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Decision

Matter of: Rotech Healthcare, Inc.
File: B-413024; B-413024.2; B-413024.3
Date: August 17, 2016

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DIGEST

1. Protest of awardee's past performance rating is sustained where solicitation provided for evaluation of offerors' performance on contracts similar in size, scope, and complexity to solicited effort, and evaluators failed to consider and document similarity of the awardee's contracts.
2. Protester's contention that the agency reopened discussions with only the awardee is sustained where, after receipt of final proposal revisions, the awardee was offered an opportunity to revise its proposed price but the protester was not.

DECISION

Rotech Healthcare, Inc. (Rotech), of Orlando, Florida, the incumbent contractor, protests the award of contracts by the Department of Veterans Affairs (VA) to Lincare, Inc. (Lincare), of Clearwater, Florida, under request for proposals (RFP) No. VA258-15-R-0092, for home oxygen and durable medical equipment with incidental services. Rotech argues that VA improperly evaluated proposals, made an improper source selection decision, and held unequal discussions.

We sustain the protest.

BACKGROUND

The RFP, issued on June 30, 2015, requested proposals for the provision of home oxygen and related medical equipment to support VA patients in the Veterans Integrated Service Network (VISN) 18 area. Agency Report (AR) at 1. The RFP contemplated award of contracts in two regions: Region 1 (Arizona and New Mexico) and Region 2 (Western Texas). Contracting Officer's Statement (COS) at 1. The solicitation indicated that VISN 18 currently serves an estimated 8,300 oxygen-using patients. RFP at 7.

Under the RFP, award was to be made on a "best value" basis, RFP at 98, to the offeror(s) whose proposal was "most advantageous to the government, price and other factors considered." Id. at 100. Evaluation factors, with possible ratings, were:

1. Joint Commission Accreditation (Acceptable or Unacceptable)
2. Region of Service (Acceptable or Unacceptable)
3. Past Performance (Excellent, Good, Satisfactory, Unsatisfactory, or Neutral)
4. Technical Capability (Excellent, Good, Satisfactory, Unsatisfactory)
5. Price.

RFP at 99-102; AR, exh. 13, Summary of Source Selection Evaluations (SSD) at 4-6. The RFP provided that past performance was slightly more important than technical capability, and that the past performance and technical capability factors, when combined, were "significantly more important than Price." RFP at 100; see SSD at 31.

Eight offerors submitted proposals for the regions of their choice. SSD at 2. After a technical evaluation, Rotech and Lincare received overall consensus ratings of good. Id. All other offerors received ratings of satisfactory. Id. The overall consensus ratings, along with the price proposals, were reviewed by the source selection authority (SSA) and a competitive range was established, which included only Rotech and Lincare. SSD at 3; AR at 1. The agency conducted discussions and requested final proposal revisions (FPRs). Both Lincare and Rotech submitted FPRs. SSD at 3. The evaluation results after final proposal revisions were as follows:

OFFEROR	PAST PERFORMANCE RATING (CONSENSUS)	TECHNICAL RATING (CONSENSUS)	REGION 1 PRICE	REGION 2 PRICE	PRICE
Lincare	Good	Good	\$49,439,503	\$19,296,769	\$68,736,272
Rotech	Good	Good	\$50,684,068	\$20,480,239	\$71,164,307

SSD at 20, 21, 31.¹

After reviewing the evaluators' findings, the SSA determined that the overall consensus ratings for the two proposals were equal, and that the award could be based on price. Because Lincare's price was approximately \$2.4 million, or 3.4%, lower than Rotech's price, the SSA concluded that Lincare's proposal represented the "overall Best Value to the Government." SSD at 32. The agency awarded contracts to Lincare for both Region 1 and Region 2 on April 13, 2016. COS at 4. This protest followed.

DISCUSSION

Rotech challenges the VA's evaluation and source selection decision in multiple respects. We have considered all the protester's arguments and conclude that two of the protest grounds raised by Rotech are meritorious. We discuss those protest grounds below.²

Past Performance

Rotech challenges the agency's assignment of a rating of good to Lincare's proposal under the past performance evaluation factor, arguing that the record fails to establish that the rating was based on Lincare's performance on contracts similar in size, scope, and complexity to the effort here, as required by the RFP. As discussed below, we agree with the protester.

The RFP instructed offerors to provide past performance information on contracts of similar size, scope, and complexity that were ongoing or completed within the last three years. RFP at 97. The solicitation explained that past performance would be evaluated as follows:

Past performance will be evaluated based on the level of risk of poor performance as indicated by an offeror's past performance references of similar size, scope, and complexity that are ongoing or have been completed within the last three years. A Past Performance Survey

¹ Both proposals were rated "Acceptable" under Factor 1, Joint Commission Accreditation, and Factor 2, Region of Service. SSD at 13-15.

