



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Constellation NewEnergy, Inc

File: B-409353.2; B-409353.3

Date: July 21, 2014

Patrick R. Buckler, Buckler Law, LLC, for the protester.
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Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's past performance evaluation is denied where the record shows that the agency reasonably evaluated the offerors' past performance records, and reasonably distinguished between those records in assigning the awardee a higher confidence rating.

2. Protest challenging the agency's award decision is denied where the record shows that the agency reasonably found that the higher ratings for the awardee's proposal under the non-price factors merited award as compared to the protester's proposal, which had a lower price but a higher performance risk.

DECISION

Constellation NewEnergy, Inc. (CNE), of Baltimore, Maryland, protests the award of a contract to Hess Corporation, of New York, New York, under request for proposals (RFP) No. SPE600-13-R-0404, issued by the Defense Logistics Agency--Energy (DLA), for electricity and ancillary services. CNE challenges the agency's evaluation of its past performance and the award decision.

We deny the protest.

BACKGROUND

DLA issued the RFP on March 5, 2013, to acquire the delivery of electricity and ancillary services to various civilian and military locations under a fixed-price, requirements contract for a 60-month delivery period. See RFP at 4-5. The solicitation sought proposals to provide electricity to seventeen locations,

comprising thirty-nine accounts¹ within the North American Electric Reliability Corporation region of PJM.² Id. at 4. The contractor was required to deliver fixed blocks of electricity to a DLA delivery point, for scheduling and coordinating, and then to a service point for each account. Id. at 8

As relevant here, the RFP performance specifications require the contractor to invoice and bill each account, and require each invoice to include specific information, such as the installation name, billing period, and total electricity charge. Id. at 8-9. In this connection, the specifications require the contractor to provide an electronic copy of each account invoice to DLA, along with a summary accounting of total charges in sufficient detail to facilitate DLA review and verification. Id. For payment purposes, the RFP stated that the government shall pay the contractor the product of the fixed fee/supply service fee (SSF) and the account's total electricity consumption in that month. Id. at 8. The SSF represented the offeror's price per kilowatt hour (kWh) for supplying electricity.

The RFP listed five evaluation factors: (1) past performance, (2) technical capability/risk, (3) socioeconomic proposals, (4) AbilityOne commitment, and (5) price. Id. at 35. Past performance was the most important non-price evaluation factor, and socioeconomic proposal and AbilityOne³ commitment were the least important non-price factors. Id. Technical capability/risk was less important than past performance but was "significantly more important" than socioeconomic proposal and AbilityOne commitment. Id. For purposes of award, the non-price factors, combined, were "approximately equal" to price. Id.

¹ The 17 "locations" were: Aberdeen Proving Grounds; National Institutes of Standards and Technology; Army Corps of Engineers; National Institutes of Health; Adelphi Laboratory; Fort Detrick Annex; Joint Base Andrews; VA Maryland Health Care System; MD Institute of Defense Analysis; Johns Hopkins Applied Physics Laboratory; United States Department of Agriculture--Beltsville; Joint Base McGuire-Dix-Lakehurst; Picatinny Arsenal; New Jersey Coast Guard--Cape May; Pittsburgh Air Reserve Base; Defense Intelligence Agency; and Naval Facilities Acquisition Command--Washington. RFP at 4. Certain of these locations had more than one associated "account"; for example, the Army Corps of Engineers location was comprised of accounts in six locations in Maryland. See RFP, amend. No. 0003, at 1.

² PJM Interconnection is a regional transmission organization that coordinates the movement of wholesale electricity. See www.pjm.com/about-pjm.aspx.

³ AbilityOne is a program initiative to help people who are blind or have other significant disabilities. See Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506.

With regard to the past performance evaluation, the RFP stated that offerors would be given the opportunity to address unsatisfactory reports of past performance, and that an offeror's response, or lack thereof, would be taken into consideration. Id. at 33. The RFP cautioned that while the agency would consider an offeror's prompt actions to correct performance problems, such actions may not mitigate all negative performance trends. Id. Also, the RFP stated that the government may use information gained from any source, but reserved the right to only consider performance on government or DLA Energy contracts. Id.

