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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Davis Strategic Innovations, Inc.

File: B-413305

Date: September 26, 2016

Jim A. Davis, for the protester.

Victoria H. Kauffman, Esq., Richard J. McCarthy, Esq., and Alex M. Ray, Esq.,
National Aeronautics and Space Administration, for the agency.

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the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the agency's consideration of past performance of the incumbent contract in evaluating the awardee's proposal is denied where the solicitation specifically permitted consideration of past performance by an offeror's predecessor companies.

DECISION

Davis Strategic Innovations, Inc. (DSI), of Huntsville, Alabama, protests the award of a contract to MEC^x, Inc., of Houston, Texas, under request for proposals (RFP) No. NND15538677R, issued by the National Aeronautics and Space Administration (NASA) for safety and environmental support services for the Armstrong Flight Research Center at Edwards Air Force Base (AFB), California. DSI contends that NASA's past performance evaluation and selection decision were based on the agency's improper consideration of the incumbent contract performed by a different entity.

We deny the protest.

BACKGROUND

The RFP was issued on July 7, 2015, as a set-aside for service-disabled veteran-owned small businesses (SDVOSB), and provided for the award of a fixed-price, indefinite-quantity, indefinite-delivery (IDIQ) contract for a base year,

four option years, and a final 6-month option period, with a fixed-price purchase order for a 1-month phase-in period. RFP at 3, 11, 27, 34.¹ The solicitation stated that award would be based on a best-value tradeoff considering three evaluation factors (mission suitability, past performance, and price) and instructed offerors to submit separate proposal volumes for each factor. Id. at 24, 29, 34.

With respect to the past performance evaluation factor, offerors were to identify five current or past contracts performed within the last 3 years, describe the contract's relevance and similarity to the tasks in the RFP's performance work statement (PWS), and provide a client questionnaire for each contract. Id. at 28. The RFP stated that past performance would be evaluated in accordance with section 15.305(a)(2) of the Federal Acquisition Regulation (FAR), which directs agencies to take into account past performance information regarding predecessor companies, key personnel, and major subcontractors when the information is relevant to an acquisition. Id. at 32; FAR § 15.305(a)(2)(iii). The RFP provided for a multi-step process for evaluating and rating the relevance, quality, and overall confidence in the offeror's ability to perform the requirement based on the offeror's performance record. See RFP at 31-34.

NASA received proposals from 12 offerors, conducted discussions, and requested final proposal revisions (FPR) from offerors in the competitive range, including DSI and MEC^x, Inc. See Agency Report (AR), Tab 6, Source Selection Decision (SSD), at 108-14. MEC^x, Inc.'s proposal cited as past performance the incumbent IDIQ contract, which, at issue here, was largely performed by MEC^x, LP (a limited partnership), but was transferred to MEC^x, Inc., by a contract novation agreement executed with NASA.² As described below, NASA's source selection authority (SSA) for the procurement selected MEC^x, Inc.'s proposal for award based, in part, on the offeror's "very relevant" past performance as the incumbent. AR, Tab 6, SSD, at 123.

¹ The agency assigned documents in the record, including the solicitation, sequential page numbers, which we use in our decision.

² See AR, Tab 4, MEC^x, Inc. Past Performance Proposal (Proposal), at 69-76; Decl. of MEC^x, Inc., Pres. (Decl.) ¶¶ 7-11; attach. 2, Novation, at 1-5. The incumbent contract, which expired in 2014, was originally awarded to MEC^x, LLC (a limited liability company) in 2006. Decl. ¶ 7; AR, Tab 4, MEC^x, Inc. Proposal, at 69. The LLC was subsequently restructured as a limited partnership (MEC^x, LP) in 2007. Decl. ¶ 8; AR, Tab 4, MEC^x, Inc. Proposal, at 69; see Protest, attach. 4.c., Certificates of Formation & Conversion, at 11-15. The protester does not dispute that the LLC and successive LP are the same entity that was awarded the incumbent contract. Rather, at issue here, is whether that entity is the same as MEC^x, Inc., which was awarded the instant contract.