² Rotech also challenges other aspects of the agency's evaluation and source selection decision. While we do not address these arguments in this decision, we have considered them and conclude that none provides an additional basis for sustaining the protest.

template will be included as an attachment to the solicitation, to include questions concerning timeliness of performance, cost control, effective management, customer satisfaction, quality awards, and the technical success of the project. All of the [P]ast Performance Survey questions are of equal importance relative to each other. Offerors shall submit those surveys to their previous contract references, who then shall complete the survey and submit directly to the contracting officer for evaluation.

RFP at 101.

In its proposal, Lincare identified eleven recent/ongoing contracts on which it was performing (or had performed), the number of oxygen patients under the contract, and the annual contract value. Two of the contracts were with the VA. Nine of the contracts served patient populations of approximately 1,000 or less; the remaining two served populations of 2,612 and 7,383 patients, respectively.³ Only the final contract had an annual value of more than \$5 million.⁴

The agency received completed past performance surveys from references on only two of the contracts identified by Lincare. One of the surveys pertained to a contract involving 962 oxygen patients (the annual value of which was \$3.5 million) on which Lincare's performance was generally rated as excellent. The other pertained to Lincare's performance on a contract involving 218 patients (with an annual value of \$2.5 million) on which Lincare's performance was generally rated as satisfactory; in response to the survey question as to whether the reference would award another contract to Lincare, this reference indicated "No." In evaluating Lincare's past performance, the evaluation team also took into consideration the personal experience of one of its members dealing with Lincare in a private industry setting. Based on her experience, this individual rated Lincare's past performance as excellent; the evaluation record contains no information as to the similarity of the private sector contract to the work solicited here, however.

The evaluation team summarized its basis for assigning Lincare's proposal a past performance rating of good as follows:

³ While information regarding the number of patients and annual contract value was redacted from the copy of Lincare's proposal furnished with the agency report, the intervenor furnished this information in its comments. Intervenor's Comments on the Second Supplemental Report at 6.

⁴ According to the protester, the value of the work is over \$10 million annually. Protester's Comments on the Second Supplemental Protest at 8.

The offeror received a long list of strengths identified by the evaluators, as evidenced by the many past performance references provided. The offeror received good comments on their references, which include current contracts with entities within the Dept. of VA. The offeror has over forty years of experience, already has a large patient population including VA, military, and private insurance patients. Nothing in their past performance references indicated poor performance, and one evaluator had personal experience dealing with the offeror in the private industry setting-with excellent reviews. They appear to be experienced, provide good customer service, and excel at solving communication issues that arise. Some weaknesses were identified, however, including the fact the offeror is not currently contracted with any entire VISN in VA, a few mixed reviews on their past performance questionnaire, including Walla Walla, WA VA rating the offeror satisfactory but not likely to renew their contract due to some problems with rural service.

Lincare's past performance consensus rating resulted in "Good" despite weaknesses identified, because the overall strengths more than offset the weaknesses. Some evaluators did give Lincare a "Satisfactory" overall rating, and one an "Excellent" rating, but after discussion the consensus was agreed upon to rate Lincare's past performance as "Good" due to the overwhelming strong responses.

SSD at 13.

As noted above, the protester contends that the agency's evaluation was flawed in that it failed to consider the similarity and relevance of Lincare's contract references to the effort solicited here.

An agency is required to consider, determine, and document the similarity and relevance of an offeror's past performance information as part of its past performance evaluation. Phillips Healthcare Informatics, B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220 at 9; see Federal Acquisition Regulation (FAR) §15.305(a)(2). As a general matter, the evaluation of an offeror's past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. The Emergence Group, B-404844.5, B-404844.6, Sept. 26, 2011, 2011 CPD ¶ 132 at 5. We will question an agency's evaluation conclusions where they are unreasonable or undocumented, however. Clean Harbors Envtl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's

past performance. DRS C3 Sys., LLC, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 at 22.

Here, the record simply does not demonstrate that the agency had a reasonable basis for assigning Lincare's proposal a past performance rating of good based on Lincare's performance on contracts similar in size to the solicited effort. There is no evidence in the contemporaneous record that the evaluators considered whether Lincare's contracts were similar in size to the contract to be awarded here; moreover, the agency received completed past performance surveys on only two of Lincare's contracts, neither of which appears to have been comparable in size (in terms of number of patients or annual contract value) to the contract here. Furthermore, there is no information in the record establishing that the contract on which one evaluator had personal experience was comparable in size, scope, and/or complexity to the solicited effort. Under these circumstances, we are unable to conclude that the agency had a reasonable basis for its rating of Lincare's past performance. Accordingly, we sustain the protest on this basis.

Unequal Discussions

Rotech also asserts that the agency conducted additional discussions with Lincare that favored Lincare. Second Supp. Protest at 9-11. By letters dated July 28, 2015, the agency advised both Rotech and Lincare of "weaknesses/deficiencies" identified in their proposals and requested a "final cost proposal revision" by July 30, 2015. AR, exhs. 11-12, (competitive range notifications). On July 29, Lincare responded, advising that it was "not making any changes and our price stands as originally submitted." AR, exh. 6c. Rotech submitted a revised price proposal on July 29. AR, exh. 5d. On March 7, 2016, the contracting specialist advised Lincare:

The subject solicitation closed more than 6 months ago, therefore the VA would like your company to verify its offer pricing before a final award decision is made for this contract. Attached is Lincare's price proposal for quick reference. Please respond either confirming the original price offer, or provide alternate price information by 6:00 pm EST on March 9th, 2016.

