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BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:	DOCKET NO. OPA-PA 09-007
GUAM EDUCATION FINANCING FOUNDATION, INC. Appellant.	**COMMENT OF INTERNATIONAL BRIDGE CORPORATION, AS AN INTERESTED PARTY, TO THE AGENCY REPORT FILED OCTOBER 5, 2009**

International Bridge Corporation, an Interested Party, concurs with the Agency Report filed October 5, 2009.

As the Report shows, the Department of Public Works rationally exercised the discretion it had to consider the proposals and select International Bridge Construction as the most highly rated of the three offerors and the offeror with which it would commence negotiations. In *TRC Environmental Corporation v. Office of the Public Auditor*, Spec. Proc. Case No. SP160-07, Decision and Order on Petition for Writ of Mandate ("D&O") (Guam Super. Ct. Nov. 21, 2008), "a procurement decision can be set aside if it lacked rational basis or if the agency's decision-making involved a violation of regulation or procedure." D&O at 8 (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238

F.3d 1324, 1332 (Fed. Cir. 2001), and *The Ravens Group, Inc. v. United States*, 79 Fed. Cl. 100, 112 (Fed. Cl. 2007)). The court further pointed out that:

> When an agency is making a procurement decision, particularly based on a 'best value' approach, rather than a 'best price' approach, courts will typically not second-guess the discretionary judgments made in balancing these factors. *Geo-Seis Helicoptersw, Inc. v. United States*, 77 Fed. Cl. 633 (Fed. Cl. 2007); *E. W Bliss Co. v. United States,* 77 F.3d 445,449 (Fed.Cir. 1996) ("The protestor's arguments deal with the minutiae of the procurement process in such matters as technical ratings and the timing of various steps in the procurement, which involve discretionary determinations of procurement officials that a court will not second guess").

Ibid.

In its administrative review of agency procurement decisions, the Comptroller General of the United States assumes the same position. In a protest involving a challenge to evaluations of proposals, akin to the protest of Guam Education Financing Foundation, Inc., the Comptroller General held:

> 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 para. 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 para. 62 at 3. An offeror's mere disagreement with the agency does not render the evaluation unreasonable. *Dual, Inc., supra.*

Matter of: K-Mar Industries, Inc., B- 400,487, 2009 CPD P 159, 2008 WL 6665282, *2 (Comp.Gen. Nov 03, 2008).

The Agency Report amply demonstrates that the evaluation of the proposals in this procurement was well within the acceptable discretion of the agency and consistent with the solicitation's evaluation. For the reasons set forth in the Agency Report, the denial of the protest in this appeal should be affirmed.

Respectfully submitted this 15th day of October, 2009.

CIVILLE & TANG, PLLC

By: _____

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APPENDIX

TRC Environmental Corporation v. Office of the Public Auditor,
Spec. Proc. Case No. SP160-07,
Decision and Order on Petition for Writ of Mandate
(Guam Super. Ct. Nov. 21, 2008)

IN THE SUPERIOR COURT OF GUAM

TRC ENVIRONMENTAL CORPORATION, Petitioner, vs. OFFICE OF THE PUBLIC AUDITOR, Respondent.	SPECIAL PROCEEDINGS CASE NO. SP160-07 DECISION AND ORDER ON PETITION FOR WRIT OF MANDATE

This matter came before the Honorable Alberto C. Lamorena III on February 1, 2008, on TRC Environmental Corporation's Petition for Writ of Mandate. Appearing on behalf of Petitioner TRC Environmental Corporation (hereinafter "TRC") and Guam Power Authority (hereinafter "GPA") were Attorneys James M. Maher and Anthony R. Camacho, respectively. Appearing on behalf of Respondent Office of the Public Auditor (hereinafter "OPA") and Emissions Technologies, Inc. (hereinafter "ETI") were Attorneys Robert G. P. Cruz and Kevin J. Fowler, respectively. After reading the briefs and upon hearing the arguments, the Court took the matter under advisement. The Court now issues its Decision and Order.

