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Decision

Matter of: Patricio Enterprises Inc.
File: B-412740; B-412740.3; B-412740.4
Date: May 26, 2016

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Robert E. Korroch, Esq., and William A. Wozniak, Esq., Williams Mullen, for Get It Done Solutions, LLC, the intervenor.
Korvin S. Kraics, Esq., Steven R. Hall, Esq., and Melissa Martin, Esq., United States Marine Corps, for the agency.
Mary G. Curcio, Esq., and Cherie J. Owen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's evaluation of the protester's past performance is sustained where the agency applied a mechanical formula in assessing past performance that resulted in an unreasonable distinction between the two offerors.

DECISION

Patricio Enterprises, Inc., of Stafford, Virginia, a service-disabled, veteran-owned small business, protests the issuance of a task order to Get It Done Solutions, LLC (GID) of Fredericksburg, Virginia, under request for proposals (RFP) No. N00024-15-R-3589, issued by the United States Marine Corps, Marine Corps Systems Command, for program and financial management support services for the agency's Program Manager, Infantry Weapons Systems (PM IWS) program.¹ Patricio asserts that the agency unreasonably evaluated the proposals of GID and Patricio. Patricio further asserts that the agency failed to perform a reasonable trade-off in making the award decision.

¹ The estimated value of the task order at issue is in excess of \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task and delivery orders under multiple-award indefinite-delivery/indefinite quantity (IDIQ) contracts. 10 U.S.C. § 2304c(e).

We sustain the protest.

BACKGROUND

The solicitation was set aside for service-disabled, veteran-owned, small business concerns (SDVOSB) that hold a Navy Seaport-e multiple-award indefinite delivery/indefinite quantity (IDIQ) contract in Zone 2, the national capital area. RFP, § M.1. The RFP contemplated the issuance of a fixed-price task order for program and financial management support services for the PM IWS in the following five areas: anti-armor systems; individual combat equipment; infantry weapons; optics and non-lethal systems; and reconnaissance and amphibious raids.² RFP, Performance Work Statement (PWS), §§ 1.1 to 1.1.5. The solicitation provided for the issuance of a task order on a best-value basis, considering the following evaluation factors, listed in descending order of importance: management and staffing capability (with subfactors for management approach and staffing approach); price; and past performance. RFP, § M.2. A fixed-price task order was to be issued for a four-month transition period, an eight-month base period, and four one-year option periods.

The agency received acceptable proposals from three offerors, including the awardee and the protester. The source selection evaluation board (SSEB), evaluated the proposals of Patricio and GID as follows:

	GID	Patricio
Management and Staffing Capability	Marginal	Outstanding
Price	\$13,915,920	\$18,500,928
Past Performance	Substantial Confidence	Satisfactory Confidence

Agency Report (AR), Tab 17, Source Selection Decision (SSD), at 1.

² Tasks to support the PM IWS include, among other things, development of acquisition program memoranda, program meetings support; program management reviews, and financial data reporting. Tasks to support the product groups include, among other things, product management (official taskers; naval messages; command chronology; operating procedures and instructions; meetings and conferences) and program analysis (program briefs; market research; project scheduling; cost analysis requirement descriptions; program life cycle cost estimates; acquisition strategies; risk analysis and risk registry; program protection plans; business case analyses; and requirements support). RFP, PWS, §§ 1.1 to 1.1.5.

In assigning Patricio's proposal a rating of outstanding³ for the management and staffing capability factor, the SSEB assessed three strengths. AR, Tab 14, SSEB Report, at 7. The first strength was for Patricio's **[DELETED]** approach to staffing," which the SSEB found would ensure that resources **[DELETED]** to meet high priority program requirements and surge requirements. Id.

The second strength was based on Patricio's transition plan. Specifically, the SSEB found that Patricio's proposal demonstrated that since Patricio is the incumbent contractor, its transition plan had the benefit of ensuring a short transition time, minimizing contract overlap and associated costs, and retaining a high rate of institutional knowledge. Id. The SSEB found this to be a strength because these benefits would "significantly minimize interruptions or delays to work in progress during the transition period," which would "exceed[] requirements in a way that would be advantageous to the Government" and would result in "significantly less need for time-consuming turnover activities allowing the progress of program activities to continue at the current pace." Id.

Patricio's third strength was for its staffing approach. Specifically, the SSEB found that Patricio proposed **[DELETED]** for specific tasks considered to be technically challenging and time consuming." Id. at 7-8. The SSEB found that Patricio's proposal "appropriately recognized the more technically challenging task areas . . . and proposed **[DELETED]**". Id. at 8. Therefore, the SSEB concluded that Patricio's **[DELETED]** exceeded the solicitation's requirements and would be advantageous to the government because "the **[DELETED]** allocated to these high risk task areas would allow **[DELETED]** for program team analysis and quality control increasing the likelihood of receiving high quality deliverables." Id.

In assigning GID's proposal a rating of marginal for the management and staffing capability factor, the SSEB assessed two weaknesses and one significant weakness. AR, Tab 14, SSEB Report, at 4-5. The first weakness was for GID's transition plan, which the SSEB found increased the risk of unsuccessful performance "because it does not allow for sufficient contractor turnover to limit schedule delays to ongoing IWS program and project efforts during the transition period." Id. at 5.

³ For the management and staffing capability factor the agency assigned proposals one of the following ratings: outstanding, good, acceptable, marginal, or unacceptable. RFP § M at 2. For the past performance factor the agency assigned proposals one of the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown/neutral confidence. Id. at 3.

The second weakness assigned to GID's proposal was related to the firm's plan to use a **[DELETED]** as part of the general support team. Id. The SSEB concluded that this approach would increase the risk of unsuccessful performance because it could potentially create a scheduling conflict between prime contractors for this contract and the **[DELETED]**, which could result in delays. Id.

Finally, the SSEB assigned a significant weakness to GID's proposal due to the evaluators' conclusion that GID proposed an insufficient number of hours for certain tasks. Id. at 5-6. Specifically, with regard to PWS tasks 3.3.4 (project scheduling), 3.3.7 (acquisition strategies/acquisition plans), and 3.3.10 (business case analyses), the number of hours proposed was "insufficient to meet PWS requirements." Id. The SSEB found that the insufficient number of hours proposed "appreciably increases the risk of unsuccessful contract performance because the lack of sufficient support will delay program schedules and key acquisition events." Id.

In the source selection authority's (SSA) three-and-a-half page selection decision, the SSA decided to "disregard" the weakness assigned to GID's proposal for proposing to use a **[DELETED]** as part of the general support team. AR, Tab 17, SSD, at 2. In removing this weakness, the SSA concluded that the current contract and the **[DELETED]** are related but separate efforts, and that it is the government's responsibility to coordinate and manage the two contracts. Id. at 2. The SSA also assigned a strength to GID's proposal because the proposal "describes a **[DELETED]** approach to support specific functions." Id. Since the other proposals received strengths for their **[DELETED]** approaches, the SSA concluded that GID's proposal should also receive a strength for offering a **[DELETED]** approach.

In the SSA's comparative assessment, he acknowledged that Patricio's proposal received a superior rating in the most important evaluation factor, management and staffing capability. AR, Tab 17, SSD, at 3. However, the SSA's tradeoff rationale stated:

The offeror's [Patricio's] incumbent status is already being paid for by the Government under the existing contract and doesn't warrant additional cost under this one. With regard to the **[DELETED]** proposed for certain tasks, while I do not discount the evaluators' assessment of merit for [Patricio's] recognition of what tasks may be more challenging or time consuming, this is a performance based requirement and the solicitation did not specify **[DELETED]** the Government considered acceptable or that more would be considered advantageous. There is an acceptable quality level that is required of the successful offeror, so the proposition of an **[DELETED]** does not equate to a benefit that is worth additional cost in a firm-fixed price arrangement when acceptable offers are available at a lower price.

Id. at 3-4.

With regard to GID's proposal, the SSA concluded that, despite the weakness and significant weakness assigned to the proposal, the level of risk was "acceptable." Id. at 4. The SSA further stated that his selection of GID and conclusion that its proposal presented an acceptable level of risk was "bolstered by the substantial confidence rating given to GID for its past performance." Id. The SSA selected GID's proposal for award and this protest followed.