AR, exh. 6d, Email Exchange, March 7-9, 2016 (emphasis added). No similar letter or invitation to submit a revised proposal was sent to Rotech. In response to the agency's email, Lincare advised that it did not choose to revise its price proposal. Id.

Rotech asserts that the March 7 email constituted discussions with Lincare, without including Rotech. Rotech asserts that when an agency permits one offeror to revise its proposal, it must provide all competitive range offerors with the same opportunity. Id. at 11. Rotech asserts that "extending the invitation to Lincare alone was improper under the FAR." Id. Rotech advises that had it been given the

opportunity, it “reasonably would have altered its proposal to improve its prospects for award.” Id. Rotech further asserts that given the passage of time since submission of FPRs seven months earlier and further depreciation of costs of equipment, it reasonably could have submitted lower pricing. Id. Rotech concludes that “the favorable treatment of Lincare thus was improper and prejudicial.” Id.⁵

The agency responds that the contracting officer did not “intentionally disclose beneficial information to one party and withhold it from another; the written communication with Lincare was solely for the purposes of pre-award price confirmation, which was only necessary due to the amount of time between the proposal and the anticipated award date; and there was no clear impropriety or obvious prejudice to Rotech in the written communication with Lincare.” Second Supp. AR at 7-8. The agency asserts that the CO “used clear language when asking Lincare to confirm [its] price prior to award; he did not ask for a revised cost proposal.” Id. at 7. In this regard, the contract specialist advises:

Due to the pre-award protest to solicitation #VA258-15-R-0092 and its subsequent resolution, nearly 8 months had passed since proposals had been received. After an internal evaluation was complete and an award decision was imminent, the agency, as a prudent business practice due to the time elapsed, asked the selected contractor Lincare to confirm its original price proposal. If Lincare had chosen not to confirm its proposal price, a new evaluation would have been completed. As Lincare did not alter its proposal pricing, no information changed and no re-evaluation was necessary.

Contract Specialist Declaration at 1.

We agree with the protester’s contention that the agency’s March 7 email to Lincare constituted discussions from which Rotech was improperly excluded. We consistently have held that the acid test of whether or not discussions have occurred is whether the offeror has been afforded an opportunity to revise or modify its proposal. Archer Western Federal JV, B-410168.2, B-410168.3, Nov. 12, 2014, 2014 CPD ¶ 351 at 5-6. After the receipt of final proposals, Lincare received an unambiguous invitation to either confirm its proposed prices “or provide alternate

⁵ Rotech further asserts that VA’s March 7 email violated FAR § 15.307(b), which requires the agency to “establish a common cut-off date only for receipt of final proposal revisions.” Second Supp. Protest at 10. Rotech argues that Lincare “was permitted to revise its proposal if it chose to do so ‘before a final award decision [was] made.’” Id. at 9. Although VA insists that it provided a common cut-off date when it requested FPRs from offerors in the competitive range on July 30, AR, exhs. 11, 12, that argument does not effectively address the plain invitation for Lincare to submit a revised price proposal in the agency’s March 7, 2016, email.

price information.” Email Exchange, Mar. 7-9, 2016, at 1. Because Lincare was given the option of revising its price, we think that the agency’s invitation constituted discussions. Where, as here, an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; see FAR § 15.306(d).

The agency argues that Rotech “cannot show any prejudice because Lincare, already the lower priced of the two proposals, did not provide any revised pricing.” Second Supp. AR at 8. We find this unpersuasive. As indicated above, Rotech advises that, if asked, it “reasonably could have submitted lower pricing,” increasing its chances for award. Second Supp. Protest at 11.

The intervenor also argues that the agency’s invitation to Lincare to submit a revised price proposal should be considered in light of the “otherwise successful offeror” rule in FAR § 15.208, which permits acceptance of a late modification of an otherwise successful proposal that makes its terms more favorable to the government. Intervenor Comments on Second Supp. AR at 30-31; see FAR § 15.208(b)(2). We find this argument unpersuasive. First, there is no indication that Lincare at this time was an “otherwise successful offeror.” We note that the March 7 email clearly indicates that it was sent “before a final award decision [was] made for this contract.” AR exh. 6d. In any case, the issue here is not whether Lincare submitted a late proposal revision that could be accepted under the “otherwise successful offeror” rule. It did not. Rather the issue is whether Rotech had the same opportunity to submit a revised price proposal, i.e., benefit from discussions, as Lincare. Here, the record is plain that it did not. Accordingly, we also sustain the protest on this ground.

RECOMMENDATION

We recommend that VA request revised price proposals from Rotech and Lincare, reevaluate and document the evaluation of Lincare’s past performance proposal, and make a new source selection decision consistent with this decision. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1). The protester 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