The RFP advised that the government will pay the contractor the monthly electricity cost for each account, including pass-through fees, as well as a fixed supply service fee (SSF) for each kilowatt hour (kWh) of electricity provided. RFP at 7. The SSF is intended to cover the contractor's profit, administrative expenses, and overhead costs. See id. at 7-8, 36; Agency Report (AR) at 1-2. For the price evaluation, the RFP stated that the price evaluation would compare each offeror's supply service fee (SSF) and that the SSF in conjunction with the non-price related factors would be the basis for the agency's best overall value award decision. RFP at 36.

Seven offerors, including CNE and Hess, submitted proposals by the closing date on April 16. AR at 2. A source selection evaluation board (SSEB) first evaluated proposals under the non-price factors. Next, the agency conducted a reverse auction to negotiate offerors' final SSF. On November 21, DLA awarded the contract to Hess. CNE protested the award at our Office on December 17, but withdrew its protest on January 10, 2014, following the agency's decision to take corrective action by reevaluating the offerors' proposals. Following corrective action, the results pertinent here were as follows:⁴

	CNE	HESS
Past Performance	Relevant/Limited	Relevant/Satisfactory
Technical Capability/Risk	Good	Good
Socioeconomic Proposal	Acceptable	Acceptable
AbilityOne Commitment	Acceptable	Acceptable
SSF	-\$0.00008/kWh	\$0.00041/kWh
Evaluated Price	\$375,844,622.83	\$378,818,845.46

⁴ Past performance was assigned a relevancy rating and a confidence rating. The relevance ratings were very relevant, relevant, somewhat relevant and not relevant. The confidence ratings were substantial confidence, satisfactory confidence, limited confidence, and no confidence. AR, Tab 2, Source Selection Plan, at 8-10. The technical capability/risk ratings were outstanding, good, acceptable, marginal, and unacceptable. The socioeconomic proposal and AbilityOne commitment ratings were acceptable or unacceptable.

See AR, Tab 30, Source Selection Decision, at 49-50.

The evaluated price for each offeror was based on the overall total estimated contract value, which includes the estimated price of the electricity purchases and associated pass-through market charges, as well as the SSF bid by the offerors. See AR at 6 n.1. The total SSF price in dollars was calculated by multiplying an offeror's SSF by the total estimated kWh to be provided over the 60-month term of the contract. For this purpose the agency used an electricity amount of 6,069,842,100 kWh, which was listed in the source selection plan.⁵ Because, as indicated above, CNE proposed a negative SSF, the company offered a credit to the government for each kWh provided. The offerors' SSF cost to the government is as follows:

	CNE	HESS
SSF	-\$0.00008/kWh	\$0.00041/kWh
Volume	6,069,842,100 kWh	6,069,842,100 kWh
Cost to Government	-\$485,587.37	\$2,488,635.26

See AR, Tab 30, Source Selection Decision, at 49-50.

The source selection authority (SSA) independently reviewed the evaluation documents, and consulted the source selection advisory council and the SSEB. Based on her review of the proposals, the SSA concluded that Hess's proposal offered the best value based on a tradeoff between CNE's lowest-priced proposal, and Hess's next-lowest-priced, higher technically-rated, proposal. See id. at 50-51. The SSA concluded that although CNE offered the lowest price, its proposal did not represent the best value when considering both price and past performance. Id. at 50.

In comparing the two proposals, the SSA noted that CNE received the lowest rating for past performance, which was the most important of the non-price factors. Id. The SSA further noted that the ratings assigned to CNE were based on references from customers who stated that the protester had experienced problems with inaccurate invoices and a failure to diligently resolve those issues. Id. The SSA also expressed concern that these problems occurred on significantly smaller contracts, which increased the risk that CNE might perform poorly on the larger DLA contract. Id. Finally, the SSA noted that some of CNE's references indicated that

⁵ This figure was different from the 7,106,105,380 kWh amount listed in the RFP, but was nonetheless applied equally to all offerors. The protester does not challenge the agency's evaluation in this regard.

they likely would not award a follow-on contract to CNE. Id. Overall, the SSA concluded that there was a “low expectation that CNE will successfully perform the required effort.” Id.

In contrast, the SSA noted that Hess had “satisfactory performance” within PJM and that its PJM references, as well as all contracting officers for contracts identified through PPIRS, indicated that they would award a contract to Hess again. Id. The SSA acknowledged that CNE proposed a lower price than Hess, but concluded that the difference was less than 1 percent of the total estimated price. Id. Based on this small difference, the SSA concluded the savings from selecting CNE’s proposal was outweighed by Hess’s lower performance risk. Id. DLA selected Hess for an award on April 4, 2014. This protest followed.

DISCUSSION

CNE contends that DLA’s evaluation was unreasonable because the agency improperly assigned a limited confidence rating⁶ to its past performance, and treated CNE and Hess differently under the past performance factor. The protester also challenges the award decision, arguing that the agency improperly traded CNE’s lower cost for an ambiguous reduced risk of poor performance; that DLA in making its best-value decision improperly determined CNE’s price to be marginally lower; and that DLA improperly gave more weight to past performance than price in contravention of the evaluation scheme. For the reasons discussed below, we find no basis to sustain the protest.

Past Performance

With respect to DLA’s past performance evaluation, CNE argues that DLA gave an inordinate amount of weight in the evaluation to concerns regarding CNE’s billing practices, rather than to its delivery of electricity. CNE argues that while provision of electricity is the primary objective of the solicitation, billing is a support function; thus, the agency’s evaluation should have placed more weight on the protester’s record of successfully providing electricity. The protester further argues that billing concerns resulted in negative reviews on only two of its contracts. CNE also argues that DLA treated CNE and Hess differently in evaluating the two proposals under this factor because the agency assigned Hess’s proposal a higher rating despite that company having similar past performance problems with account billing. We find no merit to these arguments.

⁶ A limited confidence rating was applicable where “[b]ased on the Offeror’s recent/relevant performance record, the Government has low expectation that the Offeror will successfully perform the required effort.” AR, Tab 2, Source Selection Plan, at 9.

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 and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. DynCorp Int'l LLC, B-406523.2, B-406523.3, Dec. 16, 2013, 2014 CPD ¶ 7 at 6; Falcon Env'tl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. A protester's disagreement with the agency's judgment concerning the merits of the protester's past performance does not establish that the evaluation was unreasonable. Sam Facility Mgmt., Inc., B-292237, July 22, 2003, 2003 CPD ¶ 147 at 3.

In assessing CNE with a limited confidence rating, DLA considered five references submitted by CNE⁷, and four references⁸ in reports obtained from the Past Performance Information Retrieval System (PPIRS). For the references submitted by CNE, the ratings ranged from satisfactory to exceptional. AR, Tab 26, Past Performance Confidence Assessment Report, at 3-8. The ratings obtained from PPIRS, however, were less positive, ranging from marginal to satisfactory.⁹

DLA found that CNE's lower ratings were the result of past performance problems that CNE experienced involving invoicing (GSA contract, Jan. 2010 to Dec. 2013), billing (GSA contract, May 2011 to May 2014), inaccurate billing (Joint Base McGuire-Dix-Lakehurst contract, June 2012-2013), and timely account enrollments (National Arboretum contract, May 2011-June 2012). Id. at 4-6, 8, 17. For each adverse performance issue, DLA afforded CNE the opportunity to respond. See id. at 9-13; AR, Tab 30, Source Selection Decision, at 5-8, 11-14. Based on the past

⁷ These references were: New Jersey Transit, State of New Jersey, General Services Administration, World Kitchen, and General Electric. See AR, Tab 5, CNE Proposal, Attach. II, at 1.

⁸ These references were: Joint Base McGuire-Dix-Lakehurst and New Jersey Institute for Defense Analysis, PJM Large, PJM Small, and the National Arboretum. AR, Tab 26, Past Performance Confidence Assessment Report, at 13-17.

