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**Comptroller General
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Decision

Matter of: K-Mar Industries, Inc.

File: B-400487

Date: November 3, 2008

Marilyn H. David, Esq., and Russell S. Gill, Esq., Russell S. Gill, P.L.L.C., for the protester.

Capt. John J. Cho, and Raymond M. Saunders, Esq., Department of the Army, for the agency.

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

DIGEST

1. Protest challenging the agency's consideration of contracts referenced in the awardee's proposal in evaluating the awardee's experience and past performance is denied where the agency's actions were within the broad discretion afforded the agency to determine whether a particular contract is relevant to the experience and past performance evaluations.
 2. Protest that awardee's proposal will violate Service Contract Act's implementing regulations is a matter for consideration by the Department of Labor, not GAO.
 3. Incumbent contractor's protest of estimates set forth in solicitation, raised for the first time after award, is an untimely challenge to the terms of the solicitation.
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DECISION

K-Mar Industries, Inc., of D'Iberville, Mississippi, protests the award of a contract to Five Rivers Service, LLC, of Colorado Springs, Colorado, under request for proposals (RFP) No. W9124D-08-R-0019, issued by the Department of the Army, for visual information (VI) services and equipment at Fort Knox, Kentucky.

We deny the protest.

The RFP, issued as a total set-aside for small businesses, provided for the award of a fixed-price contract for a base period of 1 year with four 1-year options, to the offeror submitting the low-priced, technically acceptable proposal. RFP at 1-7, 22, 30. The contractor will be required to "provide all services, materials, supplies,

facilities, supervision, labor, and equipment” to perform VI services at Fort Knox. RFP, Performance Work Statement (PWS), at 12. The work required includes “technical advisory services, management and control of VI equipment, graphic services, photographic services, video, audio and multimedia productions, VI logistics services, VI library services, [and] presentation services.” Id.

The solicitation provided for technical, past performance, and price evaluations, and stated that under the technical factor the agency would evaluate the staffing plans and “[e]xperience information” set forth in the offerors’ proposals. The solicitation added that the submitted “experience information” would be “reviewed for relevancy,” and specified that “[r]elevance will be based on services similar in size, scope, and/or complexity.” The solicitation also provided for an assessment under the past performance evaluation factor of the “quality” of the firm’s performance. In this regard, the RFP defined past performance “as a subjective judgment about the quality of the firm’s historical performance,” and stated that “[e]ach proposal will be evaluated for performance risk based on available past performance information and, accordingly, will be identified as low, moderate, or high risk.” The solicitation concluded that “[o]nly those offerors proposing sufficient staffing to perform the required services, showing experience in performing similar services, and receiving low or neutral performance risk assessment will be considered technically acceptable and considered for award.” RFP at 30.

The agency received six proposals in response to the solicitation, and evaluated three of the proposals, including those submitted by Five Rivers and K-Mar (the incumbent contractor), as technically acceptable with low performance risk. Agency Report (AR), Tab 9, Source Selection Decision, at 1. The agency selected Five Rivers’ low-priced proposal of \$7,825,495 for award, and K-Mar, which had submitted the second low-priced proposal at \$8,441,376, protested the award to our Office.

The protester contends that the agency’s evaluation of Five Rivers’ proposal was unreasonable. The protester first argues that Five Rivers lacks the requisite experience as evaluated under the technical factor, and that Five Rivers’ proposal should have thus been evaluated as technically unacceptable. In support of this argument, the protester provides a detailed analysis of the RFP’s PWS, and explains why, in its view, each item of work set forth in the PWS is “complex” and requires unique skill sets to accomplish. The protester’s lengthy explanation includes a detailed examination of each of the contracts set forth in Five Rivers’ proposal, and why in the protester’s view none of the contracts is similar in size, scope and complexity to the VI work set forth in the PWS, because the contracts do not evidence experience involving “the same subject matter, skill sets, employee qualifications, functional areas, equipment, or facilities.” Protest at 8.

The evaluation of proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them. In reviewing an agency’s evaluation, we will not reevaluate

proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria. Dual, Inc., 98-1 CPD ¶ 146 at 3. Where a solicitation requires the evaluation of the offerors' experience, an agency has broad discretion to determine whether a particular contract is relevant to an evaluation of experience. See All Phase Envtl., Inc., B-292919 et al., Feb. 4, 2004, 2004 CPD ¶ 62 at 3. An offeror's mere disagreement with the agency does not render the evaluation unreasonable. Dual, Inc., supra.

As an initial matter, the protester's arguments here are in large part predicated on its misunderstanding or mischaracterization of the solicitation's terms. In this regard, and contrary to the protester's arguments, the RFP did not state that a contract would be considered by the agency in its evaluation under the experience criterion only if the referenced contract was equivalent to the anticipated contract under all of the relevant experience criteria, that is, size, scope and complexity. Rather, the solicitation advised offerors that the experience information provided in their proposals would "be reviewed for relevancy," and that "[r]elevance [would] be based on services similar in size, scope, and/or complexity to the work defined in the PWS." RFP at 30 (emphasis added). As such, it was reasonable for the agency, as it did here, to consider the performance of contracts, under the experience criterion of the technical factor, that were similar to the work required here in terms of size, or scope, or complexity. Contracting Officer's Statement at 3; see KIC Dev., LLC, B-297425.2, Jan. 26, 2006, 2006 CPD ¶ 27 at 5; Roy F. Weston, Inc., B-274945, et al., Jan 15, 1997, 97-1 CPD ¶ 92 at 8-9.

We also note that the protester's characterization of the term "similar" in the context of the solicitation's statement that "[r]elevance [would] be based on services similar in size, scope, and/or complexity," is too narrow. For example, the protester argues that two of Five Rivers' contracts considered by the agency in evaluating Five Rivers' proposal as "acceptable" did not involve "similar services" because, while they involved VI services, they "are, in reality, on the lower end of complexity in the overall spectrum of VI functions." Protester's Comments at 37, 46. The protester continues this argument by detailing each requirement of the RFP's PWS that Five Rivers may not have had to perform in its past or current VI services contracts, and arguing that because of this, Five Rivers' experience in performing VI services is not "similar" to the VI services to be performed here.

Although the protester may be correct in its assertion that Five Rivers has not performed a VI services contract as complex as that contemplated by the PWS here, that does not render the agency's determination that Five Rivers has experience performing similar services unreasonable. As explained below, the record reflects that Five Rivers has performed or is performing VI services and other similar contracts, and that the agency reasonably determined that the scope of these contracts with regard to the complexity of the services, while not that same, are "similar" to those required by the RFP's PWS.

In this regard, Five Rivers' proposal provided information regarding past and current contracts at, among others, Patrick Air Force Base (AFB), Pope AFB, Cape Canaveral, and Fort Hood, and included a table that individually identified the RFP's PWS requirements, and then provided an explanation as to why Five Rivers' experience was relevant to the PWS requirements identified. AR, Tab 5, Five Rivers' Proposal, at II-2 – II-3. The proposal also included detailed descriptions of each of the contracts listed, providing, for example, each contract's value, performance period, place of performance, and cognizant contracting officer contact information. Id. at III-2 – III-10.

The agency evaluators referenced Five Rivers' experience in performing the contracts at Fort Hood, Pope AFB, and Patrick AFB in finding Five Rivers' proposal "acceptable" under the technical factor. The record reflects that under the Fort Hood contract, valued at \$12,836,408, Five Rivers provided, among other things, "a variety of training aids and devices, including the creation, design, fabrication; modification, installation, and reproduction of exhibits and scaled models of Army equipment and combat aids," to the Fort Hood Training Support Center. AR, Tab 5, Five Rivers Proposal, at III-2. The agency found that while the services performed by Five Rivers here were for training aids and devices, rather than specifically for VI, the services involved functions, such as work control, property control, and system administration, similar to those necessary for the successful performance of the VI services at Fort Knox. AR at 6; Tab 8, Price Negotiation Memorandum, at 5. The agency also noted in evaluating Five Rivers' proposal under the technical factor that the Pope AFB and Patrick AFB contracts, while lower in value (at \$865,353 and \$2,410,559, respectively) than the Fort Knox contract, involved the provision of VI services. AR at 6; Tab 5, Five Rivers Proposal, at III-6, III-8; Tab 8, Price Negotiation Memorandum, at 5. Specifically, the record reflects that under these contracts Five Rivers operates the Pope AFB and Patrick AFB VI service centers, and in doing so, provides products and services, such as "still electronic imaging, graphic services, to include web support, compact digital disk recording, and creating multimedia presentations." AR, Tab 5, Five Rivers Proposal, at III-7, III-8. These services also include "still and video photography both on location and in-studio," as well as "[g]raphic services includ[ing] computer graphic files, or actual graphic products such as illustrations, reproduction masters, viewgraphs, charts, signs, posters, displays, and short presentations." Id.

