



GAO

Accountability • Integrity • Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: United Coatings

File: B-291978.2

Date: July 7, 2003

James A. Kelley, Esq., and Lori Ann Lange, Esq., Bastianelli, Brown & Kelley, for the protester.

James. L. Weiner, Esq., and Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably evaluated the protester's and awardee's quotes under a solicitation for tank preservation services is denied where the record shows that the agency's evaluation of the quotes was reasonable and consistent with the stated evaluation criteria, and the protester's contentions represent only its disagreement with the agency's evaluation.
 2. Protest that the agency improperly failed to downgrade awardee's quote because of the intended use of several non-United States citizens, who would require a security waiver to perform work, is denied where the agency reasonably assessed the attendant risk.
 3. Protest that agency's failure to take into account, as part of the price evaluation of revised quotes, additional payments made to the awardee under an interim purchase order is denied where the record fails to show that the protester was competitively prejudiced.
-

DECISION

United Coatings (UCC) protests the issuance of a purchase order to W-Mann Services (USA) LLC, under request for quotations (RFQ) No. 1435-04-03-PR-71323, issued by the Minerals Management Service (MMS), Department of the Interior, for preservation work of various fuel oil service tanks aboard the Navy aircraft carrier,

USS John F. Kennedy.¹ UCC argues that the agency's evaluation of vendors' quotes was improper.

We deny the protest.

The RFQ,² initially issued on December 27, 2002, required the successful vendor by means of ultra high pressure (UHP) water jetting to remove the existing coating, and apply a new solid edge retentive coating, to an estimated 54,822 square feet of fuel oil service tanks. The tank preservation work was to be performed while the USS John F. Kennedy was pier-side, but still waterborne, at the Naval Air Station, Mayport, Florida. The original solicitation also informed vendors that work must commence no later than February 3, 2003, in order to ensure completion by July 31.

The RFQ contemplated the issuance of a fixed price purchase order. Tr. at 20. However, the original solicitation also stated that "the contractor shall be reimbursed for actual allowable, allocable, and reasonable travel costs incurred during performance under this [contract] in accordance with the Federal Travel Regulations currently in effect[] on the date of travel. All travel under this contract shall bear no fee, and must be pre-approved." RFQ at 16.

The solicitation identified the following evaluation factors and subfactors:

A. Technical Approach	
	1. Understanding the work.
	2. Specific methods and techniques for completing each discrete task.
	3. Anticipation of potential problem areas, and creativity and feasibility of solutions to problems.
	4. Logistics, schedule, and any other issues the government should be aware of.
	5. Ability to meet performance and other scheduled dates.
B. Past Performance	
	1. Organization's history of successful completion of projects.

¹ MMS, by means of its GovWorks Federal Acquisition Center, provides contracting services in support of other federal agencies on a fee-for-service basis. See Government Management Reform Act of 1994, Pub. L. No. 103-356, §403, 108 Stat. 3410, 3413-14 (1994). Here, MMS provided contracting services to the Supervisor of Shipbuilding Conversion & Repair (SUPSHIP), Department of the Navy.

² At a hearing that our Office conducted in this protest, the contracting officer testified that the solicitation was in fact a request for quotations, governed by Federal Acquisition Regulation (FAR) Part 13, notwithstanding that both the solicitation itself and agency report refer to it as a "request for proposals." Hearing Transcript (Tr.) at 20; see also RFQ at 1, Agency Report (AR), May 2, 2003, at 1.

