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Decision

Matter of: J. Womack Enterprises, Inc.

File: B-299344

Date: April 4, 2007

Robert E. Bergman, Esq., for the protester.

Maj. Kevin J. Wilkinson and Capt. David M. Creed, Department of the Air Force, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly considered adverse past performance information in evaluating the protester's proposal is denied where the agency's evaluation was based on a reasonable perception of the protester's inadequate prior performance.

DECISION

J. Womack Enterprises, Inc. protests the award of contracts to RCA Contracting, Inc. and MAPCO, Inc. by the Department of the Air Force under request for proposals (RFP) No. FA8501-05-R-0008 for mechanical/electrical type construction projects at Robins Air Force Base (AFB), Georgia. Womack argues that the Air Force improperly evaluated its past performance, that the agency acted with bad faith due to race and gender bias, that the Air Force's evaluation of its past performance was tantamount to a determination of nonresponsibility, and that the award decision was improper.

We deny the protest.¹

¹ The GAO attorney handling the case conducted an "outcome prediction" alternative dispute resolution (ADR) conference with the parties, advising them that the protest was likely to be denied for the reasons set forth in this decision. The protester informed our Office that it did not intend to withdraw its protest based on this ADR session, but would rather obtain a written decision on the merits of its case.

BACKGROUND

The Air Force issued the RFP on May 2, 2006, as a set-aside for historically underutilized business zone (HUBZone) small businesses, contemplating the award of indefinite-delivery/indefinite-quantity contracts for mechanical and electrical type construction projects at Robins AFB, with a base period of 1-year plus four 1-year option periods.² The RFP provided that award would be made to the offeror whose proposal represented the “best value” to the government and identified two evaluation factors: past performance and price. Past performance was identified as “significantly more important than price” for the purposes of a tradeoff in connection with the best value determination. RFP at 38.

With respect to the past performance factor, the RFP provided that the Air Force would assess an offeror’s ability to successfully accomplish the proposed effort by evaluating the “offeror’s demonstrated record of contract compliance in supplying products and services that meet users’ needs.” RFP at 38. Based on this assessment, the Air Force would assign each offeror an overall “confidence” rating of: high confidence, significant confidence, satisfactory confidence, unknown confidence, little confidence, or no confidence. RFP at 40.

In order to evaluate past performance and assign a confidence rating, the RFP instructed offerors to provide “FACTS Sheets” containing information concerning their present and past performance history. RFP at 34. Specifically, offerors were required to provide “FACTS Sheets” on up to four contracts, either active or completed within the past 3 years, that the offeror had performed and which it considered to be relevant to the work under the RFP.³ In evaluating offerors’ performance information, the RFP identified the following degrees of relevance: very relevant, relevant, semi-relevant, and not relevant. RFP at 38. The RFP also required offerors to provide the same past performance information for “critical subcontractors” and indicated that the agency would consider the performance of these “critical subcontractors,” as well as performance information pertaining to key personnel.⁴ The RFP further indicated that in evaluating past performance the

² The RFP provided for multiple awards and the agency explains that the work will be issued on a task order basis with the task orders competed among the awardees. RFP at 38; Contracting Officer’s (CO) Statement at 1.

³ Offerors were further required to provide a spreadsheet listing all the contracts they were performing or had performed within the last 3 years. RFP at 35.

⁴ “[C]ritical subcontractor” was defined as “an entity (subcontractor, teaming contractor and/or joint venture partner), other than the offeror itself, that will perform specific technical aspect(s) . . . that you consider critical to program success.” RFP at 38.

agency would consider customer past performance questionnaires, Contractor Performance Assessment Reporting System records, as well as information “obtained from other sources” and “the source of the information” received. RFP at 35, 38.

With respect to price, the RFP provided that proposals would be evaluated for reasonableness and balance, and that a total evaluated price would be calculated for evaluation purposes based upon the offeror’s total price for the base period and all option periods.

The agency received four proposals, including the proposals from Womack (teamed with A-1 Mechanical/Electrical, LLC), RCA, and MAPCO, by the June 19 due date for the receipt of initial proposals. Womack identified two contracts regarding its own performance; the Air Force past performance evaluation team (the Performance Confidence Assessment Group (PCAG)) found one contract to be “relevant” and the other, a contract with Valdosta State University (VSU) in Georgia which involved the “installation of new chiller and cooling tower, and supporting electrical system modifications,” to be “very relevant.” Agency Report (AR), Tab 17, PCAG Report, at 6.

With respect to the “very relevant” VSU contract, the Air Force received a customer questionnaire rating Womack’s performance as “marginal” in most respects and indicating that the customer would not award another contract to Womack. The PCAG contacted this reference who then identified numerous failings in connection with the contract. Among other things, he indicated that Womack had subcontracted all the work to “A-1 [Service Co.],” “no one [was] available from A-1 at the time of start-up of their new chiller [and] [t]hey had to get a mechanic to do the start-up,” there were problems with paying subcontractors, the project had been “turned over to a bonding company,” “they didn’t have a mechanical contractor’s license yet the majority of the work was mechanical,” and “[t]hey cause[d] damage to a wall around the cooling tower and would not accept responsibility.” AR, Tab 17, PCAG Report, at 7.

Womack’s proposal also identified contract references for its “teaming partner,” A-1 Mechanical/Electrical, and “critical subcontractors” L&C Electrical Service, MBM Construction, and Hamlin Air Conditioning and Sheet Metal. As it relates to the protest, the Air Force received two customer reference questionnaires for work performed by A-1 Mechanical/Electrical reflecting excellent ratings. These questionnaires had been completed by Womack’s proposed subcontractor, MBM. The Air Force also received two questionnaires regarding a contract for HVAC repair at Robins AFB, which the Air Force deemed to be “very relevant”; these questionnaires rated A-1 Mechanical/Electrical’s performance as satisfactory, but identified weaknesses with its “management of project milestones” and “number of personnel.” The agency also received another questionnaire for a project that the agency considered “relevant,” which rated A-1 Mechanical/Electrical’s overall

performance as “satisfactory.” AR, Tab 8, Womack’s Past Performance Information, at 59.

In evaluating Womack’s performance history, the agency also independently obtained information regarding a contract for construction of a warehouse addition at Robins AFB, to include mechanical and electrical work, which had been performed by the firm “A-1 Service Co., Inc.” Specifically, the Air Force received a questionnaire rating A-1 Service’s performance as “unsatisfactory” and stating that the contractor failed to return phone calls and failed to provide warranties or required “as-built drawings.” The questionnaire also identified payment problems with one of the subcontractors.

Upon completing an initial review of proposals, the Air Force decided to hold discussions with offerors and during the course of these discussions specifically notified Womack of the adverse past performance information the agency had received regarding the firm’s performance of the VSU contract, as well as the problems identified with A-1 Service Co.’s performance of the warehouse addition work at Robins AFB. In response to the VSU contract, Womack confirmed that the work had been subcontracted to the firm A-1 Service, but denied the allegations of poor performance or problems. Womack stated that “A-1 had no problems paying their [subcontractors],” the project had not been “turned over to the bonding company,” “[a]ll licenses have always been kept up to date,” and “[a]ll damage to property was corrected.” AR, Tab 11, Womack Evaluation Notices, at 49. Womack added that it believed the reference “was not satisfied with an out of town contractor being awarded this project . . . [and] tried to persuade Womack to use his contractor from the area.” Id. at 50. With regard to the warehouse addition work at Robins AFB, Womack simply stated as follows: “This project was [an] A and E design project done by A-1 Service [Co.], Inc. A-1 Service Co., Inc. is not a team member for this proposal.” AR, Tab 11, Womack Evaluation Notices, at 51.

