



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: 3D Contracting, Inc.

File: B-408478

Date: September 30, 2013

Erika B. Grubbs, Esq., and Beverly L. Anderson, Esq., Winston & Cashatt, for the protester.

Russell L. Emery, Esq., Department of Veterans Affairs, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Challenge to the agency's evaluation of the offerors' proposals and the selection decision is denied where the protester's arguments are either not supported by the record, or fail to demonstrate a prejudicial error. Additionally, the protester fails to set forth specific allegations that demonstrate that the agency evaluators were biased against the protester.

DECISION

3D Contracting, Inc. of Castle Rock, Washington, protests the award of a contract to SBH, LLC of Billings, Montana, under request for proposals (RFP) No. VA259-12-R-0579, issued by the Veterans Administration (VA) for renovation work at the Veterans Affairs Medical Center (VAMC), Fort Harrison, Montana. The protester argues that the agency evaluated the proposals in a disparate manner, the agency evaluators were biased against 3D Contracting, and the selection decision was unreasonable.

We deny the protest.

BACKGROUND

On April 30, 2012, the VA posted a solicitation to the Federal Business Opportunities (FedBizOpps) website to renovate the third and fourth floors of Building 154 at the Fort Harrison VAMC. The agency received proposals from two offerors, including 3D Contracting; on July 19, the agency cancelled the solicitation due to changes in the project. Agency Report (AR) at 2.

On March 7, 2013, the agency posted the current solicitation on FedBizOpps. The RFP was set aside for service-disabled, veteran-owned small businesses, and anticipated the award of a fixed-price contract. The solicitation was amended four times. The work is to be done in four phases with matching areas on the 3rd and 4th floor being done at the same time. RFP Amend. 2 at 2. The unaffected floors of the VAMC will be occupied during the renovation and the renovation will expand a surgical suite. Id.

The RFP listed three non-price evaluation factors: (1) past performance; (2) project team and key personnel; and (3) schedule. The solicitation required offerors to submit a base price proposal for a 550-day performance schedule, and three alternate price proposals, with varying schedules and alternative scopes of work; the solicitation advised that the agency intended to award a single fixed-price contract based on one of the schedules. RFP at 6, 23. The RFP stated that all non-price factors, when combined, were approximately equal to price. Id.

The past performance factor stated that the agency would evaluate recent and relevant performance. In this regard, offerors were to provide information regarding up to four contracts of similar type, scope, size, and complexity that had been completed within the last three years, or were currently ongoing. For each project, offerors were required to provide information regarding the type of construction project, and the “type of occupancy” involved. Offerors were also required to provide specific information regarding each project, such as scheduling, quality assurance, and cost control. RFP Amend. 2 at 4. The solicitation further instructed offerors to provide references and contact information for each project. Id.

Under the project team and key personnel factor, offerors were required to describe their construction management team and its qualifications, and to identify key personnel. The solicitation also required a list of proposed subcontractors and their qualifications/certifications; a project organization chart and narrative that describes the roles and responsibilities of the proposed subcontractors; biographical information regarding each key personnel position; and a quality assurance/quality control plan. Id. at 6.

The agency received proposals from three offerors, including 3D Contracting and SBH, by the April 8 closing date. The proposals were evaluated as follows:¹

¹ An offeror’s past performance could receive one of the following ratings: excellent, very good, satisfactory, neutral, marginal, and unsatisfactory. RFP Amend. 2 at 5. For the project team and key personnel factor and the schedule factor, an offeror’s proposal could receive one of the following ratings: excellent, very good, satisfactory, marginal, and unsatisfactory. RFP Amend. 4 at 2.

	3D Contracting	Offeror C	SBH
OVERALL TECHNICAL RATING	MARGINAL	SATISFACTORY	VERY GOOD
Past Performance	Satisfactory	Satisfactory	Very Good
Project Team and Key Personnel	Marginal	Satisfactory	Very Good
Schedule	Marginal	Satisfactory	Very Good
PRICE (Alternative Schedule 3)	\$4,975,000	\$4,944,571	\$5,410,000

AR, Tab 9, Source Selection Decision, at 1, 6.

