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**Comptroller General
of the United States**

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

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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: S4, Inc.

File: B-299817; B-299817.2

Date: August 23, 2007

David M. Pronchick, Esq., and Seth Cowell, Esq., BlueLaw LLP, for the protester. Daniel B. Abrahams, Esq., Shlomo D. Katz, Esq., and Pamela A. Reynolds, Esq., Epstein Becker & Green, P.C., for Croop-LaFrance Inc., an intervenor. Maj. Jeffrey Branstetter, Maj. John G. Terra, and Bradley S. Adams, Esq., Department of the Air Force; and Kenneth Dodds, Esq., Small Business Administration, for the agencies. Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where agency evaluation of past performance, and ultimate selection of awardee's lower-priced proposal was reasonable, and consistent with stated evaluation criteria.
 2. Protest is denied where agency properly proceeded with award notwithstanding absence of applicable North American Industry Classification System (NAICS) code from awardee's entries in the Online Representations and Certifications Application (ORCA) system because other information posted there confirmed that awardee represented itself to be small under applicable size standard.
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DECISION

S4, Inc., a small business, protests the award of a contract to Croop-LaFrance Inc. by the Department of the Air Force under request for proposals (RFP) No. FA8530-07-R-10248 for information technology desktop management services. S4 argues that the Air Force miscalculated the awardee's past performance, improperly conducted discussions only with the awardee, disregarded the basis for award stated in the RFP, and disregarded the awardee's failure to list the applicable North

American Industry Classification System (NAICS)¹ code in its proposal representations and certifications.

We deny the protest.

BACKGROUND

The Air Force issued the RFP on December 13, 2006 as a competitive 8(a) set-aside procurement. The RFP referenced NAICS code 541513, which provides a size standard of \$23.0 million. RFP at 1. The RFP described the services desired in a performance-based work statement (PBWS). The RFP specified that award would be based on a “technically acceptable-risk/past performance/price tradeoff,” which the RFP explained as follows:

For those Offerors who are determined to be technically acceptable, tradeoffs will be made between proposal risk, past performance and price. Proposal risk and past performance are of equal importance, and when combined, are considered significantly more important than price.

RFP at 39.

The RFP provided that the Air Force would use the proposal risk factor to evaluate “the risk associated with the Offeror’s proposed approach as it relates to accomplishing the requirements of the solicitation, and includes an assessment of the potential for increased cost, disruption of schedule, degradation of performance, the need for increased Government oversight, and the likelihood of unsuccessful contract performance.” RFP at 40. Risk was to be rated adjectivally as low, medium or high.

Past performance was to be first reviewed for relevance, and then rated (in descending order) as high confidence, significant confidence, satisfactory confidence, unknown confidence, little confidence, or no confidence. RFP at 41-42. The evaluation of past performance was to

assess the confidence in the Offeror’s ability (which includes, if applicable, the extent of its critical subcontractors’ or teaming partners’ involvement) to successfully accomplish the proposed effort based on the Offeror’s demonstrated present and past work record. A critical subcontractor is defined as an entity (subcontractor, teaming

¹ The NAICS code scheme is used by the federal government to identify and classify specific categories of products or services corresponding to lines of business of firms supplying them. See FAR § 19.102; Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 2 n.2.

contractor and/or joint venture partner), other than the Offeror itself, that will perform the following tasks that are considered critical:

Reference to] PBWS Para[graph]	Critical Task Description
1.2.1.2	Inventory Management
1.2.1.3	Desktop Systems Configuration Management
1.2.1.4	Deployment of Desktop Systems
1.2.2.1	Client Support Administration and Protection
1.2.2.3	Information Assurance and Protection
1.2.2.4	Customer Service
1.2.3	Program Management Services

RFP at 40.

By comparing these seven “critical tasks” from the PBWS to an offeror’s past performance, the Air Force would determine the relevance of the offeror’s references. The ratings were outlined in the RFP as follows:

VERY RELEVANT: Present/past performance efforts involved **essentially the same** magnitude of effort and complexities this solicitation requires. Must include programs that demonstrate capability in IT desktop management services by containing five (5) of the seven (7) critical tasks referenced in paragraph 2(c) above [of which the critical tasks table was part].