⁹ The PPIRS rating categories were: quality of product/service, schedule, cost control, business relations, management of key personnel, and utilization of small business. AR, Tab 26, Past Performance Confidence Assessment Report, at 13-17.

performance information, including CNE's responses, the SSEB assigned CNE's past performance a limited confidence rating, based on the following concerns:

After review of both the positive and adverse past performance information . . . CNE is rated "Limited Confidence" for the Past Performance evaluation factor. The past performance information received leaves the Government confident that CNE can coordinate delivery of electricity to a specified site, however, the Government does not have confidence that CNE can successful[ly] perform all contract requirements, particularly related to invoicing, billing, and account set-up. . . . These issues arose during performance on contracts with significantly fewer customers, fewer accounts, and lower dollar amounts than involved in the current procurement, which lowers the Government's confidence as well.

CNE's response to the adverse reports does not raise the Government's confidence level. . . . Regarding the JBMDL [Joint Base McGuire-Dix-Lakehurst] report, CNE's explanation describes multiple instances of CNE error, internal miscommunications, and misunderstandings regarding the billing and invoicing data, and seems to attribute many of the problems to the local utility. CNE's response to the GSA report similarly attributes many of the issues to the local utility. However, this explanation is unsatisfactory because it was CNE's contractual responsibility to work with the utility so that it could perform accurate and timely invoicing to the customer. Further, in its response to the GSA report, CNE stated that when problems like those identified by GSA are found, it conducts an internal process review to prevent the problems from occurring again; however, very similar billing and invoicing issues were reported by the another customer (JBMDL) on a more recent contract. Overall, therefore, CNE's responses to the adverse past performance do not give the Government any additional confidence that these issues will not occur in the future.

Overall, based on full review of the . . . past performance information and references, both positive and negative, the Government has Limited Confidence that CNE will be able to successfully perform the requirements of this solicitation. CNE's performance information does not warrant a "No Confidence" rating because multiple positive performance references were received in addition to the negative ones.

AR, Tab 26, Past Performance Confidence Assessment Report, at 17-18.

CNE does not specifically dispute the accuracy of the past performance information that DLA relied upon for its rating. See Protest at 10-11. Instead, as noted above, CNE argues that it was unreasonable for DLA to attach such significance to negative performance information regarding billing, given the support nature of the function. The protester argues that DLA ignored its successful track record of delivering electricity and the corrective action it undertook to address its billing and invoicing problems.

First, we note that the solicitation performance requirements clearly explained the importance of support functions, such as billing. The RFP requires the successful contractor to provide an electronic copy of each account invoice to DLA along with a summary accounting of total charges in sufficient detail to facilitate DLA review and verification, and made the contractor's invoices the basis for payment under the contract. See RFP at 8-9. Therefore, we find that the agency's evaluation of CNE's performance record related to invoicing and billing was consistent with the solicitation's requirements.

Second, the agency's evaluation record does not show that DLA ignored CNE's successful performance record of delivering electricity. As noted above, DLA expressed confidence that CNE could deliver electricity, but was not confident that CNE could perform the contract requirements related to invoicing, billing, and account set-up because of its poor performance record in this area. See AR, Tab 26, Past Performance Confidence Assessment Report, at 17-18. On this record, we conclude that DLA did not ignore CNE's explanations and actions to correct its billing problem, but instead discounted these mitigating factors because the record showed that problems remained after the protester's corrective actions.

With regard to the evaluation of Hess, CNE argues that DLA's evaluation of its past performance was unreasonable because the record shows that the agency rated Hess with a satisfactory past performance rating, despite Hess having experienced similar problems regarding billing and invoicing. The record shows, however, that DLA assigned different ratings to the two offerors because CNE and Hess had vastly different performance records, even though Hess had similar billing problems on two of its contracts. As noted above, CNE received PPIRS ratings that largely were negative, and it had experienced billing problems on at least two contracts. Id. at 13-15. On the other hand, the record shows that for Hess' three references and four PPIRS reports, the awardee received largely positive ratings, no marginal ratings, and that only one PJM reference indicated that it would not recommend Hess for a future award. See, AR, Tab 26, Past Performance Confidence Assessment Report, at 27-33.

The record also shows that, unlike for CNE, the SSEB was satisfied with Hess's response to its billing/invoicing problems.¹⁰ See id. at 33. The agency contends, and we agree, that the record shows that Hess and CNE received different ratings based on their specific performance records which contained different ratings, different recommendations, different amounts of positive and negative comments, and different conclusions regarding each contractor's ability to fulfill the contract requirements. In this regard, the record reflects that Hess's performance record contained more positive ratings than CNE's performance record and that Hess's billing problems were less problematic than CNE's billing problems. See Supp. AR at 6-9. In sum, for the reasons discussed above, we find that the agency's evaluation of CNE's performance record was reasonable.

Best Value Trade-off

Next, CNE argues that the award decision was unreasonable because DLA improperly focused on the protester's past performance history related to billing, and because the agency's evaluation of the offerors' price was inconsistent with the terms of the solicitation. For the reasons discussed below, we find no basis to sustain the protest.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the evaluation criteria. Atteloir, Inc., B-290601, B-290602, Aug. 12, 2002, 2002 CPD ¶ 160 at 5. Where a price/technical tradeoff is made, the source-selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, including the benefits associated with additional costs. Federal Acquisition Regulation (FAR) § 15.308; The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13. However, there is no need for extensive documentation of every consideration factored into a tradeoff decision, nor is there a requirement to quantify the specific cost or price value difference when selecting a higher-priced, higher-rated proposal for award. FAR § 15.308; Advanced Fed. Servs. Corp., B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 at 5.

¹⁰ The record shows that DLA was aware of Hess's billing problem at Picatinny Arsenal, which stemmed from the agency wanting the invoice data from Hess before it received the usage data from the utility. The agency concluded that Hess had adequately addressed that agency's concerns by not only providing the data on a website but by also emailing monthly data to the agency upon their request. See AR, Tab 26, Past Performance Confidence Assessment Report, at 32.

CNE argues that DLA's best-value decision erroneously elevated past performance over the value of price and the other non-price evaluation factors, which it asserts was not in accord with the evaluation scheme. CNE also argues that the agency failed to show any reduced risk, or other quantifiable benefit, in return for the \$3 million higher price of Hess's proposal. The protester argues that a proper tradeoff would have shown that there was approximately zero dollars in increased risk associated with CNE's billing practices, because Constellation offered to make the government whole, for any temporary billing issues. See Protester's Comments at 8-9.

None of CNE's challenges demonstrates that DLA's best-value tradeoff decision was unreasonable. Although CNE asserts that DLA elevated past performance, and the other factors, over price, the evaluation documents do not support this contention. Contrary to the protester's arguments, the SSA clearly recognized the significance of price relative to the other evaluation factors; while CNE's proposal was lower in price, the SSA concluded that Hess' higher price and higher past performance rating merited selection of its proposal for award. See AR, Tab 30, Source Selection Decision, at 50. Specifically, the record shows that in making its tradeoff, the SSA CNE's proposal reflected a higher likelihood of billing problems, in light of the protester's performance record, which offset the advantage of its lower price. Id.

In other words, the SSA found that it was more valuable for the agency to obtain a higher technical quality than a slightly lower price. Such a decision is contemplated in a best-value evaluation scheme and DLA was not required to show a quantifiable reduced risk or specific dollar advantage to making an award to Hess's higher price, higher technically-rated, proposal. See FAR § 15.308. As noted above, the extent to which a lower price may be sacrificed for higher technical quality is only governed by the test of rationality and consistency with the evaluation criteria. See General Dynamics Info. Tech., Inc., B-406059.2, Mar. 30, 2012, 2012 CPD ¶ 138 at 6. Here, we find the agency's best-value decision was reasonable and in accord with the evaluation criteria.

