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Decision

Matter of: Exelon Services Federal Group

File: B-291934

Date: April 23, 2003

Marilyn L. Hudson, Esq., Blevins, Hudson & Kizer, for the protester.
Donald E. Barnhill, Esq., and Judith Ann G. Laughlin, Esq., for BMAR & Associates, Inc.; Stephen I. Lingenfelter, Esq., and Karl Dix, Jr., Esq., Smith, Currie & Hancock, for Vanguard Contractors, Inc.; Jonathan M. Bailey, Esq., for Global Engineering and Construction LLC; and John E. McCarthy, Esq., Daniel R. Forman, Esq., and Richard J. Bednar, Esq., Crowell & Moring, for Ameresco, Inc., intervenors.
Steve Feldman, Esq., and Margaret Simmons, Esq., U.S. Army Corps of Engineers, for the agency.
Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency evaluation of past performance is unobjectionable where protester's past performance record included adverse information, the agency pointed out the evaluated problem past performance areas during discussions and considered the protester's explanations, including its disagreement with aspects of the underlying negative information, and reasonably concluded that a moderate risk rating was warranted.

DECISION

Exelon Services Federal Group protests that it should have been selected for an award under request for proposals (RFP) DACA87-02-R-0003, issued by the Army Engineering and Support Center (CEHNC) for quick responses for facility repair, renovation, conversion, alteration, additions and related activity for government installations and facilities (FRR), including architectural, civil, cost, electrical, environmental, and mechanical services. The protester contends that its proposal was improperly downgraded under the past performance evaluation factor, and that Exelon would have been in line for an award if its past performance had been properly evaluated.

We deny the protest.

The RFP, which had an April 17, 2002 revised closing date for submission of initial proposals, provided for the award of 7 indefinite-delivery/indefinite-quantity (ID/IQ) contracts for a base year with four one-year options. Exelon submitted a proposal for an unrestricted contract award, four of which were contemplated under the RFP.¹ The solicitation called for “best value” awards on the basis of four evaluation factors, technical approach, past performance, price, and small business participation. RFP § M.2. Technical approach was denominated as slightly more important than past performance and significantly more important than price and small business participation; the non-price factors, combined, were significantly more important than price. *Id.* The solicitation provided for adjectival ratings of excellent, good, satisfactory, poor and unacceptable under technical approach and small business participation. RFP § M.1.2.1. Under past performance, the solicitation provided an adjectival rating scale of low risk, moderate risk, high risk and unknown risk. RFP § M.1.2.2. A low risk evaluation was called for where “[b]ased on offeror’s past performance record essentially no doubt exists that the offeror will successfully perform the required effort”; moderate risk was called for where “some doubt exists that the offeror will successfully perform.” *Id.*

The past performance evaluation was to be based on performance under existing and prior contracts for services that were “similar in scope, magnitude, and complexity to this requirement,” RFP § M.2.2.1, and the solicitation advised that in making this evaluation the agency could utilize information from past performance questionnaires, calls to references listed by the offeror and from “other customers known to the Government, and others who may have useful and relevant information.” RFP § M.2.2.2.

The source selection evaluation board (SSEB) evaluated the 30 initial proposals that were received and established a competitive range consisting of 16 proposals, including the proposals submitted by BMAR & Associates, Inc., Ameresco, Inc., Vanguard Contractors, Inc., Global Engineering and Construction LLC, and Exelon. Discussions were conducted, after which CEHNC issued a last request for final proposal revisions with a closing date of November 13, 2002. The SSEB performed a final evaluation under which Exelon’s proposal was rated as “low excellent” under technical approach, “moderate risk” under past performance, and “medium satisfactory” under small business participation, at an evaluated price of \$15,708,000. The three highest rated proposals that were selected for award (those submitted by Ameresco, BMAR and Global), each received higher evaluations than Exelon under all of the non-price factors, and each proposed prices that were more than \$2,800,000 lower than Exelon’s. The proposal of the fourth selected offeror, Vanguard, was evaluated as “high good” under technical approach, “low risk” under

¹ Only the four unrestricted awards are at issue in this protest.

past performance, and “medium good” under small business participation, at an evaluated price of \$12,790,000.²

In selecting the Vanguard proposal for the fourth unrestricted award, the source selection authority (SSA) directly compared the Exelon and Vanguard proposals (along with other comparisons), and noted that Exelon’s slightly higher rating under technical approach (low excellent versus high good) was offset by its lower past performance rating (moderate risk versus low risk). In this regard, the SSA took into account that the past performance factor was only slightly less important than technical approach and considered it to have “almost as much significance,” and recognized the possible additional burdens and risks that a moderate risk rating represented with respect to meeting quality and schedule requirements for successful contract performance. Agency Report (AR), Tab 13, Source Selection Decision Unrestricted Awards, at 11. The SSA concluded that Exelon’s overall non-price evaluation did not reflect any advantage relative to Vanguard, and Vanguard’s significantly lower price became determinative. Exelon alleges that its proposal was misevaluated under the past performance factor and contends that if its proposal had received the appropriate low risk assessment, it would have been in line for an award.

The evaluation of past performance is a matter within the discretion of the contracting agency, which our Office will review in order to ensure that it was reasonable and consistent with the stated evaluation criteria. NLX Corp., B-288785, B-288785.2, Dec. 7, 2001, 2001 CPD ¶ 198 at 7. An agency’s past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency’s interpretation of the underlying facts, Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5, and the protester’s mere disagreement with the agency’s judgment is not sufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. Where a solicitation requires the evaluation of offerors’ past performance, an agency has discretion to determine the scope of the offerors’ performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 5.

In its initial evaluation of Exelon’s past performance, the agency’s past performance evaluation board (PPEB) considered past performance questionnaires submitted by customers that had been identified in Exelon’s proposal for itself and its subcontractors, as well as internal survey forms returned by CEHNC personnel on programs where Exelon had performed, and the personal knowledge of the PPEB chairman with respect to Exelon’s performance of an energy savings performance

² Exelon does not raise any objection to the price evaluations.

contract (ESPC) at Fort McPherson, Georgia. Based on this information, the PPEB evaluated Exelon's past performance as warranting a moderate risk assessment under two of the four listed subfactors (quality and customer satisfaction), a high risk assessment under one subfactor (cost/schedule management) and a low risk assessment under one subfactor (labor standards compliance/safety plan adherence), with a resulting overall evaluation that Exelon's past performance presented a moderate risk. AR, Tab 16, Exelon Past Performance Information, Evaluation Worksheet.

During discussions, Exelon was provided with eight questions concerning its past performance which specified the particular problem areas of concern and the underlying contract performance that the PPEB had identified as warranting the moderate risk evaluation, as well as a request to discuss and explain corrective actions that have been or will be taken with respect to preventing repetition of the problems. AR, Tab 11, Discussion Letters with Exelon, at 3. These questions referenced, among other things, demonstrated problems meeting established schedules for work (Huntsville Medical and FRR programs, Omaha Veterans Administration (VA) and other customers); authority to perform work at an installation revoked by the contracting officer because of failure to perform (Fort McPherson); demonstrated quality problems in performance (Huntsville Medical Program); demonstrated problems with overall management of work (Huntsville Medical and FRR programs, Eglin Air Force Base and other customers); and demonstrated problems controlling cost through high markups (Huntsville Medical and FRR programs, Department of Defense (DOD) Schools in Puerto Rico, Omaha VA and other customers). Id.

Exelon provided a detailed response to each question, which included its disagreement with what it denominated mistaken information, and its characterization of the discussion questions as difficult to rebut specifically because "many of the comments are generic in nature and do not identify a specific project, problem, or person." AR, Tab 8, Exelon Proposal, Discussion Questions, at 14. Nonetheless, Exelon was able to provide detailed information about specific projects, in which it disputed much of the adverse information. However, Exelon also conceded the substantial accuracy of the negative information that formed the basis for several of the adverse assessments. Thus, for example, with respect to schedule problems at the Omaha VA, Exelon provided a lengthy explanation concerning the conceded scheduling problems and delays experienced under a roof replacement contract, asserting that circumstances beyond its control, such as changes in the scope of work, delays in the start of work, and winter weather delays were the primary causes in most instances. However, Exelon also recognized its own contributions to the delays, and conceded that it "should not have accepted a task order to apply BURS [built up roof systems] in the winter months." Id. at 20. In these circumstances, while the agency concluded that the protester's performance on this project did not, by itself, validate a weakness assessment, nonetheless Exelon's explanations support the reasonableness of the agency's determination that

Exelon's past performance warranted a moderate risk assessment under the cost/schedule management subfactor.

With respect to the Fort McPherson revocation, Exelon conceded the revocation, but pointed out that it was limited to ESPC projects, and that Exelon continued to perform other Fort McPherson projects after the imposition of the ESPC revocation. While Exelon asserted that in making the revocation "the commander acted unfairly and unreasonably," the protester also acknowledged that "Exelon must accept much of the fault," and that "[t]here is no doubt the ESPC contract at Fort McPherson is a blemish on Exelon's record but we are confident the corrective actions have been successful." Id. at 26-27.³

With respect to quality problems in performance, Exelon acknowledged that it received a directive letter under its current medical program contract concerning deficiencies in the quality of a concrete slab at Lajas, Puerto Rico. As it did with respect to other problem areas, Exelon sought to deflect blame, focusing primarily on its contention that the conceded quality problems, which Exelon states it is currently working on remedying, were caused in part by the use of "defective and incomplete designs prepared by others." Id. at 29. However, Exelon also conceded that "[t]he fact that the verbal description of the design was deficient does not relieve Exelon of the obligation to identify design deficiencies," and that it "proceeded with work based on a directive from individuals that were not properly authorized to give that direction." Id.