DISCUSSION

Patricio argues that the agency's evaluation of the management and staffing capability factor and the past performance factor was flawed and that the agency improperly converted the procurement into a lowest-priced technically acceptable procurement, rather than selecting the proposal that represented the best value. As discussed below, we find that the agency unreasonably evaluated past performance.⁴

In reviewing a protest of an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgement was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Technology Concepts & Design, Inc., B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 8; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3.

Past Performance

⁴ We have considered Patricio's challenges to the evaluation of the management and staffing capability factor and find that they do not provide a basis to sustain the protest.

The solicitation instructed offerors to provide summaries of up to 5 contracts that were performed within 36 months of the proposal submission deadline and that were similar in size, scope, and complexity to the current requirement. RFP, § L.3.3. The offerors also were required to provide a questionnaire to a reference for each past performance contract listed. Id. The solicitation provided that contracts would be assessed for relevancy⁵ and quality of performance,⁶ and then assigned an overall confidence rating.⁷ RFP, § M at 2.4.

Patricio submitted five past performance references and GID submitted three past performance references. The offerors' past performance was evaluated as follows:

	GID	Patricio
Reference 1	Very Relevant/Exceptional	Very Relevant/Exceptional
Reference 2	Very Relevant/Exceptional	Very Relevant/Exceptional
Reference 3	Not Relevant	Very Relevant/Very Good
Reference 4	[none]	Relevant/Exceptional
Reference 5	[none]	Relevant/Exceptional
Overall Past Performance Rating	Substantial Confidence	Satisfactory Confidence

AR, Tab 15, Past Performance Report, at 6, 7; Agency Response (Mar. 24, 2016) at 6; Supp. AR (April 1, 2016) at 3.

⁵ Possible relevancy ratings were very relevant, relevant, somewhat relevant, or not relevant. RFP, § M at 2.4

⁶ Possible quality ratings were exceptional, very good, satisfactory, marginal, unsatisfactory, or not available/applicable. AR, Tab 15, Past Performance Report, (PPR), at 1.

⁷ Possible confidence ratings were of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. RFP, § M at 2.4.

As set forth above, GID received a past performance rating of substantial confidence⁸ and Patricio received a past performance rating of satisfactory confidence.⁹ In explaining the basis for these ratings, the SSA, who was also the Contracting Officer stated the following:

The PPET [Past Performance Evaluation Team] decided that a SUBSTANTIAL performance confidence assessment would be warranted when ALL relevant past performance was determined to be VERY RELEVANT with EXCEPTIONAL quality ratings. Any other combination of relevancy and quality would result in a SATISFACTORY (or lower) performance confidence assessment. This methodology was consistently employed by the PPET for every offeror.

AR, Tab 25, Declaration of SSA, at 2-3 (emphasis in original).¹⁰

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, B-401679.8 et al, Sept. 8, 2010, 2010 CPD ¶ 211 at 7; MFM Lamey Grp., LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a protester challenges the 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. Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, supra.

For example, in Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, we sustained a challenge to the agency's past performance evaluation methodology, finding it unreasonable because it effectively penalized offerors for submitting less relevant contract references, where, had the

⁸ The RFP provided the following definition of a rating of substantial confidence: based on the offeror's recent/relevant performance record, the government has a high expectation that the offeror will successfully perform the required effort. RFP, § M at 2.4.

⁹ The RFP provided the following definition of a rating of satisfactory confidence: based on the offeror's recent/relevant performance record, the government has a reasonable expectation that the offeror will successfully perform the required effort. RFP, § M at 2.4.

¹⁰ There is no explanation in the record beyond the agency's explanation of the formula it used to assign confidence ratings to an offeror's past performance.

less relevant contracts not been submitted, the offerors' past performance rating scores would have been higher. Id. at 8. In that case, we agreed with the protester's argument that any reasonable consideration of its less relevant contracts could only have increased its score since it received all superior ratings for those contracts. Id.; see also Olympus Bldg. Servs., Inc., B-285351, B-285351.2, Aug. 17, 2000, 2000 CPD ¶ 178 (sustaining protest where agency's mechanical formula for scoring experience unreasonably penalized an offeror for including extra, less relevant references in addition to relevant ones).

