



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: California Environmental Engineering

File: B-274807; B-274807.2

Date: January 3, 1997

Evan L. Ginsburg, Esq., Ginsburg & Hlywa, for the protester.
Karen L. Carroll, Esq., Environmental Protection Agency, for the agency.
Guy R. Pietrovito, 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 evaluation of the protester's and awardee's past performance is denied, where the record establishes the reasonableness of the agency's evaluation and the protester merely disagrees with the agency's evaluation determination.
2. The protester's supplemental protest is dismissed, where the protester failed to timely file its comments on the agency's report within the time established under the accelerated schedule provisions of the General Accounting Office Bid Protest Regulations.

DECISION

California Environmental Engineering (CEE) protests the exclusion of its proposal from the competitive range and the award of a contract to EG&G-Automotive Research, Inc. under request for proposals (RFP) No. D600007M1, issued by the Environmental Protection Agency (EPA) for automotive emissions testing.

We deny the initial protest and dismiss the supplemental protest.

The RFP provided for the award of a level-of-effort, cost-plus-fixed-fee (CPFF) contract for the operation of the federally-owned Virginia Testing Laboratory in Alexandria, Virginia, for a base with 2 option years. The contractor will be required to procure privately-owned vehicles, which would be tested in accordance with stated federal test procedures and to analyze emissions test failures. Offerors were also informed that in performing the contract they should "provide approximately 108 to 180 vehicles in order to perform approximately 360 tests within each contract period." Detailed guidelines for obtaining privately-owned vehicles for

testing were provided by the RFP. The stated level-of-effort was 16,544 direct labor hours for each contract year; as amended, the RFP identified the estimated level-of-effort for the labor categories to be used in contract performance. The RFP provided for award on a best value basis and stated that technical quality was more important than cost or price. The following technical evaluation factors and associated point scores were identified:

Past Performance	25
Adequacy of Personnel Qualifications	20
Technical Approach	15
Corporate Experience	10
Proposed Management Plan	10
Mentor Protege Program Plan	10
Quality Assurance Program Plan	5
Quality Assurance Project Plan	5
TOTAL AVAILABLE POINTS	100

The RFP also stated that the agency would evaluate whether offerors were "small business concerns which are also labor surplus area concerns and other small business concerns," but that these factors, which would not be point scored, were of less importance to both technical quality and cost/price.¹

Proposals were received from 3 offerors, including CEE and EG&G (the incumbent contractor), and evaluated as follows:

	SCORE	CPFF
EG&G	92	\$2,895,949
Offeror A	44	\$2,190,565
CEE	40	\$3,197,537

¹While the protester initially argued that its small business status was not accounted for in the evaluation, the record demonstrates that this factor was considered, but CEE's numerous other proposal deficiencies caused its proposal to be eliminated from the competitive range.

EPA determined that only EG&G's proposal was acceptable. Specifically, EG&G's proposal received superior scores under all evaluation factors, reflecting, among other things, EG&G's excellent past performance and experience as the incumbent contractor, technical approach to performing the contract, and personnel. While CEE's past performance was assessed as above average, receiving 20 of the 25 available points for this factor, its proposal was considered unacceptable under all but one of the remaining evaluation factors. The contracting officer determined that because CEE's proposal could not be made acceptable without major proposal revisions, such that CEE did not have a reasonable chance of receiving award, CEE's proposal was not in the competitive range.

CEE's initial protest that its proposal was erroneously eliminated from the competitive range is based on its contention that EPA misevaluated the relative past performance of EG&G and CEE. Specifically, CEE argues that EG&G had performance problems under the prior Virginia Testing Laboratory contract, which should have resulted in a lower technical evaluation under the past performance. In contrast, CEE argues that because of its performance of vehicle emissions testing for the State of California, it should have received a higher technical score under this factor.

In determining whether a particular evaluation conclusion is rational, we examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. A protester's mere disagreement with the agency's evaluation determination does not demonstrate that the evaluation was unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225. Here, the record provides no basis to question EPA's evaluation of EG&G's or CEE's proposals under the past performance factor.

EPA found that EG&G had over 18 years of past performance performing emission testing and restorative maintenance and in managing laboratory contracts; specifically, EG&G had specific experience managing the Virginia Testing Laboratory, as well as the National Vehicle Fuels and Emissions Laboratory. EG&G was found to generally meet performance goals within or below costs on its contract and, in particular, to have satisfactorily performed the current Virginia Testing Laboratory contract within cost. On this basis, EG&G's past performance received 25 of the available 25 points under the past performance factor.

