An agency may, but is not required to, provide in the solicitation for a price realism analysis for such purposes as measuring an offeror's understanding of the solicitation requirements, or to avoid the risk of poor performance from a contractor who is forced to provide goods or services at little or no profit. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. However, where there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4-5; Cromartie Constr. Co., B-271788, July 30, 1996, 96-2 CPD ¶ 48 at 5.

As indicated, JAF's proposal was not considered for award because its proposed price was considered unreasonably low. However, there was no technical or price evaluation factor under the RFP providing for the evaluation of price realism or the offerors' understanding of the requirements. The price evaluation provided only for the evaluation of the "reasonableness" of the proposed price, that is, whether the price was unreasonably high. Thus, the agency's concern that JAF's price was too low was a matter of the firm's responsibility. Since JAF is a small business, if the Air Force believed that JAF could not satisfactorily perform the contract at its proposed price, it was required to refer this finding of nonresponsibility to the SBA for that agency's review under its certificate of competency procedures. Accordingly, we sustain JAF's protest on this basis.

JAF also challenges the past performance ratings of itself and RTS. Our Office will question an agency's past performance evaluation only where it lacks a reasonable basis, violates statute or regulation, or is inconsistent with the stated evaluation criteria. Albert Moving & Storage, B-290733, B-290733.2, Sept. 23, 2002, 2003 CPD ¶ 8 at 5.

The protester contests its "confidence" rating for past performance on the grounds that it does not adequately reflect the 49 percent participation of its mentor, Joppa, a firm that was the incumbent contractor for Buckley AFB's grounds maintenance requirement and that received six "exceptional/high confidence" overall ratings from past performance references. AR, Tab 5M, JAF's Past Performance Evaluation. According to the protester, the agency's method of evaluating past performance rendered its mentor/protégé agreement with Joppa "totally irrelevant." JAF's Comments at 3.

JAF provided four past performance references, none of which were considered to be relevant to the work under this contract and for which it therefore received a

rating of “neutral/unknown confidence.” JAF has provided no basis to challenge this assessment. The record shows that the agency positively considered Joppa’s past performance, and that was the reason JAF’s rating was changed from “neutral/unknown confidence” to “satisfactory/confidence.”

We find that agency’s evaluation of the past performance of JAF and its major subcontractor, Joppa, to be reasonable and consistent with the solicitation. We see nothing improper in the agency focusing, in particular, on the prime contractor’s lack of past performance, given that it is the entity responsible for performing the contract, even where its mentor or subcontractor has considerable positive past performance. See Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 6. Here, the agency properly accounted for Joppa’s considerable past performance, but reasonably did not rate JAF’s past performance any higher than “confidence” in view of JAF’s lack of relevant past performance.

The protester also attacks RTS’s “high confidence” rating, noting that RTS’s past performance references all related to contracts for amounts less than \$127,000 per year as a prime contractor, and none were for government contracts. The protester notes that the size of the previous grounds maintenance contract performed by Joppa was over \$1.2 million per year.

The agency responds that the relevance of RTS’s past performance references was determined by assessing both the magnitude and the complexity of these projects. As noted above, the solicitation indicated that in order to be considered relevant, “Past/present performance effort involve[s] much of the magnitude of effort and complexities this solicitation requires.”

While the record indicates that RTS’s referenced contracts were specifically determined to be of similar complexity, the agency record lacks any contemporaneous explanation for the agency determination that the awardee’s past performance references related to contracts that involved sufficient magnitude of effort to be considered relevant, given their relatively small dollar value compared to the estimated dollar value of the present contract for integrated grounds maintenance at Buckley AFB. The only explanation offered in the agency report was that the agency determined that it was proper to take a “very generous view of magnitude” in determining that RTS’s referenced contracts were relevant. Agency Legal Memorandum at 9. Since we are unable, based on this record, to find RTS’s past performance relevant so as to allow for its “high confidence” rating, we sustain JAF’s protest on this basis as well.

We recommend that, consistent with this decision, the agency determine whether JAF is a responsible contractor. If the agency determines that JAF is not responsible because of its low price and alleged lack of understanding, this matter should be referred to the SBA for a possible certificate of competency. If JAF is found to be responsible, the agency should reevaluate RTS’s past performance, in particular to

determine the relevance of the contracts reported on by RTS's references, and make a new award decision that gives JAF credit for its low proposed price. If a firm other than RTS is selected for award, RTS's contract should be terminated and award made to that other firm. We also recommend that JAF be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). JAF should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel