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Decision

Matter of: Maywood Closure Company, LLC
File: B-408343; B-408343.3; B-408343.4; B-408343.6
Date: August 23, 2013

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DIGEST

1. Where agency erred in its rating of protester's past performance on one contract, but it is clear from the record that correction of the error would not change the overall performance confidence rating assigned, protest is denied on the grounds that protester suffered no prejudice as a result of the error.
2. Finding that a particular contract is not relevant is not a finding of deficiency or significant weakness, nor does it constitute adverse past performance information; as a consequence, agency need not inform an offeror of such a finding during discussions for the discussions to be meaningful.
3. Protest of award to firm partially owned by agency employee--employee holds a 10 percent ownership interest in awardee--is denied where neither the selection official nor the contracting officer knew of the employee's interest at the time of award, and the record shows that the agency conducted a thorough investigation, establishing that the employee in question had no role in the procurement.

DECISION

Maywood Closure Company, LLC, of Port Allen, Louisiana, protests the award of a contract to Cabrera Services, Inc., of East Hartford, Connecticut, under request for proposals (RFP) No. W912DQ-12-R-3004, issued by the Department of the Army, Corps of Engineers, for remediation services at the Maywood Superfund Site in

Maywood, New Jersey. The protester challenges the agency's evaluation of its proposal and argues that the agency failed to reasonably consider the conflict of interest stemming from an agency employee's 10 percent ownership interest in the awardee.

We deny the protest.

BACKGROUND

The RFP, which was issued on March 22, 2012, as a small business set-aside, contemplated a single award task order contract (with cost-reimbursement task orders) for a base and four option years. The solicitation provided for award to the offeror whose proposal represented the best value to the government based on consideration of four factors: (1) technical capabilities; (2) technical staff experience; (3) past performance; and (4) cost. The first three factors were listed in descending order of importance, and, when combined, were significantly more important than cost.

Under the technical capabilities factor, the agency was to evaluate the degree to which the offeror's proposed team demonstrated specialized experience and technical competence related to the type of work to be accomplished under the contract here. The RFP instructed offerors to furnish descriptions of up to ten projects demonstrating their team members' "environmental experience in cost-reimbursable and fixed-price construction, service and other relevant types of contracts related to large-scale construction remediation projects to include shoring, dewatering, excavation and handling of radiologically-impacted soils." RFP, amend. 0003, at 22. The solicitation required ongoing projects to be at least 75 percent complete, and finished projects to have been completed within the 10-year period preceding issuance of the RFP. Id.

The technical staff experience factor was comprised of four subfactors, listed in descending order of importance: personnel experience, organizational approach/management plan, safety and health, and chemical quality management. Proposals were to be rated under each of the four subfactors (as well as under the technical capabilities factor described above) as outstanding, good, acceptable, marginal, or unacceptable.¹

¹ Ratings of outstanding and good were defined as follows:

Outstanding: Proposal meets requirements and indicates an exceptional approach and understanding of the requirements. Strengths far outweigh any weaknesses. Risk of unsuccessful performance is low.

(continued...)

The past performance factor provided that the agency would evaluate the recent and relevant past performance of the offeror and its team members. For past performance information to be considered recent, it had to relate to projects that were at least 75 percent complete, with the majority of the work completed within the last five years. Offerors were to provide past performance questionnaires (PPQs) for the projects they identified under the technical capabilities factor and for up to five additional relevant projects. The solicitation also provided that the agency might review other sources of past performance information. Past performance efforts were to be rated as very relevant, relevant, somewhat relevant, or not relevant based on the similarity of service and support, complexity, dollar value, contract type, and degree of subcontracting and teaming. Id. at 34. The relevance ratings and information pertaining to the quality of the previous performance were then to be considered together to assign performance confidence ratings of substantial, satisfactory, limited, no, or unknown confidence.² Id. at 34-35.

Finally, for purposes of the cost evaluation, offerors were to provide a cost proposal for a sample project. The solicitation advised that the agency would perform a cost realism analysis of the offeror's proposed cost for the project to determine a probable cost, and that the probable cost would be used in the best value determination, unless the probable cost was less than the proposed cost, in which case the proposed cost would be used.

The agency received eight proposals by the RFP's June 7, 2012 closing date, to include proposals from Maywood and Cabrera. The agency evaluated the proposals, established a competitive range, conducted discussions, and solicited revised proposals. After evaluating the revised proposals, the source selection evaluation board (SSEB) rated the proposals of the protester and the awardee as follows:

(...continued)

Good: Proposal meets requirements and indicates a thorough approach and understanding of the requirements. Proposal contains strengths which outweigh any weaknesses. Risk of unsuccessful performance is low.

Id. at 33.

² Of relevance to this protest, a rating of substantial confidence was to be assigned if, based on the recent and relevant performance record of the offeror and its team members, the agency had a "high expectation" that the offeror would successfully perform the required effort. A rating of satisfactory confidence was to be assigned if the agency had a "reasonable expectation" that the offeror would successfully perform.

FACTOR	MAYWOOD	CABRERA
Technical Capabilities	Good	Outstanding
Technical Staff Experience		
Personnel Experience	Outstanding	Outstanding
Org. appr./mgmt. plan	Good	Good
Safety and Health	Good	Good
Chemical Quality Mgmt.	Outstanding	Outstanding
Past Performance	Satisfactory Confidence	Satisfactory Confidence

Contracting Officer's Statement of Facts, June 19, 2013, at 8. Cabrera's probable cost for the sample project, as determined by the agency pursuant to its cost realism analysis, was \$12,402,966, whereas Maywood's evaluated probable cost was \$10,991,322.

After conducting her own independent review of the technical proposals, as well as reviewing the findings of the SSEB and the recommendations of a source selection advisory council, the source selection authority (SSA) decided that Cabrera's proposal represented the best value to the government. In comparing Cabrera's proposal to Maywood's, the SSA found that while the protester had "submitted 8 of 10 projects related to [Formerly Utilized Sites Remedial Action Program (FUSRAP)] sites" and had "demonstrated relevant experience with working at sites with radiological contamination," it had "far less experience with large-scale radiological remediation projects"--and, thus, less relevant experience overall--than Cabrera. Source Selection Decision (SSD) at 26. Similarly, in comparing the two proposals under the personnel experience subfactor, the SSA noted the greater experience of Cabrera's proposed personnel with large-scale remediation projects. She also found that while the two proposals had equivalent ratings of good under the organizational approach/management plan subfactor, Cabrera's management plan and description of its lines of authority were clearer and more thorough than the protester's. In addition, she found "an advantage for Cabrera over Maywood" under the past performance factor, despite the identical ratings of satisfactory confidence. Id. at 27.

The SSA summarized the basis for her conclusion that Cabrera's proposal represented a better value than the protester's as follows:

[Maywood's] total evaluated cost proposal on the sample task order is \$10,991,322 compared with Cabrera's total price of \$12,402,966. In light of the many benefits offered by Cabrera's technical proposal, including Cabrera's superior technical proposal under the two most important evaluation factors (Factor 1 and Subfactor 2(a)), where Cabrera demonstrated extensive experience

with large-scale [radiological] remediation work involving multiple activities (including experience at the [Maywood] site and throughout EPA Region 2), I find Cabrera to present a better value to the Government than the proposal submitted by [Maywood] and one that more than merits the additional cost.

SSD at 28.

On May 8, the contracting officer awarded a contract to Cabrera and notified the other offerors of the award. After requesting and receiving a debriefing, Maywood protested to our Office on May 20.

DISCUSSION

Maywood challenges the evaluation of its proposal under the past performance and technical capabilities factors, and argues that the agency failed to conduct meaningful discussions with it regarding the former factor. In addition, the protester objects to the SSA's trade-off determination and contends that the award to Cabrera was improper since an employee of the agency held a 10 percent ownership interest thereby creating an impermissible conflict of interest, which the agency failed to reasonably consider. We discuss these allegations below.

Past Performance

Maywood raises several objections to the evaluation of its proposal under the past performance factor. The protester maintains that the evaluators erred in finding that performance on one of its projects was marginal. Maywood also argues that the agency improperly failed to consider its performance on two submitted projects based on the evaluators' unsupported conclusion that the projects were not recent. The protester further contends that the evaluators failed to adhere to the terms of the solicitation in evaluating the relevance of its projects. Finally, the protester argues that the agency failed to conduct meaningful discussions with it regarding weaknesses in its past performance.