On May 25, 2016, NASA awarded the contract to MEC^x, Inc., for \$14,044,408, and this protest followed. Protest, attach. 4.f., Award Notification.

DISCUSSION

DSI protests the agency's past performance evaluation and selection decision, arguing that NASA unreasonably credited MEC^x, Inc., with the incumbent contract largely performed by MEC^x, LP, which, according to the protester, is a completely different legal entity with a distinct company history.³ Protest at 2-4; Comments at 1-2. DSI asserts that MEC^x, Inc., must be disqualified from the competition for its allegedly improper reliance on another entity's past performance, and the protester requests that the contract be cancelled and award made to DSI. Id.

NASA maintains that the firms are the same entity and, in response to the protest, the agency submitted a declaration from the president of MEC^x, Inc., explaining the company's history. Agency Mem. of Law (MOL) at 1-3; see Decl.

Based on our review of the record described below, we find that NASA's evaluation of MEC^x, Inc.'s past performance was unobjectionable and consistent with the solicitation and applicable FAR provisions. Although our decision here does not specifically discuss each of DSI's arguments, we have considered all of the protester's assertions and find none furnishes a basis for sustaining the protest.⁴

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. SIMMEC Training Solutions, B-406819, Aug. 20, 2012, 2012 CPD ¶ 238 at 4. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that it is adequately documented. Falcon Envtl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7.

³ DSI also filed an agency-level protest, which NASA denied. See generally AR, Tabs 7-8, Agency-Level Protest & Denial.

⁴ For example, DSI contends that its protest is based on corporate law governing how entities can conduct business under a variety of legal names, and suggests that the awardee had no legal authority in that regard to rely on the incumbent's past performance. However, DSI cites no legal authority to support these assertions and largely abandoned them in its comments on NASA's agency report. Compare Protest at 2-3 with Comments at 2-3.

As stated above, the RFP provided that an offeror's past performance would be evaluated in accordance with FAR § 15.305(a)(2), which directs agencies to take into account past performance information regarding predecessor companies, key personnel, and major subcontractors when the information is relevant to an acquisition. RFP at 32; FAR § 15.305(a)(2)(iii). We have previously held that, absent solicitation language to the contrary, an agency properly may consider the relevant experience and past performance of key individuals and predecessor companies; such experience and past performance may be useful in predicting success in future contract performance. See Advant-EDGE Solutions, Inc., B-400367.2, Nov. 12, 2008, 2008 CPD ¶ 210 at 4. The key consideration is whether the experience evaluated reasonably can be considered predictive of the offeror's performance under the contemplated contract. See Al Hamra Kuwait Co., B-288970, Dec. 26, 2001, 2001 CPD ¶ 208 at 4-5.

Our reading of the record, including the statements by the contracting officer and the president of MEC^x, Inc., as well as the extensive public record submitted by DSI, leads us to conclude that NASA reasonably considered the past performance of the incumbent contract when it evaluated MEC^x, Inc.'s proposal.⁵ The record confirms that the incumbent contract was transferred to MEC^x, Inc., by novation agreement executed by NASA and MEC^x, LP's corporate officers, and that the contract was modified accordingly to recognize the novation and change in company name.⁶ The contracting officer also states that he reviewed MEC^x, Inc.'s current and past contracts in the governmentwide past performance information retrieval system (PPIRS) database,⁷ using the firm's data universal numbering system (DUNS) number and contractor and government entity (CAGE) code, and that both entities

⁵ In support of its various assertions, DSI submitted dozens of public records from 2002 to 2015 for several entities with the common name "MEC^x", including corporate filings from the Office of the Secretary of State of Texas, Texas franchise tax reports, and articles of incorporation and amendments thereto. See generally Protest, attachs. 4.b.-4.d. (The entities at issue here--MEC^x, LP, and MEC^x, Inc.--were incorporated under the laws of the state of Texas and are based in Houston. See Decl. ¶¶ 8, 10; attach. 1, Certificates of Filing & Amendment, at 1-2 (forming corporation); Protest, attach. 4.c., Certification of Formation of LP, Dec. 31, 2007, at 13-15; attach. 4.d., Change of Registered Office/Agent, at 19-20 (registered office of MEC^x, Inc., in Houston, Texas).)

⁶ Decl., attach. 2, Novation, at 1-5; compare Protest, attach. 4.c., Tex. 2008 Franchise Tax Rep., MEC^x, LP, at 16-17 with attach. 4.d., Tex. 2015 Franchise Tax Rep., MEC^x, Inc., at 21 (identifying the same individual that executed the 2013 novation agreement as a corporate officer).

⁷ The RFP stated that the agency could use past performance information obtained from PPIRS, among other sources. RFP at 32.

are associated with the same DUNS number and CAGE code.⁸ Contracting Officer's Statement (COS) at 2. The contracting officer further verified the CAGE code in MEC^x, Inc.'s active registration in the system for award management (SAM). Id. at 2-3. Moreover, the president of the company states that the majority of the employees that were with the company when it was first formed in 2002, are still employed by him. See Decl. ¶ 13. His explanation of the evolution and chronology of the company's various corporate structures is also consistent with the publicly available documents provided by the protester.⁹ See generally Decl.; Protest, attach. 4.b.-4.d. This record, in our view, supports NASA's assertion that MEC^x, Inc., and MEC^x, LP, are the same entity, but under successive corporate structures with different names. See MOL at 4; COS at 2.

DSI's various assertions, by contrast, are unsupported and lack merit. For example, DSI claims that the novation agreement is not legally binding because it was certified by the secretary of the MEC^x, LP, 4 days after the date on the agreement. See Comments, attach 1, at 8. DSI also disputes some aspects of the company's reorganization, suggesting that it could only have been accomplished through the sale or merger of the two entities. See id. at 7-9. DSI also suggests that MEC^x, Inc., lacks legal authority to use the same DUNS number and CAGE code that were previously assigned to MEC^x, LP, and that this usage is somehow "problematic." See id. at 4-5; Comments at 1; Protest at 2-3. DSI, however, cites no legal authority to support its largely conclusory assertions. See, e.g., Comments, attach. 1, at 7; see also supra n.4. Significantly, DSI does not dispute the company president's assertion that the majority of its employees have been employed by him since the company was formed. See generally Comments. We thus agree with NASA that DSI points to nothing in the record that suggests that the MEC^x entities are not related. MOL at 1.

⁸ CAGE codes are assigned to discrete business entities by the Defense Logistics Agency and are used to dispositively establish the identity of a legal entity for contractual purposes. See FAR § 4.1801; Gear Wizzard, Inc., B-298993, Jan. 11, 2007, 2007 CPD ¶ 11 at 2. DUNS numbers are established by Dunn & Bradstreet Information Services for purposes of establishing the precise identification of an offeror or contractor. See FAR §§ 2.101, 4.605(b); URS Group, Inc., B-402820, July 30, 2010, 2010 CPD ¶ 175 at 4.

⁹ The record shows that the same individual has been president of the company throughout its various corporate iterations. See Protest, attach. 4.c., Tex. 2003 Franchise Tax Rep., MEC^x, LLC, at 2; Certification of Formation of LP, Dec. 31, 2007, at 13-15; attach. 4.d., Tex. 2015 Franchise Tax Rep., MEC^x, Inc., at 21. The president of the company explains that MEC^x, LP, was restructured as a corporation (MEC^x, Inc.) in 2013, to buy out his business partner and to recertify as a SDVOSB. Decl. ¶ 10; see, e.g., Protest, attach. 4.c., Certificate of Amend., at 18-19 (change in partner).

In any event, DSI's assertions are misplaced because, as noted above, the key consideration is whether the experience evaluated by NASA can be reasonably considered predictive of MEC^x, Inc.'s performance under the contemplated contract. See, e.g., Advant-EDGE Sols, Inc., supra (protest of agency's evaluation of awardee's experience denied where the awardee is a newly formed company that shares the same contract management staff, processes, experience, and support as its predecessor company); Al Hamra Kuwait Co., supra (denying protester's argument that awardee is not successor firm because the incumbent still exists as a legal entity, where the awardee acquired the resources used in performing the cited contracts, thus affording additional confidence in the likelihood of successful performance); Consortium HSG Technischer Serv. GmbH & GeBe Gebäude-und Betriebstechnik GmbH Südwest Co., Mgmt. KG, B-292699.6, June 24, 2004, 2004 CPD ¶ 134 at 3 (denying protester's challenge to validity of the firm's sale and novation agreement where there is no suggestion that any of the strengths of the former entity are other than fully intact and available to the awardee).

Based on our review of the evaluation record, we find that NASA reasonably evaluated MEC^x, Inc.'s past performance record, including its performance of the incumbent contract, which the agency reasonably considered predictive of the awardee's performance under the new contract. As described above, the RFP stated that the agency would evaluate the relevance and quality of an offeror's past performance and assess the confidence in the offeror's ability to perform the PWS based on the offeror's record. See RFP at 31-34. In this respect, the PWS requires the contractor to perform a number of safety and environmental management tasks, such as conducting reviews and worksite hazard analysis of all new jobs occurring at NASA's Armstrong Flight Research Center; identifying pollution prevention opportunities; and ensuring compliance with federal, agency, and state environmental laws and policies. See, e.g., PWS at 2-4, 15, 19.

Consistent with these requirements, the record shows that MEC^x, Inc.'s proposal was assessed a significant strength for MEC^x, LP's prior performance of the same services for NASA. See AR, Tab 6, SSD, at 119-20. MEC^x, Inc., was also evaluated favorably for its performance of a support contract for the Environmental Protection Agency for a long-term emergency response to an oil spill. Id. The offeror was further assessed a strength for its positive client reviews in its PPIRS reports and questionnaires. See id.; AR, Tab 5, MEC^x, Inc. Past Performance Evaluation, at 104-06. The SSA, in her cost/technical tradeoff, recognized the slight technical superiority of DSI's proposal, but concluded that MEC^x, Inc.'s proposal provided the best value to NASA, because DSI's proposal was significantly higher priced than MEC^x, Inc.'s proposal and based--reasonably, as we discuss above--on

MEC^x, Inc., more relevant experience as the incumbent.¹⁰ AR, Tab 6, SSD, at 120-23. DSI has not shown this conclusion to be unreasonable.

In sum, we find that NASA's evaluation of MEC^x, Inc.'s past performance and the agency's source selection decision were reasonable. While DSI disagrees with the agency's judgment and conclusions, the protester's disagreement provides no basis to sustain its protest. See Trailboss Enters., Inc., B-297742, Mar. 20, 2006, 2006 CPD ¶ 64 at 5 (agency properly considered past performance record of predecessor company and nothing in record suggests contract novation between the companies was invalid); Consortium HSG Technischer Serv. GmbH & GeBe Gebäude-und Betriebstechnik GmbH Südwest Co., Mgmt. KG, supra, at 3; see also Harbor Servs., Inc., B-408325, Aug. 23, 2013, 2013 CPD ¶ 214 at 4 (denying protest where record indicated that key personnel and company assets were transferred or otherwise available to awardee providing for continuity of operations between the successive firms).

The protest is denied.

Susan A. Poling
General Counsel

¹⁰ NASA did not provide DSI's evaluated price, and DSI does not challenge the agency's evaluation of DSI's proposal or the evaluations under the mission suitability and price factors.