DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO 7 Jan 00

MEMORANDUM FOR ALL FORSCOM Directorates of Contracting

SUBJECT: Contracting Information Letter (CIL) 00-10, When Does The Three-Year Limit on Past Performance Begin?

1. The question to be addressed here is: When does the three-year limit on past performance information begin? In a multi-year contract, a contractor who gets off to a bad or rocky start could have it on his record for some time as the enclosed recent decision of the General Accounting Office (GAO) demonstrates.

a. The Federal Acquisition Regulation (FAR) puts a three year limit on the use of past performance information. FAR 42.1503(e) states, "past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance".

b. The Department of Agriculture issued a solicitation for mobile food services. One of the unsuccessful offerors, D. F. Zee's Fire Fighter Catering (DFZ), learned that in the evaluation of its offer, the government considered adverse past performance information on DFZ from the 1994 fire season. DFZ considered this to be contrary to the three-year limit specified in the FAR. The agency argued that because the contract ended in 1998, DFZ's performance under the contract could be considered for three years from that date, through the year 2001.

c. The General Accounting Office (GAO) agreed with the agency that the three-year period ran from the end of contract performance. The GAO looked at the regulatory history of the FAR provision and noted that it was lengthened from simply three

years to three years after completion of contract performance on the belief that the retention period should exceed the length of the contract. The only way for that to happen would be to start the clock when a contract ends. Concluding that the agency properly considered the past performance information on DFZ, GAO denied the protest.

2. For additional information, please contact Irene Hamm hammi@forscom.army.mil or 404/464-5632.

Encl
as

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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: D.F. Zee's Fire Fighter Catering

File: B-280767.4

Date: September 10, 1999

John Lukjanowicz, Esq., Oles Morrison Rinker & Baker, for the protester.
Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.
John L. Formica, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably evaluated the protester's final revised offer (FRO) under certain technical evaluation factors is denied where the record shows that the evaluation was reasonable; the fact that the protester's FRO received a slightly lower technical rating than the protester's previous offer, even though the protester's FRO and previous offer were substantially the same, does not establish that the FRO evaluation was unreasonable.

2. Agency complied with Federal Acquisition Regulation § 42.1503(e), which provides that "past performance information shall not be retained to provide source selection information for longer than 3 years after completion of contract performance," even though it considered all of the protester's 5-year past performance history under the predecessor contract, because the past performance evaluation took place within 3 years of completion of that contract's performance.

DECISION

D.F. Zee's Fire Fighter Catering (DFZ) protests the awards of contracts to Z-Best Company and Port-A-Pit Catering under request for proposals (RFP) No. 49-98-10, issued by the Forest Service, Department of Agriculture, for mobile food services. The protester argues that the agency's evaluation of proposals and selection of the awardees' higher-priced proposals for the awards were unreasonable.

We deny the protest.

The RFP, issued on March 11, 1998, provided for award of fixed-price, indefinite-delivery, indefinite-quantity, requirements contracts for a 1-year base period with four 1-year options. RFP §§ B, at 2, L.5, at 138. The successful contractors under the

RFP are required to provide hot and cold meals and supplemental items during wildland fires and other activities at the locations and periods specified in each contract line item (CLIN). RFP § C-1.1, at 12. For example, CLINs 16 and 17 (the CLINs that are the subjects of this protest) required that the contractor have the necessary equipment based within 20 miles of Bend, Oregon, from June 15 through September 30, and July 1 through September 30, respectively, and be available to provide the required services during these periods should the need arise. RFP § B, at 4. Each offeror could offer to perform the services at any location or multiple locations, so long as the contractor remained available at the required times at the locations offered (i.e., the availability dates at two locations did not overlap).

The RFP stated that awards would be made to the offerors submitting the proposals determined to be most advantageous to the government, and listed the following evaluation factors in descending order of importance: (a) Past Performance, (b) Equipment, (c) Ability to Understand and Perform the Work, and (d) Experience.[1] RFP § M.4, at 151. The RFP added that these "non-price factors" as a whole would be considered more significant than price in determining which proposals represented the best overall value. Id.

