



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services, Inc.

File: B-256346

Date: June 14, 1994

John Miklich for the protester.
Matthew Pausch, Esq., and Ronald B. Bayes, Defense Reutilization and Marketing Service, Defense Logistics Agency, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that procuring agency improperly assigned a good rating to the past performance of both awardee and protester is denied where a review of the record shows that the agency's evaluation was reasonable and consistent with the past performance evaluation scheme set forth in the solicitation.

DECISION

Laidlaw Environmental Services, Inc. protests the award of a contract to Environmental Systems Company, Inc. (ENSCO) under request for proposals (RFP) No. DLA200-93-R-0018, issued by the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency (DLA), for removal, transportation, and disposal of hazardous waste.

We deny the protest.

BACKGROUND

The solicitation provided for the award of an indefinite-quantity contract for the removal, transportation, and disposal of hazardous waste generated at military installations in New York and New Jersey. Offerors were

¹The solicitation called for service for three geographical areas and provided that one or more contracts could be awarded depending on what combination of contract awards would be most advantageous to the government. The agency
(continued...)

to submit a technical proposal, past performance proposal, and price proposal. Award was to be made to the offeror whose proposal was technically acceptable and demonstrated the "best value" to the government in terms of price and past performance. In reaching the award decision, price was to be considered the most important factor with past performance being significant but of less importance. Price was to be evaluated for reasonableness. Concerning past performance, the RFP stated that the government would consider information in the offeror's proposal and information obtained from other sources, including past and present customers. The RFP also stated:

"The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical [and management] proposals.

"Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services. This is a matter of judgment. Offerors will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response--or lack thereof--will be taken into consideration.

"By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the

¹(...continued)
decided to make three awards, and this protest concerns only award area 1.

offeror's business-like concern for the interest of the customer, DRMS will also consider an offeror's performance on same or similar contracts in terms of waste quantities, variety of pick-up locations and waste streams, and disposal timeframes."

Of the 10 proposals that were submitted, 8 were found technically acceptable and included in the competitive range. The contracting officer performed price reasonableness and past performance evaluations on the eight offers.² Although not detailed in the solicitation, the agency rated past performance with adjectival ratings of superior, good, acceptable, and marginal. Both Laidlaw and ENSCO were rated good. Based on a review of four contracts that ENSCO referenced in its past performance proposal, the contracting officer found that ENSCO showed experience in commercial hazardous waste removal and disposal. The contracting officer also considered comments made by the references listed for these contracts. Based on this information, the contracting officer concluding that ENSCO's record of performance indicated that its probability of success was good, risks concerning potential contract performance and schedule compliance were moderate, that ENSCO's history showed some minor deficiencies that were readily correctable, and that ENSCO displayed a reasonable, cooperative attitude and a fair commitment to customer satisfaction.

Laidlaw's past performance evaluation was based on a review of 15 DRMS contracts that Laidlaw had performed. The contracting officer found that Laidlaw had a great deal of experience with DRMS hazardous waste contracts and that of

²DLA often issues solicitations for the same services being procured here and receives responses from the same group of contractors. As a result, in evaluating past performance for a particular solicitation, DLA does not always contact all the past performance references listed in every proposal under every solicitation. Rather, DLA first checks to see if the reference has been previously listed by the contractor in a prior proposal and contacted during the prior evaluation. If so, DLA uses that reference's comments for the current solicitation, instead of contacting the reference again. Thus, here, ENSCO had previously submitted a proposal with the same past performance data and DLA had contacted the references at that time. As a result, in rating ENSCO's past performance for this solicitation, DLA simply relied on the comments made by the references during the earlier solicitation. Similarly, the contracting officer used information that was gathered under an earlier solicitation to evaluate Laidlaw's past performance.

the 15 contracts reviewed, Laidlaw had minor deficiencies on 4. The contracting officer rated Laidlaw's past performance good because based on his review of the comments of the references he believed that Laidlaw's record of performance indicated that its probability of success was good, risks concerning potential contract performance and schedule compliance were moderate, Laidlaw's history showed some minor deficiencies that were readily correctable, and Laidlaw displayed a reasonable, cooperative attitude and a fair commitment to customer satisfaction.

Concerning price, ENSCO submitted the low offer of \$589,754 and Laidlaw submitted the second-low offer of \$599,866. After finding both prices reasonable, the contracting officer determined that since both offerors received identical past performance ratings, ENSCO's low-priced offer represented the best value to the government. The source selection authority agreed and awarded the contract to ENSCO.

ALLEGATIONS

Laidlaw's protest challenges the decision of the contracting officer to give it and ENSCO the same past performance rating. Specifically, Laidlaw argues that it should have received a rating of superior or, alternatively, that if it received a rating of only good, then ENSCO should have been rated no higher than acceptable. Concerning its own performance history, Laidlaw notes it is the incumbent on the current contract and is also performing 13 other DRMS contracts. Laidlaw asserts that any hazardous waste generator under its current contract will attest to Laidlaw's excellent performance and argues that these factors alone demonstrate that it should have received a superior rating and that its rating should have been higher than ENSCO's. According to Laidlaw, the current contract is very complex and requires an inordinate amount of coordination and flexibility to meet required pickup dates for delivery orders. In this regard, Laidlaw explains that there are a limited number of truck routes to and from the pickup locations and a typical delivery order usually includes 12 or more locations. Laidlaw states that traffic conditions are very bad and that the long distances between the sites strain the ability of the contractor to make scheduled pickup times. Laidlaw argues that despite these factors the risks concerning performance and schedule compliance using Laidlaw have always been minimal, which is characteristic of superior past performance. Laidlaw argues that a superior rating also was warranted by the fact that there were minor deficiencies under only 4 of the 15 contracts reviewed, and because its performance evidenced a high commitment to customer satisfaction and cooperative behavior, as evidenced by its removal of misidentified waste

from the Naval Station at Staten Island and its removal of waste that was inaccessible except by freight elevators at another location.

Regarding ENSCO's past performance, Laidlaw asserts that ENSCO has no specific DRMS experience and at best only minimal experience providing the level of service Laidlaw has been providing.

ANALYSIS

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Our Office does not make an independent determination of the merits of technical proposals, but examines the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Mere disagreement with the agency does not render the evaluation unreasonable. Columbia Research Corp., B-247073; B-247073.2, Apr. 23, 1992, 92-1 CPD ¶ 385.

Our review of the agency's evaluation of ENSCO's and Laidlaw's past performance demonstrates that the evaluation was reasonable. As a preliminary matter, we point out that the agency was evaluating past performance, not just experience as measured by the number of contracts an offeror had performed. Thus, the agency considered whether the offerors performed similar contracts to determine, as stated by the solicitation, whether the offeror had a record of conforming to the specifications and to standards of good workmanship; had adhered to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and, generally, the offeror's business-like concern for the interest of the customer. This being the case, we do not agree with Laidlaw

Laidlaw also notes that the evaluation memorandum of ENSCO's proposal states "[n]o further information is required from ENSCO as the probability of them receiving an award resulting from this solicitation is remote." According to Laidlaw, this statement indicates that the agency did not have confidence in ENSCO's past performance. The statement, however, was followed by: "[t]his determination is based on the prices submitted in their proposal," and thus was not based on ENSCO's past performance rating. As reported by the agency, the statement no longer applied after ENSCO reduced its price after the solicitation was amended.

that it should have received a higher past performance rating than ENSCO simply because it has performed 15 DRMS contracts and ENSCO has performed none.

Laidlaw's Past Performance Rating

Concerning whether Laidlaw should have received a superior rating for past performance, in the agency's standardized ratings for past performance of hazardous waste disposal contracts, superior performance is characterized by:

"Record of performance which met or exceeded specified requirements in a beneficial way to the customer.