Based on the discussion answers provided by Exelon, its cost/schedule management subfactor rating improved from high risk to moderate risk as a result of the PPEB's determination to delete one of the identified weaknesses. However Exelon's overall moderate risk evaluation remained unchanged, reflecting the three moderate risk

³ Exelon also asserts that the ESPC contract performance is not relevant because of its dissimilarity to the current requirement. We disagree. First, in its discussion responses, the only dissimilarity noted by Exelon with respect to the ESPC contract pertained to manner in which the work is financed. In any event, as noted above, the solicitation called for past performance assessment on the basis of prior contracts that were similar in scope, magnitude and complexity, not for contracts that are identical. The contracting officer has explained that the ESPC contract work includes the installation, maintenance and repair of energy efficient equipment under a process that is substantially similar to that used in performing the FRR work at issue here. AR at 16-20. In these circumstances, the agency reasonably determined, consistent with the RFP, that Exelon's ESPC contract performance was sufficiently similar to be considered relevant for purposes of its past performance evaluation here. Oceaneering Int'l, Inc., B-287325, June 5, 2001, 2001 CPD ¶ 95 at 8.

and one low risk subfactor evaluations. AR, Tab 16, Exelon Revised Evaluation Worksheet.

In our view, the record provides no basis to object to the agency determination that Exelon's past performance warrants a moderate risk rating. Exelon correctly points out that its references include a number of instances in which it received assessments that were uniformly excellent or good. However, the record also makes clear that there were a number of instances in which Exelon's past performance was evaluated as presenting meaningful problems. As noted above, the solicitation specifically advised offerors that the agency could obtain past performance information from sources other than those submitted by the offeror, hence the fact that some of the adverse references were not the ones listed in Exelon's proposal provides no basis to discount them. Similarly, the fact that Exelon was able to provide a number of favorable references does not provide any basis to require the agency to ignore the adverse information presented by other references, including ones that Exelon had not included in its proposal. While Exelon seeks to place partial blame for these performance problems on a variety of outside factors, it is also apparent from Exelon's explanations quoted above that in its discussion responses the protester recognized and acknowledged its own contributory responsibility as well. In these circumstances, we see no basis to question the agency's determination that Exelon's documented past performance problems provide a reasonable basis to conclude that there was some doubt that Exelon would perform successfully, which under the RFP warrants a moderate risk rating.

In this regard, Exelon also contends that the agency failed to conduct meaningful discussions with respect to its past performance. In order to satisfy its obligation to conduct meaningful discussions with competitive range offerors, while an agency is required to lead the offerors into areas of their proposals that require revision or amplification, the fact that an offeror's responses do not fully satisfy the evaluators provides no basis to conclude that the discussions were inadequate. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6-7. As detailed above, notwithstanding Exelon's complaints regarding lack of specificity, here CEHNC did more than lead the protester into the relevant areas. The agency disclosed to Exelon all of the evaluated weaknesses and referenced the customers and contracts underlying them in the written discussion questions, which enabled Exelon to provide specific, detailed responses. Indeed, as noted above, Exelon's explanations were sufficient to convince the agency to delete one of the assessed weaknesses and to raise the applicable subfactor rating as a result of the information provided.

The record also reflects that the agency considered Exelon's responses in making its final evaluation, but found them insufficient to merit an upward assessment of Exelon's overall performance risk assessment. CEHNC's determination that the additional information, explanations and excuses offered by Exelon were unpersuasive provides no basis to object to the discussions. While Exelon attempts to provide a more favorable picture of its past performance than that drawn by the

agency, as detailed above, Exelon's answers actually serve to corroborate some of the evaluated problems. In short, the record reflects that the agency conducted meaningful discussions, and that the information provided by Exelon during the discussions supports the agency's moderate risk assessment for Exelon's past performance.

The protest is denied.⁴

Anthony H. Gamboa
General Counsel

⁴Exelon initially protested that the agency's use of distinguishers such as "low" or "high" was inconsistent with the RFP evaluation criteria for technical approach, which prescribed adjectival ratings ranging from unacceptable to excellent, without specifying differentiation between low and high. In its report, the agency explained that application of these distinguishers is consistent with the evaluation scheme and reflected the agency's appropriate attempt to recognize meaningful differences between proposals with the same adjectival rating that were not of equal quality. Since Exelon failed to respond to the agency's explanation, we have no basis to consider this aspect of its protest. Baldt, Inc., B-278422, Jan. 28, 1998, 98-1 CPD ¶ 36 at 3 n.3. Additionally, in its comments on the agency report Exelon raised for the first time allegations concerning the evaluation of the past performance of other offerors, including allegedly unequal treatment. These separate and independent allegations are untimely because they were filed more than 10 days after Exelon learned of their bases from the agency report. 4 C.F.R. § 21.2(a)(2) (2003). Exelon was granted an extension of time in which to file its comments, but such an extension does not toll our timeliness requirements. Litton Sys., Inc., Data Sys. Div., B-262099, Nov. 17, 1995, 95-2 CPD ¶ 261 at 4 n.4. Finally, Exelon has alleged that agency officials were personally biased against it in their conduct of the procurement. Because government officials are presumed to act in good faith, we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition; rather, the protester must present credible evidence that the officials acted with specific and malicious intent to injure the protester. Strategic Res., Inc., B-287398, B-287398.2, June 18, 2001, 2001 CPD ¶ 131 at 6 n.8. Here, Exelon's allegations essentially reflect its disagreement with the judgments of the agency officials, which does not provide a basis to attribute bias.