The RFP included detailed instructions for the preparation of proposals, and requested that the offerors' technical proposals consist of two parts. Part A was to address the equipment and ability to understand and perform the work evaluation factors, and part B was to address the past performance and experience factors. RFP § L.9, at 139-41. The RFP specified that the equipment offered would first be evaluated against the minimum requirements set forth in the RFP to determine technical acceptability, and if the equipment were determined acceptable, it would then "be evaluated based upon the Mobile Food Service Unit's flexibility for efficient feeding." Id. at 140. In this regard, the RFP required that offerors submit drawings of the Mobile Food Service Unit offered "indicating equipment location, traffic flow, layout, size of unit, etc." Id.

The agency received proposals from 21 offerors by the RFP's April 24, 1998, closing date. Agency Report, Tab R8, Prenegotiation Memorandum, at 2. The proposals were forwarded to a technical evaluation team (TET) for review. Sixteen proposals were included in the initial competitive range. The agency scheduled and conducted inspections of each offeror's proposed equipment, during which discussions were also held. Id. at 3. The agency found the equipment proposed by one offeror to be technically unacceptable. The remaining 15 proposals were further evaluated by the agency. One offeror subsequently withdrew from the competition, and the agency excluded three more proposals from the competitive range. Id. at 6; Agency Memorandum of Law at 3.

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[1]The ability to understand and perform the work evaluation factor included the following subfactors: organization, personnel, and capacity.

The agency requested and received best and final offers (BAFO) from the offerors whose proposals remained in the competitive range, and the TET made tentative award recommendations for some of the CLINs. Agency Memorandum of Law at 3. Two of the three offerors whose proposals were excluded from the competitive range filed protests with our Office. One of the protests was withdrawn based upon the agency's inclusion of that offeror's proposal in the competitive range, and the other protest was denied. See Wilderness Mountain Catering, B-280767.2, Dec. 28, 1998, 99-1 CPD ¶ 4.

The agency subsequently provided each of the competitive range offerors with updated, complete adverse past performance information, and requested responses to this information as well as final revised offers (FRO). Agency Report, Tab L, Protester's Combination Invitation/Opportunity to Comment on Past Performance and Invitation to Submit a Final Revised Offer; Agency Memorandum of Law at 4. The TET evaluated the FROs and made award recommendations for each CLIN. Agency Report, Tab R22, Mobile Food Services Contract Award Recommendations. The contracting officer concurred with the TET's recommendations, and forwarded the award recommendations, report of the TET, and associated materials to the agency's Office of General Counsel and Head of Contracting Activity for review and approval. Agency Memorandum of Law at 31; Agency Report, Tab R23, Memorandum from the Contracting Officer to the Director, Acquisition Management (May 19, 1999). After receiving the necessary approvals, the agency made awards under the RFP, with Z-Best and Port-A-Pit receiving the contracts for CLINs 16 and 17, respectively. These CLINs are the subjects of DFZ's protest.

DFZ's proposal was rated as "acceptable -" (i.e., acceptable minus) overall, with a rating of "acceptable -" under the past performance evaluation factor, and ratings of "acceptable" under the equipment, ability to understand and perform the work, and experience factors, at a price for three meals per day per person of [DELETED]. Agency Memorandum of Law at 5. Z-Best's proposal was rated as "acceptable +" overall, with ratings of "acceptable" under the past performance and ability to understand and perform the work evaluation factors, and "acceptable +" under the equipment and experience evaluation factors, at a price for three meals per day per person of $38.78. Id. Port-A-Pit's proposal was also rated as "acceptable +" overall, with ratings of "acceptable +" under the past performance and equipment factors, "exceptional -" under the experience factor, and "exceptional" under the ability to understand and perform the work factor, at a price for three meals per day per person of $40.50. Id. at 6.