Here, Patricio asserts that the evaluation methodology used by the agency was unreasonable. We agree. Specifically, Patricio, like GID, had two very relevant past performance contracts that were rated exceptional for quality. Patricio also had two additional references that were found to be relevant and rated exceptional for quality, and one additional reference that was very relevant and rated very good for quality. In our view, the agency's mechanical evaluation of past performance was unreasonable where the result was that additional relevant past performance references with exceptional and very good quality resulted in a downgraded past performance rating. In sum, the agency's past performance evaluation methodology was not rational and resulted in an unreasonable evaluation of the offerors' past performance. Therefore, we sustain the protest on this basis.

Prejudice

Our Office will not sustain a protest absent a showing of competitive prejudice, i.e., where the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving the award. Fintrac, Inc., B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 11. We resolve any doubts regarding competitive prejudice in favor of the protester. Kellogg, Brown & Root Services, Inc.--Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 4.

Here, the solicitation required the agency to select the proposal that represents the best value to the government, considering all three evaluation factors. Patricio's proposal was evaluated as superior under the most important evaluation factor, but GID's proposal offered a lower price. With regard to the past performance evaluation factor, we cannot predict what ratings the offerors would have received if the past performance evaluation had been conducted in a reasonable manner.

The agency argues that even if Patricio had received the highest past performance rating, we should deny the protest because the source selection official would have reached the same award decision regardless of a change in past performance evaluations, and therefore, Patricio has not suffered competitive prejudice. We disagree. Our Office gives little weight to new evaluation or tradeoff judgments made in response to a protest. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. We accord lesser weight to such post hoc arguments or analyses because we are concerned that judgments made in

the heat of an adversarial process may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Id.

Here, while Patricio's proposal was 33 percent higher than GID's proposal in price, Patricio was rated exceptional under the most important evaluation factor. In determining which proposal offers the best value, the agency must consider the differences between proposals under each evaluation factor to distinguish their relative quality. Johnson Controls World Servs., Inc.; Meridian Mgmt. Corp., B-281287.5 et al., June 21, 1999, 2001 CPD ¶ 3 at 4. We cannot, at this point, speculate what past performance ratings will be assigned to Patricio or to GID once the agency performs a reasonable evaluation of past performance.¹¹ In other words, we have no basis--and we decline the agency's invitation--to speculate about how the SSA would have viewed the relative merits of GID's and Patricio's proposals in light of a new, reasonable past performance evaluation; we cannot conclude that the agency's source selection decision would not have proceeded differently given different ratings under one of the three evaluation factors.¹²

RECOMMENDATION

We recommend that agency re-evaluate past performance consistent with this decision. We further recommend that based on the results of the reevaluation, the source selection official make a new source selection decision, and that if an offeror

¹¹ In its response to questions from this Office regarding prejudice, the agency inexplicably assumes that even if the protest were sustained on the basis of an unreasonable past performance evaluation, it is beyond dispute that GID's past performance rating would remain the same in a reevaluation and that only Patricio's rating could potentially be impacted. See Agency Response (May 16, 2016) at 3. However, given our conclusion that the agency's past performance evaluation methodology was unreasonable, we see no basis to make that assumption.

¹² Since we are recommending that the agency conduct a new past performance evaluation and make a new source selection decision, we need not address Patricio's challenge to the agency's best-value tradeoff decision. However, in making a new tradeoff decision, the agency should consider Patricio's arguments that the SSA's tradeoff rationale (for example, his conclusion that the benefits associated with Patricio's superior transition plan could be disregarded because the agency had already paid for these benefits under the incumbent contract) was unreasonable. The agency should also ensure that it appropriately considers whether technical strengths are worth the additional price associated with them, rather than considering solely whether an "acceptable quality level" can be obtained at a lower price. See AR, Tab 17, SSD, at 3-4.

other than GID is selected for award, the agency terminate the order issued to GID and make a new award. We also recommend that the agency reimburse Patricio the reasonable cost of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Patricio should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel