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Decision

Matter of: Innovative Builders, Inc.

File: B-402507.2

Date: September 15, 2010

Cody W. Waters, Esq., for the protester.
Mary Elizabeth Hall, Esq., and Judson R. Jones, Esq., Mockbee Hall Drake & Hodge, P.A., for Hemphill-Key Joint Venture, the intervenor.
Deborah J. Shoemake, Esq., Megan O. Jorns, Esq., and Stephen L. Sowell, Esq., Department of the Army, Corps of Engineers, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the agency's evaluation of the protester's past performance is denied where record shows that the agency reasonably determined that the protester's past performance projects were not relevant or recent.

DECISION

Innovative Builders, Inc., of Bay Saint Louis, Mississippi, protests the award of a contract to Hemphill-Key Joint Venture (HKJV), of Florence, Mississippi, under request for proposals (RFP) No. W91278-09-R-0101, issued by the Department of the Army, Corps of Engineers, for the construction of a seawall and related work. Innovative challenges the agency's determination that the firm lacked recent, relevant past performance.

We deny the protest.

BACKGROUND

The RFP, issued on September 23, 2009, contemplated the award of a fixed-price contract to construct a concrete seawall and other work in Bay Saint Louis. Specifically, the work consisted of

[c]onstructing a new approximately 5,600 long feet stepped and reinforced concrete seawall with a vinyl, sheet pile cut off;
constructing a new approximately 800 feet long vinyl sheet pile,

concrete capped bulkhead; constructing and placing pre-case reinforced concrete seawall foundation piles; disassembling and replacing an existing pier; locating and installing new storm drainage with related piping, manholes, outfalls and trench drains; procuring and placing select beach and compact fill, riprap, filter fabric and clearing the site for construction.

RFP amend. 1, § 00100.

Offerors were informed that award would be made on the basis of a performance-price tradeoff, considering the following two evaluation factors: past performance and price. The past performance factor, which was significantly more important than price, consisted of two equal elements: company specialized experience and past performance surveys. RFP § 001200, at 2.

With regard to company specialized experience, offerors were required to submit at least three, and no more than five, examples of recent, relevant construction projects. Id. The RFP defined a recent construction project to be one that was completed within 5 years of the RFP issue date, or was at least 50 percent complete by the issue date; it defined a relevant project to be one that “involved much of the scope, effort, and complexities as the work described in this solicitation.” Id. § 001100, at 2.

With regard to the past performance surveys, offerors were requested to submit performance information for each of the projects submitted in response to the company specialized experience element. The solicitation advised that the agency would use this information to evaluate the “quality” of the offeror’s performance. Id. §§ 001100, at 3; 001200, at 2.

The RFP provided that the past performance factor would be evaluated as exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. See RFP § 001200, at 3-4. A neutral/unknown confidence rating was defined to mean that an offeror “has little or no relevant record of past performance upon which to base a meaningful performance risk prediction. Risk is unknown.” Id. at 3.

The agency received 19 proposals, including the protester's and the awardee's, which were evaluated by the agency's source selection evaluation board (SSEB), as follows:

	Past Performance Rating	Price
Offeror A	Neutral	\$15.8 million
Innovative	Neutral	\$16.2 million
Offeror B	Neutral	\$16.3 million
Offeror C	Neutral	\$16.5 million
Offeror D	Satisfactory	\$16.9 million
HKJV	Satisfactory	\$17.1 million
Offeror E	Neutral	\$17.3 million
Offeror F	Satisfactory	\$17.8 million
Offeror G	Neutral	\$18 million
Offeror H	Satisfactory	\$18.3 million
Offeror I	Satisfactory	\$18.7 million
Offeror J	Neutral	\$19.7 million
Offeror K	Neutral	\$20.3 million
Offeror L	Satisfactory	\$21 million
Offeror M	Neutral	\$23.8 million
Offeror N	Very Good	\$25.3 million
Offeror O	Neutral	\$27.4 million
Offeror P	Satisfactory	\$27.5 million
Offeror Q	Neutral	\$34.6 million

Agency Report (AR), Tab C, Re-Evaluation Source Selection Decision Document, at 6-7. Of the 19 proposals received by the agency, the SSEB assigned a very good/significant confidence rating to 1 proposal and satisfactory/confidence ratings to 7 proposals, including the awardee's. Eleven proposals, including Innovative's, were rated neutral/unknown confidence because the SSEB found these offerors had not identified at least three recent, relevant projects.¹

The SSEB performed a performance-price tradeoff analysis and recommended award to HKJV. In its performance-price tradeoff analysis, the SSEB did not consider any of the offerors, like Innovative, whose proposals were rated neutral. The source selection authority (SSA) agreed with the SSEB's recommendation, and selected HKJV's proposal for award without conducting discussions.