In determining which proposal offered the best value to the government under CLIN 16, the agency noted that "[a]lthough [DFZ's] price is [DELETED] less than Z-Best's price, Z-Best's equipment has a higher cooking capacity and serving flexibility providing greater capacity and efficiency." Agency Report, Tab R22, Mobile Food Services Contract Award Recommendation, at 19. The agency also discussed DFZ's history of performance deficiencies and acceptable equipment, noted Z-Best's

superior performance history, and concluded that Z-Best's "better past performance history, larger sized equipment with higher cooking capacity and serving flexibility . . . justifies paying [DELETED] more per day per person." Id. at 18-19. Similarly, with regard to CLIN 17, the agency, while noting DFZ's [DELETED] per person per day price advantage, found that Port-A-Pit's "better past performance history, larger sized equipment with higher cooking capacity and serving flexibility . . . justifies paying [DELETED] more per day per person." Id. at 20.

DFZ protests that the evaluation of its proposal was unreasonable primarily because its FRO received a lower rating than its BAFO, even though its FRO and BAFO were essentially the same. Protester Comments at 6-9. In this regard, the protester notes that its BAFO received a rating of "acceptable" under the past performance factor and "acceptable" overall, whereas its FRO was rated as "acceptable -" under the past performance factor and "acceptable -" overall.[2]

The evaluation of proposals is primarily a matter within the agency's discretion, since it is responsible for defining its needs and deciding on the best method for accommodating them. Thus, we question the evaluation only if the record demonstrates that it was unreasonable or inconsistent with the RFP's evaluation criteria. Andrulis Corp., B-281002.2, June 2, 1999, 99-1 CPD ¶ 105 at 4. The fact that DFZ's BAFO received a higher rating than DFZ's FRO does not establish in and of itself that the agency's FRO evaluation was unreasonable. Rather, we look to the complete record to determine the reasonableness of the agency's evaluation. Id.

In our view, the primary difference between the agency's evaluation of DFZ's BAFO and FRO is not that DFZ's FRO received the lower score of "acceptable -," as opposed to "acceptable," but rather the detail and clarity of the agency's FRO evaluation as reflected by the relevant documentation. For example, while the

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[2]DFZ is correct that according to the record its BAFO received an overall rating of "acceptable" whereas its FRO received an overall rating of "acceptable -." However, it is difficult to determine from the record whether DFZ's BAFO received a rating under the past performance evaluation factor of "acceptable," as DFZ claims, or "acceptable -." For example, although, as DFZ points out, the relevant consensus rating sheet includes a statement that based upon favorable evaluations "from 1998" DFZ's past performance rating "was upgraded to acceptable from acceptable -," the rating on the sheet itself remained "acceptable -." Agency Report, Tab R11, Protester's BAFO Consensus Rating Sheet. Unfortunately, the TET's recommendation for award fails to clear up this discrepancy. Specifically, while the TET's narrative provides that DFZ's proposal was rated "acceptable" because, among other things, "they have acceptable performance on the present contract," the accompanying technical consensus summary lists a rating of "acceptable -" for DFZ under the past performance evaluation factor. Agency Report, Tab R13, TET Contract Award Recommendations After Receipt and Rating of BAFOs, at 7, 9.

evaluation documentation of the TET's consensus rating of the protester's BAFO consists of one hand-written sheet (which was unclear as to what rating DFZ's proposal actually received under the past performance factor), the documentation of the consensus rating of the protester's FRO consists of approximately three typewritten pages setting forth in considerable detail the reasoning behind the agency's conclusions. Agency Report, Tab R11, Protester's BAFO Consensus Rating Sheet; Tab R19, Protester's FRO Consensus Rating Sheet. Based on our review, we find the agency's well-documented evaluation of DFZ's FRO to be reasonable.