FACTUAL HISTORY

Among others, ETI and TRC submitted proposals in response to GPA's October 17, 2006 Request for Proposal ("RFP") to operate and maintain emissions systems. On January 22, 2007, GPA informed ETI that TRC had the best offer. ETI protested this via a January 30, 2007 letter, citing ETI's history of experience with GPA in performing the precise work called for by the RFP. The resulting January 31st, 2007 GPA stay of procurement ended when GPA sent its March 28, 2007 fax to all interested parties, informing them of its March 26, 2007 denial of ETI's protest in which it also informed ETI that it had a right to seek administrative or judicial review. ETI responded to GPA with an April 6, 2007 "Letter of Protest" in which it asked for administrative review, alleged bias toward ETI, and requested confirmation that TRC was licensed to practice business on Guam. On April 10, 2007, GPA stayed proceedings again, but lifted the stay on April 13, 2007 in a faxed denial letter to ETI in which it explained how it

interpreted the April 6, 2007 letter as an appeal, which fell under the jurisdiction of the OPA rather than GPA. ETI then filed a formal appeal with OPA on April 20, 2007 based on TRC's alleged lack of business license, and submitted an Amended Notice of Appeal on May 1, 2007. GPA's May 4, 2007 Agency Report stated that the RFP did not require offerors to obtain a business license prior to submitting a proposal. A July 6, 2007 hearing was held before the Public Auditor Hearing Officer Therese M. Terlaje, at which point TRC's application for a Guam Business License was pending with the Department of Revenue and Taxation. Public Auditor Doris Flores Brooks, in her August 1, 2007 Decision, found jurisdiction over the matter and ordered that TRC be eliminated from consideration for procurement based upon its lack of a Guam business license.

TRC then filed the instant Petition for Writ of Mandate on August 22, 2007. On August 23, 2007, the court signed an Alternative Writ, ordering OPA to show cause as to why it should not vacate its decision and reinstate TRC into the consideration process. OPA complied with this order by submitting its Show of Cause for Noncompliance on October 10, 2007. GPA Joined in TRC's Petition for Writ of Mandate on October 11, 2007. On October 25, 2007, ETI filed both an Answer and a Response to the Petition. TRC Supplemented the Certification of Record, and Replied to the OPA's Show of Cause and to ETI's Opposition on December 11, 2007. The Court now addresses the Petition for Writ of Mandate.

DISCUSSION

The issues before this Court are Petitioner's standing to file a writ of mandate, ETI's timeliness in filing an appeal before the Office of the Public Auditor, and the exact point at which a bidder is 'considered' by GPA for an award. Petitioner TRC has brought the instant Petition for Writ of Mandate in an attempt to challenge the OPA's recent exercise of its jurisdiction and thus reinstate itself into the GPA consideration process. Respondent asks that the Court deny the proposed writ. Both parties ask for costs. While an administrative agency has discretion in how it proceeds, this discretion is not unfettered. *Skelly v. State Personnel Bd.*, 15 Cal. App. 3d 194 (1975). A writ may issue by any court to any inferior tribunal to compel the

performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded by such inferior tribunal. 7 G.C.A. § 31202. A writ may issue when, "there is not a plain, speedy, adequate remedy in the course of law." 7 G.C.A. § 31203. Mandamus lies to compel an agency to comply with its rules. *Stationary Eng'rs Local 39 v. County of Sacramento*, 59 Cal. App. 4th 1177 (Cal. App. 3 Dist. 1977); *California Correctional Peace Officers Ass'n v. State Personnel Bd.*, 899 P.2d 79 (Cal. 1995); *Hardin Oldsmobile v. New Motor Vehicle Bd.*, 60 Cal. Rptr. 2d 583 (Cal. App. 3 Dist. 1997).

I. Standing

Standing for filing a writ of mandate requires that the petitioner be a beneficially interested party. 7 G.C.A. § 34203; *City of Garden Grove v. Superior Court,* 157 Cal.App.4th 355, 366 (Cal.App. 4 Dist. 2007). This does not mean that petitioner must be a party to the litigation, but it does mean that petitioner must obtain some benefit from the issuance of the writ, or suffer some detriment from its denial; he must have a special interest to be served or a particular right to be protected over and above the interest held in common with the public at large. *Cruz v. Guam Election Commission,* 2001 Guam 26, ¶ 24; *Monterey Club v. Superior Court,* 119 P.2d 349 (D. Cal. 1941); *Emid v. County of Santa Barbara,* 107 Cal.Rptr.2d 6, 10 (Cal. Ct. App. 2001). The interest that the petitioner seeks to advance must also be within the zone of interests to be protected or regulated by the legal duty asserted. *Waste Management v. County of Alameda,* 94 Cal.Rptr.2d 740, 747 (Cal.App.3 Dist. 2000). Economic injuries alone are often recognized as sufficient to provide for judicial review. *Sierra Club v. Morton,* 92 S.Ct. 1361, 1365 (1972).

TRC asserts its standing to file the instant writ by calling notice to the irreparable harm the OPA's decision has caused by precluding TRC's proposal from consideration. TRC reasons that ordering OPA to vacate its Findings and Recommendations and reinstating TRC for

consideration would restore a professional benefit and reputation not shared by the public at large. So far, Petitioner's logic has no defect.

ETI states that, although under 5 G.C.A. § 5707, a person "may appeal from a *decision* by the Public Auditor to the Superior Court of Guam," TRC only appealed from the OPA Hearing Officer's *Findings and Recommendations*, rather than from the actual Aug. 1, 2007 OPA *Decision*, and thus there is nothing to review. ETI adds that TRC has no standing to appeal because TRC did not intervene when the matter was before the OPA, nor did TRC appear before the OPA in this matter. ETI's basis for this argument is in *Katenkamp v. Dep't of Finance*, 9 Cal.App.2d 343 (Cal. Ct. App. 1935), which states that one must be a party in order to appeal, and 5 G.C.A. §§ 9240 and 9104, which respectively state that "judicial review may be had of any agency decision by any party affected adversely by it", and "a party includes the agency, the respondent, and any person other than an officer or an employee of the agency in his official capacity who has been allowed to appear in the proceeding".

TRC counter-argues that both of these arguments by ETI lack merit because they are founded on the premise that TRC *appealed*- which is entirely different from what TRC is actually doing, which is filing for a writ of mandate- a separate civil action falling under separate procedural rules, including G.R.C.P. 15. TRC adds that since the Hearing Officer's Findings mirror and are incorporated into the Decision, there would be no surprise by granting a petition to amend this blunder in word choice.

There is little need to belabor the issue of standing because GPA, a party pursuant to Sections 9240 and 9104, who did appear before the OPA on this matter, joined in the instant petition for writ of mandate on October 11, 2007- thus curing any defect of standing because GPA would be treated as if it had originally brought the petition. *Bridget A. v. Superior Court*, 148 Cal.App.4th 285 (Cal. App. 2 Dist. 2007); *MC Asset Recovery, LLC v. Castex Energy, Inc.*, 2008 WL 2940602 (N.D. Tex. 2008). Nevertheless, to find a lack of standing for the reason proposed by ETI would prove inconsequential because such a noticeable lack of prejudice would support the freely-given leave to amend suggested by *Foman v. Davis*, 371 U.S. 178 (1962).

Moreover, TRC clearly appeals OPA's decision to assume jurisdiction, regardless of whether TRC states the actual word 'decision' in its Petition.

II. Timeliness

The jurisdiction of the Office of the Public Auditor is limited to "matter[s] properly submitted to her." 5 G.C.A. § 5703; 2 G.A.R. §12103. Title 5 of the Guam Code Annotated, Section 5425(e) states that an appeal of a protest denial must be filed with the Office of the Public Auditor within fifteen (15) days after receipt of the denial. TRC argues that OPA went beyond its jurisdiction because ETI's April 20, 2007 appeal from GPA's March 26, 2007 denial of the first protest was untimely because in order to comply with § 5425(e), ETI would have had to file the protest by April 11[1], 2007. ETI combats this timeliness argument in two ways: first by supporting the OPA's interpretation of the April 6th letter as an appeal, and second by arguing that a tolling occurred.

ETI received an April 12, 2007 letter from OPA acknowledging that OPA had received the April 6, 2007 letter from ETI to GPA, and that OPA believed that the letter was intended as a procurement appeal, but wanted confirmation of ETI's desires. The OPA further advised that "ETI must submit to OPA a formal appeal in the format specified by the Rules of Procedure for Procurement Appeals within fifteen (15) days...." ETI then wrote to OPA on April 19, 2007, explaining the basis of the appeal, and formally filed its appeal on Apr. 20, 2007.

Despite the appearance of ETI's April 19, 2007 letter as a confirmation of ETI's April 6th intent to appeal, the OPA could not have properly interpreted this April 6th letter as an appeal because the OPA articulated exactly how to confirm ETI's desires: by "submit[ting] to OPA a formal appeal in the format specified by the Rules of Procedure for Procurement Appeals within fifteen (15) days." This April 19, 2007 letter falls short of such description. In its April 12, 2007 letter, the OPA did not state that it would accept the April 19, 2007 letter, or any similar

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[1] April 11, 2007: 15 days after Mar. 26, 2007 is actually Apr. 10, 2007. So ETI would have had to file the appeal by the end of Apr. 10, 2007.

notification, in lieu of a proper and formal appeal, nor did OPA or ETI bring to light any statutory or case law authority warranting such interpretation of a letter. In the absence of contrary authority, 5 G.C.A. § 5425(e) is interpreted strictly.

ETI maintains that its letter to GPA on April 6, 2007, stating that "this will now serve as ETI's official request for an administrative review of this award," was a request for reconsideration, rather than a second protest. TRC argues that since the letter did not meet the requirements of 2 G.A.R. § 9101(h)(1), and was labeled "Letter of Protest", it was *not* a request for reconsideration and thus no tolling occurred. Section 9101(h)(1) states that "[t]he request for reconsideration shall contain a detailed statement of factual and legal grounds upon which reversal or modification is deemed warranted." Akin to the standing analysis above in which TRC's failure to use the word "Decision" was non-dispositive, ETI's failure to use the word "Reconsideration" is equally non-dispositive in light of its adequate outline of the basis for modification. On April 10, 2007, GPA wrote to ETI stating that "the department has executed a stay of procurement on the above subject Request for Proposal as a result of your company's letter dated April 06, 2007, until such time the concerns are resolved. We are currently reviewing the Request for Proposals submitted and will formally advise the outcome." ETI argues that GPA's making such a statement, and then claiming, one day after ETI had missed the 15-day appeal deadline, that it had no jurisdiction to consider the April 6, 2007 letter's issues, constituted sufficient trickery to warrant a tolling of the 15-day limitations period.

Limitations periods can be tolled on an equitable basis, especially if the government has engaged in trickery. *Young v. United States*, 535 U.S. 43, 50 (U.S. 2002). This Court finds no trickery, however, in GPA's actions. GPA did advise of the outcome as it stated it would. The stay which resulted from ETI's April 6, 2007 request for reconsideration was lifted as evidenced by GPA's April 13, 2007 protest denial letter sent to all interested parties- putting ETI on notice of its renewed duty to abide by 5 G.C.A. 5425(e). At that point, ETI did not need a reminder of § 5425(e) still being in effect because ETI had received, a day earlier, a letter from OPA containing similar cautionary language regarding the impending § 5425(e) deadline. Further, this Court agrees with TRC that a tolling of the limitations period would be futile because the

nine (9) days before the stay (March 28 – April 6) would still be counted toward the fifteen (15), and so when the nine (9) are combined with the six (6) remaining post-stay days (April 13 – April 19), that would put the new filing deadline at April 19, 2007. Thus, even with a tolling, ETI's April 20, 2007 filing of appeal with the OPA was untimely.

Respondent OPA supports ETI by reminding the Court that the OPA has the power to review and determine *de novo* any matter properly-submitted to her or him, and that absent a finding of being arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law, any decision of the Public Auditor regarding the interpretation of the procurement law or regulations shall be entitled to great weight and the benefit of reasonable doubt. 2 G.A.R. § 12103. In this, OPA fails to assist ETI because the operative term is "properly-submitted", and by being untimely, as explained above, ETI's appeal was not 'properly-submitted'. For the same reason, ETI's filing was 'contrary to law' and thus falls below the § 5704 standard.

III. Illegality

ETI contends that the Court may not grant the writ because mandamus cannot compel an illegal act or an act contrary to pubic policy. *Cook v. Noble,* 181 Cal. 720 (Cal. 1919). In support of this contention, ETI cites 5 G.C.A. § 5008 (Procurements must be made from companies licensed to conduct business on Guam), and pages 24, 31, and 35 of the RFP ("Business License and additional requirements must be submitted at the time of RFP Closing"; "It is the policy of the Guam Power Authority to award proposals to offerors duly authorized and licensed to conduct business on Guam"; "[GPA will] not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law").

GPA counteracts by clarifying that there are three (3) steps to the procurement process: 1. Proposal (at which point the bidder is *not* required to have a Guam Business License), 2. Price Solicitation, Negotiation, and Agreement, and 3. Award of the Order. TRC adds that despite its being the most qualified at the time of ETI's protest, it had not been 'considered' because the intermediate step of price solicitation, negotiation, and agreement had yet to be completed.