¹ One of the 11 proposals received a neutral rating because that offeror failed to provide 3 past performance surveys.

Following award to HKJV, Innovative protested to our Office, arguing that the agency had improperly found that the firm's proposal did not provide at least three relevant projects. We sustained Innovative's protest because the record did not show that the agency reasonably assessed the relevance of Innovative's past performance projects. Innovative Builders, Inc., B-402507, May 24, 2010, 2010 CPD ¶ __. We recommended that the Corps reevaluate Innovative's proposal under the past performance factor and make a new source selection decision.

In response to our decision, the agency reconvened the SSEB, which reevaluated Innovative's proposal. In assessing whether Innovative's past performance projects were recent, the board examined whether Innovative's projects were at least 50 percent complete by September 23, 2009, the RFP issue date. In assessing the relevance of Innovative's projects, the board examined whether the projects were of the same type, scope, effort, and complexity as the work to be performed here.² AR, Tab C, Re-Evaluation Source Selection Decision Document, at 3.

The SSEB concluded that, of the five projects submitted by Innovative, one was not recent and the remaining four were not relevant. Specifically, the SSEB found that Innovative's project No. 1--a \$17.5 million joint venture project to replace piers and bulkheads--failed to satisfy the RFP's requirement that 50 percent of the project be completed by the RFP issue date. The remaining four projects--a \$4.1 million project (No. 2) to expand and enhance communications ductbanks, a \$2.0 million project

² These terms were defined by the SSEB as follows:

1. *Type*: Does the project have strongly defined similarities and features as that of the subject solicitation?
2. *Scope*: Does the project contain a similar range of activities and dollar range as that of the subject solicitation? Does the project demonstrate a similar level of required plant, labor, equipment and materials as the subject solicitation?
3. *Effort*: Does the project demonstrate a similar level of activities, similar amount of energy and capacity of the Prime Contractor to achieve successful construction completion? Does the project demonstrate a similar level of management of the site and project, contractor mobility and supervision as that of the subject solicitation?
4. *Complexity*: Does the project demonstrate similarity in the interrelated work features and similarity in features that make the project difficult?

AR, Tab C, Re-Evaluation Source Selection Decision Document, at 3.

(No. 3) for a small craft harbor, a \$966,700 project (No. 4) to reconstruct five municipal piers, and a \$326,500 project (No. 5) to construct a municipal marina--were found not to be relevant when compared to the type, scope, effort and complexity required here. AR, Tab D, Re-Evaluation of Innovative Builders, at 6.

The SSEB again rated Innovative's proposal as neutral under the past performance factor. Under a new performance-price tradeoff analysis, HKJV's proposal was again determined to reflect the best value to the Corps. With respect to Innovative's proposal, the SSA determined that HKJV's strengths and more relevant past performance outweighed Innovative's price advantage. AR, Tab C, Re-Evaluation Source Selection Decision Document, at 8-9.

DISCUSSION

Innovative protests the agency's evaluation of its past performance. Specifically, Innovative complains, with regard to the project that was determined to be not recent, that by the RFP issue date it had completed over 50 percent of the portion of the overall project that was assigned to the firm, and thus the agency should have found the project to be recent.³ Innovative also complains, with regard to the remaining four projects that were found to not be relevant, that each of these projects contained features that were relevant to the work being procured here.

In reviewing a protest challenging an agency's past performance evaluation, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Ostrom Painting & Sandblasting, Inc., B-285244, July 18, 2000, 2000 CPD ¶ 132 at 4.

We find from our review of the record that the agency's conclusions regarding Innovative's projects were reasonable.⁴ With respect to Innovative's first project, the Bert Jones Yacht Basin Bulkhead, Dredging and Pier Replacement contract, the Corp

³ Innovative also states that the agency's original evaluation found this project to be recent. Given this, Innovative suggests that other proposals may have been misevaluated during the original evaluation. Protest at 3. Innovative's speculation, however, is insufficient to form a valid basis for protest. King-Fisher Co., B-256849, July 28, 1994, 94-2 CPD ¶ 62.

⁴ Given that offerors were required to submit three recent, relevant projects, we only discuss three of Innovative's five projects in our decision. Because we conclude, as described below, that the agency's evaluation of these three projects was reasonable, there is no need to address the protester's remaining two projects. We have, however, reviewed the other two projects, and agree with the Corps that these projects were also not relevant.

found that this project, which was identified as being performed by an unnamed joint venture,⁵ did not satisfy the solicitation's requirement that the project be 50 percent complete by the RFP issuance date. The Corps noted that Innovative's proposal showed that at the time of the RFP's September 23, 2009 issuance date, Innovative had been performing the project for only 6 months, with an estimated completion date of January 24, 2011, that is, some 16 months later. See AR, Tab D, Re-evaluation of Innovative Builders, at 6; Innovative's Proposal, Vol. 1, Past Performance. In its comments, Innovative does not assert that 50 percent of the project was completed by the RFP issuance date, rather Innovative asserts that it had completed 50 percent of its portion of the overall project by that date. Protester's Comments at 5. Innovative's proposal did not, however, identify what work comprised Innovative's portion of the project, or identify that 50 percent of this work had been completed by the RFP issuance date. Accordingly, we find that the agency reasonably concluded that this project did not satisfy the RFP's requirements.

We also find reasonable the agency's conclusion that Innovative's fourth project (reconstruction of piers) and fifth project (construction of municipal marina) were not sufficiently similar in scope, type, effort and complexity to be considered relevant to the construction project here. Construction of the seawall solicited by the RFP here would require forming and placement of structural concrete, reinforcement, vinyl sheet pile, storm drainage or trench drains, compacted fill, and other things. See AR, Tab D, Re-Evaluation of Innovative Builders, at 14. This would require 15,249 cubic yards of concrete, 95,000 linear feet of concrete pile, 140,000 cubic yards of compacted fill, 61,000 cubic yards of beach fill, and 15,000 tons of rip rap, among other things. Id. In comparison, Innovative's project No. 4 (a \$966,700 project), required only 300 cubic yards of concrete (2.0% of what was required here), no vinyl sheet pile, no storm drainage or trench drains, no compacted fill, only 500 cubic yards of beach fill (0.8% of what was required here), and only 1,000 tons of rip rap. The Corps found that this did not demonstrate that this project had a similar scope, level of effort, or complexity to establish that this project was relevant. See id. at 15. Although Innovative disagrees with the Corps' judgment in this regard, its disagreement does not show that the agency's judgment was unreasonable. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

With regard to Innovative's fifth project (a \$326,500 project), the Corps found that the marina only required 100 cubic yards of concrete (0.7% of what was required here), only 400 linear feet of vinyl sheet pile (7% of what was required here), and 2,800 linear feet of timber pile (compared to the 95,000 linear feet of concrete pile). The Corps also found that the project did not contain any forming or placement of structural concrete or concrete piles. Id. at 16. Again, given the significant disparity

⁵ Innovative's proposal does not identify what companies comprised the joint venture, or exactly what portion of the work was being performed by Innovative.

in size and scope of these projects with the seawall being procured here, we find reasonable the agency's conclusion that this project was not relevant.

In its comments, Innovative appears to contend that it may have been treated disparately in the reevaluation, asserting that its past performance projects were subject to greater scrutiny than other proposals. This protest allegation was not timely raised, however, since Innovative received the agency's report (containing the revised source selection decision and reevaluation) on August 6, 2010, but did not file its comments until August 17, some 11 days later. See 4 C.F.R. § 21.2(a)(2) (2010) (a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew of the basis for protest). Moreover, Innovative does not argue that the awardee's satisfactory performance rating would have changed if its proposal had been reevaluated using the alleged stricter scrutiny that was applied to Innovative's proposal.

The protest is denied.

Lynn H. Gibson
Acting General Counsel