	2. Quality of cooperation (with each other) of key individuals within the organization and quality of cooperation between the organization, its subcontractors, and clients.
	3. Organization's specific proof of past performance to include evidence of the ability to perform UHP water jetting.
	4. Organization's ability to apply high solids edge retentive coating while the ship is waterborne.
	5. Organization's ability to remove and install tank coatings in a period as short as 14 days.
	6. Degree of comparability of past projects to the current project, including number of projects, complexity, and dollar amount.
C. Key Personnel Qualifications	
	1. Currency, quality, and depth of experience of individual personnel in working on similar projects.
	2. Quality and depth of education; experience on other projects which may not be similar to this specific [RFQ], but may be relevant; and publication history.
	3. At least one [National Association of Corrosion Engineers] International Certified Coating Inspector or [Naval Sea Systems Command] NAVSEA equivalent on staff.
	4. Appropriate mix and balance of education and training of team members.
D. Organizational Experience	
	1. Degree of comparability of past projects to the current project, including number of projects, complexity, and dollar amounts.
	2. Appropriate mix and balance of education and training of team members.
E. Price	

The solicitation established that the non-price factors were of equal importance and that, within each factor, the subfactors were of equal importance. The RFQ also stated that price was less important than nonprice factors. Award of the purchase order was to be made, without discussions, to the responsible vendor whose quote conformed to the solicitation and provided the overall "best value" to the agency, based on consideration of all factors. RFQ at 4, 19.

Three vendors, including W-Mann and UCC, submitted quotes by the January 6 closing date.³ A technical evaluation panel (TEP) consisting of three SUPSHIP

³ The quotes submitted by W-Mann and the third vendor each priced the tank preservation work on a square-footage basis, thereby enabling a determination of the vendor's total price. UCC's quote, by contrast, included various labor and material
(continued...)

employees evaluated vendors' technical quotes using a numeric rating system. On January 15, following both the technical and price evaluation of quotes, MSS determined that W-Mann's quote represented the best overall value. W-Mann began performance of the subsequently issued purchase order on February 3. On February 13, following a debriefing by the agency, UCC filed an earlier protest with our Office.⁴ MMS directed W-Mann to stop performance on February 19.

On March 11, the agency notified our Office of its intent to amend the solicitation and reopen negotiations with vendors while staying performance of the issued purchase order to W-Mann. We subsequently dismissed UCC's initial protest as academic.

On March 7 and again on March 10, the agency revised its solicitation. The amended RFQ both increased the estimated quantity from 54,822 to 66,400 square feet, and accelerated the required completion date from July 31 to June 15. Relevant to this protest the solicitation also contained the following "security note":

No employee or representative of the Contractor shall be admitted to any facility or ship of the U.S. Navy unless satisfactory proof of citizenship of the United States has been furnished. (Note--Waivers will be considered by the US Navy for Contractor personnel possessing unique skills or knowledge. Case by case determination will be made based on Contractor's request and adequate justification).

RFQ amend. 2, at 12. The amended solicitation also expressly required vendors to submit prices for tank preservation work on a square footage basis, and created a separate line item for the pricing of mobilization (e.g., travel, per diem, set-up, and staging) expenses.

Both W-Mann and UCC submitted revised quotes to the agency by the March 11 closing date. W-Mann's total revised price was \$1,657,480, to include [DELETED] for mobilization; UCC's total revised price was \$2,297,822, to include [DELETED] for mobilization.

The TEP, consisting of one new and two former evaluators, reviewed the revised technical quotes of W-Mann and UCC, now using an adjectival rating system:

(...continued)

cost information, as specified by the RFQ, but did not provide a unit price for the tank preservation work, thereby precluding a determination of its total price.

⁴ UCC protested, among other things, that MMS had failed to treat vendors equally and had evaluated quotations improperly as the solicitation had never requested or required pricing on a square footage basis.

outstanding, highly acceptable, acceptable, marginal, unacceptable, technically unacceptable. The TEP also developed quantitative and qualitative criteria for each evaluation subfactor in support of the aforementioned adjectival ratings.⁵ AR, Tab 11, Evaluation Standards. In its evaluation of revised quotes the TEP neither considered nor referred to the scores rendered under the initial evaluation of quotes. Tr. at 184-85, 206-07. The TEP's ratings for the two vendors' revised quotes were as follows:

Factor	W-Mann	UCC
Technical Approach	Highly Acceptable	Acceptable
Past Performance	Acceptable	Marginal
Key Personnel Qualifications	Highly Acceptable	Highly Acceptable
Organizational Experience	Highly Acceptable	Acceptable

AR, Tab 13, TEP Evaluation Results for UCC; Tab 14, TEP Evaluation Results for W-Mann.