Next, CNE complains that DLA's selection decision unreasonably minimized the difference between the offerors' proposed prices by considering the SSF in the context of the overall estimated contract price, rather than limiting the comparison to only the SSF. In this regard, the agency added each offeror's SSF to the fixed estimated electricity costs set forth in the RFP to calculate an offeror's estimated contract value. See AR at 6 n.1. DLA concluded that, based on a comparison of the estimated contract values for CNE (\$375 million) and Hess (\$378 million), the government would pay less than 1 percent more for Hess' proposal. See AR, Tab 30, Source Selection Decision, at 50. The protester notes that the RFP stated that the agency's price evaluation would "be conducted by comparing each offeror's" SSF. RFP at 36. For this reason, the CNE contends that DLA should have limited its comparison to the offeror's proposed SSFs (-\$485,587.37 for CNE,

as compared to \$2,488,635.26 for Hess), without reference to the fixed electricity costs--which would have resulted in a 600 percent difference between the offerors' proposed prices.

The record here shows that the agency specifically considered the differences between the offerors' proposed SSFs, but considered those in the context of the overall price the government would pay to each offeror, that is, the estimated contract value. We think that it was reasonable for the agency to consider the overall cost to the government in making its award decision. In this regard, agencies are required to consider in every award the cost to the government, and must employ an evaluation that reasonably compares the relative costs of proposed price or cost to the government. See 10 U.S.C. § 2305(a)(3)(A)(ii); FAR §§ 15.304(c), 15.405(b); PlanetSpace, Inc., B-401016, B-401016.2, Apr. 22, 2009, 2009 CPD ¶ 103 at 15. We further conclude that the RFP did not advise offerors that the agency would compare offerors' SSFs in the manner advocated by the protester, that is, by ignoring the overall costs to the government from the electricity costs. On this record, we find no basis to conclude that the agency unreasonably evaluated the offerors' price for purposes of the award.

Finally, CNE argues that the award decision was unreasonable because DLA awarded a similar contract to CNE on May 15, 2014--after the protest was filed--following a competition where Hess was one of the offerors. The protester argues that if DLA's actions were reasonable for the disputed award here, then the agency would not have awarded CNE a contract to provide electricity to the same accounts. See Protester's Comments (May 28, 2014), at 6; Supplemental Protester's Comments (June 11, 2014), at 3.

As an initial matter, our Office has long recognized that different evaluation panels may reasonably reach different conclusions regarding the quality of an offeror's proposal given the subjective judgment necessarily exercised by evaluators. See Next Tier Concepts, Inc., B-406620.3, B-406620.4, Nov. 13, 2012, 2013 CPD ¶ 5 at 4. Thus, the fact that DLA may have reached a different result regarding CNE's performance in a different procurement does not provide a basis to challenge the current best-value award decision.

In addition, this argument is untimely. To the extent the protester believed that the award of a related contract on May 15 was evidence of the agency's unreasonable evaluation for this procurement, the protester was required to file its protest within 10 calendar days. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2014). The protester initially represented itself pro se, and received the agency report on May 12. The protester subsequently retained outside counsel, who was admitted on May 21 to a protective order issued by our Office. We granted an extension of time for the protester's counsel to file comments by May 28. On May 22, however, the protester, rather than its outside counsel, filed comments on the agency report, which raised the issue of the May 15 contract. Protester's Comments (May 22,

2014), at 6. That same day, however, CNE's outside counsel advised our Office that the protester "withdraws the submission" made by CNE, and advised that the outside counsel would later submit comments which incorporated his review of documents that were provided under the terms of the protective order. Email from CNE's Counsel (May 22, 2014). The protester's revised comments, which were filed by its outside counsel on May 28, again raised the issue of the May 15 contract award. Because the protester withdrew the May 22 comments, and subsequently raised the issue of the May 15 contract award in the May 28 comments filed by outside counsel, we conclude that the argument is untimely because it was not filed within 10 days of the contract award.

In sum, we find no basis to sustain this protest.

The protest is denied.

Susan A. Poling
General Counsel