RELEVANT: Present/past performance efforts involved **much** of the magnitude Must include . . . four (4) of the seven (7) critical tasks

SOMEWHAT RELEVANT: Present/past performance efforts involved **some** of the magnitude Must include . . . three (3) of the seven (7) critical tasks

Id. (emphases in original).

Consequently, “[i]n order to obtain a ‘Very Relevant’ rating, the prime and its subcontractors/team members had to demonstrate past performance in five of the seven critical functions.” Contracting Officer’s (CO) Statement at 4. The RFP also provided that cost for each offeror would be evaluated on the basis of pricing for individual subtasks within a sample task. RFP at 42.

The Air Force received 20 proposals. The proposal from Croop-LaFrance did not contain completed representations and certifications, but instead indicated that the agency should use the Online Representations and Certifications Application

(ORCA)² system to retrieve Croop-LaFrance's representations and certifications. Agency Report (AR), Tab 10, Croop-LaFrance Proposal, at 28 (response to FAR § 52.204-8(b)(2)). Croop-LaFrance did not list NAICS code 541513 in its size status representations in the ORCA system. Nevertheless, the firm's representations specify that its average annual revenues were between five and ten million dollars, and several other NAICS codes listed in its representations apply size standards less than or equal to the \$23.0 million standard applicable under NAICS code 541513. AR, Tab 26, ORCA Printout, at 8, 15.

The Air Force reviewed all 20 proposals for technical acceptability, and found that 16 proposals were acceptable, after which the evaluators turned to the evaluation of risk and past performance.

During the course of the evaluation, the Air Force sent an e-mail to each of the offerors seeking clarification of various issues. Each of those e-mails also made the following request:

Please confirm that if awarded the contract, you will work with the Government Program Manager during the transition period to jointly review and assess implementation of your proposed processes and procedures as contained in your technical proposal . . . and develop a process guide for jointly agreed upon processes and procedures.

AR, Tab 24, E-mail from CO to Croop-LaFrance, Apr. 16, 2007, at 1; CO Supplemental Statement, attach. 1, E-mail from CO to S4, Apr. 16, 2007, at 1.

S4's response stated that "S4 DOES confirm that we will work with the Government Program Manager during the transition period to jointly review and assess . . ." CO Supplemental Statement, attach. 1, E-mail from S4 to CO, Apr. 17, 2007, at 1.

In contrast, the response from Croop-LaFrance began with a statement that the firm ". . . will perform as stated in the Government's question." However, the response then continued for approximately 1 more page, providing additional discussion of the firm's intentions to cooperate with the Air Force throughout contract performance. AR, Tab 24, Letter from Croop-LaFrance to CO, Apr. 18, 2007, at 1-2.

² ORCA was established as part of the Business Partner Network, an element of the Integrated Acquisition Environment, which is implemented under the auspices of White House Office of Management and Budget, Office of Federal Procurement Policy, and the Chief Acquisition Officers Council. ORCA is "the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government." Federal Acquisition Regulation (FAR) § 2.101.

At the conclusion of the evaluation, the Air Force rated eight of the 16 technically acceptable offerors as low risk under the risk factor, three as moderate risk, and five as high risk. Under the past performance factor, 15 of the 16 technically acceptable offerors were rated high confidence, while one was rated significant confidence. S4 and Croop-LaFrance both received the highest ratings under both factors: low risk and high confidence. The evaluators then briefed the source selection authority (SSA) on the results of the evaluation.³

With respect to Croop-LaFrance, the evaluators reviewed seven characteristics that supported the evaluation of the firm's technical approach as low risk. AR, Tab 27, Evaluation Briefing, at 14 (slide 27). Under the past performance factor, the evaluators indicated that Croop-LaFrance's references ranged from relevant to somewhat relevant⁴ (with one reference deemed "not relevant"), its subcontractor, Rome Research Corporation, had multiple highly-relevant references (with one reference deemed "not relevant"). The evaluators stated that they had received 12 responses to questionnaires for Croop-LaFrance and its subcontractor, and had conducted eight interviews, which revealed that the firm and its subcontractor had a satisfactory history of performance, and experience in performing all seven of the critical tasks. AR, Tab 27, Evaluation Briefing, at 31-32 (slides 62-64). On that basis, the evaluators described Croop-LaFrance's past performance as "Very Relevant, High Confidence." Id.

