Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Black & Veatch Special Projects Corp.

File: B-279492.2

Date: June 26, 1998

James A. Pemberton, Esq., and Paul E. McNulty, Esq., King & King, for the protester.
Robert L. Magrini, Esq., Hayes & Magrini, for McMaster Construction Co., an intervenor.
James E. Whitman, Esq., and John W. Sturges, Esq., Department of the Army, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misled offeror during evaluations and improperly downgraded offeror's proposal for submitting "exceptions and clarifications" with its best and final offer is untimely where the offeror learned of its grounds of protest at debriefing conducted more than 10 days before the protester first raised these issues at the General Accounting Office.

2. Protest that agency failed to provide offeror with an opportunity to rebut negative past performance information is denied where offeror was not prejudiced as indicated by apparent accuracy of information obtained from knowledgeable individual and limited impact of past performance on evaluation score and award determination.

DECISION

Black & Veatch Special Projects Corp. (B&V) protests the award of a contract to McMaster Construction Co. under request for proposals (RFP) No. DACA56-97-R-0042, issued by the U.S. Army Corps of Engineers for design and construction of a building at Tinker Air Force Base, Oklahoma. B&V argues that the evaluation and award determination were flawed.

We deny the protest.

The RFP sought a single contractor or team of contractors to both design and construct (design/build) a B2 ADAL Software Maintenance Facility. In addition to a price proposal, offerors were required to submit a management/technical proposal detailing the proposed approach, personnel, team organization and responsibilities, and subcontractors; the offeror's experience and past performance; and management control systems, implementation, and past success. Offerors also were required to submit a partial design at a level of completeness indicated in RFP drawings. The RFP advised that "[m]odifications shall be limited to design criteria which is nonmandatory as set forth in [the RFP]" and that "the existing design is considered acceptable for consideration."

The RFP provided for evaluation of the proposals under the following criteria, listed in descending order of importance: management/technical (85 points), partial design (15 points), and price (not scored). Offerors were advised that the total price was estimated to be $8.67 million and that proposals exceeding that level could be rejected. The RFP contemplated award of a fixed-price contract with a performance award fee. Award was to be made to the offeror whose proposal provided the best combination of management and technical capability, design features, and price reasonableness with the agency explicitly reserving the right to select other than the lowest-priced proposal.

Five offerors, including B&V and McMaster, submitted proposals by the November 4, 1997 closing date for receipt of proposals. The agency performed an initial evaluation and determined to include all the proposals in the competitive range. In this initial evaluation, McMaster's proposal received a score of 78 points and B&V's proposal a score of 75 points. The agency amended the RFP (No. 0004) in part to respond to questions raised by the offerors. It then sent discussion questions to all offerors and responded to clarification requests including 45 such requests raised by B&V in its initial proposal. The discussion questions also reminded the offerors of the estimated cost ceiling and requested suggestions of how specifically identified high-cost areas of the proposals could be reduced. Both B&V and McMaster submitted revised proposals in December.

Based on its evaluation of the revisions, the agency raised McMaster's proposal score to 80 points and B&V's to 76 points. The evaluators remained concerned that the proposed costs exceeded the government's estimate and conducted additional discussions with the offerors. The agency then issued an amendment (No. 0005) to respond to questions by the offerors and invited additional proposal revisions. With its January 23 and 29 submissions, B&V submitted 15 "exceptions and clarifications," most of which previously had been raised in B&V's initial proposal. The agency advised B&V that two of its assumptions were correct and that the remaining items were "acceptable provided they meet the requirements of the RFP."

The letter also provided an example of one such item and advised that if the agency "determined that an item does not satisfy the requirements of the RFP," B&V would have to meet the requirement at no additional cost to the government. In a separate letter, the agency invited B&V to submit a best and final offer (BAFO).

With its BAFO, B&V again raised the 15 "exceptions and clarifications" it included in its January submissions, plus one additional assumption. When the evaluators reviewed B&V's BAFO, they lowered B&V's proposal score to 70 points. Due to the "continuous clarifications and variations submitted [by B&V the] board members were concerned that the offeror did not fully understand the requirements of the RFP." Final Evaluation Summary Ratings, 12 Feb. 1998, at 2. McMaster's proposal score was increased to 82 points.

In making the award determination, the contracting officer considered that all proposals exceeded the government's revised estimate of $9.5 million. B&V proposed to perform the base requirement for $10,894,897 and McMaster proposed to perform for $11,548,058. Another offeror's proposal was scored the highest of all (84 points), but its proposed cost was approximately $200,000 higher than McMaster's. In addition, this offeror was currently working on three other large projects of similar type and had had difficulty managing its resources. The contracting officer recognized the cost savings presented by B&V's lower proposed cost, but considered that B&V had the lowest management technical score, and that its continuous exceptions indicated its difficulty in understanding the RFP requirements. In view of McMaster's close to high score (82 points), lower cost, and the highest-scored offeror's potential problems with handling this contract, the contracting officer determined to award the contract to McMaster. After receiving notice of the award and a debriefing, B&V filed this protest challenging the award determination.

In its protest, B&V argued that it should have received the award because of its lower price and superior technical ability.[1] B&V also alleges that, during the competition, it complained to a contracting official that McMaster had attempted to obtain B&V design information from an unnamed B&V electrical subcontractor. At the same time, B&V also alleged that an unnamed mechanical subcontractor had accepted copies of B&V's design information without revealing a pre-existing agreement with McMaster. In a cover letter to one of its proposal revisions, B&V,

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[1]B&V has raised a number of arguments in support of its protest and the agency has responded to each one. We have reviewed them all and find that none has merit. (For example, since the record establishes that B&V's proposal received the lowest technical score and the RFP specifically provided for selection of other than the lowest-priced offer, B&V's bare allegation that it should have been considered in line for award based on its low price provides no basis to sustain its protest.) This decision will address only the more substantial issues.

without identifying who its competition was, advised the agency that "[t]hey [its competition] have been trying to get our subcontractors to give them copies of our technical documents." Since the agency did not investigate this matter and eliminate McMaster from the competition, B&V argues that the agency failed to determine McMaster's integrity as part of its responsibility determination under Federal Acquisition Regulation (FAR) § 9-103. In the absence of evidence of bad faith on the part of procurement officials, or that definitive responsibility criteria have not been met, our Office does not review an agency's affirmative determination of responsibility. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (1998); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177 at 2. Where, as here, there is no such showing, we have no basis to review this protest allegation.[2]

In its comments on the agency report, B&V for the first time challenged the agency's decision to downgrade B&V's proposal for submitting exception and clarification matters. In B&V's view, these matters were in the nature of "explanations and clarifications, like notes on a drawing." B&V also contends that the agency misled it by advising the protester that these matters were "acceptable" and by requesting a BAFO. In support of this argument, B&V contends that the record does not contain any references to agency concerns in either of the first two evaluations. These issues are untimely.

While B&V purports to have learned of these issues after review of the agency's evaluations, in fact, during B&V's debriefing on March 27, 1998, it was placed on notice of the agency's downgrading of B&V's proposal because of agency concerns with B&V's exceptions and clarifications. According to the debriefing minutes, and undisputed by B&V, there was a "discussion about the 'exceptions' that [B&V] took to the advertisement." The contracting officer "emphasized very strongly that B&V took liberties with the exceptions they proposed which were different than those that were printed in the [RFP]." While the project called for "an extensive amount of design . . . B&V took exception and narrowed the design or restricted it. Thus, they received less credit for their submittal." B&V did not raise this issue in its initial protest and did not protest this matter until it submitted its comments.

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[2]We note that at the time of its complaint, B&V did not identify the subcontractors by name or trade and did not identify the name of the competitor to whom design information may have been disclosed. Apart from identifying McMaster and the subcontractors' trades, B&V has provided no further information to our Office. Without sufficient information, the agency was not required to launch an "integrity" investigation. Accordingly, the contracting official to whom B&V complained explained to B&V that the agency had no control over subcontractors and dropped the matter. In this regard, McMaster denies obtaining or attempting to obtain B&V's design data from anyone and avers that its mechanical and electrical subcontractors did not use B&V design information in preparing their bids. Under these circumstances, there is no basis for finding the agency's actions unreasonable.

To be timely, a protest filed after a protester receives a statutory debriefing must be filed within 10 calendar days of the debriefing. 4 C.F.R. § 21.2(a)(2). Where, as here, a protester initially files a timely protest, and later supplements it with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. G.H. Harlow Co., Inc.--Recon., B-245050.2, B-245051.4, Apr. 10, 1992, 92-1 CPD ¶ 357 at 3. Here, B&V was apprised of the basis for these grounds of protest at its debriefing on March 27. Since its comments on the agency report in which it first raised this issue were not submitted to our Office until May 4, its protest on these grounds is untimely.[3]

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[3]In any event, B&V's arguments are without merit. With regard to the argument that B&V was "misled," while the agency requested a BAFO and advised B&V that its exceptions and clarifications were "acceptable," the agency clearly qualified that statement by adding that they were acceptable "provided they meet the requirements of the RFP." The notice included an example of one such matter and specifically advised that B&V would be responsible for providing any RFP-required items at no additional cost to the government. This was sufficient to meet the agency's obligation to provide meaningful discussions. SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462 at 15. The reason that the evaluators' concerns about B&V's exceptions do not appear in the first two evaluations is because both were completed before B&V submitted the matters for which its proposal was downgraded.

