



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: BFI Waste Systems of Nebraska, Inc.

File: B-278223

Date: January 8, 1998

Kevin Rauber for the protester.

Gary L. Young, Esq., Keating, O'Gara, Davis & Nedved, for Environmental Health Systems, Inc., an intervenor.

Jane S. Converse, Esq., Department of Veterans Affairs, 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

Agency's evaluation of offeror's past performance is unobjectionable where alleged deficiencies in past performance were reasonably assessed by the agency as having no negative impact on offeror's otherwise excellent past performance record.

DECISION

BFI Waste Systems of Nebraska, Inc. protests the award of a contract to Environmental Health Systems, Inc. (EHS) under request for proposals (RFP) No. 636-1-98, issued by the Department of Veterans Affairs. BFI challenges the agency's evaluation of EHS' past performance.

We deny the protest.

The RFP contemplated award of a fixed-price contract for pickup, transportation, and disposal of infectious medical waste from the Veterans Affairs Medical Centers (VAMC) in Omaha and Lincoln, Nebraska. Proposals were to be evaluated on the basis of quality (40 points), past performance (30 points), and price (30 points). Award was to be made to the offeror whose proposal was evaluated as most advantageous to the government.

For evaluation purposes, offerors were required to submit specific information with regard to the first two evaluation factors. As to quality, offerors were to submit statements as to: whether the offeror was in compliance with Department of Transportation (DOT), Environmental Protection Agency (EPA), and Occupational Safety and Health Agency (OSHA) regulations, along with the date or copy of the offeror's license, permit, or certificates; quality management programs or training programs in effect and whether in-service and other continual training is provided to employees; and programs or training available for reduction of contaminated

biomedical waste. With regard to past performance, offerors were required to: provide references with names and telephone numbers of prior or current customers; list hospitals for which the same service had been provided; and list "transgressions" from compliance with DOT, EPA, or OSHA regulations in the past 3 years.

Two offerors, BFI and EHS, submitted proposals by the September 15, 1997, closing date. Both proposals were technically evaluated by the contracting officer and the Omaha VAMC's industrial hygienist. Both proposals received the maximum number of points for quality and past performance. With regard to the evaluation of EHS' past performance and quality, there was no evidence of past violations of DOT, EPA, or OSHA regulations. Further, the contracting officer observed that in her direct experience dealing with EHS for the past 5 to 6 years, the contractor had always provided service on a prompt, efficient, and professional basis. She also noted that no one at the Omaha or Lincoln VAMCs had expressed any dissatisfaction with EHS' performance.

BFI's proposed price of \$198,048 received a score of 20 points, while EHS' price of \$155,596 was evaluated at 30 points. Since the agency found the two proposals were technically equal, it determined that price was the deciding factor. In accordance with the RFP, the agency made the award to EHS on the basis of initial proposals, without conducting discussions. Upon receiving notice of the award, BFI filed this protest with our Office.

BFI asserts that the agency's evaluation of EHS' proposal under the past performance and quality factors was flawed because it did not take into account alleged deficiencies in EHS' performance under the incumbent contract. In this regard, 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 the relative merit of competing proposals is primarily a matter of administrative discretion. Information Sys. & Networks Corp., 69 Comp. Gen. 284, 285 (1990), 90-1 CPD ¶ 203 at 3; Advanced Technology and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3. An agency may properly consider its own experience with an offeror's performance where the solicitation contains past performance as an evaluation factor. Neal R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30 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. We have reviewed the record and find nothing unreasonable in the agency's evaluation of EHS' proposal.

BFI bases its challenge to the evaluation on three alleged deficiencies in EHS' performance under the predecessor contract. The agency responds that the alleged deficiencies were not directly considered in the evaluation of EHS' past performance, but states that they would have no negative impact on EHS' evaluation as "superior."

The first deficiency involves EHS' failure to furnish sufficient red plastic bags to the Lincoln VAMC. Under the provision "transport containers," the contract calls for the contractor to furnish rigid plastic barrels of specified capacity and condition to be "lined with 2 mil. red plastic bags." On a site visit to Lincoln, a BFI representative allegedly learned that the agency was purchasing these bags because EHS was not furnishing them. By the protester's calculation, the cost of these bags could be as much as \$1,300 over the 86 weeks of contract performance at Lincoln. Since BFI told the Lincoln contracting officer's representative (COTR) that EHS should be furnishing the bags, BFI asserts that this aspect of EHS' past performance should have been considered as a negative element in the evaluation.

The contracting officer explains that she was not aware of the failure to furnish red bags at the time she evaluated EHS' past performance and thus did not consider it in the evaluation. Her evaluation was instead based on her great satisfaction with EHS' performance overall during the past 5 to 6 years, and the absence of any expressed dissatisfaction with EHS' performance from either of the VAMCs. While the agency did not consider this matter, it views the evaluation as reasonable in any event. In this regard, it accepts much of the blame because of its failure to properly administer EHS' contract by ensuring that the COTR was aware of and enforcing this contract requirement. Further, the agency advises that it was never charged extra for undelivered bags.

