



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Neal R. Gross & Co., Inc.

File: B-275066

Date: January 17, 1997

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for the protester.
Mary L. Johnson, Esq., National Mediation Board, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency point of contact for evaluation of past performance, listed as a reference by both offerors, provided positive reference for the awardee and negative reference for protester, there is no basis for concluding that contracting officer's reliance upon the one reference in selection of an offeror was unreasonable, absent any basis for concluding that additional references listed by protester would have provided information outweighing the negative reference provided by the agency's own personnel.
2. Protester's assertion that its subcontractor bore responsibility for poor performance under its prior prime contract with the agency presents no basis for concluding that the agency unreasonably determined that the protester's performance under that contract was poor; the prime contractor under a government contract is generally responsible for the performance of its subcontractors.
3. Where solicitation for fixed-price requirements contract contained no estimated quantities and provided no method for evaluating price beyond advising that each line item would be given equal weight, post-award protest that solicitation failed to provide for adequate evaluation of price is untimely.

DECISION

Neal R. Gross & Co., Inc. protests the award of a contract to Ann Riley & Associates under a request for proposals (RFP) issued by the National Mediation Board for court reporting services. Gross contends that the selection decision was unreasonable and contrary to the selection criteria announced in the RFP.

We deny the protest.

On August 15, 1996, the Board issued the RFP for a fixed-price requirements contract for services during fiscal year 1997. The solicitation sought prices per page for same-day, next-day, and standard (5-day) delivery for original and additional copies of transcripts. The schedule also allowed separate pricing for delivery within the Washington, D.C. area and elsewhere, 12 line items in all. The solicitation contained no estimated quantities and provided no method for evaluating price, beyond advising offerors that each line item would "be given equal weight." Section M of the RFP provided that the agency would make its selection decision based on "lowest overall [price] to the [g]overnment and past performance."

The record indicates that the agency expected potential contractors to provide the Board with original copies of transcripts for free. Past contractors had done so (and the competitors here offered to do so), in the expectation of a profit from selling additional copies to the public. The agency would therefore pay only for any additional copies that it needed. The record shows that the agency has generally paid \$20,000 to \$25,000 under past contracts; presumably most of this expense resulted from proceedings where the Board required more than one copy of a transcript. In this regard, the RFP advised offerors that 60 to 75 percent of transcripts would involve presidential emergency boards, requiring delivery of an original and three copies. Arbitration proceedings, approximately 5 percent of transcripts, required an original and one copy. The remainder (mediation boards) would require only an original. (The RFP provided that the contractor would charge the public the same price for transcripts as it charged the agency for additional copies.)

The RFP, as issued, contained no instructions for the submission of proposals. Five offerors submitted proposals, but only one of them provided any information on past performance with its initial proposal. The agency established a competitive range consisting of the three low offers, including those from Gross and Riley. By letters dated September 18, it requested the three offerors to provide past performance referrals by September 25. In response, Gross provided a list of seven references, including a prior contract with the Board. The awardee, Riley, also referenced a Board contract. Both offerors listed the same Board attorney as a point of contact.

On September 27, the agency asked the Board attorney listed as the point of contact to provide a reference for Gross and Riley. The attorney reported that Gross had used a subcontractor for work in the New York area, that the subcontractor was inefficient, and that the transcripts contained numerous mistakes, and that the reporter for Gross' subcontractor had disrupted Board proceedings with arguments over the responsibility for transcript errors. By contrast, the attorney reported that experiences with Riley had been "pleasant, professional and efficient," citing several instances of excellent performance in transcribing Board proceedings. As a consequence of this report, and without contacting the other references listed by

the two offerors, the agency awarded a contract to Riley on October 1. After receiving a debriefing on October 7, Gross filed this protest.

Gross contends that the selection decision was inconsistent with the solicitation. Gross contends that by requesting past performance information in its September 18 letter, the agency was advising offerors either that it would not consider their performance under Board contracts, or that it considered all offerors' performance under Board contracts essentially equal in quality. Otherwise, Gross argues, there was no reason to request information on past performance. In addition, Gross argues, by failing to consider six of seven references that the protester provided with its proposal, the agency failed to evaluate past performance in accordance with the solicitation, which implied that the agency would consider all references in its evaluation.

We see no implication in the agency's request for information on past performance that the agency would either consider all references or not consider the offerors' past performance under Board contracts. Agencies evaluating proposals may properly consider their own experience with an offeror's performance where the solicitation contains past performance as an evaluation factor. George A. and Peter A. Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286. Contrary to Gross' assertions of how it understood the September 18 letter, the record shows that Gross itself specifically referenced its Board contract in its response to that letter. We see nothing unreasonable or improper in the agency's consideration of past performance under Board contracts for the purpose of evaluating past performance.