With respect to S4, the evaluators listed eight characteristics to support rating its approach low risk. AR, Tab 27, Evaluation Briefing, at 19 (slide 37). Under the past performance factor, the evaluators indicated that S4 had submitted three very relevant references and one relevant reference, and that each of S4's three subcontractors had submitted four very relevant references. The evaluators had received 34 questionnaires and had conducted ten interviews. The references confirmed that S4 and its team members had a satisfactory performance record, and experience performing all seven of the critical tasks. AR, Tab 27, Evaluation Briefing, at 46-47 (slides 92-94). Accordingly, the evaluators also rated the S4's past performance as "Very Relevant, High Confidence." Id.

³ Since the protest issues relate only to Croop-LaFrance and S4—and to a limited extent, a third offeror—we omit details and further discussion of the remaining offerors.

⁴ The agency emphasizes that even though no single reference covered five of the seven critical tasks by itself, when taken together Croop-LaFrance's own references did cover five critical tasks.

The three lowest-priced offerors were Croop-LaFrance, S4, and a third firm. The ratings and evaluated prices were as follows:

Team	Proposal Risk	Past Performance	Total Evaluated Price
Croop-LaFrance	Low	High Confidence	\$30,772,813.20
S4	Low	High Confidence	\$30,907,730.72
Offeror A	High	High Confidence	\$29,813,739.97

AR, Tab 27, Briefing Slides, at 61 (slide 122).

In summary, Croop-LaFrance was one of the eight firms with the highest ratings under both the risk and past performance factors, while its evaluated price was second-lowest overall. After receiving the briefing, the SSA determined that he could find “no measurable differences” among the eight offerors with low risk and high confidence past performance assessments—other than price. AR, Tab 28, Source Selection Decision, at 6. The SSA then considered whether the advantage of Croop-LaFrance’s low risk outweighed the lower price offered by Offeror A under its high risk approach. He concluded that the low risk was worth the additional cost, and selected Croop-LaFrance for award.

In order to implement the SSA’s selection, the CO sent an e-mail to the Small Business Administration (SBA), informing it of the selection of Croop-LaFrance, and requested coordination with SBA before awarding the contract. The CO’s e-mail stated that the award relied on representations and certifications, retrieved from ORCA on May 4, 2007. The SBA representative responded by e-mail, stating that “Croop[-]LaFrance is in full compliance with SBA 8(a) eligibility requirements[.] They are in good standing and have the prerequisites necessary to perform on this award.” AR, Tab 29, E-mail from SBA to CO, May 14, 2007, at 1. The CO then announced the award to Croop-LaFrance, and notified the other offerors that they were unsuccessful. S4 received a debriefing, and then filed this protest.

DISCUSSION

In its initial protest, S4 argued that the Air Force generally misevaluated past performance, changed the basis for award to lowest cost technically acceptable, and should have disqualified Croop-LaFrance because the firm did not list the proper NAICS code in its representations and certifications. After receiving the agency report, S4 filed a supplemental protest to further argue that the agency misevaluated the past performance of Croop-LaFrance, and improperly conducted discussions with Croop-LaFrance.

The Air Force responds that its past performance evaluation was reasonable and consistent with the RFP, and that S4 mischaracterizes a clarification question sent to all offerors as discussions. The Air Force also maintains that its source selection

decision properly considered risk and past performance in addition to price, and that Croop-LaFrance was properly determined to be eligible for award regardless of the fact that it had not listed the applicable NAICS code in its online (ORCA) representations. We will first address the allegation that the Air Force conducted discussions with Croop-LaFrance, then the past performance evaluation and the source selection decision, and finally the NAICS code issue.

S4 argues that the Air Force conducted discussions with Croop-LaFrance by allowing it to submit a substantive response to the Air Force's April 16 clarification request. S4 alleges that the Air Force used that response to determine that Croop-LaFrance was technically acceptable and low risk, and hence improperly conducted discussions with the eventual awardee. Protester's Comments at 17.

The Air Force responds that S4 was provided essentially the same clarification inquiry as Croop-LaFrance. Additionally, even though some offerors, including Croop-LaFrance, provided more information in their responses, the CO withheld the actual responses from the evaluators, and only told them that the offerors had responded in the affirmative. CO Supplemental Statement at 10. Thus, the Air Force argues that no discussions occurred since the Air Force did not give Croop-LaFrance an opportunity to modify its proposal, and the firm's more extensive response had no effect on the evaluation.