The contracting officer subsequently adopted the TEP's technical ratings of the quotes. Tr. at 35; AR, Tab 16, Source Selection Decision. On March 17, having found the quote of W-Mann to be both lower-priced and higher technically rated than that of UCC, the contracting officer determined that W-Mann's quote represented the overall best value to the government. AR, Tab 16, Source Selection Decision. This protest followed.⁶

In its protest UCC raises numerous issues that can be grouped into two general categories. First, UCC contends that the agency's evaluation of W-Mann's quote (e.g., technical evaluation, price evaluation) was improper in various ways. Second, UCC alleges that the agency's evaluation of UCC's quote was improper. Although we do not here specifically address all of UCC's complaints about the evaluation of quotes, we have fully considered all of them and find that they afford no basis to question the agency's selection decision.

⁵ The TEP rated proposals by having each member separately review and assign an adjectival rating to each technical subfactor and factor. The TEP then developed consensus ratings based upon discussions among the members of the strengths and weaknesses of each quote.

⁶ The agency subsequently notified our Office of its determination and findings, pursuant to FAR § 33.104(d), to continue performance of the issued purchase order notwithstanding UCC's protest here. W-Mann completed the work on June 13.

Evaluation of W-Mann's Quote

UCC first argues that the agency's evaluation of W-Mann's quote, under all five evaluation factors, was improper. Specifically, UCC argues that the TEP's evaluation of W-Mann's quote as to the technical approach, past performance, key personnel qualifications, and organizational experience factors was both unreasonable and unsupported. UCC also contends that W-Mann's quote fails to conform to certain material requirements of the solicitation and should have been found unacceptable. Lastly, the protester asserts that the agency's price evaluation of W-Mann's quote was improper and provided the awardee with an unfair competitive advantage.

In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals, but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3; Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 14. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. As demonstrated below, our review of the record, including the quotations themselves, the parties' pleadings, and testimony taken during the hearing in this matter, provides us no basis to find the agency's evaluation here unreasonable or otherwise objectionable.

For example, UCC challenges the TEP's evaluation of W-Mann's quote, under the technical approach, past performance, and organizational experience factors, arguing that the agency improperly attributed the experience and past performance of a different company to W-Mann. The protester contends that the ratings that W-Mann received under these evaluation factors was in large part the result of the tank preservation work recently performed on the Navy aircraft carrier USS George Washington.⁷ UCC alleges that the work performed on the USS George Washington in fact was done by Hempel Paint Company and its subcontractor, W-Mann Services, ApS (W-Mann ApS), a foreign firm that is not the concern that submitted the quote here. Similarly, the other two past performance references provided in W-Mann's quote were also for work performed by W-Mann ApS, at a point in time that predated the formation of W-Mann as a business entity.

The agency does not dispute that the tank preservation work performed on the USS George Washington as well as the awardee's other two past performance references was done by Hempel and/or W-Mann ApS. Instead, the agency points to the fact that the three key individuals who performed the work on the USS George Washington as

⁷ UCC does not challenge the agency's judgment regarding the quality of the work performed on the USS George Washington, which the Navy found to be outstanding.

employees of Hempel and W-Mann ApS were now key employees of the vendor here, W-Mann.⁸ AR, May 2, 2003, at 4-5. The TEP was aware of this fact when conducting its evaluation, and acknowledges that it evaluated the newly-created company on the basis of the experience of its key individual members. Tr. at 113-19.

FAR § 15.305(a)(2)(iii) directs agencies to take into account past performance information regarding predecessor companies, key personnel, and major subcontractors when the information is relevant to an acquisition. Thus, an agency properly can consider the relevant experience and past performance history of key individuals and predecessor companies in evaluating the past performance of a newly-created company, since that experience may be useful in predicting success in future contract performance. See Interstate Gen. Gov't Contractors, Inc., B-290137.2, June 21, 2002, 2002 CPD ¶ 105 at 5; SDS Int'l, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167 at 4. In this regard, we believe the agency here reasonably concluded that the experience of the aforementioned key individuals, gained while employed by other firms, did adequately demonstrate W-Mann's capability to function as a corporate entity and to successfully perform the current project.

