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**Comptroller General
of the United States**

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

Decision

Matter of: Prime Environmental Services Company

File: B-291148.3

Date: March 4, 2003

Eric Radke for the protester.

Phillipa L. Anderson, Esq., Dennis Foley, Esq., and Philip Kauffman, Esq.,
Department of Veterans Affairs, for the agency.

Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly evaluated protester's proposal with respect to the firm's performance history and certain technical areas is denied where the record shows that the evaluation was reasonable and consistent with the solicitation's evaluation factors.

DECISION

Prime Environmental Services Company protests the award of a contract to North State Environmental under request for proposals (RFP) No. 600-088-02, issued by the Department of Veterans Affairs (VA) to procure hazardous waste removal services at VA facilities in southern California. Prime argues that the agency improperly evaluated its proposal and unreasonably selected North State's higher-priced proposal for award.

We deny the protest.

The VA issued this solicitation on June 26, 2002 to procure the services of a contractor to remove and dispose of hazardous waste at VA facilities in Los Angeles, Long Beach, Loma Linda, and San Diego, California. Prime is the incumbent contractor providing these services. The solicitation anticipated the award of a fixed-price contract for a base period of 1 year, with up to four 1-year option periods. Award was to be made to the firm whose offer was most advantageous to the government, considering three equally important evaluation factors: performance history, technical, and price. The technical factor was comprised of four equally

important subfactors: management capability, staff adequacy, facilities and equipment, and financial condition. RFP at 157.

The VA received proposals from six firms by the July 24 closing date. After the proposals were evaluated, the contracting officer determined that all offerors save one were nonresponsible. North State challenged that determination in a protest filed in our Office on August 19. Several days later, the firm withdrew its protest based upon the contracting officer's notice that he had withdrawn his nonresponsibility determination and would conduct discussions with the firm. The VA then conducted discussions with each offeror, and requested the submission of final proposal revisions (FPR). Despite the agency's advice during discussions that the firm's service in the past had not been satisfactory, and that its proposal was weak in the areas of staff adequacy and financial condition, Prime's proposal revisions were limited to its price proposal. The final point scores from the VA's evaluation of the FPRs were as follows:¹

	North State	Prime
Performance History	88 points	60 points
Technical	94 points	54.25 points
Management Capability	24 points	24 points
Staff Adequacy	23 points	0 points
Facilities and Equipment	22 points	22 points
Financial Condition	25 points	8.25 points
Price	\$792,718	\$679,682

The contracting officer, acting as the SSA, noted that Prime's past performance score was the lowest of all offerors, and recited various reasons for this low score. Among other things, the SSA explained that Prime tended to be non-responsive and slow to respond to requests for service, and had mismanaged waste, causing the government to expend extra funds to correct the problem and subjecting the government to potential regulatory violations. The SSA also explained that Prime used a cumbersome manifest system, and that North State offered a superior records management system. Specifically, the agency found that North State's records management system allows the firm to arrive at the pick-up site with a pre-printed

¹ Each non-price evaluation factor was worth up to 100 points, and each technical subfactor was worth up to 25 points. The proposals of three offerors were removed from consideration based on their low technical ratings and high prices. The proposal of a fourth offeror received a higher point score than North State but proposed a higher price; the source selection authority (SSA) determined that this firm's proposal presented no advantage over North State's proposal that would justify its higher price. This fourth offeror's protest of the award to North State was dismissed because the firm failed to file comments on the agency's report. Bid Protest Regulations, 4 C.F.R. § 21.3(i) (2002).

manifest indicating that the disposal facility has issued an acceptance authorization. In contrast, the agency found that Prime generally writes its manifest on site and seeks authorization from the disposal facility later. The SSA stated that waiting for this authorization until after the pick-up delayed the VA's ability to send a copy of the manifest to the appropriate regulatory body and jeopardized its ability to meet regulatory time limits. The SSA also found that Prime's staff was not as large or well trained as that of North State. He stated that packing the waste was one of the most complicated parts of the requirement, and a mistake could lead to a dangerous reaction of incompatible chemicals. The SSA found that the fact North State always has a chemist present during the packing was an advantage over Prime's use of a truck driver to perform the packing. In addition, the SSA stated that the VA has a need for emergency response and clean-up operations to cover these four facilities, and the contractor must have sufficient facilities and staff to respond to one or more spills concurrently. He found that North State was better able to respond because of its larger and more highly trained staff.

The SSA concluded that North State would save the government time in records management, reduce the risk of mishaps, and provide faster and more complete emergency spill response. He stated that one instance of an adverse chemical reaction due to improper packing or of an improperly contained hazardous waste spill could subject the government to costs far greater than the approximately \$22,000 annual price difference between the two offers, and determined that North State offered the best value to the government. Award was made on December 11 and Prime filed this protest after its debriefing. Prime argues that the VA improperly evaluated its performance history and certain aspects of its technical proposal, and unreasonably selected North State's higher-priced proposal for award.

