

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

Decision

Matter of: Philadelphia Produce Market Wholesalers, LLC

File: B-298751.5

Date: May 1, 2007

Ellis M. Fleisher for the protester.

Daniel R. Weckstein, Esq., Vandeventer Black LLP, for Military Produce Group, LLC, an intervenor.

Elliot J. Clark, Jr., Esq., Defense Commissary Agency, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee has an organizational conflict of interest arising from performance of contracts for similar work is denied where there is no support in the record for allegation that the awardee participated in drafting the performance requirements for the current procurement.
 2. Protest of evaluation of proposals and award is denied where record shows evaluation and source selection were reasonable and consistent with the terms of the solicitation.
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DECISION

Philadelphia Produce Market Wholesalers, LLC protests the award of a contract to Military Produce Group, LLC (MPG) under request for proposals (RFP) No. HDEC02-06-R-0005, issued by the Defense Commissary Agency (DeCA) for fresh fruits and vegetables for resale at commissaries in its eastern region; Philadelphia protests the Area 3, Group 2 award. The protester contends that the agency should have excluded MPG from the competition based on an organizational conflict of interest; according to Philadelphia, MPG's performance of essentially the same work for the agency in another geographical region served as the basis for the current RFP's performance requirements. Philadelphia also contends that the past performance evaluations were unreasonable and generally challenges the reasonableness of the

agency's determination that MPG's higher-rated technical proposal and lower proposed cost savings offered the best value to the agency.¹

We deny the protest.

The RFP was issued as a small business set-aside on March 20, 2006 for the award of a requirements-type, indefinite-delivery contract (with a 2-year base period and two 12-month option periods) for each of several groups of commissaries. RFP at 28, 50. Award was to be made to the firm that submitted the proposal deemed to offer the best value to the agency considering technical capability, past performance, and price. Technical capability (including subfactors for experience, quality program, production capability/distribution plan, and additional support/promotion plan) was to be significantly more important than past performance; technical capability and past performance combined were to be significantly more important than price. *Id.* at 28. The evaluation of past performance was to assess the probability of successful performance of the work required under the solicitation. *Id.* The evaluation of price was to be based on the proposed minimum percentage of patron savings (reflecting commissary savings compared to pricing at comparable commercial operations). *Id.* amend. 5, at 7. Proposed prices for produce items were to be reviewed for reasonableness, realism, and to assess the offeror's understanding of the application of the proposed savings percentage. *Id.* at 15.

Twelve proposals were received under the RFP for Area 3, Group 2; all but one were included in the competitive range for discussions and revised proposals were received and evaluated. An initial award to Four Seasons Produce, Inc. was terminated by the agency due to a determination by the Small Business Administration that the firm was other than a small business. Upon reevaluation of the proposals for a new source selection, the agency determined that the MPG proposal's superior technical capability and higher-rated past performance represented the best value to the agency, despite its lower offered cost savings; consequently, an award was made to that firm. This protest followed.

As an initial matter, the protester contends that the agency should have excluded MPG from the competition due to an organizational conflict of interest arising from the awardee's performance of other contracts at other DeCA commissaries. As explained below, there is no support in the record for this allegation.

Contracting officers are required to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of

¹ The protester was not represented by counsel that could be admitted to a protective order and, therefore, did not have access to source selection sensitive and proprietary information. Accordingly, our discussion is necessarily general. Our conclusions, however, are based on our review of the entire record.

conflicting roles that might impair a contractor's objectivity. Federal Acquisition Regulation (FAR) §§ 9.504, 9.505; Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38. The situations in which organizational conflicts of interest arise can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. As relevant to the protester's claim in this case, a biased ground rules conflict of interest arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2.

Here, according to Philadelphia, MPG's performance of essentially the same work at other DeCA commissaries served as the basis for the current RFP's performance requirements and as a result gave rise to a conflict of interest on MPG's part. The agency asserts that the RFP's performance requirements were not based on the work previously performed by MPG or its affiliates, but rather were developed by DeCA procurement personnel based on extensive market research conducted by the agency, as well as consideration of the comments received from produce industry representatives.

Our review of the record confirms the agency's position that MPG did not assist in the development of the performance requirements here, and we see no other support in the record for the protester's allegation of a conflict of interest by the firm. While MPG has performed work at other DeCA commissaries, the existence of a prior or current contractual relationship between a contracting agency and a contractor does not create an unfair competitive advantage unless the alleged advantage was created by an improper preference or unfair action by the procuring agency. See Optimum Tech., Inc., B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7-8. In this regard, incumbent contractors with good performance records can offer real advantages to the government in terms of lessened performance risk; accordingly, proposal strengths flowing from a firm's prior experiences are proper considerations in selecting an awardee where, as here, past performance is an important evaluation factor. *Id.* In sum, since the record refutes Philadelphia's contention that MPG contributed to the development of the current work requirements, and there is no evidence of any other improper preference or unfair action by the agency, the protester's suggestion that excluding the awardee from the competition is warranted is baseless.

Philadelphia next challenges the reasonableness of the past performance evaluations, arguing only that it should have received a higher past performance rating for having been in the produce business substantially longer than MPG and its teaming partners. In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate proposals. Rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and

regulations. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11. A protester's mere disagreement with the evaluation is not sufficient to render it or the source selection unreasonable. Id.

In response to the protest, the agency provided a detailed report including a comprehensive evaluation record and source selection decision analyzing the benefits of the proposals. The record supports the reasonableness of the evaluation and award. Specifically, while Philadelphia's proposal was rated "very good" for past performance due to its teaming members' experience and customer service, the awardee's proposal was rated "exceptional," due mainly to its successful performance of essentially the same work as is required here at 22 other DeCA commissaries, along with several more favorable responses received from references for the firm and its teaming partners. On the other hand, while Philadelphia demonstrated that it has previously supplied produce to several DeCA commissaries, it did so without performing the full range of services required here, and thus clearly lacks the same degree of directly relevant experience as was evident in the MPG proposal. As noted above, an agency reasonably may regard an offeror's directly relevant experience performing essentially the same requirements as offering additional value to the agency. We find unpersuasive the protester's suggestion that its longer period of time in the produce business alone necessitates a higher past performance rating than for a newer firm with more directly relevant experience and highly favorable past performance references. Based on the record, we find reasonable the agency's ranking of the MPG proposal ahead of Philadelphia's proposal in terms of past performance.

With regard to the protester's challenge to the selection decision, our review of the full evaluation record confirms the reasonableness of the agency's determination that MPG's proposal offered the best value to the agency. Specifically, given the MPG proposal's higher rating of "exceptional" for technical capability, the RFP's most important evaluation factor, compared to the protester's proposal's rating of "very good" for the factor (reflecting the agency's finding that Philadelphia's proposal lacked detail regarding its proposed quality programs and procedures), as well as MPG's higher past performance rating, the record provides no basis to question the reasonableness of the agency's determination that the technical

superiority of the MPG proposal outweighed the lower cost savings it proposed.²

The protest is denied.

Gary L. Kepplinger
General Counsel

² Philadelphia, without elaboration or support of any kind, generally contends that MPG is not a responsible contractor and that the agency has not conducted the procurement in good faith. These unsupported and speculative contentions fail to state a valid basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.1(c) (4) and (f) (2006).