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Decision

Matter of: FC Construction Company, Inc.

File: B-287059

Date: April 10, 2001

Garreth E. Shaw, Esq., for the protester.
Sharon A. Jenks, Esq., and Gary M. Jackson, Esq., Department of the Air Force, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's challenge to the agency's assessment of past and present performance is denied where the record shows that the agency evaluation was reasonable, and that offerors were treated equally, despite insignificant differences in the agency's approach to gathering the information due to requests from the protester's references.

2. Protester's assertion that the agency wrongly transcribed the telephonic responses of commercial references identified by the protester's subcontractor is denied where the commercial references apparently declined to make themselves available for a hearing that would permit assessment of the relative credibility of witnesses whose version of the same event is in conflict.

DECISION

FC Construction Company, Inc. protests the award of a contract to TRECO Services, Inc. pursuant to request for proposals (RFP) No. 41614-00-R0003, issued by the Department of the Air Force for base custodial services at Goodfellow Air Force Base (AFB), San Angelo, Texas. FC argues that the Air Force improperly evaluated its past performance, and that of the awardee, TRECO, leading the contracting officer to wrongly conclude that TRECO's higher-priced proposal offered the greatest value to the government.

We deny the protest.

BACKGROUND

This RFP for custodial services was issued on June 29, 2000, and restricted the competition to minority-owned small businesses participating in the Small Business Administration's (SBA) section 8(a) program, and registered as 8(a) businesses with the SBA's district office in San Antonio, Texas. RFP at 1. The RFP anticipated award of a fixed-price contract for a 1-year base period followed by up to four 1-year options. Id. at 2. The RFP also advised that award would be made to the offeror whose proposal is considered most advantageous to the government after evaluating performance and price; the two evaluation factors were approximately equal in weight. Id. amend. 0003, at 9b.

Potential offerors were advised that the agency would rank proposals by price, evaluate the performance of the offerors submitting the lowest-priced proposals, and perform a limited price evaluation. Id. at 9b. The RFP also advised that the agency's review of each offeror's past and present performance would be conducted using written questionnaires and would lead to an assessment of performance risk as either "exceptional," "very good," "satisfactory," "none," "marginal," or "unsatisfactory." The rating of "none" was reserved for offerors with no relevant past or present performance history, and was to be "treated neither favorably nor unfavorably." Id.

In addition to setting forth the evaluation process, the RFP also advised potential offerors of certain award preferences based on the evaluation information generated. Id. at 9b-9c. In this regard, the RFP directed that if the offeror with the lowest-priced proposal received a performance risk rating of exceptional, award would "be made to that offeror without further consideration of any other offers." Id. at 9b. In addition, the RFP reserved for the agency the right to award to other than the offeror with the lowest-priced proposal "if that offeror is judged to have a performance risk rating of 'very good' or higher." Id. at 9c. In this event, however, the RFP required that the contracting officer "make an integrated assessment best value award decision." Id.

The Air Force initially received five proposals in response to this solicitation. As indicated above, the proposals were ranked by price, with FC submitting the lowest-priced proposal ($2.4 million). Contracting Officer's (CO) Statement at 2; Price Competition Memorandum at 1. For reasons not relevant here, the second and fourth lowest-priced proposals were removed from the competition, and were not evaluated. Thus, TRECO was ultimately the offeror with the second lowest-price ($2.7 million), while a third offeror proposed the highest price ([deleted]). Id. After completing the first of two price evaluations, neither of which is relevant to this dispute, the agency turned to its review of performance.

FC's proposal did not initially include references or any other information for the agency to review for its evaluation of performance. Thus, the agency

contacted the owner of FC, who provided a list of references to the agency by facsimile transmission. Upon receiving the list, the agency noted that the list was headed by the name of a different company, American Building Maintenance Co. (ABM). In response to Air Force questions regarding the relationship between FC and ABM, FC's owner explained that ABM would be performing the work for FC, and that the Air Force should contact ABM's references for its review of FC's performance. Past Performance Assessment, Dec. 6, 2000, at 1.[1] Since FC provided no references of its own, the Air Force initially concluded that FC had no experience performing custodial services, and assigned the company's proposal a performance risk rating of "none." CO's Statement. After contrasting FC's performance risk rating of "none" with the rating of "exceptional" assigned to TRECO's proposal, the agency initially decided that TRECO's proposal represented the best value to the government, despite its higher price. Best Value Decision (undated), Agency Report, Tab 10.

Upon review of the initial decision to select TRECO for award, Air Force review authorities directed the contracting officer to reopen the evaluation, contact ABM's references, assign a rating based on the reports of those references, and make a new selection decision. Id. Accordingly, the Air Force attempted to contact four of the six ABM references, and ultimately reached two of them. Id. After both of the contacted references requested that they be allowed to answer the past performance questionnaire telephonically, the contract administrator states that she read the references each of the questionnaire's 26 questions and ratings definitions, and transcribed their answers. Memorandum for Record, Past Performance Evaluation Procedures, Feb. 21, 2001, at 2. The Air Force-transcribed responses for these two references show the following array of answers to the 52 total questions: [deleted] responses of "exceptional," [deleted] responses of "very good," [deleted] responses of "satisfactory," and [deleted] responses of "none."