Our Office will question an agency's evaluation of proposals only if it lacks a reasonable basis, violates statute or regulation, or is inconsistent with the stated evaluation criteria. An agency may base its evaluation of past performance upon its reasonable perception of prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. See Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5; Quality Fabricators, Inc., B-271431, B-271431.2, June 25, 1996, 96-2 CPD ¶ 22 at 7. A protester's mere disagreement with the agency's judgment does not establish that the agency acted unreasonably. Coffman Specialties, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 at 5. Our review of the record shows that the VA's evaluation of Prime's proposal was reasonable.

With respect to the evaluation of its performance history, Prime initially contends that the VA improperly failed to contact any of the three non-VA references it provided in its proposal but, instead, contacted the four VA facilities served under Prime's incumbent contract for their references, even though one was "known to have personnel that were overtly hostile to Prime." Protest at 5.

The record shows that the VA did attempt to telephone the three non-VA references cited in Prime's proposal, but two of the numbers were no longer in service and the third reference failed to return the evaluator's telephone call. There is no legal requirement that all past performance references be included in a valid review of past performance. Advanced Data Concepts, Inc., B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 at 10. An agency is only required to make a reasonable effort to contact an offeror's references, and, where that effort proves unsuccessful, it is unobjectionable for the agency to evaluate an offeror's past performance based on fewer than the maximum possible number of references the agency could have received. Universal Bldg. Maint., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 8 n.1. This is particularly true where, as here, the contracting officer actually contacted the most current and relevant references for the work at hand: the four facilities currently served by Prime under its incumbent contract for these services.

As for Prime's assertion that one of these VA facilities was "known to be hostile" to the firm, Protest at 6, in order to show bias, the record must clearly establish that agency personnel intended to injure the protester. Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21 at 5. We will not attribute unfair or prejudicial motives to such personnel on the basis of inference or supposition. Eastco Bldg. Servs., Inc., B-283972.2, Feb. 10, 2000, 2000 CPD ¶ 38 at 3. There is no showing of bias here. The record contains no evidence--aside from the protester's allegations--that references from this facility harbored "hostility" toward the firm or made untrue negative statements about the firm's past performance. Moreover, the record shows that all four facilities--not just this one--were dissatisfied with Prime's performance. All four facilities reported that Prime's response to complaints or problems was not the optimum "immediately" but, rather, within a week; three facilities reported that Prime's response to requests for service was not the optimum "one day" but, rather, less than a week, and one facility reported that it was more than a week; and all four facilities reported that the experience of Prime's staff was merely adequate. This consistency among the four facilities undercuts Prime's assertion that its evaluation was unduly influenced by the "hostile" remarks of one facility.

We have reviewed Prime's specific objections to each of the SSA's negative comments about its past performance, along with the record supporting those comments. As the following examples illustrate, none of Prime's objections show that the VA's evaluation of its past performance was unreasonable.

Prime objects to the SSA's statement that it "tends to be nonresponsive and . . . slow to respond to requests for services." Source Selection Memorandum at 2. Prime states that it was occasionally slow in returning telephone calls during the initial few months of its performance, but that, since that time, it has been "totally responsive." Comments at 3. In response to GAO's request to address Prime's objection, the VA provided detailed contemporaneous evidence supporting the agency's position that Prime was repeatedly late showing up to scheduled appointments and nonresponsive with regard to returning phone calls and providing adequate customer service. Prime has not rebutted any of this information, which supports the VA's conclusion

that the firm tended to be nonresponsive and slow to respond to requests for services.²

Prime next objects to the SSA's finding that the firm had, on occasion, mismanaged waste. The firm concedes that it played some role in this mismanagement, but shifts much of the blame to the VA for these problems. At GAO's request, the VA provided a detailed response to this allegation, along with a contemporaneous statement from Prime in which the firm accepted responsibility for the problem. Again, Prime has failed to rebut the VA's explanation or its own prior statement, which supports the VA's conclusion that Prime had instances where it mismanaged waste.

Prime also complains that the SSA improperly found that it used a cumbersome manifest system. Prime states that it has historically provided manifests with all of the information pre-printed except the actual waste stream information. However, at GAO's request, the VA provided a detailed account from the industrial hygienist at one facility in which she states that Prime routinely appeared with blank manifests, to be filled out by hand, even though a detailed inventory of items and amounts to be disposed had been faxed to the firm before the scheduled service. Prime has not rebutted this individual's account, or her explanation regarding the negative impact Prime's manifest system had on her facility's operations. As a result, we have no basis to object to the VA's conclusion that the firm's manifest system was cumbersome.

Finally, in response to the SSA's finding that its staff was not as large or well trained as that of North State, Prime asserts that its staff is more than capable of handling the requirements. The VA responded to Prime's assertion by citing instances where Prime sent only one individual to perform the service, sent out staff who were unaware of the scope of the work and needed to be told what to do, and sent out staff who were uncomfortable speaking English. The VA also cited instances where waste pickups were delayed due to Prime's staff shortages. Again, Prime has not rebutted the VA's explanations, which support its findings regarding the firm's past performance in connection with staffing.