The agency elected to make award based on alternate schedule 3, which reduced the period of performance and scope of the project due to issues concerning the number of beds approved for the VAMC.² AR at 2. The contracting officer, who was also the source selection authority, found that SBH's proposal represented the best value to the agency, as it was the highest-rated proposal under the non-price factors, and because the reduced risk associated with its proposal merited a price premium as compared to Offeror C, the second-highest rated and lowest-priced offeror. AR, Tab 9, Source Selection Decision, at 6.

3D Contracting received notice of the award to SBH on June 7, and requested a debriefing, which was provided on June 18. This protest followed.

DISCUSSION

3D Contracting challenges the VA's evaluation under the past performance, and the project team and key personnel factors; specifically the protester argues that the agency evaluated the offerors' proposals in a disparate manner. The protester also argues that because two of the five agency evaluators here were involved with a previous 3D Contracting project, which resulted in a disputed contract claim, they were biased against 3D Contracting. Finally, the protester contends that the agency's selection decision failed to consider the relative merits of the offerors' proposals.

² The selection decision was initially made based on alternative schedule 1; the agency subsequently awarded the contract to SBH based on alternative schedule 3. AR, Tab 9, Source Selection Decision, at 6; Contracting Officer's Statement at 1. The record here shows that the difference between the protester's and awardee's price was larger under alternative schedule 1 than under alternative schedule 3, and the technical evaluation criteria did not take into account differences between the alternative schedules. See AR, Tab 9, Source Selection Decision, at 6. The protester does not challenge the reasonableness of the selection decision based on the agency's ultimate decision to award the contract based on alternative schedule 3.

As explained in detail below, we find no basis to sustain the protest. Although we conclude that the record does not support the agency's evaluation with regard to one argument raised by the protester concerning the evaluation under the project team and key personnel factor, we conclude that this error did not prejudice the protester.

In reviewing an agency's evaluation, we will not reevaluate offerors' proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and procurement statutes and regulations. The Eloret Corp., B-402696, B-402696.2, July 16, 2010, 2010 CPD ¶ 182 at 12. It is an offeror's obligation to submit an adequately written proposal for the agency to evaluate, and an offeror fails to do so at its own risk. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 19. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Id.

Past Performance

First, 3D Contracting argues that the VA unreasonably evaluated the protester's and awardee's past performance by assigning the awardee a higher rating, despite what the protester characterizes as similar or identical performance records. The protester also argues that the agency ignored information concerning its performance of contracts for the VA that, if considered, could have resulted in a higher evaluation rating. We find no merit to these arguments.

3D Contracting's proposal listed three projects for construction or remodeling work, each of which was at a different occupied VAMC facility. One of the three projects was for the remodeling of existing and occupied space at the Fort Harrison VAMC, the facility under the solicitation here. AR, Tab 4, 3D Contracting's Proposal, at 3. The agency noted strengths for 3D Contracting based on its experience with the VAMC facilities on projects that posed similar performance risks. AR, Tab 9, Source Selection Decision, at 3. However, the agency also noted weaknesses because the protester failed to identify the aspects of past jobs that were relevant to the current project, and because the protester's identified projects did not match the scope of the current project. Id. The agency further noted that the protester's proposal included contacts who could not be reached due to outdated phone numbers, or individuals no longer being employed at the location cited. Id. Based on the assessment of the strengths and weaknesses, the agency assigned 3D Contracting a rating of satisfactory. Id. at 1.

The VA's evaluation of SBH's past performance noted similar concerns to those cited regarding 3D Contracting's performance, and assigned the awardee weaknesses because its proposal lacked a detailed description of some of the identified projects and because the projects were not of the same scope as the

solicitation. Id. at 2. The agency's evaluation of SBH's performance record noted strengths based on the awardee's past work at VA medical facilities on projects with similar risk factors, and further noted that feedback from SBH's performance questionnaires were overwhelmingly positive, i.e., SBH's performance was rated "very good" overall twice, and "excellent" overall twice. Id.; see AR, Tabs 13-16, SBH's Past Performance Questionnaires and AR at 5. The agency noted as strengths these positive references on past projects, and also noted SBH's history of timely completion of its projects. Id. As a result, SBH received a rating of very good for this factor. AR, Tab 9, Source Selection Decision, at 1.

The record here shows that both offerors were assessed similar weaknesses because their past performance references were not of the same scope as the solicitation requirements, and because the offerors' proposals lacked detail regarding some projects. Id. at 2-3. SBH, however, was found to have strengths regarding additional details in its proposal concerning its performance at occupied medical facilities and its history of quality control and assurance, as well as positive information from its past performance references. Id.; see Tabs 13-16, SBH's Past Performance Questionnaires and AR at 5. In contrast, the agency found that the protester provided less detail, and that it had provided outdated contact information for its past performance references.³ While the protester disagrees with the agency's evaluation judgments, we find no basis in the record to conclude that the agency's evaluation was unreasonable.

3D Contracting also argues that, to the extent its proposal lacked detail concerning its past performance, the agency was obligated to consider its own knowledge concerning the protester's performance of projects for the VA. Our Office has recognized that while there is no legal requirement that an agency consider all past performance references, some information is simply "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider information. Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, B-401679.4 et al., Mar. 10, 2010, 2010 CPD ¶ 77 at 8; Int'l Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

³ To the extent that the protester challenges the deficiency that the agency assessed under the past performance factor based on a lack of updated contact information for its references, this allegation is untimely. The protester was provided the evaluation of its proposal in the agency report on July 25, and did not specifically address this contention until its supplemental comments on Sept. 17. See AR, Tab 9, Source Selection Decision, at 3; Protester's Supp. Comments (Sept. 17, 2013) at 6. This argument was raised more than 10 days after receipt of the agency report, and is therefore untimely. 4 C.F.R. § 21.2(a)(2).

Unlike International Business Systems, Inc., cited by the protester, the VA's evaluation here was not the result of an agency official failing to complete a form or validate past performance information that was known personally by the contracting officer. Instead, the evaluation here was based on the protester's failure to adequately describe the relevance of its past performance in its proposal.⁴ For this reason, we find no basis to apply the "too close at hand" principle. In sum, we find nothing unreasonable in the agency's evaluation of the offerors' past performance.

Project Team and Key Personnel

Next, 3D Contracting argues that the VA evaluated the offerors' proposals in a disparate manner under the project team and key personnel evaluation factor. As discussed above, the awardee's proposal received a very good rating for this factor, while the protester's proposal received a marginal rating. We address two examples below. With regard to the second example, we conclude that although a strength assigned to the awardee's proposal is not supported by the record, this error did not prejudice the protester in a manner that merits sustaining the protest.

First, the protester argues that while SBH's proposal was assigned a strength for a well-defined organization chart, the protester's organization chart was similarly well defined and should have also received a strength. The VA's evaluation of the protester's proposal identified a number of concerns regarding 3D Contracting's organization chart, including the following: (1) the chart shows a safety director, but an individual is not identified, as required; and (2) although the protester's proposal stated that it had "entered into a teaming agreement with Westland Construction," Westland was not included in 3D Contracting's organization chart, nor was its role discussed elsewhere in the protester's proposal. See AR, Tab 4, 3D Contracting's Proposal, at 5, 15; AR, Tab 9, Source Selection Decision, at 4. While the protester contends, generally, that the agency should have viewed its organization chart as equivalent to the awardee's chart, the protester's disagreement with the agency's judgment here does not demonstrate that the evaluation was unreasonable.

Next, 3D Contracting argues that SBH's proposal was improperly assigned a strength for listing all of the awardee's subcontractors, when in fact it did not do so. As the protester notes, the awardee's proposal identified three subcontractors, but also identified 10 areas where major subcontractors would perform work, and did not identify a subcontractor for each area of performance. AR, Tab 4, 3D Contracting's Proposal, at 12-13, 16. The agency nonetheless assigned SBH the following strength: "All of the subcontractors are listed for this project." AR, Tab 9, Source Selection Decision, at 2. In contrast, 3D Contracting listed two

⁴ The record does not show, nor does the protester allege, that the projects cited in the protester's proposal--including the Fort Harrison VAMC project--involved the same contracting officer.

subcontractors, and the agency assigned its proposal the following weakness: “Not all major subcontractors are listed.” Id. at 3.

Despite this apparent error, we do not find that the protester could have been prejudiced by this error. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

Here, even if we were to conclude that the VA improperly assigned SBH a strength for listing all of its subcontractors, this error would affect only one of the eight strengths assessed for the awardee’s proposal under this factor. See AR, Tab 9, Source Selection Decision, at 2. Similarly, even if we were to conclude that the VA had unequally or improperly assigned a weakness to 3D Contracting’s proposal for failing to list all of its subcontractors, this error would affect only one of the nine weaknesses, major risks, and deficiencies assessed for its proposal. See id. at 3. On this record, we find no basis to conclude that the protester would have a substantial prospect for award, even if this error in the agency’s evaluation was corrected. See TELESIS Corp., B-299804, Aug. 27, 2007, 2007 CPD ¶ 150 at 7.

Moreover, we do not think the record demonstrates that the error here could have prejudiced the protester because of the intervening proposal from Offeror C. As discussed above, Offeror C proposed a lower price than 3D Contracting, its past performance received an equal rating to the protester, and its proposal received higher ratings than the protester’s proposal under both the project team and key personnel factor and the schedule factors. AR, Tab 9, Source Selection Decision, at 4-6. For these reasons, even if we were to conclude that there was a reasonable possibility that the protester’s proposal could merit a higher rating under the Project Team and Key Personnel factor--an assumption we do not think is supported by the record, as discussed above--Offeror C’s proposal would still have a higher rating under the schedule factor (the protester did not challenge its marginal rating for this factor) and would remain lower priced. Because the agency’s selection decision specifically concluded that SBH’s proposal merited award over Offeror C’s proposal, we conclude that there is no basis to find that 3D Contracting could have been prejudiced by the error regarding the identification of subcontractors.⁵

⁵ Additionally, 3D Contracting argues that the agency’s evaluation was unreasonable because it appears to fault the protester for failing to provide details that could not be addressed within the solicitation’s 30-page limit for technical proposals. Protest at 11; see RFP Amend. 2 at 8-9. To the extent that 3D Contracting argued that the page limitations prevented it from submitting a complete proposal, such an argument is untimely. This alleged apparent solicitation

(continued...)

Bias

Next, 3D Contracting argues that the VA was biased against it because two of the five agency evaluators were involved with the protester's performance of a contract at the Fort Harrison VAMC, which resulted in a disputed claim. The protester contends that the participation of these two individuals may have affected the agency's evaluation.

The agency acknowledges that two of the five evaluators were involved, either directly or indirectly, with the protester's prior Fort Harrison VAMC contract, and that the contract resulted in a disputed claim. Supp. AR (Sept. 12, 2013) at 7. The agency notes, however, that all of the evaluators were required to sign nondisclosure agreements and certify that they would conduct a "fair and unbiased" evaluation of proposals. *Id.* at 8. The agency contends that the protester's mere reference to a disputed contract claim does not demonstrate bias on the part of the agency officials. We agree.

Government officials are presumed to act in good faith and a protester's claim that an agency official was motivated by bias or bad faith must be supported by convincing proof. Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 4. Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition, and these general and unsupported allegations provide no basis on which to question the propriety of the action of the evaluators or the agency's evaluation and selection of SBH for award. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 28. Here, we conclude 3D Contracting provides no evidence to support its assertion that the evaluators were biased because they were involved in a contract that was the subject of a disputed claim. In the absence of specific allegations supported by sufficient evidence, we find no basis here to overcome the presumption of good faith accorded to agency officials.

Source Selection Decision

Finally, 3D Contracting argues that the agency's selection decision was unreasonable. The protester argues, in essence, that the contracting officer relied on adjectival ratings without considering the underlying merits of the offerors' proposals.

(...continued)

impropriety was required to be protested prior to the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1); SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 6 n.10.

We find that the record shows that the agency's selection decision did not rely on the adjectival ratings alone. In this regard, the selection decision summarizes the strengths and weaknesses for each of the three offerors, and why those strengths and weaknesses support the adjectival rating ratings assigned to the offerors' technical proposals. See AR, Tab 9, Source Selection Decision, at 1-5. The record shows that the contracting officer considered the technical and price aspects of 3D Contracting's proposal, and conducted cost/technical tradeoff between the proposals of the two most highly-rated offerors, Offeror C (who proposed the lowest price) and SBH (who proposed the highest price). See id. at 6-7. On this record we find no basis to conclude that the selection decision was unreasonable. See Silverback7, Inc., B-408053.2, B-408053.3, Aug. 26, 2013, 2013 CPD ¶ __ at 10.

The protest is denied.

Susan A. Poling
General Counsel