We note that the agency's clarification request appears to be no more than a confirmation that the firm will cooperate during the transition period, which is a duty already encompassed by the contract. See generally RFP amend. 9, PBWS rev. 4, at 3, 13, 16. Further, the "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to modify its proposal. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 11; Park Tower Mgmt. Ltd., B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 7. The record here clearly confirms that the Air Force did not provide any competitor an opportunity to modify its proposal. Moreover, even if Croop-LaFrance's more extensive submission could be characterized as an effort to supplement its proposal, it had no effect on the evaluation because the evaluators did not review it.

With respect to the evaluation of past performance, S4 raises a number of arguments. While we have reviewed all of them, we find none to be meritorious. For example, S4 argues that the Air Force should have discounted Croop-LaFrance's past performance because the company's own references (as opposed to the references provided by its primary subcontractor) demonstrated experience with only five of the seven critical tasks. S4 also argues that references for Croop-LaFrance's subcontractor should have been given less weight, and that the reference provided from a recently-initiated contract (which S4 terms less "mature") should not have been considered at all. Additionally, according to S4, Croop-LaFrance should have

been downgraded because it failed to establish that it had any experience providing two of the critical tasks.⁵ For these reasons, S4 argues that its past performance should have been viewed as superior to that of Croop-LaFrance. Protester's Supplemental Comments at 1-10.

The Air Force responds that, as provided in the RFP, the evaluators properly treated overall past performance involving five or more of the critical tasks as meeting the definition of "very relevant." The agency states that, in making that assessment, the evaluators properly considered the past performance of both the prime contractor and significant subcontractors, and reasonably considered recently-initiated efforts. In short, the agency submits that its evaluation was both reasonable and consistent with the past performance evaluation scheme described in the RFP.

Determining the relative merits of an offeror's past performance information is primarily a matter within the contracting agency's discretion; we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4. Here, the RFP did not commit the Air Force to evaluating past performance only in the more selective manner that S4 desires. Rather, based on our review of the record, we find that the Air Force's approach was consistent with the RFP, and the overall rating of Croop-LaFrance as "high confidence" under the past performance factor was reasonable.

Next, S4 argues that the source selection decision improperly ignored significant distinctions, which S4 alleges differentiate its past performance from that of Croop-LaFrance. S4 argues that by overlooking the differences, the SSA improperly selected Croop-LaFrance on a technically acceptable-lowest-price basis, contrary to the award basis stated in the RFP. Protester's Comments at 9.⁶

The Air Force responds that the SSA was extensively briefed on the basis of the risk and past performance ratings for each offeror, after which the SSA reasonably

⁵ S4 notes that the evaluators downgraded some offerors because they failed to describe what proportion of the work would be performed by subcontractors, and argues that Croop-LaFrance should have been similarly downgraded. Protester's Comments at 8. To the contrary, the record here shows that Croop-LaFrance plainly stated the proportion of work to be performed by its primary subcontractor. AR, Tab 8, Croop-LaFrance Proposal, vol. IV, at 4.

⁶ While the protester had originally argued that the award rationale had been abandoned in favor of award to the technically acceptable lowest-priced offeror, the record confirms that the CO actually selected Croop-LaFrance over a lower-priced technically acceptable, but less-highly-rated, offeror. We therefore address the argument as refined in the protester's comments on the agency report: that the agency should have considered S4's proposal to be worth its higher evaluated cost.

concluded that “none of the technically acceptable, low risk proposals were superior to any of the other technically acceptable, low risk proposals” and they were thus “considered to be equal.” CO Statement at 10-11. The Air Force states that the selection of Croop-LaFrance was therefore proper, because it offered a lower evaluated price. Legal Memorandum at 10. To the extent that S4 argues that the agency should have drawn more detailed distinctions in the past performance evaluations when an offeror had performed more than five of the critical tasks, we disagree. Where, as here, both offerors have relevant past performance, an agency is not required to further differentiate the past performance ratings given each offeror based on a more refined assessment of the relative relevance of the offeror’s prior contracts, beyond the scheme set forth in the RFP. See University Research Co., B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 16. Here, as indicated, the RFP specified that offerors with experience in five or more of the seven critical tasks would receive a rating of “very relevant.” As the agency reasonably concluded that Croop-LaFrance and its subcontractor established that they had past performance references to meet this standard, there was no requirement that the agency draw further distinctions.