² While Prime complains that the contact person at one VA facility created scheduling problems by insisting on speaking only with its vice-president of operations, an individual from a different VA facility complains of difficulties in scheduling because Prime itself insisted that its vice-president of operations was the only scheduling contact point. Prime has not rebutted this individual's detailed explanation of her difficulties in this regard, which supports the evaluation committee's finding of a degree of risk in Prime's proposal because all operational decisions and activities had to be funneled through its vice-president of operations.

We now turn to Prime's challenges of the evaluation of its proposal under two of the four technical subfactors. Under the staff adequacy subfactor, the RFP required offerors to submit:

Proof of 40 Hour [Hazardous Waste Operations and Emergency Response Standard (HAZWOPER)] training for technicians who will perform lab packing, bulk packing, labeling, loading, and transporting hazardous Materials, Proof of Certified First Responder Training for staff responding to hazardous materials spills or incidents. List of all personnel who will support this contract including each individual's training, refresher training, along with all relevant experience and qualifications and current valid required licenses.

RFP at 158.

The VA's evaluation team assigned zero points to Prime's proposal under this subfactor. As for the requirement to submit "[p]roof of 40 Hour HAZWOPER training for technicians who will perform lab packing, bulk packing, labeling, loading, and transporting hazardous materials," the VA found that Prime's proposal did not include any proof for any individual for the 40-hour HAZWOPER initial training, but only included certificates for HAZWOPER annual refresher training for seven individuals. None of these certificates indicated how many hours or days of training were received, and four of the certificates were expired. In addition, these certificates indicated the names of the individuals, but not all of their positions, so the VA was unable to clearly ascertain which individuals were driver/technicians and which were supervisors.

Prime concedes that several certificates were expired, but asserts that all of the personnel that would actively inventory, prepare and pack the waste had current certificates included. This claim is not supported by Prime's proposal. Although Prime complains that the VA did not contact the training program administrator to ascertain the validity of the expired certificates, the VA was not required to do so because the RFP placed the burden on Prime to provide this required information. Prime also argues that the 40-hour training was performed many years ago and the certificates were unavailable, and that the refresher certificates "imply" that the original 40-hour training was completed. Whether or not this is true, the RFP plainly required the submission of the 40-hour certificates and Prime's failure to meet the RFP's requirements warranted the VA's downgrading of its proposal. An agency's evaluation is dependent upon information furnished in a proposal, and it is the offeror's burden to submit an adequately written proposal for the agency to evaluate. Chant Eng'g Co., Inc., B-279049, B-279049.2, Apr. 30, 1998, 98-2 CPD ¶ 65 at 7.

The VA next considered the requirement to submit proof of first responder training for all staff responding to hazardous material spills or incidents. The VA found that Prime had provided no such proof and did not describe the staff that would meet this requirement. Our review of Prime's proposal confirms the validity of this finding.

The VA finally turned to the requirement to provide a list of personnel who will support this contract including each individual's "training, refresher training, along with all relevant experience and qualifications and current valid required licenses." RFP at 158. The VA concluded that, because not all of the positions were identified, it was impossible to determine which training requirements applied to each of the personnel. The VA found that, to provide proper resources to this contract, certain training requirements must be met and they had problems finding any evidence of such training in Prime's proposal. Our review of the proposal confirms the validity of this finding. Although Prime argues that it provided biographical data on key personnel, the RFP's requirement was to provide such information on all personnel supporting the contract. Most of the biographies in Prime's proposal are for managers and administrative or sales staff; the proposal contains a very brief description of the project manager with none of the required information, and contains no information on any of the firm's technicians. While Prime states that it "did not think it relevant to include information on every technician," Comments at 12, the RFP plainly required it to do so.

Finally, under the financial condition subfactor, offerors were required to provide "[c]opies of insurance certificates, business license permits, latest Profit and Loss statement and Balance sheet." RFP at 158. Prime's proposal included its current insurance certificate, but none of the other required information. Instead, the firm simply stated that it was a private corporation and did not publish financial statements; explained that it had been in business for more than 10 years, was financially sound, and had an established line of credit; and provided a list of credit references, bank references and other credit information. Since Prime failed to comply with the solicitation's requirement to submit business license permits and its latest profit and loss statement and balance sheet, the evaluation committee gave it only 8.25 of the 25 available points.

Notwithstanding Prime's argument that it is a private company and does not disclose its financial information, the RFP plainly required this information and Prime plainly did not comply with this requirement. If Prime believed that the nature of its business precluded it from requiring the information required by the solicitation, it was required to protest this issue prior to the initial closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1); see Novavax Inc., B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 9. An offeror cannot learn of what it views as a requirement that cannot be met and continue to compete on that basis without objection, and then complain when it is not selected for award. Id.

As for Prime's objection to the SSA's selection for award of North State's higher-priced, and higher-rated proposal, source selection officials in negotiated procurements have the discretion to select other than the lowest-priced proposal, if, as here, doing so is consistent with the solicitation's evaluation criteria. B. Diaz Sanitation, Inc., B-283827, B-283828, Dec. 27, 1999, 2000 CPD ¶ 4 at 4. We have

concluded that the evaluation of Prime's proposal was reasonable, and Prime has given us no basis to question the SSA's decision that the advantages offered by North State justified its higher price.

The protest is denied.

Anthony H. Gamboa
General Counsel