Giving due deference to the agency's broad discretion to determine whether a particular contract is relevant to the evaluation of an offeror's experience, we believe that the agency's consideration of the Fort Hood, Pope AFB and Patrick AFB contracts was reasonable, as was the agency's determination that Five Rivers has performed or is performing contracts involving "services similar in size, scope, and/or complexity to the work defined in the PWS." See RFP at 30.

The protester also argues that the agency's evaluation of Five Rivers' proposal as "low risk" under the past performance factor was unreasonable.

Five Rivers' proposal included past performance information in narrative form, as well as two completed past performance questionnaires, with one having been completed by the Contracting Officer Representative (COR) for the Fort Hood contract discussed above. With regard to the Fort Hood contract, Five Rivers' performance was rated as "outstanding" on each of the questionnaire's 24 different "performance information" bases, and the cognizant COR's narrative at the conclusion of the questionnaire stated that "[t]he support provided by Five Rivers . . . for [the] services has always been outstanding," and that "[t]heir expertise in all contracted services is above reproach." AR, Tab 5, Five Rivers Proposal, at III-3 -- III-4. The agency states that it contacted the COR for the Fort Hood contract, who confirmed that "Five Rivers performs all services of the contract in an outstanding manner." Contracting Officer's Statement at 4. Based upon this, and other favorable comments regarding Five Rivers' performance indicating that "customers were very pleased with the various services provided," the agency evaluated Five Rivers' proposal as posing "low" performance risk. Id.

The protester asserts that the evaluation of Five Rivers' proposal as posing "low" performance risk is unreasonable because the rating "is based on false information." Protester's Comments at 45. In this regard, the protester points out here that the agency's price negotiation memorandum identifies Five Rivers' contract with Fort Hood as being for "Visual Information Support Services and Training Aids and Devices," though, in the protester's view, the Five Rivers' Fort Hood contract does not involve the performance of any VI services. Id. The protester continues here by noting that the price negotiation memorandum also refers to a contract performed by Five Rivers at "Fort Carson" (in addition to those at Patrick AFB and Pope AFB), even though nothing in the record indicates that Five Rivers has held a contract at "Fort Carson." Id. at 46.

Although we agree with the protester, and as is conceded by the agency, the agency's price negotiation memorandum contains an error with regard to the reference of a contract performed by Five Rivers at Fort Carson, we do not find that this error, or the alleged error with regard to the Fort Hood contract as to the identification of that contract as including VI services, renders the evaluation unreasonable. In this regard, there is nothing in the record indicating that either of the errors (or alleged errors) that appear in the price negotiation memorandum had any effect on Five Rivers' past performance rating; the facts remains that Five Rivers' past performance at Fort Hood was rated as "outstanding" and favorable comments were made regarding Five Rivers' performance of other relevant contracts. As such, we cannot find unreasonable the agency's evaluation of Five Rivers' proposal under the past performance factor as posing low risk.

As to Five Rivers' staffing plan under the technical factor, the protester contends that "Five Rivers's proposal is Technically Unacceptable because it violates the Service Contract Act's implementing regulations," specifically arguing here that "Five Rivers proposes to staff the Fort Knox job with [DELETED] exempt personnel and

with levels and pay rates that violate these regulations.”¹ Protester’s Comments at 47. The determination of prevailing wages and fringe benefits, and the issuance of appropriate wage determinations under the Service Contract Act, are matters for the Department of Labor (DOL). Concerns with regard to establishing proper wage rate determinations or the application of the statutory requirements should be raised with the Wage and Hour Division in DOL, the agency that is statutorily charged with the implementation of the Act. See 41 U.S.C. §§ 353(a); 40 U.S.C. § 276a (2000); SAGE Sys. Techs., LLC, B-310155, Nov. 29, 2007, 2007 CPD ¶ 219 at 3. Thus, the protester’s apparent contention that Five Rivers may not properly categorize its employees under the SCA or compensate some of its employees at the required SCA wage rate, is not a matter for our consideration, since the responsibility for the administration and enforcement of the SCA is vested in DOL, not our Office, and whether contract requirements are met is a matter of contract administration, which is the function of the contracting agency. SAGE Sys. Techs., LLC, supra; Free State Reporting Inc., B-259650, Apr. 4, 1995, 95-1 CPD ¶ 199 at 7 n.7.