Given Womack’s denial of the concerns raised regarding the VSU contract, the PCAG contacted the primary point of contact identified by Womack for the VSU contract in order to obtain an “independent opinion” of Womack’s performance. The individual contacted confirmed that Womack had subcontracted the work to A-1 Service Co. and indicated that he considered the project “satisfactory” in the end, but that the experience with the contractor led them to “rewrite[] their [p]re qualification program in an effort to not go [through] this experience again.” AR, Tab 8, Womack’s Past Performance Information, at 14. The person contacted further indicated that the “biggest problems were paperwork in general” and described the individual whom Womack had proposed as its senior project manager and chief estimator (M.W. Maddox) as a “roadblock.” Id. The PCAG member who conducted the interview ultimately concluded that the reference supported the general opinion expressed in the customer questionnaire—that they would not want to do business with the contractor again. Id.

The PCAG also examined whether consideration of the Robins AFB warehouse addition contract was appropriate in light of Womack's assertion that A-1 Service had not been proposed as a member of its team. In this regard, based on its review of information contained in the Central Contractor Registration database, other government contracts, and state business filings, the PCAG found that G.R. "Ricky" Maddox is the Chief Executive Officer (CEO) of A-1 Mechanical/Electric, as well as the primary point of contact for government business and past performance for A-1 Service Co.; that M.W. "Matt" Maddox, the brother of Ricky Maddox, is the CEO and Chief Financial Officer of A-1 Service Co., a manager of A-1 Mechanical/Electric, and senior project manager and chief estimator for J. Womack Enterprises; that A-1 Service and A-1 Mechanical/Electrical share the same office address; and that Ricky Maddox and J. Womack, the President and CEO of J. Womack Enterprises, also share the same address. Based on this information, the PCAG concluded that the information it had learned regarding the performance of A-1 Service on the Robins AFB contract was relevant to its evaluation of Womack's past performance and should be considered. AR, Tab 17, PCAG Report, at 19-20.

Based on Womack's past performance record (considering the record of A-1 Mechanical/Electrical and A-1 Service), the Air Force assigned Womack a past performance rating of "little confidence." In the Air Force's view, Womack's past performance information reflected some history of failing to pay subcontractors, to properly address warranty issues, to fulfill contractual requirements, and to return customer phone calls. Due to the various deficiencies attributed to Womack in the past performance information it had received, the Air Force had "substantial doubt" regarding Womack's ability to successfully perform the contract requirements. In reaching this conclusion, the Air Force gave little or no weight to the two excellent questionnaire ratings it had received regarding Womack's teaming partner, A-1 Mechanical/Electrical, since the questionnaires had been completed by another member of Womack's team, MBM, a proposed "critical subcontractor," and were, in the Air Force's view, potentially biased due to MBM's stake in the outcome of the competition.⁵ AR, Tab 17, PCAG Report, at 20.

Considering the past performance evaluations and pricing of all the offerors, the Air Force made its source selection decision and concluded that because of MAPCO's and RCA's higher past performance ratings ("high confidence" and "significant

⁵ In evaluating Womack's past performance, the Air Force found that Womack's other critical subcontractors, MBM, L&C Electrical Service, and Hamlin Air Conditioning and Sheet Metal, had very good to excellent past performance. AR, Tab 17, PCAG Report, at 20. The Air Force concluded, however, that the portion of the contract work proposed to be performed by these subcontractors was relatively small; thus, their ratings were not sufficient to overcome the Air Force's concerns about Womack's performance history in the aggregate. Id.

confidence,” respectively)⁶ their proposals represented the best value to the government, notwithstanding their higher prices (\$25,467,450 and \$25,662,050, respectively), when compared with Womack’s lower past performance rating of “little confidence” and lower price (\$23,164,300). AR, Tab 18, Source Selection Decision. Upon learning of this decision and after receiving a debriefing from the Air Force, Womack filed this protest.

Past Performance

Womack argues that the Air Force’s evaluation of its past performance was unreasonable and fraught with bias, bad faith, and “malicious ill will.” Comments at 6. By way of example, Womack asserts that the Air Force failed to consider past performance information concerning other relevant contracts performed either by A-1 Mechanical/Electrical or A-1 Service at Robins AFB which were relevant to the subject RFP. In its protest, but not in its proposal, Womack attached past performance information in connection with numerous other contracts. Womack argues that the Air Force’s bias, bad faith, and malice are further reflected by its reliance on the negative past performance information regarding the VSU contract and the Robins AFB warehouse addition contract. In this regard, Womack denies the underlying concerns raised in connection with both contracts and maintains that such concerns had never been raised by the customer with Womack or A-1 Services during or after performance. With regard to the VSU contract, Womack specifically argues that the conclusions reached by the Air Force were unfounded given the information provided. Regarding the Robins AFB warehouse addition contract, Womack suggests that it should not have been downgraded based on the concerns about A-1 Service’s performance since, as proposed here, Womack is the prime contractor and A-1 is “a subcontractor at the most.” Comments at 3. Moreover, Womack argues that the Air Force acted “maliciously” in disregarding the excellent evaluations of A-1 Mechanical which had been completed by its team member, MBM.

Where a solicitation requires the evaluation of offerors’ past performance, 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, since determining the relative merits of offerors’ past performance information is primarily a matter within the contracting agency’s discretion. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10; Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4. In this regard, 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,

⁶ The record indicates that the Air Force did not receive any adverse past performance information regarding the awardees. AR, Tab 18, Source Selection Decision Document, at 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. Here, our review of the record establishes that the agency's evaluation of Womack's past performance was reasonable and consistent with the RFP's evaluation terms.

As an initial matter, Womack argues that in evaluating its past performance, the Air Force unreasonably failed to consider other positive indications of its past performance. However, the information was not considered because it was included only in Womack's protest, not in Womack's proposal. In any event, much of the information provided by Womack in its protest was not eligible for consideration since it either was beyond the 3-year window of consideration or not relevant; further, in some instances, the information reflects "marginal" ratings for Womack's performance and, thus, actually supports the agency's rating. CO Statement at 10-12.

Womack also challenges the validity of the underlying adverse past performance information which led to its rating of "little confidence"; Womack essentially denies the accuracy of the allegations.⁷ However, with respect to the information concerning A-1 Service's performance of the Robins AFB warehouse addition contract, Womack did not dispute the accuracy of the information when the Air Force raised the issues with Womack during discussions. Rather, Womack simply noted that A-1 Service was not a member of its proposed team, thereby suggesting that the information was not relevant to the agency's evaluation of its proposal. Upon further investigation, however, the Air Force determined that A-1 Service's performance should be attributed to Womack given the close affiliation and the overlapping key personnel between A-1 Service, Womack, and its teaming partner, A-1 Mechanical/Electrical. Womack has not disputed the reasonableness of the agency's determination in this regard; in fact, the firm corroborates the agency's conclusions regarding affiliation and relationship of the companies in its protest submissions.⁸ Since the allegations were not rebutted by Womack, we conclude that the agency reasonably considered these allegations as accurate in evaluating Womack's past performance.

⁷ In its report, the agency provided several contemporaneous contracting documents supporting the comments included in the questionnaire. For example, the agency included a memorandum by the contracting office detailing problems with A-1 Service making subcontractor payments, providing warranties, addressing problems raised, and returning phone calls. AR, Tab 8, Womack's Past Performance Information, at 5-8.

⁸ For example, in its protest, Womack highlights the performance ratings of several contracts performed by A-1 Service, which it contends supports the notion that it should have received a past performance rating of "satisfactory confidence." Protest at 9 and attachments.