The evaluation of past performance is a matter within the discretion of the contracting agency. In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation. Jantec, Inc., B-292668, B-292668.2, Nov. 6, 2003, 2003 CPD ¶ 222 at 3.

In evaluating past performance here, the evaluators--consistent with the terms of the RFP--considered the PPQs furnished by the protester's references, and the ratings retrieved from the Contractor Performance Assessment Reporting System (CPARS). Of the 15 projects for which Maywood's references furnished PPQs, the evaluators determined four to be non-recent and four to be non-relevant. SSEB

Final Report, Nov. 20, 2012, at 150-151. The evaluators considered one of the remaining seven projects very relevant; two relevant, and four somewhat relevant. On the very relevant contract, one of the relevant contracts, and three of the somewhat relevant contracts, the protester's performance was rated as very good; on the other relevant contract, its performance was rated as satisfactory; and on the final somewhat relevant contract, performance was rated as marginal.

The evaluators also considered four CPARS ratings pertaining to contracts performed by Maywood team members. Two of the contracts were considered relevant: on one, the Maywood team member's performance was rated as very good; on the other, the performance was rated as satisfactory. The two remaining contracts were considered somewhat relevant: on these, the Maywood team member received a rating of satisfactory on one, and a rating of marginal on the other.

The agency issued an evaluation notice (EN) to the protester concerning the marginal CPARS rating and also contacted the author of the rating for further information. After reviewing Maywood's response to the EN, as well as the record of the conversation with the author of the negative CPARS rating, the SSEB assigned the protester a past performance rating of satisfactory confidence, noting the marginal CPARS rating as a weakness.

Maywood complains that the evaluators erroneously characterized its PPQ rating on one of its prior projects as marginal. The agency concedes that an error was made and that on the PPQ for the contract in question, the protester's performance was, in fact, rated as very good. The agency nonetheless argues that the protester suffered no prejudice as a result of the error because even without the incorrectly attributed marginal rating, Maywood would still have received a past performance rating of satisfactory confidence. Prejudice is an essential element of every viable protest, and we will not sustain a protest where it is clear from the record that a protester suffered no prejudice as a result of an agency evaluation error. A-Tek, Inc., B-404581.3, Aug. 22, 2011, 2011 CPD ¶ 188 at 10. As set forth below, we find that the record supports the agency's position that even without the mistake, Maywood's past performance would have been rated as satisfactory confidence, and that the protester was thus not prejudiced by the error.

In particular, the record shows that (1) the evaluators considered the protester's performance on ten projects in addition to the one with regard to which the error was made; (2) the rating in question pertained to a contract that was considered merely somewhat relevant; (3) the erroneously-rated project was not the only one on which the protester's performance was rated as marginal; and (4) none of the PPQs or CPARS retrievals rated the protester's performance as excellent. Given this record, we see no prejudice to Maywood, and we find that this argument does not provide a basis for sustaining Maywood's protest.

Next, Maywood disputes the agency's conclusion that two of its projects failed to qualify as recent pursuant to the definition set forth in the RFP. The protester argues that the evaluators considered only the period of performance for each contract--one performed from March 2002 through April 2011, and the other performed from January 2002 through November 2008--in assessing whether a majority of the work had been performed within the five years preceding issuance of the RFP, i.e., after March 2007. Maywood maintains that this was improper because it failed to take into account that work under a contract is not always performed at a constant rate. According to Maywood, the agency should have relied on representations in its proposal that for both of the contracts the majority of work had been performed within the last five years.

We have no basis to find the agency's evaluation unreasonable. Although the protester's proposal included a table representing that there had been performance on the contracts in question within the "last five years," Protester's Past Performance Proposal at 3-1, the table did not represent--nor was it otherwise apparent from information included in the protester's proposal--that a majority of the work on these contracts had been performed within the last five years, which is what the solicitation required for a project to be considered recent.³ Given the absence of specific representations in the proposal regarding performance of a majority of the work completed within the past five years, it was reasonable for the evaluators to rely upon the periods of performance as a yardstick in determining whether a majority of performance had occurred within the past five years.⁴

The protester further argues that the agency treated it unequally by considering two of Cabrera's projects as recent despite the fact that a majority of the period of performance for each occurred prior to March 2007. In this connection, the protester highlights the fact that one had a period of performance extending from 1996 to 2013 and the other had a period of performance extending from 1998 to the present.