UCC also alleges that the TEP improperly evaluated the interim work performed by W-Mann on the USS John F. Kennedy, pursuant to the initially issued purchase order, even though only a small amount of work had been performed prior to the agency's issuance of a stop-work order.⁹ The protester contends that the TEP unreasonably treated the limited work performed by W-Mann on the USS John F. Kennedy as equivalent to completed projects, and improperly gave W-Mann credit for this partial work on past performance subfactors 3-6.¹⁰ UCC contends that consideration of the work performed by W-Mann under the interim purchase order wrongfully resulted in an improper evaluation rating.

While the record is not entirely clear on this point, we think that, reasonably interpreted, the record shows that the past performance ratings for W-Mann were

⁸ The individuals in question were proposed by W-Mann to be the director, project manager, and general foreman for the work performed on the USS John F. Kennedy. AR, Tab 8B, W-Mann's Revised Quote, at 7-8.

⁹ The revised solicitation represented that W-Mann had removed approximately 25 percent of the coating in one tank, and 45 percent of the coating in a second tank. RFQ amend. 2, at 2. It is unclear whether W-Mann had removed 100 percent of the old coatings in any areas of the two partially-worked tanks; it is certain that W-Mann had yet to apply any new coatings or complete any tanks. Tr. at 169-73, 188-89.

¹⁰ As to past performance, the TEP rated W-Mann's quote as highly acceptable as to subfactors 3, 5, and 6, as acceptable as to subfactors 1, 2, and 4, and as acceptable overall. AR, Tab 14, TEP Evaluation Results for W-Mann, at 3-4.

not in fact based on consideration of the awardee's performance on the USS John F. Kennedy pursuant to the initially issued purchase order. We base our conclusion on our review of the TEP's consensus evaluation report and reference checks gathered by the agency regarding the awardee. Thus, for example, under subfactor 5, the TEP consensus evaluation gives the following rationale for its rating of the awardee as highly acceptable: "For 2 referenced projects, W-Mann accomplished three tanks in 23 days and 67,000 square feet in 45 days." AR, Tab 14, TEP Evaluation Results for W-Mann, at 4. Although the consensus report does not identify the two ships by name, the reference checks the agency performed for W-Mann indicate that the two projects referred to in the consensus report are the USS George Washington (three tanks in 23 days) and another ship, the Anglo Eastern, involving equivalent work (63,700 square feet¹¹ in 45 days).¹² AR, Tab 12, TEP Reference Checks, at 2-3. We recognize that the TEP evaluator who testified at the hearing held by our Office stated that he considered the work performed on the USS John F. Kennedy as part of his individual evaluation of W-Mann's past performance. Tr. at 169-89, see also AR, Tab 23, Evaluation Worksheets of Mr. Korzun, at 8-11. The ratings assigned W-Mann reflect the findings of all the evaluators, however, and in our view the record shows that the TEP consensus evaluation and the ratings assigned W-Mann were based on consideration of projects listed in the reference checks, not on W-Mann's interim performance pursuant to the initially issued purchase order.

The protester also argues that the evaluation of W-Mann's quote was unreasonable with regard to the key personnel qualifications factor, because many of the key personnel listed in W-Mann's quote are not U.S. citizens and would have to obtain a waiver from the Navy in order to perform work on the USS John F. Kennedy. UCC contends that the TEP improperly assumed that the Navy would automatically grant the requisite waivers, and failed to take into account the additional risk inherent in W-Mann's quote when performing its evaluation. Protest at 8-9. We disagree.

The TEP was aware when evaluating W-Mann's quote that three of the awardee's key personnel were not U.S. citizens and would have to secure waivers in order to perform any work on the USS John F. Kennedy. Tr. at 103-05. Additionally, it is clear that the granting of waivers to non-U.S. citizens was an action that NAVSEA, and not the TEP members, controlled. Id. at 109. The TEP knew, however, that the

¹¹ The consensus evaluation apparently erred in writing the numbers in the square footage and recorded it as 67,000 square feet.