With regard to the agency's reliance on past performance under one Board contract, there is no legal requirement that all references listed in a proposal be checked. Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. In the absence of any argument or evidence that contacting other references would have made a difference in light of the negative report from the Board attorney, we do not find the contracting officer's reliance upon the one reference unreasonable. That is, presuming that all other references would have reported favorably on Gross' performance, and absent evidence that Riley's references would have provided negative information, we can only conclude that the contracting officer would have relied upon the only meaningful discriminator available to her--the negative reference for Gross provided by the staff attorney, as opposed to that same attorney's positive reference for Riley.

Gross also disputes the adverse information provided by the Board attorney on its recent performance. Gross argues variously that the problems were not recent; were undocumented; were not brought to its attention; and were the fault of its subcontractor, in any event. In fact, the record shows that the events were recent, transpiring under Gross' fiscal year 1995 contract. On the other hand, we agree

with Gross that the ten random pages of marked transcript provided by the agency are not convincing evidence of overall poor performance by a reporting service. Still, we cannot conclude that the Board attorney's apparent exasperation with the subcontractor's disruption and distraction from her duties as hearing officer was unreasonable. Gross' attempt to place responsibility solely on its subcontractor, and to point out that Riley uses the same subcontractor at times, is unavailing. The general rule is that a prime contractor under a government contract is responsible for the performance of its subcontractors. See Logicon Inc., Armed Services Board of Contract Appeals No. 37130, Sept. 8, 1995, 95-2 BCA ¶ 27921. Gross provides no basis for departing from that general rule here.

In its comments on the agency report, Gross for the first time asserts that the agency did not properly evaluate price. The solicitation stated that each line item would "be given equal weight." The agency therefore added the price of an original page, same-day delivery, to the price of an additional copy of that page, same-day delivery, to the prices for next-day delivery and the prices for standard delivery. Further, each offeror provided a price for delivery within 30 miles of Washington, D.C. and a price for delivery elsewhere, for 12 line items in all. Six of these line items represented the free originals, and neither offeror provided a price for delivery within the Washington area different from that for delivery elsewhere, so that only three prices (each one doubled) were actually involved.¹ Gross' total, \$11.40 for the six line items, was 10 cents less than Riley's price. Gross argues that the agency's determination that the offerors were essentially equal in price was unreasonable.

As a preliminary matter, we think any failure of the price evaluation scheme to provide meaningful distinctions in price was inevitable given the lack of any specific provisions in the RFP regarding how price was to be evaluated. Such defects, however, must be protested prior to the time set for receipt of initial offers, not, as here, after award. Bid Protest Regulations, § 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1)); District Moving & Storage, Inc.; Todd Van & Storage, Inc.; Eureka Van & Storage Co., Inc., B-240321 et al., Nov. 7, 1990, 90-2 CPD ¶ 373. In this regard, given the lack of price evaluation provisions in the RFP, we do not find reasonable Gross' assertion that, until it received the agency report, it had no idea that the agency would be unable to find any meaningful difference in price among the offerors. Thus, if Gross believed that the solicitation

¹Gross offered to provide additional copies as follows: same-day delivery, \$2.20 a page in Washington; \$2.20 a page elsewhere; next-day delivery, \$2.00 a page in Washington and \$2.00 a page elsewhere; standard delivery, \$1.50 a page in Washington and \$1.50 elsewhere. These prices total \$11.40, which was Gross' evaluated price. Riley offered the same price for next-day delivery, with same-day delivery for \$2.75 per page and standard delivery for \$1.00 a page, or \$11.50.

did not provide for an adequate evaluation of price, it should have raised the issue prior to the receipt of initial proposals on September 15, rather than waiting until October 9, after Riley had already won the award, to file its protest.²

Further, Gross provides no basis for us to conclude that there was a real difference in price that the agency ignored in finding the offers equal in price. Although, as noted above, the RFP contains some information on how often the Board will require additional copies, it provides nothing from which one can estimate how often it will require the transcripts on a same-day, next-day, or standard delivery basis. The record shows only that Gross' price for same-day delivery--\$2.20 per page for additional copies (within the D.C. area and elsewhere) versus Riley's \$2.75 per page--was significantly (20 percent) lower than that of the other competitive range offerors, while its price for standard delivery--\$1.50 per page for additional copies (within the D.C. area and elsewhere) versus the other offerors' \$1.00 a page--was significantly higher. While Gross asserts that its pricing is truly the lowest, Gross makes no assertion and provides no evidence that same-day delivery is more common than standard delivery, or whether it is common at all.³ Under these circumstances, and given the solicitation here, we see no basis to conclude that the agency was unreasonable in treating the competitive range offerors as essentially equal in price.

The protest is denied.

Comptroller General
of the United States

²This presumes that Gross raised the issue in its initial protest, where it stated only that the selection decision was inconsistent with the solicitation and did not represent the best value for the procuring agency. It was not until its comments on the agency report, filed with our Office on November 26, that Gross for the first time alleged that the agency's determination to treat the offerors as essentially equal in price was unreasonable, because it had offered a lower price. If we consider the issue as raised in the November 26 comments, it is far too late, considering that Gross received a debriefing on October 9.

³Gross performed the services here under contracts for fiscal years 1994 and 1995.