Womack did challenge the validity of the adverse information regarding its performance of the VSU contract in its response to the discussion questions raised by the Air Force. Given the conflicting views, the Air Force conducted an interview with another individual to obtain yet another assessment of Womack's performance, which in the agency's view corroborated the negative evaluation of Womack's performance and the conclusion that the customer would not award Womack another contract. Womack argues that the interview information does not support the initial negative assessments of A-1 Service's performance, nor does it support the conclusion that the customer would not award Womack another contract. While the interview information may not support every detail of the initial evaluation, which the agency received, the overall tenor of the information does support the assessment of Womack's performance as "marginal." In this regard, the interview contact noted paperwork, communication, and performance problems under the contract. In addition, the contact specifically indicated that the customer had implemented changes to its contractor prequalification process so that it would not repeat the experience it had with Womack, reasonably leading the agency to conclude that the customer was not satisfied with Womack's performance and would not do business with the firm again. Thus, notwithstanding Womack's contentions to the contrary, we believe the record shows that the agency acted reasonably in its assessment of Womack's performance of the VSU contract.

We also conclude that the agency acted reasonably by not crediting Womack with the positive past performance questionnaires completed by MBM regarding the performance of A-1 Mechanical/Electrical. The Federal Acquisition Regulation (FAR) § 15.305(a)(2)(i), provides that, in evaluating past performance information, the "source of the information" shall be considered. Moreover, the RFP expressly stated that the Air Force would consider the "source" of the past performance information received. RFP at 38. Consistent with this notion, the Air Force reasonably questioned the validity of the responses, given MBM's role on Womack's team as a "critical subcontractor" with an obvious stake in the outcome of the competition.

Regarding Womack's allegations that the Air Force's evaluations were motivated by bias and bad faith, we find these allegations to be unfounded. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwa Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Here, the protester has provided no evidence of bad faith; rather, it draws an inference from a series of facts to support its allegations and essentially

asks that we assume bad faith.⁹ The protester's conclusion that these actions demonstrate bad faith constitutes speculation, and is insufficient to support a finding of bad faith. As discussed above, our review of the record shows that the agency's evaluation of the protester's past performance was reasonable and supported by the record.

Responsibility

Womack also argues that by its evaluation, the Air Force essentially found the firm nonresponsible, and by implication, the matter should have been referred to the Small Business Administration (SBA) for review under the certificate of competency program. See Federal Acquisition Regulation § 19.602-1(a). This argument is without merit. An agency may use traditional responsibility factors, such as past performance, as technical evaluation factors where, as here, a comparative evaluation of those areas is to be performed. Advanced Res. Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2. A comparative evaluation means that competing proposals will be rated on a scale relative to each other, rather than on a pass/fail basis. Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 3. No SBA referral is required where a small business offeror's proposal is not evaluated as unacceptable and is not selected for award because another offeror's proposal is evaluated as superior under a comparative analysis or because of a cost/technical tradeoff analysis. Capitol CREAG LLC, B-294958.4, Jan. 31, 2005, 2005 CPD ¶ 31 at 6-8. Here, the assessment of Womack's past performance was part of a comparative, best value evaluation, not a responsibility determination, and Womack's past performance was not evaluated as unacceptable. Accordingly, no referral to SBA was required.

Tradeoff

As a final matter, Womack objects to the Air Force's tradeoff decision, arguing that it did not make award to the responsible firm with the lowest price. Where, as here, the RFP allows for a price/technical tradeoff, the selection official has discretion to select a higher-priced but technically higher-rated proposal, if doing so is reasonably found to be justified. 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 10. The RFP provided that past performance was significantly more important than price, and consistent with the RFP, the Air Force made award to firms with higher past performance ratings as compared to Womack,

⁹ For example, Womack argues that the Air Force's bad faith is evidenced by its decision not to credit Womack with the positive past performance questionnaires completed by MBM, a decision that we conclude was reasonable, as noted above, given MBM's stake in the outcome of the competition.

notwithstanding Womack's lower price. We have no basis to question the Air Force's decision in this regard.

The protest is denied.

Gary L. Kepplinger
General Counsel