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**Comptroller General
of the United States**

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

Decision

Matter of: United Paradyne Corporation

File: B-297758

Date: March 10, 2006

Joseph Hasay for the protester.

David B. Dempsey, Esq., Kristen E. Ittig, Esq., and Anand Ramana, Esq., Holland & Knight LLP, for Four Winds Services, Inc., the intervenor.

Eric Kattner and Maj. Jeffrey Branstetter, Department of the Air Force, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that past performance evaluation was unreasonable is sustained where agency used methodology to determine performance confidence ratings that improperly penalized offerors with relevant experience for their non-relevant experience and that effectively gave equal weight to highly relevant and non-relevant performance.

DECISION

United Paradyne Corporation (UPC) protests the decision not to select its proposal for award under request for proposals (RFP) No. FA8601-05-R-0050, issued by the Department of the Air Force for fuels management services at Wright-Patterson Air Force Base (AFB), Ohio. The protester contends that the Air Force's evaluation of its past performance and the agency's "best value" tradeoff determination were unreasonable.

We sustain the protest.

The RFP, which contemplated the award of a fixed-price contract, provided for the evaluation of proposals on the basis of three factors: mission capability, past performance, and price. Mission capability was to be evaluated on an acceptable/unacceptable basis, with only those proposals receiving ratings of acceptable proceeding to evaluation of past performance and price. Past

performance and price, which were of approximately equal weight, were to be traded off against one another in the determination of best value.

The solicitation provided for the assignment of performance confidence ratings to offerors based on their past performance. There were six possible ratings, ranging from exceptional/high confidence (“Based on the offeror’s performance record, essentially no doubt exists that the offeror will successfully perform the required effort”) to unsatisfactory/no confidence (“Based on the offeror’s performance record, extreme doubt exists that the offeror will successfully perform the required effort”).¹ RFP at 45. The RFP advised that the past performance evaluation would be accomplished by reviewing offerors’ relevant present and recent past performance; the solicitation defined recent past performance as work performed within the last 3 years and relevant contracts as contracts for similar services with similar scope and complexity. To facilitate evaluation of their past performance, offerors were instructed to submit with their proposals a list of all relevant past and present performance (with contact information) and to furnish information regarding all terminated contracts since 2000. The RFP did not specify a required minimum number of contract references.

Nine proposals were received by the July 13, 2005 closing date. All were determined to be technically acceptable. After evaluation of past performance and price, the source selection authority (SSA) selected the proposal of Four Winds Services, Inc. (FWSI), to which the agency evaluators had assigned a performance confidence rating of satisfactory/confidence and which offered a price of \$7,898,073, as representing the best value to the government. UPC’s proposal received a performance confidence rating of very good/significant confidence and was higher in price than FWSI’s. The agency awarded FWSI a contract on December 1. UPC requested and received an agency debriefing and then protested to our Office on December 16.

UPC takes issue with the agency’s evaluation of its past performance, arguing that the Air Force unreasonably failed to take into account its performance of a highly similar contract at Roosevelt Roads Naval Air Station in Puerto Rico and that the agency did not give it sufficient credit for its performance of contracts at Vandenberg AFB and at the Kennedy Space Center. The protester further argues with regard to the Kennedy Space Center contract that, even to the extent that the agency could reasonably have viewed the effort as non-relevant, performance of a non-relevant contract should not have negatively affected its performance confidence rating. The protester contends that if the Air Force had properly rated its past performance as exceptional/high confidence rather than merely very good/significant confidence, the

¹ The other ratings were: very good/significant confidence; satisfactory/confidence; neutral/unknown confidence; and marginal/little confidence.

agency would have determined that its combination of past performance and price represented the best value to the government.

As a preliminary matter, the Air Force argues that UPC is not an interested party to protest the evaluation process here because it would not be in line for award if the award to FWSI were set aside. The agency contends in this regard that there were other proposals that the SSA would have selected for award before UPC's because they were lower in price than UPC's.

In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2005); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the evaluation of its own proposal where there is a reasonable possibility that the proposal would be in line for award if the protest were sustained. Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290 at 3.

We are not persuaded by the agency's argument here because it cannot be determined from the existing record that raising UPC's performance confidence rating to exceptional/high confidence would not have led to the selection of UPC's proposal for award. In this connection, none of the proposals that was lower in price than UPC's was from an offeror whose past performance was rated exceptional/high confidence. Pointing to the SSA's decision to select FWSI's proposal (with its satisfactory/confidence rating) over the slightly higher priced proposal of a third offeror with a performance confidence rating of very good/significant confidence, the Air Force argues that it should be inferred that it "would not have been willing to pay [a] significantly higher price" to UPC for an exceptional/high confidence rating. Agency Report, Memorandum of Law at 5. In essence, the agency argues that, based on the record here, there is no reasonable possibility that it would have selected the protester's proposal over one of the lower-priced proposals from offerors with lower past performance ratings, if UPC's rating were raised to exceptional/high confidence. We disagree. The agency's selection of FWSI, with a performance confidence rating of satisfactory/confidence, over a higher-priced offeror with a performance confidence rating of very good/significant confidence, does not support a conclusion that there is no reasonable possibility that the agency would have selected UPC for award had it received a performance confidence rating of exceptional/high confidence.

Moreover, since, as discussed in detail below, the protest involves a challenge to the propriety of the methodology the agency used to rate past performance, the protest in effect calls into question the evaluation of all the offerors' past performance; thus, the appropriate remedy, if the protest were sustained, would be reevaluation of all the offers, with potentially new relative rankings as a result. Under these circumstances, we conclude that the protester is an interested party to maintain the protest.

Turning then to the merits of UPC's argument, as a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. We will question an agency's evaluation conclusions where they are unreasonable or undocumented, however. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance. Id. As explained below, we do not think that the past performance evaluation here meets this standard.²

The Air Force arrived at the performance confidence rating for each offeror using the following methodology, which was not disclosed to offerors in the RFP. After rating the relevance of each contract identified by the offeror in its proposal, the Air Force averaged these ratings to arrive at an overall "relevance" rating. It then integrated this rating with an overall past performance rating, also obtained by averaging the point scores on the performance questionnaires furnished by the offeror's references. This process yielded an overall performance confidence rating. Thus, for example, an average relevance rating of "highly relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "exceptional/high confidence"; an average relevance rating of "relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "very good/significant confidence"; an average relevance rating of "somewhat relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "satisfactory/confidence"; and an average relevance rating of "not relevant" combined with an average past performance rating of "exceptional/high confidence" yielded an overall performance confidence rating of "neutral/unknown confidence."

UPC identified four contracts in the section of its proposal where it was to identify relevant contracts (the predecessor contract to the one at issue in the protest at Wright-Patterson and contracts performed at Edwards AFB, Vandenberg AFB, and

² The protester also argued that FWSI's price was unrealistically low and that the individual who acted as the SSA had not properly been delegated such responsibility. We will not consider the former argument because it was not raised within 10 days after the protester was informed of FWSI's price and thus is untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). With regard to the latter argument, the agency explains that the responsibility for source selection was orally delegated to the individual who acted as SSA, and the protester has not demonstrated that an oral delegation was improper.

the Kennedy Space Center); in addition, the protester identified one terminated contract (performed at Roosevelt Roads Naval Air Station in Puerto Rico).³ The agency assigned the Wright-Patterson contract a point score of 60 out of 60 possible points for relevance; the Edwards AFB contract a relevance score of 56; the Vandenberg AFB contract a score of 22; and the Kennedy Space Center contract a score of 0. It did not assign the Roosevelt Roads contract a relevance score. The agency then averaged the four scores for a relevance score of 34.5. The agency's relevance matrix defined a score of 0-15 points as not relevant; a score of 16-30 as somewhat relevant; a score of 31-45 as relevant; and a score of 46-60 as highly relevant. Because the averaged score (34.5) fell within the point range for relevant performance, the Air Force assigned UPC's proposal an overall contract relevance rating of relevant. The agency then integrated this rating with a past performance rating for UPC of exceptional/high confidence that it had arrived at by averaging the point scores on the past performance questionnaires furnished by UPC's references. The result was an overall performance confidence rating of very good/significant confidence. Similarly, another offeror that had performed three contracts rated by the agency as highly relevant, three contracts rated by the agency as relevant, and five contracts rated by the agency as somewhat relevant was assigned an overall contract relevance rating of relevant because this was its average rating; as a result of this relevance rating, this offeror, whose past performance was, like UPC's, rated outstanding/high confidence, was assigned an overall performance confidence rating of only very good/significant confidence.

We think that the agency's approach to evaluating past performance was unreasonable because it had the effect of penalizing offerors with relevant experience such as UPC and the other offeror noted above for their non-relevant experience. For example, using the agency's methodology, an offeror that had performed four highly relevant contracts well would have received a higher performance confidence rating than an offeror that had performed four highly relevant and four somewhat or not relevant contracts equally well. Such a result is, in our view, clearly irrational.

The agency's methodology is further unreasonable in that it gave equal weight in the calculation of offerors' past performance ratings to highly relevant and non-relevant performance. In UPC's case, for example, the protester's performance on the predecessor contract to the effort solicited here, for which it received a relevance score of 60 of 60, was given the same weight in the computation of its past performance score as its performance on the Kennedy Space Center contract (for which the protester received a relevance score of 0) and its performance on the Roosevelt Roads contract (for which, as discussed in greater detail below, the protester was given no relevance score). Agency Report, Tab 3b-4. Moreover, it was

³ The proposal explained that the contract at Roosevelt Roads was terminated for the convenience of the government due to closure of the base.

contrary to the terms of the RFP, which provided that the past performance evaluation would be accomplished by reviewing offerors' "relevant present and recent past performance" (emphasis added), RFP at 46, for the agency to have considered non-relevant experience in its evaluation. In addition, the agency's failure to assess the relevance of individual contracts in determining the weight to assign offerors' performance of them was contrary to the direction in Federal Acquisition Regulation § 15.305(a)(2)(i) that "the currency and relevance" of the information should be considered in the evaluation of past performance.

We also agree with the protester that it was unreasonable for the agency to have failed to consider its performance on the contract at Roosevelt Roads Naval Air Station in evaluating its relevant experience. The agency explains that it did not factor the Roosevelt Roads contract into its relevance matrix because it "was submitted under a 'terminated contract' whereby a relevance determination, positive or negative, was not calculated." Agency Report, Memorandum of Law at 6. To the extent that the agency is arguing that it was reasonable for it to assume that terminated contracts would be irrelevant for purposes of its performance confidence assessment, the very fact that the agency sought information regarding terminated contracts in the first place—under the heading "Relevant Contracts," no less—is, in our view, evidence that the agency viewed them as potentially relevant. Moreover, the agency did in fact obtain and consider information regarding the protester's performance on the Roosevelt Roads contract in its evaluation of past performance, suggesting that it did not regard the performance as irrelevant.⁴

Because we find that the Air Force's evaluation of UPC's past performance was unreasonable, we sustain the protest. We recommend that the agency reevaluate the past performance of UPC and the other offerors using an appropriate methodology, i.e., one that takes into consideration the relevance of a particular contractual effort in determining the weight to be assigned the offeror's performance of it. Based on that reevaluation, we recommend that the agency make a new source selection

⁴ The agency responded to UPC's complaint that the agency had not given it sufficient credit for its performance of contracts at Vandenberg AFB and at the Kennedy Space Center by explaining in its report that none of the performance elements for the Kennedy Space Center and only a portion of the performance elements for the Vandenberg AFB contract were relevant to the current fuel management contract. The protester did not seek to rebut these arguments in its comments, but instead reiterated its generalized assertion that the contracts should have been considered relevant because they involved fuels. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. Clean Harbors Env'tl. Servs., Inc., supra, at 5-6 n.1.

determination. If the agency determines that the proposal of an offeror other than FWSI represents the best value to the government, we recommend that the agency terminate the contract awarded to FWSI and make award to the offeror selected. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f) of our Regulations, UPC's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel