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Washington, DC 20548

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Decision

Matter of: Advanced Environmental Solutions, Inc.

File: B-401654

Date: October 27, 2009

William E. Hughes III, Esq., Whyte Hirschboeck Dudek SC, for the protester.
Gerald H. Werfel, Esq., Pompan, Murray & Werfel, P.L.C., for Dunamis Environmental Group, LLC, the intervenor.
Sharon A. Jenks, Esq., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In evaluating a newly formed joint venture's past performance, an agency may consider the past performance of the individual joint venture partners unless prohibited from doing so by the solicitation.

DECISION

Advanced Environmental Solutions, Inc. (AES) of Worcester, Massachusetts protests the award of a contract to Dunamis Environmental Group, LLC, of Del City, Oklahoma (a newly formed joint venture of Dunamis Power Systems, LLC and Eason Enterprises, LLC) under request for proposals (RFP) No. FA8101-09-R-0002, issued by the Department of the Air Force, for hazardous waste transportation and disposal services.

We deny the protest.

The RFP, issued on April 24, 2009, as a set-aside for service-disabled veteran-owned small business concerns (SDVOSBC), contemplated the award of an indefinite-delivery/indefinite-quantity fixed-price contract to provide hazardous waste transportation and disposal services at Tinker Air Force Base, Oklahoma.¹ The contract is for industrial waste removal services necessary to pump, remove, and

¹ The contract included a 15-day transition period, a 3-month base period and four 1-year option periods.

transport waste oils, contaminated fuels, sludge, oil slurry, hydraulic fluid, water solvent, and chemical waste as required from points of generation and other locations to approved storage sites on-base or to Environmental Protection Agency (EPA) approved treatment/storage/disposal (TSD) facilities located off-base.

The RFP provided for award on a best-value basis utilizing “performance price tradeoff” source selection procedures under which tradeoffs would be made between evaluated past performance and price among those offerors whose proposals have been determined to be technically acceptable. Past performance was said to be significantly more important than price.

The RFP listed the following subfactors for determining technical acceptability:

- (a) Acceptable list of the equipment will meet all requirements of [performance work statement (PWS)] paragraph (pp) 1.3.
- (b) An acceptable approach will be to provide proof of applicable [Department of Transportation] and EPA licenses and certifications. An acceptable plan will clearly show how applicable licenses and certification will be in place when needed [in accordance with (IAW)] PWS pp 1.3.6.
- (c) An acceptable approach will demonstrate [and] include how an emergency spill will be handled including addressing time constraints and disposal requirements IAW PWS pp 1.2.3.1.
- (d) An acceptable plan will address disposal of industrial waste and disposal of hazardous waste including transportation IAW PWS pp 1.2.2.3, 1.2.2.4, and 1.3.

RFP § M, at 2.

With regard to past performance, the RFP indicated that the agency would assess the degree of confidence² in the offeror’s ability to perform the contract requirements,

² The RFP listed the following confidence assessment ratings: substantial confidence - based on the offeror’s performance record, the government has a high expectation that the offeror will successfully perform the required effort; satisfactory confidence - based on the offeror’s performance record, the government has an expectation that the offeror will successfully perform the required effort; limited confidence - based on the offerors performance record, the government has a low expectation that the offeror will successfully perform the required effort); no confidence - based on the offeror’s performance record, the government has no expectation that the offeror will be able to successfully perform the required effort; and unknown confidence -

considering the recency, relevancy, and performance quality of its past performance. Regarding relevancy, the RFP stated that “consideration will be given to things such as similar service, similar complexity of the effort, breadth and depth of skills, similar contract scope and type, contract magnitude and schedule.”³ It further stated that “[a] relevancy determination of the Offeror’s (including joint venture partner(s) and major and critical subcontractor(s)) past performance will be made based upon the aforementioned considerations.” RFP § M, at 3. The proposal instructions for the RFP stated:

Offerors shall submit information . . . on a minimum of three (3) but no more than six (6) recent contracts from the prime contractor considered most relevant in demonstrating performance abilities on the proposed effort. Also, Offerors shall include information on a maximum of three (3) recent contracts performed by each of the core team members and significant subcontractors considered most relevant in demonstrating their ability to perform the proposed effort.

RFP § L, at 5.

Three offerors, including AES and Dunamis, responded to the RFP by the May 11 closing date. After the initial evaluation, discussions, and final proposal revisions, AES’s and Dunamis’s proposals received the following evaluation ratings:

Offeror	Price	Technically Acceptable	Past Performance
Dunamis	\$6,498,541	Yes	Satisfactory Confidence
AES	\$7,976,073	Yes	Substantial Confidence

AR, Tab 7, Integrated Assessment Best Value Decision, at 2.

(...continued)

no performance record is identifiable or the offeror’s performance record is so sparse that no confidence assessment rating can be reasonably assigned. RFP § M, at 3.

³ The RFP listed the following relevancy ratings: very relevant – past/present performance effort involved essentially the same magnitude of effort and complexities this solicitation requires; relevant – past/present performance effort involved much of the magnitude of effort and complexities this solicitation requires; somewhat relevant – past/present performance effort involved some of the magnitude of effort and complexities this solicitation requires; and not relevant – past/present performance effort involved little or none of the magnitude of effort and complexities this solicitation requires. RFP § M, at 4.

A performance confidence assessment group (PCAG) evaluated the offerors' past performance. The Dunamis joint venture provided a past performance reference for Dunamis Power (one of the joint venture partners) and multiple references for Eason (the other joint venture partner). The PCAG found the Dunamis Power contract and one Eason contract to be relevant. The PCAG also found three Eason contracts to be only somewhat relevant primarily because the magnitude of work on those contracts was not the same as the solicited contract. The performance on all these contracts was reported as very good to excellent. Dunamis's past performance received an overall confidence rating of satisfactory. AR, Tab 9, PCAG Final Report, at 6-8.

The source selection authority (SSA) found that Dunamis's proposal represented the best value because it was not necessary to pay the additional (23 percent) price premium associated with AES's proposal, since Dunamis's past performance was satisfactory and would meet the agency's needs. In so doing, the SSA acknowledged that the Dunamis's satisfactory confidence rating was based on performing hazardous waste transportation and disposal on a smaller scale. See AR, Tab 7, Decision Document, at 2-3. Award was made to Dunamis on July 20. After a debriefing, this protest followed.

AES argues that Dunamis's proposal should have been determined unacceptable because Dunamis did not identify a facility or legitimate business address; did not have the necessary personnel and equipment; did not provide information regarding its TSD facility license and EPA license; and failed to provide any information on whether its personnel had commercial driving licenses with hazardous material endorsements. These arguments are meritless. As noted by the agency, the RFP instructions and technical subfactors did not require offerors to provide information regarding the offeror's facility; list particular personnel; or provide TSD facility or commercial driving licenses to be deemed technically acceptable. Further, the agency reports, and our review confirms, that Dunamis's proposal included a list of equipment on hand and to be purchased, as well as a detailed explanation of where such necessary equipment would be located and used during contract performance. Moreover, Dunamis indicated in its proposal and during discussions that it was applying for DOT and EPA licenses, which would be in place by the time of contract award, and, as a back-up plan, that its listed subcontractor had DOT and EPA licenses. Based on our review, the agency reasonably determined Dunamis's proposal to be technically acceptable.

AES also challenges Dunamis's satisfactory confidence past performance rating, arguing that it should have received an unknown confidence or no confidence rating because the joint venture had no relevant contracts, and that Dunamis's proposal did not comply with the RFP requirement for the offeror (not the individual partners) to submit past performance information on a minimum of three contracts.

Our Office examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of offerors' proposals are primarily matters within the contracting agency's discretion. Kay & Assocs., Inc., B-291269, Dec. 11, 2002, 2003 CPD ¶ 12 at 4. In this regard, our Office will not question an agency's determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation criteria. Id. A protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

We first note that Dunamis did provide the requisite past performance references with its proposal. In this regard, Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iii) directs agencies to take into account past performance information regarding predecessor companies, key personnel, and major subcontractors when such information is relevant to an acquisition. Thus, an agency properly can consider the relevant experience and past performance history of the individual joint venture partners of the prime contractor in evaluating the past performance of a joint venture, so long as doing so is not expressly prohibited by the RFP. MVM, Inc., B-290726 et al., Sept. 23, 2002, 2002 CPD ¶ 167 at 4; Network Sec. Techs., Inc., B-290741.2, Nov. 13, 2002, 2002 CPD ¶ 193 at 9. The RFP here did not prohibit considering the past performance of individual joint venture partners in evaluating an offeror's past performance; indeed, the RFP specifically encouraged offerors to provide such information and advised that consideration would be given to the relevant past performance of the joint venture partners. RFP § M at 3. Because at least three past performance references for the joint venture partners were provided in Dunamis's proposal and because it provided sufficient information regarding these referenced contracts on the forms provided in the RFP, Dunamis satisfied the RFP requirements.

AES challenges the relevance of the various contracts relied upon by the Air Force in finding Dunamis's past performance to be of satisfactory confidence. Our review of the record shows that the Dunamis contracts determined to be relevant or somewhat relevant in the evaluation involved many of the same activities required under the solicited contracts, such as pumping oil/water and barrel sludge, cleaning oil spills, transporting waste, and storing and disposing of industrial and hazardous waste. AR, Tab 5b, Dunamis Past Performance Proposal; Tab 9, PCAG Final Report, at 6-7. While the protester asserts that the Dunamis Power base operation services contract that had been determined relevant by the agency did not involve hazardous waste removal and therefore should not have been considered relevant, the record reflects that the evaluators considered this contract to be relevant because the duties involved maintaining an initial accumulation point for storage and disposal of hazardous waste, and because the company was "providing equipment necessary and an emergency spill plan" for the hazardous waste. AR, Tab 9, PCAG Final Report, at 6. Given the discretion vested in the agency in making this judgment, we

cannot find it unreasonable. While AES also questions the relevancy of several of the smaller scope contracts relied upon as past performance references for Dunamis given their small value, it was for this reason that the agency reasonably determined that these contracts to be only somewhat relevant. In sum, we find reasonable the agency's rating of Dunamis past performance as satisfactory confidence.

AES's complaints about the best value decision are primarily premised upon its view that Dunamis's past performance was something less than satisfactory confidence. However, as discussed above, the agency acted reasonably in rating Dunamis's past performance as being of satisfactory confidence. Under the circumstances, we find the agency's best value decision that found that the price premium for AES's superior past performance did not offset Dunamis significantly lower price for satisfactory past performance to be reasonable and consistent with the RFP. In this regard, the SSA in the best value decision recognized that one of the major reasons that Dumanis's past performance was only regarded of satisfactory confidence was that its hazardous waste transportation and disposal was on a smaller scale than required under this RFP. AR, Tab 7, Integrated Assessment Best Value Decision, at 2.

The protest is denied.

Lynn H. Gibson
Acting General Counsel