While CEE complains that EG&G's past performance of the current contract should not have been evaluated as satisfactory, based upon the protester's definition of satisfactory performance, the record supports EPA's evaluation conclusions. For example, while CEE argues that EG&G did not consistently "capture the high-ranked, prioritized vehicles" for testing, EPA explains that this is generally not within the control of the contractor because, among other things, the contractor

must select automobiles from a randomized list of vehicles provided by each state's motor vehicle administration. Thus, CEE has provided no basis to conclude that EG&G's past performance was overrated.²

The record also supports EPA's evaluation of CEE's past performance. EPA found that CEE had experience performing exhaust emissions testing and restorative maintenance and managing laboratory contracts, and on this basis CEE's proposal was assessed as very good under the past performance factor, receiving 20 of the available 25 points. CEE's past performance was somewhat downgraded because its past performance primarily involved procuring fleet or specialized vehicles rather than vehicles from the general public, as required under this RFP. CEE's argument that it should have received a higher technical score than EG&G for this factor is nothing more than a mere disagreement with the agency's technical judgment that does not demonstrate that the evaluation was unreasonable.³ Moreover, the record establishes that, even if CEE's proposal received a perfect past performance score, its proposal would still have been found unacceptable and excluded from the competitive range, given CEE's unacceptable ratings under most of the remaining evaluation factors.⁴

²CEE also challenged EPA's evaluation of EG&G's proposal under the adequacy of personnel qualifications factor, contending that EG&G was proposing its incumbent personnel who were allegedly misperforming the current Virginia Testing Laboratory contract. Given our denial of CEE's challenge to EPA's evaluation of EG&G past performance of this contract, this provides no basis to question EPA's evaluation of the adequacy of EG&G's proposed personnel.

³CEE's allegation that its slightly lower past performance evaluation factor score was attributable to EPA's bias against CEE or for EG&G is unsupported by the record. Where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a bias against the protester or for the awardee, and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52. The fact that some evaluators were responsible for overseeing EG&G's performance of the Virginia Testing Laboratory contract provides no basis for questioning these evaluators' conclusions.

⁴CEE also complains that its proposed cost should have been evaluated as lower than EG&G's if the agency had considered CEE's cost per vehicle. This contention is based on CEE's assertion that it promised to provide at least 180 vehicles each year under the designated level-of-effort, while EG&G allegedly would only provide 108 vehicles under this level-of-effort. This argument is meritless. The RFP did not provide that offerors' estimated costs would be compared by determining a cost per
(continued...)

After receipt of the agency report filed in response to the initial protest, which provided the details as to why CEE's proposal was eliminated from the competitive range, CEE protested a number of other aspects of EPA's evaluation of CEE's and EG&G's proposals. In order to decide these new protest allegations within the time established for our decision on the initial protest, we invoked the accelerated schedule provisions of our Bid Protest Regulations, sections 21.9, 21.10, 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. §§ 21.9, 21.10). As the protester was informed, pursuant to this accelerated schedule, CEE's comments on the agency's report on its supplemental protest were required to be filed within 5 calendar days of receipt of the accelerated report. CEE received EPA's supplemental report on December 6, 1996, which meant that its comments were required to be filed by 5:30 p.m. eastern time on December 11. Section 21.0(g), 61 Fed. Reg. at 39043 (to be codified at 4 C.F.R. § 21.0(g)). CEE untimely filed its comments on the supplemental agency report by facsimile transmission at 6:10 p.m., December 11.

Our Bid Protest Regulations contain strict rules requiring the timely submission of protests, comments, and requests for reconsideration. These filing deadlines are prescribed under the authority of the Competition in Contracting Act of 1984, as amended by the Federal Acquisition Streamlining Act of 1994; their purpose is to enable us to comply with the statutory mandate that we resolve protests expeditiously without unduly delaying or disrupting the procurement process. See 31 U.S.C. § 3554(a) (1994); Green Management Corp.--Recon., B-233598.2, Feb. 27, 1989, 89-1 CPD ¶ 208. To avoid delay in the resolution of protests, our Regulations provide that a protester's failure to file comments within the time required, or to request an extension of time for submitting comments, will result in the dismissal of the protest. Sections 21.3(i), 21.10(d)(2), 61 Fed. Reg. at 39044, 39046 (to be codified at 4 C.F.R. §§ 21.3(i), 21.10(d)(2)).

⁴(...continued)

vehicle provided for testing. Rather, offerors were apprised that their proposed costs would be evaluated in reference to the RFP's estimated level-of-effort for each labor category, which is precisely the method by which EPA evaluated EG&G's and CEE's proposed costs. Moreover, EG&G's proposal did not limit its performance to providing only 108 vehicles per year for testing, as CEE's supposes, but promised to satisfy the RFP requirements, which provide for between 108 and 180 vehicles. Thus, there is no basis for the cost per vehicle comparison argued by CEE. See The Research Foundation of State University of New York, B-274269, Dec. 2, 1996, 96-2 CPD ¶ 207. In any case, CEE's proposal was eliminated from the competitive range because it was rated unacceptable under the majority of the technical factors, not because of its higher-evaluated cost.

We dismiss CEE's supplemental protest because the protester failed to file its comments within the time required. Although CEE requests that we consider its admittedly untimely filed comments under the good cause exception of section 21.2(c), 61 Fed. Reg. at 39043 (to be codified at 4 C.F.R. § 21.2(c)), as indicated by the express language of our Regulations, this exception is only considered in connection with the late-filing of protests and is not applicable to untimely filed comments. Marconi Elecs., Inc.--Recon., 64 Comp. Gen. 331 (1985), 85-1 CPD ¶ 289.

The initial protest is denied and the supplemental protest is dismissed.

Comptroller General
of the United States