"Record of performance which displays that the offeror has had experience on the same or similar type contract in terms of quantities, variety of waste streams, variety of pick-up locations, timeframes, complexity, etc. Contractor's record on these contracts is that which meets or exceeds specified requirements.

"Probability of success is extremely high.

"Risks concerning performance and schedule compliance are minimal.

"Contractor's record of performance includes reasonable and cooperative business-like behavior. Displays a high commitment to customer satisfaction, including administrative aspects."

In the agency's standardized ratings good performance is characterized by:

"Record of performance which met specific requirements.

"Record of performance which displays the offeror has experience on the same or similar types of contracts in terms of quantities, variety of waste streams, variety of pick-up locations, timeframes, complexities, etc.

"Probability of success is good.

"Risks concerning potential contract performance and schedule compliance are moderate.

"Contractor's history shows some minor deficiencies, readily corrected.

"Contractor displays a reasonable, cooperative attitude and a fair commitment to customer satisfaction."

DLA found that Laidlaw generally performed well on the DRMS contracts it provided as references for past performance. However, there were minor problems on four of them. For example, the references submitted showed that in one case Laidlaw showed up without the proper equipment, in another it was late on a pickup, on another it used government personnel and equipment to load hazardous waste, and that Laidlaw did not always return paperwork promptly.⁴ DLA also considered the letters of appreciation supplied by Laidlaw. While the letters were favorable, the agency notes that Laidlaw attempted to solicit a letter of appreciation in return for performing a service at no additional cost to the government. In addition, in one case, Laidlaw charged the agency three times more than it had originally agreed for adding batteries to a delivery order. Based on these factors, the agency determined that Laidlaw's past performance did not consistently exceed specified contract requirements and that Laidlaw displayed a fair but not a high commitment to customer satisfaction. The contracting officer thus concluded that Laidlaw deserved a good but not superior rating for past performance.

Laidlaw asserts that the fact that it was late once should not have caused it to receive a good rather than a superior rating. Likewise, Laidlaw argues that it rectified the problem with the improper equipment so that this cannot justify giving Laidlaw less than a superior rating. Laidlaw also argues that the paperwork was not required to be in earlier than it was submitted and that it used a government worker and equipment in one instance with the agreement of the facility involved. Laidlaw concludes that these contracts provided no justification for giving the firm less than a superior rating.

Our review shows that Laidlaw did not lose a superior rating on the basis of any single deficiency; rather its rating was

⁴Laidlaw notes that for one reference, the record includes a solicitation number and a contract number and asserts that it did not receive the award under the solicitation. Laidlaw therefore argues that it is unclear whether the agency in fact considered information relevant to Laidlaw, rather than to the contractor that actually received the contract. The information referenced is a solicitation for which Laidlaw submitted an offer. The agency used a past performance reference contacted during the evaluation under that solicitation in assessing Laidlaw's past performance under the present solicitation.

based on the agency's review of the firm's performance on a number of contracts, some of which included deficiencies. In this regard, as noted by the agency, good performance is characterized by some minor problems that are readily corrected. Insofar as the agency states that Laidlaw's paperwork was not always timely, even assuming Laidlaw is correct and there was no contractual requirement to provide the paperwork earlier, based on the past performance ratings and definitions used by the agency, good performance is characterized by adherence to contract requirements while superior performance is characterized by exceeding contract requirements. We find that the agency's decision to rate Laidlaw good rather than superior for past performance was reasonable based on these standards. Laidlaw's disagreement with this rating and its belief based on its own assessment of its performance does not change this result. See Columbia Research Corp., supra.

ENSCO's Past Performance Rating

We do not agree with Laidlaw that DLA improperly evaluated ENSCO's past performance proposal. Laidlaw asserts that DLA improperly rated ENSCO's past performance as good, because the main contract DLA relied on to evaluate ENSCO's past performance, a contract with the Texas Water Commission, had only a single waste stream for pesticides while the current contract will include numerous waste streams; it thus was not sufficiently similar to the current contract. Laidlaw also argues that ENSCO's primary experience is with incineration, only a small part of performance under the current solicitation; ENSCO has no DRMS experience; and ENSCO violated its Arkansas permit and had to pay a \$500,000 settlement.

Laidlaw's contentions do not demonstrate that DLA's evaluation of ENSCO's past performance was unreasonable. First, as already discussed, performance on similar contracts was only one factor that DLA considered in evaluating past performance. Therefore, the mere fact that ENSCO had performed fewer similar contracts than Laidlaw was

⁵Laidlaw also argues that the agency failed to identify during discussions any performance problems on its previous contracts, as the RFP required. As explained, the solicitation stated that offerors would be given an opportunity to address "especially unfavorable reports of past performance." Here, Laidlaw received a good past performance rating and the agency had only minor concerns about its performance under its previous contracts. We do not think, and Laidlaw does not argue, that the evaluation record included any "especially unfavorable" reports on Laidlaw's performance.

not a basis for assigning ENSCO a lower past performance rating.

Further, DLA did not rely on the Texas Water Commission contract primarily or exclusively to evaluate ENSCO's past performance. Rather, in assessing ENSCO's past performance, DLA also considered other ENSCO contracts with Reutgers Neese Chemical, MSE Environmental, Inc., and Beechcraft Lab Packing. DLA found that these three contracts were comparable to the subject solicitation and they played the heaviest role in the past performance evaluation. In evaluating the four contracts, DLA noted where the contracts were not the same as the present solicitation. Thus, DLA recognized in its evaluation that the waste streams were not as varied on the Texas Water Commission contract and that the number of pickup sites and the dollar values on some of the referenced contracts were not similar to the present solicitation. DLA also recognized, however, that like the present solicitation, the Texas Water Commission contract involved removing waste from multiple sites. Similarly, while the Reutgers contract was different because it did not have a variety of pickup sites, it was similar to the present solicitation since it involved many waste streams. Also, similar to the present solicitation, the MSE contract involved a variety of wastes and multiple sites. Under these circumstances, we think that DLA reasonably concluded that, based on its review of all four contracts, ENSCO had a performance history on contracts with a variety of pickup locations and waste streams, even though none of the four referenced contracts was identical to the present solicitation.

Concerning ENSCO's incineration experience, this experience was relevant to the evaluation because some of the hazardous wastes will be disposed of through incineration. DLA, however, did not rely heavily on ENSCO's incineration experience in assessing ENSCO's past performance, but rather, as noted above, considered the four contracts that ENSCO referenced in its past performance proposal. Regarding ENSCO's lack of DRMS experience, such experience was not listed as an evaluation factor or otherwise required by the solicitation. Therefore, DLA was not required to downgrade ENSCO's proposal for not having previously performed DRMS contracts. Finally, the agency did consider that ENSCO paid a settlement because its Arkansas site was not in compliance with its permit. DLA noted, however, that ENSCO corrected the problems and is now in compliance with the permit and that there had not been further problems. Given these factors, we have no basis to find that DLA's decision to rate ENSCO's past performance proposal good was unreasonable.

CONCLUSION

Since we find that DLA properly rated both ENSCO and Laidlaw good for past performance and since ENSCO submitted the low-priced proposal, DLA properly awarded the contract to ENSCO.⁶

The protest is denied.



for Robert P. Murphy
Acting General Counsel

⁶Laidlaw argues that since this is a requirements contract, depending on what DLA actually orders, the agency may not realize the savings it attributes to ENSCO's proposal. The award, however, was based on the evaluation of proposals as they were submitted, not on speculation as to what may or may not be ordered. Based on the proposals as submitted, ENSCO's proposed price was low and it was the proper awardee.