With regard to B&V's protest of the evaluation, based on our review of the record, the agency reasonably downgraded B&V's proposal for continuing to raise its "exceptions and clarifications." See Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203 at 3. This procurement is for both the design and construction of a building, and the RFP included a basic design and identified the user's requirements. While the RFP invited offerors to submit clarifications, it also warned offerors that "[e]xtensive qualifications, exclusions and exceptions in the form of clarifications" could be grounds for considering the proposal "non-responsive." Here, after submitting and receiving answers to some 45 clarifications, B&V supplemented them with 15 "exceptions and clarifications" most of which had been referenced in the initial group of 45. After being advised that two of these assumptions were correct, and warned that the others were acceptable only if they met the requirements, in its BAFO, B&V submitted the same list of 15, plus a 16th. While B&V now denominates these as simply "explanations," it was the protester who called them "exceptions," a more apt description. For example, while the amended RFP called for the use of five chillers, B&V proposed to use only three. After the agency advised B&V that this was acceptable, if it met requirements, and warned that B&V would be responsible for meeting the requirements at no extra cost, B&V again proposed three units in its BAFO. B&V's continued identification of this and other matters was reasonably viewed by the evaluators as evidence of a lack of understanding of the agency's requirements.

B&V also contends that the agency's past performance evaluation was flawed. It is not the function of our Office to evaluate proposals de novo. Rather, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of competing proposals is primarily a matter within the contracting agency's discretion. Advanced Tech. and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Medland Controls, Inc., B-255204, B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260 at 3. From our review of the record, the agency's past performance evaluation was reasonable.

The RFP advised offerors to submit information to demonstrate the experience of the team proposed to complete the facility using a design/build process. This information was to include a list of relevant design/build projects, current or completed within the past 5 years, and a list of relevant completed projects in which the contractor had worked with other members of its team. The past performance evaluation subfactor was worth 35 points and included five subcriteria: documented experience (12 points), resource commitment (9 points), references (8 points), financial capacity (4 points), and management commitment (2 points).

B&V challenges only the agency's handling of the "references" aspect of the past performance evaluation. Although B&V submitted 15 projects and identified contact references for each one, the agency investigated only two of the projects and did not speak with the named references on either project. Consequently, B&V maintains that its proposal received a lower score than if the agency had contacted all named references and investigated more than 2 of its 15 projects.[4]

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[4]In a related argument, B&V alleges that McMaster should have received a lower past performance score because it allegedly is behind schedule on a design/build contract and that the agency failed to take this delinquency into account. The agency explains that the contract in question is not a design/build and that, while McMaster was behind schedule, it had taken action to reduce the delay to less than 30 days. Furthermore, it appeared that McMaster's corrective action could result in completion of the project on time. In view of the agency's awareness of the scheduling problem and McMaster's satisfactory steps to correct it, there is no basis to conclude that the agency failed to take it into account in its past performance evaluation.

The agency explains that all offerors were treated the same way: the evaluators contacted a single reference for each offeror/team member.[5] Thus, the evaluators questioned one project reference for McMaster and one reference for each of its two team members. Since B&V was not proposing as a team, the agency intended to investigate the single most relevant project. In choosing that project, the evaluators considered the nature of B&V's submitted projects: eight "design/build" projects and seven "design" projects. Of the eight "design/build" projects, the evaluators noted that four involved design and construction "management services," that two included physical construction (one of which was an expansion of B&V's own facility), and that there were only two federal "design/build" projects, both at Kirtland Air Force Base, New Mexico. In addition, the evaluators noted that B&V's proposed construction manager had been the construction manager on one of the Kirtland projects. The evaluators concluded that the Kirtland projects were significant and thus chose them for further investigation. Since the Kirtland contracts were Corps of Engineer projects, the agency contacted the Corps project engineer. While he was not the reference contact point identified by B&V, the record shows that he had specific knowledge of both projects and could provide a realistic perspective from the Corps's point of view. We find nothing objectionable in any of these aspects of the agency's reference evaluation choices.