In addition to the information collected from ABM's references, the contracting officer considered in-house Air Force knowledge about FC's performance on two ongoing contracts. For one of these Air Force contracts, the agency respondent advised that while FC's performance is satisfactory overall, FC is currently behind schedule and successful completion of the effort is requiring a great deal of attention from the contract administrator. Past Performance Assessment, FC Construction, Dec. 6, 2000, at 2. For the other contract, which is being managed by the contracting officer here, no adjectival rating is provided, but a detailed narrative describes numerous problems and administrative difficulties involved in FC's ongoing performance. Id. Combining the information from the ABM references and the two Air Force sources, the agency assigned FC a performance rating of "satisfactory."

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[1]For reasons not clear from the record, FC denied that ABM was its subcontractor, answering instead that ABM performs FC's custodial work. Id.

In making a revised selection decision, the contracting officer compared FC's lowest-priced proposal of $2.4 million and its performance rating of "satisfactory," with TRECO's second-lowest priced proposal of $2.7 million and its performance rating of "exceptional," and again concluded that the TRECO proposal provided the best value to the government. Best Value Decision, Dec. 15, 2000, at 1. In reaching his conclusion, the CO specifically mentions several concerns regarding the risk of poor performance by FC, compared to benefits offered by TRECO's "exceptional" performance rating, and the company's pending Mentor-Protégé Agreement with the incumbent contractor. Id. at 1-2. By letter dated December 18, 2000, the agency advised FC of its intent to award to TRECO, and this protest followed.

DISCUSSION

FC argues that the agency unreasonably concluded that TRECO's higher-priced proposal offered the best value to the government, as the conclusion was based on an improper evaluation of both FC's and TRECO's past performance. Specifically, FC contends that the evaluation of its performance was improper because the Air Force elected to poll its references telephonically, rather than having them complete written questionnaires, and because the agency failed to contact all of the references. In addition, FC alleges that the Air Force either erroneously or intentionally misrepresented the telephonic responses of the references. FC also contends that the evaluation of TRECO's performance was improper because the Air Force failed to consider the poor performance of TRECO's subcontractor (and the incumbent here) on an Air Force contract at another base.

The Air Force responds that its approach to evaluating FC's past performance was reasonable, and that any difference in treatment between FC and the other offerors was due in large measure to problems that were created by FC, or requests that were made by its references. With respect to the use of telephonic polling rather than written questionnaires, the Air Force points out that it elected to collect past performance information telephonically only when the two references it managed to reach asked that they be allowed to complete the past performance survey over the telephone. With respect to the issue of whether the Air Force acted improperly by not contacting all of FC's references (as opposed to polling only two of them), the agency points out that it is not required to contact all identified references; that it attempted to contact two other references but was unable to reach them with the information provided by FC; that some of the references were for efforts clearly dissimilar to the contract here; and that there was no unequal treatment, as the agency also did not contact all of TRECO's references.

Our standard in reviewing evaluation challenges is to examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Based on our review, we agree with the agency's

view that it was reasonable to poll these references telephonically under the circumstances, and with its claim that it did nothing improper by not polling all six of the references identified by FC.

The record here shows that one of the references did not have a working facsimile machine, and requested a telephonic interview after the agency repeatedly attempted to transmit the written questionnaire. Memorandum for the Record, Feb. 21, 2001, at 2. The record also shows that the second reference explained that he was "going out the door" and asked to be interviewed telephonically. Id. at 1-2. While FC correctly notes that the solicitation advised that written questionnaires would be used, there was nothing unreasonable or improper per se in deciding to conduct the interview telephonically under these circumstances. In addition, we have long held that there is no legal requirement that all past performance references be included in a review of past performance. Advanced Data Concepts, Inc., B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 at 10; Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8. For our Office to sustain a protest challenging the failure to obtain or consider a reference's assessment of past performance, a protester must show unusual factual circumstances that convert the failure to a significant inequity for the protester. Advanced Data Concepts, Inc., supra; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. There has been no such showing here.

We turn next to FC's allegation that the Air Force contract administrator who spoke with the two references for ABM (FC's apparent subcontractor) either erroneously or intentionally misrepresented their telephonic responses. As indicated in the past performance assessment submitted with the agency report, and in a supplemental memorandum provided after receipt of the protester's comments, the contract administrator explained that she ultimately interviewed these references via telephone, and that she read both references all 26 questions, as well as the definitions for the adjectival ratings to use in responding to the questions. Past Performance Assessment, supra, at 1-2; Memorandum for the Record, supra, at 1-2. In addition, the agency provided the completed questionnaires prepared by the contract administrator based on these conversations. Agency Report, Tab 12.

