GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: TLT Construction Corporation

File: B-286226

Date: November 7, 2000

Patrick J. Sullivan, Esq., Heafitz & Sullivan, and Robert J. Symon, Esq., Spriggs & Hollingsworth, for the protester.
William A. Hough, Esq., U.S. Army Corps of Engineers, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Use of negotiated rather than sealed bidding procedures in procurement for demolition and construction services is proper where the agency, based on performance problems encountered on prior contracts, reasonably determines that discussions might be necessary to ensure that offerors fully understand the importance of timely, quality performance, and that award must be based on technical evaluation factors as well as price.

2. Allegation that it is improper for an agency to rely on information retrieved from an electronic database to evaluate a construction contractor's past performance, without giving protester an opportunity to comment on allegedly negative information in the database, is denied, where the record shows that the protester has previously been given ample opportunities to clarify adverse past performance information in the database, and there is no reason to question the validity of the past performance information.

DECISION

TLT Construction Corporation protests the U.S. Army Corps of Engineers' use of negotiated procedures in soliciting offers for upgrading the D-Area barracks at Fort Bragg, North Carolina under request for proposals (RFP) No. DACA21-00-R-0030. TLT also argues that the RFP's evaluation methodology is unreasonable.

We deny the protest.

The RFP, issued August 11, 2000, contemplates the award of a fixed-price contract for the basic requirement and one option item. RFP Schedule and § 52.216-1, at 12. Offerors are required to submit technical and price proposals. Section 52.0020-4101 lists the following technical factors to be evaluated on a "Go/No Go" basis: experience, past performance, effectiveness of management, and compliance with safety standards. Under the past performance area, the RFP also lists two subfactors: (a) timeliness and (b) quality. Price will not be separately scored. The RFP provides that all factors and subfactors are of equal weight, and that if a proposal is rated "No Go" under any subfactor, the proposal will not be acceptable. Award is to be made to the offeror submitting the technically acceptable, lowest-priced proposal whose price is determined to be fair and reasonable. Offerors are further advised to submit their best technical proposals and prices in their initial proposals, and that the agency intends to make award without conducting discussions.

TLT contends that the agency's decision to use negotiated instead of sealed bid procedures violates the requirements established by the Competition in Contracting Act of 1984 (CICA). According to the protester, none of the exceptions listed in the statute for requiring the use of negotiated procedures are present here. For instance, the protester asserts that time permits for discussions, and that any concerns the agency might have regarding an offeror's performance could be easily addressed using sealed bids during a pre-award survey. TLT further argues that the agency has fulfilled a similar requirement using sealed bidding procedures.

The protester also contends that the evaluation scheme announced in the solicitation--which provides that the agency will rely, among other things, upon information obtained from an electronic database to assess offerors' past performance--is arbitrary and capricious, because it does not guarantee TLT an opportunity to respond to alleged negative past performance information in that database. The protester argues that the announced approach will effectively preclude TLT from competing under this RFP.[1]

Under CICA, contracting agencies are required to determine the competitive procedure--competitive proposals (negotiation) or sealed bidding--that is best suited to the circumstances of a given procurement. 10 U.S.C. § 2304(a)(1) (1994); Military Base Management, Inc., B-224115, Dec. 30, 1986, 86-2 CPD ¶ 720 at 2. CICA does provide, however, that sealed bidding is to be used if (1) time permits, (2) award will be based on price, (3) discussions are not necessary, and (4) more than one bid is expected. 10 U.S.C. § 2304(a)(2)(A). Thus, an agency need not solicit sealed bids if it reasonably determines that it must evaluate factors other than price, F & H Mfg.

[1] In its initial protest, TLT also alleged that the RFP's evaluation scheme will result in an improper sole-source award. TLT subsequently withdrew this allegation. See Protester's Comments, Oct. 20, 2000, at 4 n.6.

Corp., B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520 at 4, or that it will be necessary to conduct discussions with responding sources about their offers. TLC Sys. and King-Fisher Co., B-227842, B-227842.2, Oct. 6, 1987, 87-2 CPD ¶ 341 at 3. Here, as explained more fully below, we think that the agency reasonably determined to use negotiated procedures instead of sealed bids.

By way of background, the contracting officer (CO) explains that Fort Bragg is currently renovating hundreds of existing barracks. Agency Report (AR) exh. 5, CO Affidavit, Oct. 2, 2000 at ¶ 3. This renovation program consists of six separate projects--the Smoke Bomb Hill Barracks, and five phases of the D-Area upgrade. Id. The CO states that the renovation program is in addition to a major new construction barracks for the 82nd Airborne Division, which is currently underway and is scheduled to continue through 2008. Id. As a result of all of these renovations, the CO explains that "swing space," which provides soldiers temporary quarters while their assigned barracks are renovated, is very limited. Id. at ¶ 4.

The CO further explains that each of the six projects in the renovation program is to be executed in different fiscal years, thus allowing for the completion of one project prior to the start of the next one. The start/completion date of any one project is thus coordinated and its progress closely monitored in order that sufficient livable barracks space is available for the soldiers at all times throughout the renovations. According to the CO, any delays in the start or completion of any of the six projects would essentially have a domino effect on subsequent renovations. Consequently, phasing and sequencing requirements must be adhered to so as to avoid delaying or affecting the established schedule of the follow-on project. In this connection, the CO further explains that the start of work on the D-Area barracks is constrained due to delays caused by the late completion of previous work on the Smoke Bomb Hill Barracks project. As such, any delays or failure of the successful offeror in completing the work required by the instant RFP will affect follow-on renovation projects. The CO explains that with respect to the Smoke Bomb Hill Barracks project, the agency was required to accept substantially completed barracks, with extensive "punch list" work remaining to be performed. The agency states that because its soldiers will be required to move into those barracks, the contractor will have to complete its work while the buildings are occupied.

In our view, the Army's need to ensure that the successful contractor understands the importance of completing the project in a timely manner, the agency's need to ensure performance quality, and the relatively complex coordination and scheduling requirements of this project, provide reasonable support for the agency's determination to use negotiated procedures here. See United Food Servs., Inc., B-220367, Feb. 20, 1986, 86-1 CPD ¶ 177 at 4-5. Moreover, contrary to the protester's argument, in view of the agency's recent experience on the Smoke Bomb Hill Barracks renovation project, we think that the agency reasonably determined that its requirements necessitate an assessment of the offerors' experience, past performance, effectiveness managing similar projects, and compliance with safety

standards, in addition to price, and, therefore, that negotiation rather than sealed bidding is necessary.[2] See F & H Mfg. Corp., supra, at 4.

TLT's contention that a preaward survey could resolve the agency's concerns is without merit. While a preaward survey may allay some of the agency's concerns regarding the successful offeror's capability, a site visit alone would not provide the agency with a mechanism for assessing an offeror's adherence to schedules or quality standards in the past, or whether the offeror fully understands the project's scheduling requirements. See D.M. Potts Corp., B-247403, May 29, 1992, 92-1 CPD ¶ 479 at 3. Further, the fact that the agency may have fulfilled a similar requirement using sealed bidding procedures does not establish that negotiated procedures are inappropriate here. TLC Sys. and King-Fisher Co., supra, at 3.

TLT also argues that under the evaluation approach announced in the RFP, it will improperly be denied the opportunity to address alleged negative past performance information in the agency's electronic database. According to the protester, the agency's approach will effectively debar TLT from competing under this (and perhaps other) construction projects. Based on our review of the record, we conclude that the agency's approach is unobjectionable.

Under the past performance area, the RFP states that offerors are to be evaluated on their success in meeting schedules and their compliance with requirements and standards of workmanship exhibited in past contracts. Under the timeliness subfactor, the RFP states that offerors are to be evaluated on their success in completing construction contracts on schedule. In addition, under the quality of past performance subfactor, offerors are to be evaluated on their success in complying with requirements of past contracts and standards of workmanship. As relevant to TLT's protest, the RFP states as follows concerning the sources the agency may rely upon in evaluating past performance:

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[2] TLT relies on our decision in Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, to argue that the CO's post-protest explanation of the determination to use negotiated procedures should not be accorded any weight. The Boeing case involved a post hoc reevaluation and cost/technical tradeoff late in the protest process where no tradeoff had been made during the initial source selection. The protester's reliance on the Boeing decision here is misplaced. We view the CO's response to the protest as simply providing a further explanation of the decision to use negotiated procedures which was previously documented in the evaluation plan prepared for this procurement, and in no way creating a new, post hoc rationale for the agency's decision.