For example, in evaluating DFZ's FRO as "acceptable -" under the past performance evaluation factor, the agency noted that DFZ had "encountered difficulty" during the first 3 years of the predecessor contract. Agency Report, Tab R19, Protester's FRO Consensus Rating Sheet, at 1. The TET found that DFZ had discussed these difficulties in its proposal "openly and effectively," and that the performance information provided by DFZ in its BAFO for the 1998 fire season, as well as agency records, "show positive performance." Id. The TET added, however, that, while DFZ's performance had improved, deficiencies nevertheless occurred "in nearly every year of the previous 5-year contract." Id. The TET explained that, while the "deficiencies were rectified after each specific occurrence . . . some continued to occur sporadically throughout the entire contract performance period." Id. The TET added that "[e]ven though the management showed willingness to change there was insufficient evidence of resolution or corrective actions established to give additional credit," and that while DFZ "readily admitted problems . . . few solutions were observed in performance from 1996 forward." Id. In light of the fact that the protester does not dispute the accuracy of the agency's characterization of its past performance, and the apparent reasonableness of the agency's views, we have no basis to object to the agency's evaluation of DFZ's past performance as "acceptable -."

With regard to the protester's equipment, the protester complains that, while the kitchen unit proposed in its BAFO and FRO was the same and even though its "acceptable" rating remained the same, its equipment "suddenly became old and tired" in the agency's narrative after the FRO evaluation. Protester's Comments at 9. Here, too, the primary difference between the agency's evaluation of DFZ's BAFO and FRO is the detail and clarity of the agency's FRO evaluation as reflected by the relevant documentation. Included in the FRO evaluation is a more precise description of the protester's equipment, including its kitchen unit. The protester does not argue that the agency's description of its equipment as "older" is inaccurate, nor does the protester argue that its equipment should have received a rating other than "acceptable." Moreover, it is not apparent from the TET's award recommendation that describes the relative merits of the offerors' equipment that the fact that DFZ's kitchen unit is "older" was given any weight in the agency's award decision.

The protester argues that the agency "added two evaluation subfactors to the equipment [factor] which are not fairly included in the RFP--the age of the equipment and two serving lines." Protester's Comments at 10. The protester points out here that the agency documents recommending that the award of CLINs 16 and 17 be made to Z-Best and Port-A-Pit, respectively, both noted in a positive manner that the kitchen units proposed by these offerors had "the flexibility of two serving lines." Protester's Comments at 10; Agency Report, Tab R22, Mobile Food Services Contract Award Recommendations, at 18, 19.

Solicitations must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors set forth in the solicitation. Federal Acquisition Regulation (FAR) §§ 15.203(a)(4), 15.305(a). Although agencies are required to identify all major evaluation factors, they are not required to identify all areas of each factor which may be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. JoaQuin Mfg. Corp., B-275185, Jan. 29, 1997, 97-1 CPD ¶ 48 at 2.

As mentioned previously, the RFP specifically stated that the equipment offered would "be evaluated based upon the Mobile Food Service Unit's flexibility for efficient feeding," and in order to facilitate this, it required the submission of drawings of each Mobile Food Service Unit offered "indicating equipment location, traffic flow, layout, size of unit, etc." RFP § L.9, at 140. Given this language, it was consistent with the RFP's evaluation factors for the agency to consider in a positive manner the "flexibility for efficient feeding" resulting from the awardees' demonstrated abilities to provide two serving lines.[3]

The protester also argues that Port-A-Pit's proposal was improperly evaluated. Specifically, the protester points out that the sinks in Port-A-Pit's proposed kitchen unit did not meet the minimum dimensions required by the agency. Protester's Comments at 9; Agency Report, Tab R7, Technical Proposal Evaluation Summary Sheet Site Visit for Port-A-Pit. The protester adds that after the agency raised this deficiency with Port-A-Pit during discussions, Agency Report, Tab R9, Port-A-Pit's BAFO Invitation, and after receiving Port-A-Pit's BAFO which proposed new sinks that were compliant with the agency's requirements, Agency Report, Tab R10, Port-A-Pit's BAFO, at 2, the agency evaluated Port-A-Pit's equipment as "acceptable +." The protester argues that informing Port-A-Pit during discussions of the deficiency regarding its sinks and affording the awardee an opportunity to correct this deficiency in its BAFO "render[ed] the site inspection and the equipment rating meaningless." Protester's Comments at 9.