The protester finally argues that the workload estimates set forth in the RFP are understated. In support of this claim, the protester has submitted extensive workload analyses, using the workload estimates set forth in the RFP and data in its possession as the incumbent contractor, to purportedly demonstrate that the RFP’s workloads are understated by “huge amounts.” Protester’s Comments at 16. The protester claims, for example, that the workload estimates in the RFP are understated for logistics services by 130,048 units of work, or 583 percent; for graphics services by 169,720 units of work, or 325 percent; and for television services by 219,991 units of work, or 3,501 percent. Id. In response to the agency’s assertions

¹ The protester also argues for the first time in its supplemental comments filed on October 20 that the agency’s evaluation of Five Rivers’ staffing plan under the technical factor was inadequately documented and unreasonable. Specifically, the protester asserts that the agency report contains “insufficient documentation to show that the Army evaluated proposed management, labor classifications, hours, cross-utilization, and work schedules,” and provides a detailed analysis of the RFP’s PWS, the agency’s staffing estimate, K-Mar’s staffing plan, and Five Rivers’ staffing plan, in support of its position. Protester’s Supplemental Comments at 40. These arguments are based upon information set forth in the agency report, which the protester received on September 26, and are thus untimely. Our Bid Protest Regulations provide that protests which are not based upon solicitation improprieties must be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier). 4 C.F.R. § 21.2(a)(2) (2008). We note that although K-Mar generally asserted in its initial protest that “[d]ue to the low price proposed by Five Rivers, [K-Mar] believes that Five Rivers’ staffing plan was inadequate,” such general allegations in an initial protest does not render timely subsequently submitted specific examples of the alleged general flaws. See CAE USA, Inc., B-293002; B-293002.2, Jan. 12, 2004, 2004 CPD ¶ 25 at 11 n.9.

defending the accuracy of the RFP's workload estimates, the protester argues, among other things, that "neither the COR nor the agency had adequate information upon which to base historical data for the RFP," and concludes by contending that the "workload error in the RFP requires the solicitation to be canceled and/or the contract to be terminated for convenience." Protest at 6; Protester's Submission (Sept. 10, 2008), at 7.

The challenge of the incumbent protester to the accuracy of the estimates set forth in the RFP is untimely. Our Bid Protest Regulations require that protests concerning alleged improprieties apparent on the face of the solicitation be filed prior to the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1). This requirement is intended to provide parties with a fair opportunity to present their cases and to enable the contracting agency to take effective corrective action when it is most practicable and where circumstances warrant. Allstate Van & Storage, Inc., B-247463, May 22, 1992, 92-1 CPD ¶ 465 at 5. Here, the RFP included workload data for the functional areas set forth in the PWS. To the extent that the protester, as the incumbent, thought that the workload data was inaccurate based on its incumbent experience, the protester was required to protest the matter prior to the deadline for submitting proposals.² Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 4; Allstate Van & Storage, Inc., supra, at 6.

The protester asserts that its protest should nevertheless be considered timely, because it was not until after award, when the protester questioned an agency employee as to "why the RFP had drastically reduced the workload requirements/estimates, as compared to the workload [the protester] as the incumbent had been performing for the past four years" and was informed by the agency that the workload estimates in the RFP were based on the incumbent's performance, that the protester was aware of the agency's error. Protest at 5-6. We find this argument unpersuasive. The protester, based on its own experience as the incumbent contractor, knew or reasonably should have known of the alleged errors in the government estimates set forth in the RFP. The protester's arguments provide no reasonable explanation as to why it, as the incumbent contractor, failed to realize that the RFP's workload estimates were incorrect where the estimates were understated by, according to the protester, up to 3,500 percent, and where, as argued

² The protester also argues for the first time in its October 6 comments on the agency report that the agency acted improperly by issuing "an RFP for a firm-fixed-price contract and amend[ing] it just before proposals were due to state that it would add cost-reimbursable elements upon award." Protester's Comments at 56. The protester's argument here is untimely, and will not be considered, given that it is based upon language set forth in amendment No. 3 to the RFP, issued on June 25, but the protest challenge was not filed until well after the solicitation's July 8 closing date. 4 C.F.R. § 21.2(a)(1).

by the protester, the agency was incapable of developing accurate estimates because the agency lacked accurate historical data on which to base its estimates.

The protest is denied.

Gary L. Kepplinger
General Counsel