> **Evaluation Sources**: This factor will be evaluated by reviewing: 1) all [U.S. Army Corps of Engineers' Construction Contractor Appraisal Support System (CCASS)] database factors relative to Timely Performance and/or 2) communication with the points of contact listed by the Offeror; and/or 3) other data available to the Government pertinent to this work.

RFP § 52.0020-4101, Evaluation Factors for Award, ¶ 2.1.2 at 16.

The RFP further states that:

> **The offeror must have received an average satisfactory performance rating on all CCASS data related to Timely Performance (Adequacy of Initial Progress Schedule, Adherence to Approved Schedule, Resolution of Delays, Submission of required Documentation, Completion of Punchlist Items, Submission of Updated and Revised Progress Schedule, Warranty Response) with no individual factor rated at Unsatisfactory, similar supporting data in the last three years, and/or telephone interview reports must be satisfactory (average) or higher to receive a GO evaluation.**

Id. ¶ 2.1.3, at 17.[3]

TLT challenges this evaluation approach, arguing that there is a clear reason to question the validity of the alleged negative past performance information in the CCASS, and thus, that the RFP should guarantee offerors an opportunity to respond to any adverse information in the CCASS database before the agency uses that information to evaluate their past performance. To demonstrate the alleged unreliability of the CCASS database, TLT asserts that the only unsatisfactory ratings for TLT in the CCASS database relate to "interim reports" on three uncompleted projects, which, according to TLT, are more than 2 years old, and on which TLT has not had an opportunity to comment. TLT also maintains that the agency's approach will ignore other satisfactory evaluation ratings from the end-user that allegedly conflict with the ratings in the CCASS database. As explained more fully below, we find the agency's approach legally unobjectionable.

U.S. Army Corps of Engineers Regulation (ER) No. 415-1-17 (March 26, 1993) establishes procedures for evaluating a construction contractor's performance, and for transmitting those evaluations to the CCASS database. The CCASS is a

[3] The RFP contains similar language concerning the evaluation of proposals under the quality of past performance, effectiveness of management, and compliance with safety standards factors. See id. ¶¶ 3.3, 4, at 18.

centralized, automated database of performance evaluations on construction contractors which contains past performance information to assist federal government contracting agencies in assessing contractors' past performance.[4] See ER No. 415-1-17 app. B; Department of Defense Federal Acquisition Regulation Supplement subpart 236.2. Generally, the CCASS database contains past performance information for the last 6 years, starting from the time a reviewing official signs the performance rating. Final performance evaluation reports are prepared by the contracting agency which reviewed and accepted the construction firm's work within 60 days of substantial completion of the work, and are transmitted electronically to CCASS by the office that signed the evaluation. ER No. 415-1-17 ¶ 5.c(1). The regulation provides for each performance report to be reviewed for accuracy and fairness by an individual knowledgeable of the contractor's performance at a supervisory level above that of the evaluating official. Id. The regulation further requires that COs provide contractors a copy of their final evaluations regardless of the rating.

If the evaluating official concludes that a contractor's performance was overall "unsatisfactory," the regulation requires that the contractor be advised in writing that a report of its unsatisfactory performance is being prepared, and of the basis for that report. ER No. 415-1-17 ¶ 5.c(2). The regulation further requires that the contractor be afforded an opportunity to submit written comments, which the agency should address and include in the final report. Id. The regulation also allows for unsatisfactory ratings to be amended, if warranted, to reflect changes in performance ratings. Amendments to final unsatisfactory reports in the CCASS database are to be made in writing, explaining why a change to the rating is necessary and which elements need to be changed. The regulation further states that a contractor that receives a final unsatisfactory performance evaluation should be notified of its option to appeal that rating within 30 days to a level above the CO. The appeal is a written request to the CO, stating the reasons why the contractor believes a further review of its performance evaluation is justified.