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[3]In light of our prior finding that there is no evidence that DFZ's "older" kitchen unit was considered in a negative manner in the agency's award decision, we need not consider the protester's argument that the consideration of the proposed equipment's age was not encompassed by the RFP's evaluation criteria.

Contracting agencies have wide discretion in determining the nature and scope of discussions, and our Office will not question that discretion unless it is shown to lack a rational basis. Delany, Siegel, Zorn & Assocs., Inc., B-258221.2, B-258221.3, July 10, 1995, 95-2 CPD ¶ 7 at 5 n.5. There is certainly nothing improper in an agency advising an offeror during discussions of weaknesses and deficiencies in its proposal, as the Forest Service did with Port-A-Pit here. Nor was it in any way improper for the agency to give Port-A-Pit the opportunity to revise its proposal after the close of discussions. See FAR § 15.307(b).

The protester argues that the agency failed to comply with FAR §§ 42.1503(b) and (e) in its evaluation of DFZ's past performance. Specifically, the protester complains that the agency did not review certain disagreements regarding DFZ's past performance at a level above the contracting officer, as required by FAR § 42.1503(b), and was precluded by FAR § 42.1503(e) from considering adverse past performance information from the 1994 fire season because that information was more than 3 years old.

FAR subpart 42.15 "provides policies and establishes responsibilities for recording and maintaining contractor performance information." FAR § 42.1500. FAR § 42.1503 sets forth the procedures to be followed by agencies in recording and maintaining past performance information, with FAR § 42.1503(b) requiring that contractors be provided with and given an opportunity to comment on the agency's evaluations of their performance. FAR § 42.1503(b) states in pertinent part that "[a]gencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation," and notes that "[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency."

Here, contrary to the protester's assertions, the record reflects that DFZ's past performance information, which included both DFZ's and the contracting officer's views regarding DFZ's past performance, was reviewed by the agency's Head of Contracting Activity and Office of General Counsel. Agency Memorandum of Law at 31; Agency Report, Tab R23. In any case, as noted above, DFZ has not refuted the negative information except to argue that it relates to incidents that occurred more than 3 years ago.

FAR § 42.1503(e) provides that "past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance." The agency points out that DFZ's performance under the predecessor contract was completed on December 31, 1998 (the date the predecessor contract expired), and the agency contends that DFZ's performance under the predecessor contract may properly be considered for 3 years from that date, that is, through December 31, 2001. Agency Memorandum of Law at 32. The protester responds that "[t]he contract performance [under the predecessor contract] that is in question occurred in 1994 and 1995," and that because those

particular incidents of contract performance took place more than 3 years ago, the agency's consideration of them was inconsistent with FAR § 42.1503(e). Protester's Comments at 13.

The agency's reading of FAR § 42.1503(e) is, in our view, the more reasonable reading of the provision and is consistent with the provision's regulatory history. Specifically, the regulatory history of FAR § 42.1503(e) reflects that the amount of time that past performance information could be retained and considered was lengthened from 3 years to, ultimately, "three years after completion of contract performance" in light of the belief that "the retention period should exceed the length of the contract." 58 Fed. Reg. 3575 (1993). Accordingly, we agree with the agency that a contractor's past performance information may be considered for up to 3 years after the completion of contract performance as a whole, rather than for only 3 years after each incident of performance under the contract, as argued by the protester.

Finally, DFZ challenges the agency's price/technical tradeoff determination based upon its contentions regarding the agency's evaluation of proposals. As explained above, we find that the agency's evaluation of proposals was reasonable. Since the award selection document reasonably explained why Port-A-Pit's and Z-Best's higher-rated proposals were worth their evaluated price premiums, DFZ's contentions here provide no basis for overturning the award determination. Matrix Int'l Logistics, Inc., B-277208, B-277208.2, Sept. 15, 1997, 97-2 CPD ¶ 94 at 14.

The protest is denied.

Comptroller General
of the United States