Where a protester challenges the selection rationale, we will review whether the award decision was reasonable in light of the RFP evaluation scheme, and whether the selection official adequately documented the basis for the selection. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321 at 5; DynCorp, B-245289; B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 7. When a selection official has determined that proposals are equal, it means that overall there is no meaningful difference in what the proposals have to offer. It does not mean that the proposals are identical in every respect. Northern Virginia Serv. Corp., B-258036.2, B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36 at 9.

S4 has provided no basis on which to question the SSA’s conclusion that none of the differences in the past performance of S4 and Croop-LaFrance were meaningful. Where a selection official reasonably regards proposals as being essentially equal under non-price factors, as the SSA did here, price can become the determining factor in making award notwithstanding that the evaluation criteria assigned price less importance than non-price factors. Parks Co., B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354 at 4. A protester’s mere disagreement with the agency’s determinations as to the relative merit of competing proposals, and its judgment as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable. Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4. On this record, we conclude that the selection of Croop-LaFrance was reasonable.

Finally, S4 argues that since Croop-LaFrance did not list NAICS code 541513 in its ORCA certifications, it was ineligible for award. In this regard, S4 is not arguing that Croop-LaFrance is not eligible for award under the size standard here. Rather, S4’s complaint is simply that an offeror is ineligible for award in a set-aside procurement

where the firm has not listed the applicable NAICS code in its ORCA representations. The Air Force responds that the omission was insignificant, and the agency therefore proceeded to make the award after confirming with the SBA that Croop-LaFrance was eligible and in good standing in the SBA's 8(a) program.

We requested the SBA provide its views on this aspect of the protest. In a conference call with all parties, SBA confirmed that notwithstanding the missing NAICS code, Croop-LaFrance effectively represented that it was a small business. In particular, SBA noted that the upper end of each of the general size range representations in Croop-LaFrance's ORCA statement was below the applicable size standard of \$23.0 million under the applicable NAICS code here.⁷ By submitting its proposal, Croop-LaFrance was representing that it was clearly smaller than the \$23.0 million average annual revenues standard under the applicable NAICS code.

On the narrow issue that it raises,⁸ S4 has been unable to point to any requirement in statute or regulation that mandates listing in ORCA the precise NAICS code applicable to a procurement. We note that the preamble to the regulation implementing ORCA suggests that—particularly since ORCA limits the number of NAICS codes that an offeror may list—the contracting officer may use other representations to supply the necessary information where the relevant NAICS code is not listed. 69 Fed. Reg. 76341, 76343 (daily ed. Dec. 20, 2004) (“Contracting officers can use that information to calculate size status for NAICS not provided”). Here, in addition to a representation of average annual revenues between five and ten million dollars, the ORCA printout also lists several other NAICS codes with standards equal to or smaller than the applicable standard here. AR, Tab 26, ORCA Printout, at 8, 15. In short, it is not clear why the absence of a specific NAICS code in this context would have the critical importance that S4 claims. Cf. Cal-Tex Lumber Co., B-277705, Sept. 24, 1997, 97-2 CPD ¶ 87 at 3 n.1 (absence of size certification is normally waivable and may be made after bid opening because it pertains only to bidder's status and eligibility for award); Insinger Mach. Co., B-234622, Mar. 15, 1989, 89-1 CPD ¶ 277 at 2 (in formally advertised procurement, bidder's failure to submit certificate of size status did not render bid nonresponsive; failure could be waived as a minor informality). On this record, and in the absence of any reason for the CO to conclude that Croop-LaFrance was ineligible for award at

⁷ Specifically, Croop-LaFrance checked the boxes for “51-100” for the number of employees, and “\$5,000,001-\$10 million” for average annual gross revenues under the representations at FAR §§ 52.212-3(c)(8)(ii)(B), 52.219-19(c), and 52.219-21. AR, Tab 26, ORCA Printout, at 10, 18-19.

⁸ We note our Office does not review protests against the size status of an offeror, nor of the selection of an appropriate NAICS code. Bid Protest Regulations, 4 C.F.R. § 21.5(b) (2007).

this size threshold, we conclude that the Air Force properly proceeded with the award to Croop-LaFrance.

The protest is denied.

Gary L. Kepplinger
General Counsel