¹² Likewise, under subfactor 4, the TEP consensus evaluation determined that W-Mann had one equivalent job demonstrating the ability to apply high solids edge retentive coatings while the ship is waterborne, a finding supported by W-Mann's reference to the work on the USS George Washington, and rated the awardee here as acceptable. AR, Tab 12, TEP Reference Checks, at 2; Tab 14, TEP Evaluation Results for W-Mann, at 4.

W-Mann employees in question had previously secured waivers to perform similar tank preservation work on the USS George Washington, a nuclear-powered aircraft carrier. Id. at 105. By contrast, the tank preservation work here was to take place on the USS John F. Kennedy, an oil-burning carrier with significantly less stringent security requirements. Id. Thus, the fact that certain key employees would need waivers did not negatively affect the TEP's evaluation of W-Mann's quote. Id. at 109. Having considered and assessed the risk attendant to W-Mann's quote because of its non-U.S. citizen personnel, the TEP's evaluation of W-Mann's proposal in this regard was reasonable.

UCC also contends that W-Mann's quote failed to comply with various material requirements of the RFQ. Specifically, UCC alleges that W-Mann's quote took exception to the solicitation's revised completion date and that the awardee placed conditions on its pricing, whereas the solicitation required the submission of fixed prices. The protester argues that because W-Mann's quote failed to comply with material requirements of the RFQ, W-Mann should have been found ineligible for award.

A quote that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. See, e.g., Marshall-Putnam Soil and Water Conservation Dist., B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90 at 5; Techseco, Inc., B-284949, June 19, 2000, 2000 CPD ¶ 105 at 3; Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 10. Here, however, W-Mann's revised quote does not take exception to any of the RFQ requirements as alleged by the protester; on the contrary, W-Mann's quote expressly commits the firm to satisfy these requirements.

As set forth above, the amended solicitation accelerated the required completion date from July 31 to June 15, and required vendors to submit fixed prices for both the tank preservation work (on a square footage basis) and mobilization expenses. RFQ amend. 2, at 2-3. In its revised quote, W-Mann acknowledged and took no exception to the revised completion date; the vendor also submitted fixed prices for both the tank preservation work and mobilization line items. AR, Tab 8B, W-Mann's Revised Quote, at 10-12.

UCC argues that other portions of W-Mann's quote do in fact take exception to the project completion date. For example, UCC points to the language in the awardee's revised quote which states:

Note: We would like to add for your attention that you have stated and approved in the solicitation that the contractor can use 14 days per tank. If that is the case the Navy will only get 8 tanks completed during the period of performance.

* * * * *

W-Mann Services secured the project on the USS John F. Kennedy The project started on 13 February (original[ly] scheduled [for] 3rd February but the vessel delayed the start date due to valve isolation issues) We were ready to absorb the 10 days delay from the original start date through the creative use of resources and manpower. We are confident that we would have completed the 16 fuel oil tanks within 100 working days and fully understand the US Navy need to have this aircraft carrier ready for sea at the prescribed time.

AR, Tab 8B, W-Mann's Revised Quote, at 1, 5. Notwithstanding the protester's characterization of these comments as express exceptions to the solicitation's completion requirement, we think the comments, reasonably interpreted, constitute an observation by W-Mann regarding the schedule chosen by the Navy, not an exception to the schedule. Accordingly, we see no basis to question the reasonableness of the agency's acceptance of W-Mann's quote in this regard.¹³

UCC also challenges the agency's price evaluation of W-Mann's revised quote, specifically with regard to mobilization expenses, a line item that UCC priced at [DELETED] and that W-Mann priced at [DELETED]. The protester contends that W-Mann failed to include the full cost for mobilization in its revised price quote because the awardee was separately seeking to be paid for these costs under the initial purchase order issued to it by the agency.¹⁴ UCC argues that MMS, when evaluating vendors' revised price quotes, essentially provided W-Mann with an unfair competitive advantage by not taking into consideration those additional payments that would be made to the awardee for mobilization expenses under the initial purchase order.

It is a fundamental principle of government procurement that competition must be conducted on an equal basis, which includes treating all offerors equally and evaluating proposals on a common basis. See Systems Mgmt., Inc.; Qualimetrics, Inc., B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8; Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5. This general

¹³ Likewise, UCC's allegation that W-Mann had qualified its pricing (e.g., that it was based on the conditions found on the USS George Washington and not on the USS John F. Kennedy, and that the quote contained a fixed rate for any changes or delays incurred) and thus again failed to conform to a material term or condition of the RFQ, is also without merit.

¹⁴ As set forth above, while the original RFQ contemplated the issuance of a fixed price purchase order, it also contained language that the contractor's travel expenses would be treated as a cost-reimbursement item.

tenet is equally applicable to simplified acquisitions, and our Office will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57 at 6; Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 8-10. As applied here, a failure by the agency to consider any additional payments made by it to W-Mann for mobilization costs pursuant to the initial purchase order in the evaluation of revised price quotes could preclude an “apples-to-apples” comparison between the two vendors, working to the disadvantage of the protester.

The agency states that, pursuant to the initial purchase order issued by W-Mann, it has made contractual payments to W-Mann for tank preservation work performed, and extra-contractual payments (e.g., site access delays, stop-work order delays, change orders), the latter of which will result in the awardee receiving payments totaling more than its \$1,657,480 revised purchase order price. The agency argues, however, that it properly did not take these amounts into account in the evaluation of vendors’ revised price quotes. UCC contends that notwithstanding W-Mann’s characterization of its extra-contractual charges as delay claims, it is evident that the expenses in fact represent the awardee’s mobilization costs. We need not resolve this issue regarding whether the extra-contractual expenses invoiced by W-Mann under the initial purchase order represent the awardee’s mobilization costs, and the reasonableness of the agency’s decision not to take them into account in the evaluation of W-Mann’s revised price quote, however, because the record demonstrates that the protester could not have been prejudiced as a result of any alleged error in this regard.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award. Parmatic Filter Corp., B-285288.3, B-285288.4, Mar. 30, 2001, 2001 CPD ¶ 71 at 11; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, by the protester’s own calculations, the agency’s failure to take into account payments under the initial contract award and unrelated to work performed resulted in MMS understating W-Mann’s evaluated price by \$308,393. Protester’s Comments, May 19, 2003, at 2. By contrast, the total price difference between the quotes of UCC and W-Mann was in excess of \$640,000. Under these circumstances, we conclude that UCC could not have been prejudiced since, even assuming the agency’s evaluation of W-Mann’s price was unreasonable and should be adjusted as alleged by UCC, W-Mann’s higher-rated quote would remain lower priced.¹⁵

¹⁵ In its protest UCC also argued that given the large disparity between the prices offered by W-Mann and UCC for mobilization, the agency was required to conduct discussions or clarifications with UCC to allow it to compete on an equal basis. The
(continued...)

Evaluation of UCC's Quote

UCC goes to great length alleging that the evaluation of its quote with regard to the four technical factors was unreasonable.¹⁶ The protester essentially challenges every instance under four evaluation factors and seventeen subfactors where the TEP evaluated its quote as less than highly acceptable. We have examined each of the protester's arguments in detail and find no basis to question the agency's evaluation. Quite simply, the protester's allegations amount to mere disagreement with the agency's evaluation, which does not render it unreasonable. C. Lawrence Constr. Co., Inc., supra.

For example, UCC challenges the evaluation of its quote as to technical approach, where the protester was rated as acceptable under all subfactors and acceptable overall. For the first technical approach subfactor, understanding of the work, the TEP determined that, "UCC demonstrated [DELETED]. Rated acceptable." AR, Tab 13, TEP Evaluation Results for UCC, at 2. While UCC argues that its quote did [DELETED], and thereby should have received a rating of highly acceptable, we simply find no basis to object to the agency's evaluation.