Moreover, as noted by EHS, there is no evidence that EHS was attempting to increase its profits by failing to meet this requirement. In this regard, EHS fully complied with the bag requirement at the Omaha VAMC and, upon notice of the Lincoln deficiency, immediately complied with the requirement. In addition, according to a statement submitted by the agency to our Office, EHS, by deliberately foregoing its option to charge a higher rate for the low volume of waste at Lincoln, saved the agency more than \$5,000 during the Lincoln performance period.¹ Under these circumstances, we find nothing objectionable in the agency's evaluation in this regard. Laidlaw Envtl. Servs., Inc., B-256346, June 14, 1994, 94-1 CPD ¶ 365 at 8-9.

¹The statement explains that the savings are attributable to EHS' voluntary reduction of its rate per pound of waste based on volumes of 100,000 pounds or more, with the option to charge the original rate if volumes were less than 100,000 pounds. Even though the volume at Lincoln was less than 70,000 pounds over 19 months, EHS states that it charged the lower rate.

BFI next contends that EHS failed to meet its obligation under the current contract to submit appropriate invoices. In this regard, section G of the contract requires that a "proper invoice" must include the "description, date of pickup of infectious waste for disposal, the number of containers for disposal and the gross and net weight for that date, at the unit price claimed." BFI has submitted one of EHS' invoices and observes that it does not show the number of containers or the gross weight.

The agency acknowledges that it did not consider this matter in its evaluation of EHS' proposal and agrees that the invoice does not contain all the information specified in section G, "contract administration data." However, the agency notes that section C, "description/specifications/work statement," of the current contract requires the contractor to provide a certifiable weighing system to enable proper billing. It is the weighing system performance requirement with which the agency is concerned with regard to past performance. The agency states that EHS has fully met this performance aspect of the contract.

For each pickup of medical waste, EHS provides the VA with a copy of a manifest which shows the number of containers picked up. When the waste is off-loaded at the EHS facility, EHS verifies the number of containers received using its copies of the same manifest. At the time of destruction, EHS fills out a destruction log indicating complete information about each manifest, including the number of containers, gross weight, tare weight, and net weight. It then totals and verifies all the numbers and annotates the net weight on the manifest, a copy of which is then returned to the VA. The invoice showing net weight totals for each pickup is generated from the manifest and log. While EHS did not provide all the information on its invoice, the agency had the information to verify the accuracy of the invoice readily available in the form of the returned manifest. It was also free to review EHS' records at any time. The VA states that it is satisfied with EHS' system and its invoices and believes that EHS has fulfilled the spirit, if not the letter, of the section G contract administration requirement. Here, while the subject of EHS' invoices was not considered in the evaluation, the agency was satisfied with the invoicing practice. Under these circumstances, we see nothing objectionable in the agency's determination that EHS' practice and the agency's acceptance of that practice did not warrant an adverse evaluation. Laidlaw Env'tl. Servs., Inc., supra.

BFI next alleges that EHS has improperly disposed of chemotherapy wastes. As evidence of this, the protester relies on its site visit observations, its understanding of EHS' contract responsibilities, and various conversations it had with agency representatives. According to BFI's understanding, EHS believes that it receives only "de minimis" amounts of chemotherapy waste, which it properly disposes after microwaving. BFI has submitted a document from the Nebraska Department of Environmental Quality, which advised EHS that microwaving is not approved for treatment of chemotherapeutic, radioactive, or gross anatomical wastes. BFI interprets this information as establishing that EHS used unapproved methods for

disposing of this type of waste. In BFI's view, EHS' actions in this regard should have been considered as an adverse factor in the past performance/quality evaluation.

The agency explains that the VA does not send chemotherapeutic, radioactive, or gross anatomical waste to EHS for disposal, since the firm does not have a permit to dispose of these waste types. The agency further points out that the contract specifications do not provide for the contractor to remove and dispose of chemotherapy or hazardous waste generated by the VAMCs. Agency representatives have advised the contracting officer that, in fact, no such waste has been sent to EHS for disposal. In this regard, the record contains the VA's certification to EHS that specifically enumerated wastes generated by the VA have been isolated from the wastes consigned to EHS for treatment. The agency also certified that it had reviewed the listing of hazardous wastes, and that, if generated, they are not included with the waste sent to EHS.

Our review of the record confirms that neither the predecessor, nor the contract at issue, requires the removal, transportation, or disposal of chemotherapy or hazardous wastes. Since these wastes are not within the scope of EHS' contract and the agency avers that no such wastes are consigned to EHS, there is no factual basis for BFI's allegations.

Finally, BFI questions whether EHS is properly disposing of infectious waste from the Omaha VAMC, located outside Lancaster County, in a Lancaster County landfill. Under a Lincoln, Nebraska ordinance, only solid waste generated inside Lancaster County is authorized for disposal in the Lancaster landfill. According to EHS, the Lincoln City Council has approved the disposal of medical waste from outside Lancaster County, based on the industrial processing of the waste inside the county. In this regard, every year since 1991, EHS has received a permit for disposal of the Omaha waste in the Lancaster landfill. BFI has provided no rebuttal to EHS' statements in this regard, and we therefore conclude that BFI's argument is without merit.

The protest is denied.

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