FC contends that both of the references the Air Force contacted have advised it that they described ABM's past performance as "exceptional." In support of this contention, FC provides an affidavit from one of the references indicating that he was contacted by the contracting officer and was asked "approximately 26 questions" regarding ABM's past performance for his company. He indicates that his "response to virtually all of the questions (more than 20) was that ABM performance should be rated as exceptional," and that the remaining responses were "very good." FC represents that the second respondent was unable to provide a timely affidavit, but advised the company that he believes the information he provided "was that ABM's past performance is excellent or exceptional and he is willing to so state if called as a witness at a hearing." Protester's Comments on Agency Report, Feb. 16, 2001, at 4. As indicated above, these statements by the two

references conflict with the transcription of their responses prepared by the contract administrator, which shows an array of answers that support the agency's overall rating of "satisfactory."

Given the direct conflict between the affidavit of the one reference and the answers reflected on the questionnaire as completed by the contract administrator, our Office offered to convene a hearing by videoteleconference to take testimony from three witnesses: the Air Force's contract administrator; the affiant whose responses she transcribed; and the second reference, who was unable to provide a timely affidavit but whom FC described as willing to testify. In addition, we were willing to convene this videoteleconference in a location as convenient as possible for the two witnesses, recognizing that neither of them has any apparent relationship to the government, or the protester. Despite this offer, the two references apparently declined to participate in such a hearing. We note that one of them is no longer employed by the commercial entity for whom ABM performed custodial services, while the other is unavailable for unknown reasons.

While we recognize the difficulties involved in producing witnesses who have no obligation to the protester--or in this case, even to the commercial entity for whom the protester's subcontractor performed work--under these circumstances and for the reasons below, we will not overturn the satisfactory rating assigned FC by the Air Force. Our purpose in holding a hearing in a matter like this, and receiving testimony from the individuals identified above, would be to make a judgment about the relative credibility of witnesses whose testimony is in direct dispute. See OneSource Energy Servs., Inc., B-283445, Nov. 19, 1999, 2000 CPD ¶ 109 at 8 (where, in a case involving a direct dispute over the information provided by a past performance reference, we sustained the protest after convening a hearing that permitted our Office to make a judgment about the relative credibility of a past performance reference and the individual who reported the answers of that reference). Because this case involves a direct conflict between the description of the answers provided by the references, any judgment by our Office about the relative credibility of these individuals must be based, in significant measure, on an assessment of witness demeanor. Given that the protester is unable to produce these witnesses, and as a result, we are unable to assess their credibility, this dispute must be resolved on the written record.

In considering this record, we note that both the contract administrator and the affiant agree that the past performance review conducted by telephone here was not a narrative conversation, but instead was based on asking, and receiving answers for, the 26 questions on the past performance questionnaire. We find unlikely the notion that the contract administrator erred in transcribing all 26 of the reference's responses. Instead, it appears that the only logical explanation for wrongly reflecting 26 separate answers would be bad faith on the part of the contract administrator, but we see no evidence of that here.

In addition, we note that even if we assume arguendo that ABM's two outside references rated the company's performance as "exceptional," this record reflects the serious concerns of Air Force sources about FC's performance (as opposed to that of FC's apparent subcontractor). The presence of these concerns, and the fact that they involve FC rather than ABM, lead us to conclude that it is extremely unlikely that FC could have received an overall rating of "exceptional," or even "very good." Our view in this regard is bolstered by the fact that one of the two Air Force sources is the contracting officer here. Given the fact that the contracting officer could not properly ignore such information (about poor performance by FC) located so very close at hand, see International Bus. Sys., Inc., supra, we simply cannot conclude that there was any likely prejudice to FC as a result of being unable to obtain testimony to support its challenge to the agency's assessment of its past performance as "satisfactory." Accordingly, this portion of FC's protest is denied.

Finally, FC argues that the Air Force evaluation of TRECO was improper because the agency did not consider the poor performance of TRECO's subcontractor (and the incumbent here) on an Air Force contract at another base. In response, the Air Force admits that it did not consider this information, as it was not aware of the matter at the time it performed its past performance assessment. In addition, the agency points out that TRECO did not provide any references for the Air Force contract at issue, so that the agency was not only unaware of the matter, but would not have learned of it even if it had contacted all of TRECO's references. Thus, the agency contends it reasonably assessed TRECO's performance as "exceptional" based on the information before it. We agree. Without a showing that the agency personnel were aware of a problem with TRECO's performance, or had reason to be aware of it, we have no basis to conclude that the evaluation was unreasonable. Airwork Ltd.-Vinnell Corp. (A Joint Venture), B-285247, B-285247.2, Aug. 8, 2000, 2000 CPD ¶ 150 at 9-10.

The protest is denied.

Anthony H. Gamboa
General Counsel