³ The protester's argument that its representations in the table should have been accepted at face value as evidence that the projects in question qualified as recent is undercut by the fact that it has not disputed the evaluators' finding that two of its other projects--both of which were identified by the table on page 3-1 of its proposal as having been performed in the "last five years"--were not recent.

⁴ We also note in the foregoing connection that the protester has not affirmatively represented in any of its pleadings that a majority of the work on either of the contracts in question was, in fact, performed within the past five years; it simply argues that the agency should have accepted that this was the case based on its representations in the table on page 3-1.

The record suggests that for referenced contracts with ongoing performance as of the date proposals were due, the evaluators did not in fact question whether a majority of the work had been completed within the past five years in assessing whether the contracts were recent. Thus, it appears that the agency relaxed the majority completion requirement for such contracts. It also appears, however, that the agency relaxed this requirement for both Maywood and Cabrera. Specifically, the record reflects that the agency considered the two ongoing Cabrera contracts noted above as recent, and similarly considered an ongoing Maywood contract on which performance began in 1999 to be recent. Thus, for both firms, the evaluators considered performance on ongoing contracts with performance periods extending from before 1999, as recent, despite the fact that strict application of the requirement that a majority of the work have been performed within the past five years would have resulted in their exclusion from consideration.

Moreover, it appears that the impact of the deviation on the evaluation of the two proposals was roughly equivalent--that is, in each case, the evaluators considered one additional contract on which the offeror's performance was rated very good.⁵ In sum, as above, we find that the protester suffered no prejudice as a result of the agency's failure to adhere strictly to the terms of the solicitation in evaluating the recency of offerors' ongoing projects.

Next, Maywood argues that the agency considered the quality of its performance in assessing the relevance of its prior projects, which was contrary to the evaluation scheme set forth in the solicitation. As support for its argument, the protester notes that one of the past performance evaluators described the significant features of its third and fourth projects in identical terms--that is, he described both as involving "Lg. soil excavation with dewater; no shoring--weak." Agency Report (AR), Tab 32. Notwithstanding the identical project descriptions, the evaluator rated the third project, on which the protester's performance was rated as satisfactory as somewhat relevant, while rating its fourth project, on which the protester's performance was rated as very good, as relevant.

The record fails to support the protester's argument. While it is true that one of the evaluators assigned different relevance ratings to the protester's third and fourth projects despite furnishing similar summaries of the basis for his rating, the same evaluator found other projects on which the protester's performance was rated as very good to be somewhat relevant or not relevant. Moreover, the same evaluator rated a Cabrera project on which performance was rated as excellent as not relevant. AR, Tab 44. In sum, the record does not establish that the evaluators considered quality of performance in assessing relevance.

⁵ While the protester argues that the deviation resulted in the incorrect characterization of two Cabrera contracts as recent, one of the two contracts was separately excluded from consideration on the basis that it was not relevant.

Finally, with regard to past performance, Maywood argues that the agency's discussions were not meaningful where they failed to inform Maywood that several of its past performance references had not been considered because the projects were considered to be non-recent or non-relevant.

For discussions to be meaningful, they must identify deficiencies, significant weaknesses, and adverse past performance to which the offeror has not yet had an opportunity to respond; however, agencies are not required to afford offerors all-encompassing discussions, or to point out every aspect of a proposal that offers a relatively less desirable approach. ProLog, Inc., B-405051, Aug. 3, 2011, 2012 CPD ¶ 84 at 7; PWC Logistics Servs., Inc., B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 6. We have previously held that an evaluation panel's conclusion that a particular contract is not relevant does not rise to the level of a deficiency or significant weakness, and that such a determination does not constitute adverse past performance information. ProLog, Inc., supra, at 7. As a consequence, we deny Maywood's argument in this regard.