In addition to the final evaluation reports described above, the database also contains "interim performance evaluations" prepared when a contractor's performance is generally unsatisfactory for a period of 3 months or longer. If a firm is assigned an "unsatisfactory" interim rating, but subsequently improves its performance to satisfactory or better, the interim rating is removed from the database upon entry of the final rating. Interim unsatisfactory performance evaluations cannot be appealed, however.

[4] Further information on this database may be found at the CCASS home page, <http://www.hq.usace.army.mil/CEMP/E/ES/CCASSWEB/index.htm>.

Based on our review of the record, including the protester's arguments, the agency's explanations, and the procedures established in ER No. 415-1-17 for evaluating a construction contractor's performance, we see no basis to object to the agency's approach under this RFP. The procedures established by the regulation specifically require that contractors be notified when the agency is preparing an unsatisfactory performance evaluation, and give the contractors an opportunity to submit written comments on that evaluation to the agency. In fact, here, in accordance with the procedures established by the regulation, the CO informed TLT that the agency was preparing an unsatisfactory "interim" performance rating on one project--the SOF Medical Barracks, Phase II at Fort Bragg, DACA21-98-C-0046--and specifically advised the firm that the CO was "willing to consider any reasons why [the CO] should not issue this evaluation." Letter from CO to TLT, Dec. 9, 1999. The record further shows that by letter December 21, 1999, TLT replied to the CO's letter. Although the CO considered TLT's response, the CO concluded that issuance of the interim unsatisfactory rating was warranted. Letter from CO to TLT, Jan. 3, 2000.

The record also contains other correspondence dated December 1, 1998, and October 25, 1999, showing that TLT responded to the agency's interim and final negative evaluations of TLT's unsatisfactory performance on other construction projects. See Protester's Comments, exh. 6. Thus, the protester's assertion that it has not been previously afforded an opportunity to comment on the alleged negative performance reports in the CCASS database, is simply not supported by the record. Moreover, contrary to TLT's contention that the interim evaluations are "stale," the agency asserts, and the record shows, that the interim negative ratings TLT has received are dated November 1998 (DACA21-97-D-0015 and DACA21-98-C-0046). The record thus shows that the unsatisfactory ratings concern its recent performance, and that TLT has previously been given ample opportunities to clarify allegedly adverse past performance information in the database. In sum, TLT has provided no reason to question the recency or validity of the past performance information in the CCASS database.

Given our conclusion about the reliability of CCASS database, we see no merit to TLT's argument that the agency is required to give it a further opportunity to respond before it relies on the CCASS information in conducting the past performance evaluation. Federal Acquisition Regulation (FAR) § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where, as here, an award will be made without conducting discussions, "offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors (emphasis added)."[5] As TLT recognizes, this provision is

[5] We recognize that the issue regarding the agency's alleged duty to seek clarifications could be seen as premature since the protest was filed before

(continued...)

clearly permissive. That is, while it gives COs broad discretion to decide whether to communicate with a firm concerning its performance history, it does not require that they do so in every case. See, e.g., Rohmann Servs., Inc., B-280154.2, Nov. 16, 1998, 98-2 CPD ¶ 134 at 8-9. Here, in view of the clear evidence in the record showing that TLT has had ample opportunity to comment on its unsatisfactory performance, we think that the CO reasonably could exercise her discretion in deciding not to communicate further with TLT regarding the alleged negative past performance information in the CCASS database. Given the permissive language of FAR § 15.306(a)(2), the fact that TLT may wish to rebut or provide further comments on the information in the database does not give rise to a requirement that the CO give TLT an opportunity to do so.[6] See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

(...continued)
proposals were due and the agency has not yet affirmatively decided not to seek clarifications. We treat the issue on its merits, however, in view of the fact that the RFP makes it clear that the agency does not intend to seek clarifications on matters related to offerors' CCASS ratings.

[6] To the extent that TLT alleges that the agency will not take into account relevant, favorable ratings in the CCASS database in assessing its past performance, TLT's allegation is merely anticipating improper agency action which has not yet taken place, and, is thus speculative and premature. See Saturn Indus.--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5. Consequently, there is no basis for us to consider TLT's claim at this time. If, in the future, the Army takes concrete action that may properly form the basis for a valid bid protest, TLT may file with our Office at that time.