UCC also argues that it should have been given the opportunity to address the negative past performance information that the agency obtained from one of its references. Specifically, one of UCC's references provided the TEP not only with favorable information about work performed on the specific project referred to in UCC's quote (the MV Lt. John P. Bobo), but also unfavorable information about a different project (the aircraft carrier USS Enterprise). UCC argues that had it been given the opportunity, it would have explained that the work performed on the USS Enterprise was done by UCC's parent company, Earl Industries, LLC, and an unrelated subcontractor, and not by UCC itself.

As noted above, MMS conducted this acquisition using simplified acquisition procedures. These procedures provide discretion to contracting officers to use one

(...continued)

agency addressed this allegation in its report, and the protester failed to respond in its comments; thus, we consider UCC to have abandoned this argument and will not consider it further. MFVega & Assocs., LLC, B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65 at 4.

¹⁶ Among other things, the protester contends that the TEP's evaluation ratings of UCC's revised quote were not the same as—and in many instances lower than—the TEP's earlier evaluation ratings, that the worksheets of the individual TEP evaluators often failed to provide any written rationale for various factor and subfactor ratings, and that the TEP's consensus ratings were different than the individual evaluators' ratings without explanation.

or more of the evaluation procedures in FAR parts 14 and 15, and do not require formal evaluation plans, the establishment of a competitive range, or the conduct of discussions. See FAR § 13.106-2(b). Again, our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. See Finlen Complex, Inc., supra.

FAR § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where, as here, an award will be made without conducting discussions, “offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror’s past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.” Pursuant to this provision, an agency has broad discretion to decide whether to communicate with a firm concerning its performance history. NMS Mgmt., Inc., B-286335, Nov. 24, 2000, 2000 CPD ¶ 197; A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5. We will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement. NMS Mgmt., Inc., supra.

With regard specifically to clarifications concerning adverse past performance information to which the vendor has not previously had an opportunity to respond, we think that for the exercise of discretion to be reasonable, the agency must give the offeror an opportunity to respond where there clearly is a reason to question the validity of the past performance information, for example, where there are obvious inconsistencies between a reference’s narrative comments and the actual ratings the reference gives the offeror. In the absence of such a clear basis to question the past performance information, we think that, short of acting in bad faith, the agency reasonably may decide not to ask for clarifications. Id.

Applying this standard here, we think the agency reasonably exercised its discretion in deciding not to communicate with UCC regarding the adverse past performance information reported by one of UCC’s references. First, there is nothing on the face of the adverse reference that would create concerns about its validity. Second, the TEP member who performed the reference checks testified at the hearing conducted by our Office that he had no reason to question the relationship between UCC and Earl, a view supported by language in UCC’s quote suggesting that they would work together on the project here.¹⁷ Tr. at 225. Given the permissive language of the relevant provision, FAR § 15.306(a)(2), the fact that UCC may wish to respond to the

¹⁷ Specifically, while UCC’s letterhead states that it is a division of Earl Industries, the cover letters accompanying both UCC’s original and revised quotes here state, “Earl Industries and United Coatings look forward to the possibility of working with the [agency] in completion of this project” AR, Tab 9A, UCC’s Initial Quote, at 1; Tab 9B, UCC’s Revised Quote, at 6.

adverse reference does not give rise to a requirement that the agency give the protester an opportunity to do so. NMS Mgmt., Inc., supra.

Lastly, UCC alleges that the agency was biased against it. UCC argues that the agency's bias is evidenced by, among other things, the fact that SUPSHIP solicited a quote from W-Mann before the RFQ was formally issued, that SUPSHIP did not include UCC on its source list of qualified marine industrial coating contractors, and that the TEP dramatically downscored UCC's revised technical quote in relation to the evaluation of the initial quote. Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since this Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. ACC Constr. Co., Inc., B-289167, Jan. 15, 2002, 2002 CPD ¶ 21 at 4. Here, UCC has not provided any proof to support this allegation.

The protest is denied.

Anthony H. Gamboa
General Counsel