Technical Capabilities

The protester argues that the agency misevaluated its proposal under the technical capabilities factor by failing to identify several of its projects as large-scale. Maywood asserts in this connection that the agency credited it with only three large-scale remediation projects even though it submitted at least five such projects.

In evaluating the protester's proposal under the technical capabilities factor, the evaluators noted the following significant strength:

The proposal demonstrates the team has strong experience working at sites impacted with radiological contamination. 8 of 10 projects presented include some element of radiological related work and 3 of those were for large scale soil remediation work.

SSEB Final Report at 32. Accordingly, the evaluators' finding was not that the protester had performed 3 large-scale projects; it was that the protester had performed 3 large-scale radiological remediation projects involving soil remediation. While the protester contends that it had more than 3 large-scale projects, it does not dispute the actual strength, which was based on the nature of the work performed, in addition to the size of the projects. Thus, we find that this argument does not provide a basis for sustaining the protest.

Trade-off Determination

Maywood objects to the SSA's trade-off determination on the grounds that it refers to factor 1 (technical capabilities) and subfactor 2(a) (personnel experience) as "the two most important evaluation factors." SSD at 28. The protester contends that it is clear from this reference that the SSA considered subfactor 2(a) to be more important than factor 3 (past performance), which, according to Maywood, is inconsistent with the terms of the solicitation. The protester in essence argues that it is inherent in the designation of some evaluation criteria as factors and others as subfactors that those identified as factors will carry greater weight than those identified as subfactors. The agency argues in response that the RFP provided simply that factor 1 would be more important than factor 2 and factor 2 more important than factor 3, and that it is not inconsistent with such a weighting scheme for the agency to assign greater weight to one of the factor 2 subfactors than to factor 3.

We do not think that it is necessary for us to resolve this question given that the record fails to establish that the relative weighting of the evaluation factors and subfactors had any impact on the trade-off determination. The basis for the SSA's best value determination was not that Cabrera's strength under factor 1 and subfactor 2(a) outweighed Maywood's strength under factor 3--it was that the "many benefits" of Cabrera's proposal outweighed its additional cost.

Conflict of Interest

Finally, the protester argues that Cabrera should have been excluded from the competition since an employee of the Baltimore District of the Corps of Engineers, has a 10 percent ownership interest in Cabrera. In this regard, Maywood argues that the award was in violation of Federal Acquisition Regulation (FAR) § 3.601, which prohibits a contracting officer from "knowingly" awarding a contract "to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees." Maywood further argues that the agency failed to reasonably consider whether the employee's dual roles as a government official and as a business owner with a personal stake in the outcome of a procurement created a conflict of interest.

First, with regard to the alleged violation of FAR § 3.601, the record here clearly establishes that prior to Maywood's protest, neither the contracting officer nor the SSA was aware of the Baltimore District employee's ownership interest in Cabrera. Indeed, according to the agency, neither was even aware that the individual in question was a Corps employee, an unsurprising circumstance given that the SSA and the contracting officer are both employees of the Corps' Kansas City District, which is over a 1,000 miles from the Baltimore District. Thus, without addressing the issue of whether the employee's 10 percent ownership interest constitutes substantial ownership, neither can be said to have "knowingly" awarded a contract

to a firm substantially owned by a government employee. See, e.g., Biosystems Analysis, Inc., B-198846, Aug. 25, 1980, 80-2 CPD ¶ 149 at 4 (reaching same conclusion as here under the Federal Procurement Regulations, which were applicable to civilian agencies prior to implementation of the FAR, which became effective in 1984).

Second, with regard to the alleged conflict of interest, while we have recognized that an actual or apparent conflict of interest may arise when an agency employee has both an official role in the procurement process and a personal stake in the outcome, TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 8, the record demonstrates that the agency conducted a thorough investigation, once this situation was brought to the contracting officer's attention through Maywood's protest. This investigation established that the employee in question had no role in the procurement process here. The investigation also established that none of the individuals who were involved in the procurement had any contact with this employee during the course of the procurement. As a result, we disagree with Maywood's assertion that Cabrera should have been excluded from this competition.

The protest is denied.

Susan A. Poling
General Counsel