Under the aforementioned 'arbitrary and capricious' standard, a procurement decision can be set aside if it lacked rational basis or if the agency's decision-making involved a violation of regulation or procedure. *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1332 (Fed. Cir. 2001); *The Ravens Group, Inc. v. United States,* 79 Fed. Cl. 100, 112 (Fed. Cl. 2007). However, *de minimus* errors in the procurement process do not justify relief. *Grumman Data Sys. Corp. v. Dalton,* 88 F.3d 990, 1000 (Fed. Cir. 1996). Rather, the protesting bidder must prove that a significant error marred the procurement in question. *L-3 Global Communications Solutions, Inc. v. United States*, 2008 WL 3852149 (Fed. Cl. 2008). "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989).

Courts have been reluctant to micro manage the minutiae of a procurement to ferret out technical deficiencies. *Pacific Helicopter Tours, Inc. v. United States,* 2007 WL 5171114 (Fed. Cl. 2007). When an agency is making a procurement decision, particularly based on a 'best value' approach, rather than a 'best price' approach, courts will typically not second-guess the discretionary judgments made in balancing these factors. *Geo-Seis Helicoptersw, Inc. v. United States,* 77 Fed. Cl. 633 (Fed. Cl. 2007); *E.W. Bliss Co. v. United States,* 77 F.3d 445, 449 (Fed. Cir. 1996) ("The protestor's arguments deal with the minutiae of the procurement process in such matters as technical ratings and the timing of various steps in the procurement, which involve discretionary determinations of procurement officials that a court will not second guess").

GPA's consideration of a bidder for the award would take place towards the end of Step 2, either after 'negotiation', or after 'agreement' of the price. The record reflects that GPA had received TRC's best and final price offer of $169,850.00 on April 18, 2007. However, receipt of a price offer does not indicate that an agreement has been reached, nor that negotiations on such offer have even begun. This Court finds convincing the evidence from the Transcript of the July 6, 2007 protest hearing regarding the procurement process and the lack of immediate need for a

bidder to be licensed. Putting Petitioner back in the situation where the intermediate step of negotiation and price agreement can be accomplished does not violate the RFP and thus, is not illegal or against public policy. GPA employed a multi-factor best value analysis, as was its common practice, in favoring Petitioner TRC after TRC had gotten past Step 1 in the procurement process. GPA provided a coherent and rational explanation of the procurement process regarding the timing of steps in the procurement. In the face of such explanation, any further inquiry into when exactly a bidder is 'considered' for the award qualifies as minutiae which this Court opts not to second-guess.

CONCLUSION

Based on the above, the Court finds that the Office of the Public Auditor lacked jurisdiction to render its Aug. 1, 2007 Decision. Therefore, TRC's Petition for Writ of Mandate is hereby GRANTED.

IT IS SO ORDERED this 21st day of November, 2008.

Alberto C. Lamorena III
Presiding Judge
Superior Court of Guam

Matter of: K-Mar Industries, Inc.,
B- 400,487, 2009 CPD P 159, 2008
WL 6665282, *2 (Comp.Gen. Nov 03, 2008)

B- 400487, 2009 CPD P 159, 2008 WL 6665282 (Comp.Gen.)

COMPTROLLER GENERAL

***1 Matter of:**
K–Mar Industries, Inc.

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.

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.

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.

***2** 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 para. 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 para. 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 para. 27 at 5; *Roy F. Weston, Inc.,* B–274945, *et al.,* Jan 15, 1997, 97–1 CPD para. 92 at 8–9.

*3 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.*

*4 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.

*5 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." [FN1] 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. sections 353(a); 40 U.S.C. sect. 276a (2000); *SAGE Sys. Techs.,*

LLC, B–310155, Nov. 29, 2007, 2007 CPD para. 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 para. 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 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.

***6** 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. sect. 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 para. 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. [FN2] *Accumark, Inc.,* B–310814, Feb. 13, 2008, 2008 CPD para. 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 contrac-

tor, 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 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

FN1. 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. sect. 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 para. 25 at 11 n.9.

FN2. 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. sect. 21.2(a)(1).

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History

Direct History

=> 1 **Matter of: K-Mar Industries, Inc.,** 2008 WL 6665282, B- 400,487, 2009 CPD P 159 (Comp.Gen. Nov 03, 2008)