The comments of the Corps project engineer were generally unfavorable. For example, he reported that, while the work was timely performed, B&V had not lived up to a promise to finish early. He found that the work was not well planned and had a considerable impact on the occupants, and that B&V's expertise had been "overstated." There was difficulty in negotiating changes and most of the work had been subcontracted. He also noted that B&V's field representative was not in control of the project and all negotiating had to be done with a higher authority at B&V. As an additional matter, he observed that B&V had very little experience with federal design/build projects.

B&V terms these comments as "unsubstantiated and subjective criticism" that was not representative of its numerous references. Notwithstanding B&V's view, the comments appear accurate and relevant. For example, as evidenced by B&V's own proposal, only 2 of its 15 references were federal design/build contracts thus, substantiating B&V's lack of federal design/build experience. Also, while B&V discounts the relevance of its unmet promise to finish early, we believe that such an unfulfilled commitment was reasonably considered relevant to the past performance inquiry.

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[5]While the evaluators only contacted a single "reference" for each offeror/team member, the record indicates that the remaining projects listed by each offeror were considered in evaluating each offeror's past performance under the other subcriteria, which accounted for 27 of the 35 potential points under the past performance subfactor.

We also do not think the agency was required to conduct further investigation to independently establish the validity of the reports from the reference it contacted regarding the two B&V projects. Where offerors are required to list prior experience and the offerors are aware that the source of this experience may be contacted, the contracting agency may contact these sources and consider their replies without further investigation into the accuracy of the information. See SDA Inc., B-256075, B-256206, May 2, 1994, 94-2 CPD ¶ 71 at 7 n.9. With regard to the agency's decision not to contact those named in B&V's proposal, we note that B&V's proposal does not indicate the position held by the contacts it listed or the basis of their knowledge of the projects. Under the circumstances, the agency chose a reasonable alternative in the person of the project engineer for the contracts at issue. As the government's project engineer, he could be expected to have complete, relevant information on B&V's past performance.

As for the agency's decision not to contact a reference for all 15 of B&V's projects, the RFP did not require the agency to do so, and there is no legal requirement that all references listed in a proposal be checked. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 6; SDA Inc., supra, at 7 n.8. The agency's choice of references also was reasonable. The two projects chosen were the only two federal design/build projects submitted by B&V and given the past experience of the proposed construction manager on one of the projects, these were highly relevant to the evaluation for award of the instant contract. Of the other six identified "design/build" projects, four did not include physical construction of the facility, only construction management services, and one was for work on a B&V building.

B&V also observes that it had no opportunity to rebut these negative comments furnished by the Kirtland project engineer. Under Federal Acquisition Regulation (FAR) § 15.610(c)(6) (June 1997), competitive range offerors shall be provided "an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment." Since nothing in the record indicates that the agency addressed B&V's past performance during discussions, the agency does not appear to have satisfied its obligation under this FAR provision.

However, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Based on our review of the record, we conclude that the protester would not have had a reasonable possibility of receiving the award but for the agency's failure to discuss its references.

As we noted above, the information supplied by the Kirtland reference appears accurate, making any rebuttal of little, if any, value. In this regard, despite B&V's

disagreement with the accuracy of the comments and its stated desire to rebut them, it has submitted no rebuttal or contradictory evidence to our Office, which suggests that it is unlikely that B&V would have provided the agency with a persuasive rebuttal had the opportunity been provided during discussions. Further, this aspect of the evaluation had a limited impact on the evaluation as a whole and on the award determination. The references subcriterion represented only 8 of 35 points under the past performance evaluation factor. Had B&V received a perfect score for this subfactor, its proposal score would have increased by only 6 points, making its overall score 76 points, still significantly below McMaster's final score of 82. See Continental Serv. Co., B-271754, B-271754.2, July 30, 1996, 96-2 CPD ¶ 65 at 5-6. More importantly, the record makes clear that the contracting officer's decision not to award to B&V did not result from B&V's inferior past performance score. While the contracting officer recognized B&V's design and construction capabilities and its lower-priced proposal, he did not select it for award because of B&V's "continuous exceptions/clarifications submitted with [its] proposal, indicating [its] difficulty in understanding the RFP requirements." Price Negotiation Memorandum at 4. McMaster received the award because of its superior technical/management proposal, including its construction experience and proposed schedule control. In sum, this record provides no basis to question the award determination.

The protest is denied.

Comptroller General
of the United States