



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: B. Diaz Sanitation, Inc.

File: B-283827; B-283828

Date: December 27, 1999

Michael A. Gordon, Esq., Holmes, Schwartz & Gordon, for the protester.
Joshua A. Kranzberg, Esq., and Janet E. Sloan, Esq., Department of the Army, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests are denied where the agency's evaluations of proposals were reasonable and consistent with the solicitations' evaluation schemes, which provided that an offeror's capability was more important than price, and where the contracting officer reasonably selected for award higher priced proposals of incumbent contractors based on the higher capability ratings given to these contractors.

DECISION

B. Diaz Sanitation, Inc. protests the award of a contract to Donato Marangi, Inc. (DMI) under request for proposals (RFP) No. DAAG60-99-R-0042 (RFP-0042), issued by the United States Military Academy (USMA), West Point, New York, for the collection, transportation, and disposal of solid waste and recyclable materials.¹ Diaz also protests the award of a contract to Waste Management, Inc. (WMI) under RFP No. DAAG60-99-R-0047 (RFP-0047), issued by the USMA for the collection, transportation, and disposal of solid waste at the former Stewart Army Subpost (STAS), New Windsor, Orange County, New York. Diaz essentially challenges the agency's best value determinations resulting in awards to higher priced incumbent contractors.

¹ RFP-0042 consolidated requirements previously provided under three separate contracts at West Point. Contracting Officer's (CO) Statement-0042 at 1.

We deny the protests.

BACKGROUND

Each RFP contemplated the award of a fixed-price contract. RFP-0042 (contract value--over \$3 million) was for a 1-year base period and four 1-year option periods and RFP-0047 (contract value--over \$140,000) was for a 1-year base period only. CO Statement-0042 at 2, 6; CO Statement-0047 at 1, 6. The RFPs contained the same evaluation and award methodologies. More specifically, each RFP provided that the award would be made to the offeror whose proposal provided the best value on the basis of (1) the merits of the proposal (technical acceptability and price reasonableness)² and (2) the offeror's capability. RFP-0042 at 712; RFP-0047 at 36.

As relevant here, an offeror's capability would be determined based on the firm's organizational experience and its organizational past performance in providing refuse and recycling services of "similar cost and complexity." RFP-0042 at 712; RFP-0047 at 37. For experience, each RFP provided that the agency would evaluate the "breadth," "depth," and "relevance" of an offeror's experience to the refuse and recycling services required by the respective solicitations. RFP-0042 at 713; RFP-0047 at 37. For past performance, each RFP provided that the agency would "contact some" of each offeror's customer references. *Id.*³ Each RFP provided that in determining the best value, an offeror's capability was more important than price, and in making comparisons between offerors, if one offeror had the better capability and higher price, then the agency would determine whether the marginal difference in capability was worth the marginal difference in price. If the agency considered the better capability to be worth the higher price, then the higher priced proposal of the more capable offeror would be determined to represent the best value and that offeror would receive the award. RFP-0042 at 713; RFP-0047 at 37.

For each RFP, Diaz submitted a "Partial List of Pertinent Contract Experience," in which the firm listed 15 clients (10 condominiums/other multi-unit residential complexes, a mobile home park, 3 school complexes, and a residential community

² The proposals of Diaz, DMI, and WMI were determined technically acceptable and their respective prices were considered reasonable.

³ The RFPs required an offeror to submit descriptions of its prior contracts (government, private institutional, and commercial) within the past 10 years (i.e., relevance/similarity of prior contracts to current requirements, contract dollar values, and technical performance problems encountered and corrective actions taken). The RFPs advised that both independent data and data provided in proposals could be used to evaluate an offeror's past performance; the RFPs specifically advised that not all offeror-provided references would necessarily be interviewed. RFP-0042 at 711; RFP-0047 at 53.

with 400 separate units) for which it has provided “container” or “curbside” service from 1980 through the current time. Agency Report (AR)-0042, Tab IV.B; AR-0047, Tab IV.B. Diaz’s three most current contracts were for “container” service at three condominium complexes and ranged in annual value from approximately \$10,000 to \$40,000. Id.

Under RFP-0042, the source selection evaluation board (SSEB) contacted three of the references listed by Diaz. AR-0042, Tab IV.B; AR-0042, Tab IV.F.1.⁴ The first reference was for a current contract being performed by Diaz (annual value--approximately \$10,000) for container service at an 80-unit condominium complex; this reference rated the firm’s overall performance as exceptional and stated that he would pay a price premium to contract again with Diaz. The second reference was for a contract performed by Diaz from 1992 through 1997 (annual value--approximately \$42,000) for container service at a 340-unit residential complex; this reference rated Diaz’s overall performance as satisfactory. The third reference was for a contract performed by Diaz from 1992 through 1995 (annual value--approximately \$16,000) for curbside service at a 475-unit mobile home park; this reference rated Diaz as an above-average contractor whom she would not hesitate to contract with again. AR-0042, Tab IV.F.1. Based on these references, the SSEB concluded that Diaz performed acceptably, but on much smaller scale projects, specifically noting that the firm provided no references for projects as detailed or as large as the West Point requirements. AR-0042, Tab IV.F.⁵

Under RFP-0042, the SSEB contacted five of DMI’s 14 listed references. AR-0042, Tab IV.C; AR-0042, Tab IV.H.1. Most relevant here is the reference provided for DMI as the incumbent contractor at West Point. The reference rated DMI’s overall performance as exceptional, noting that the firm’s personnel maintained the West Point site at the highest possible standard. AR-0042, Tab IV.H.1. The reference pointed out that DMI management addressed all concerns immediately and resolved all issues; that DMI ensured that an adequate number of qualified personnel were on-site daily and were properly trained; that DMI completed all required tasks on or ahead of schedule; and that DMI was an above-average contractor whom the reference would not hesitate to contract with again. Id. The reference noted that DMI did damage several government-owned solid waste collection containers, but that the firm reimbursed the government at the full replacement value. Id. In

⁴ References were asked to complete past performance surveys by answering various questions in which they could rate aspects of an offeror’s performance as exceptional, satisfactory, marginal, or unsatisfactory.

⁵ The SSEB also expressed concern that Diaz did not have adequate equipment. However, the record shows that the contracting officer, who served as the source selection authority in both procurements, rejected this concern because having adequate equipment was not a stated capability consideration. AR-0042, Tab IV.I.

addition, in August 1999, DMI received a letter of appreciation from the Office of the Commandant of Cadets at West Point commending the firm for “perform[ing] far above . . . expectations” during the past year, and noting that the firm’s “performance has far exceeded the last three trash removal contractors.” AR-0042, Tab IV.P.1. Based on the West Point reference and four other relevant references,⁶ the SSEB concluded that DMI performed similar collection contracts with exceptional results; that DMI achieved a high level of customer satisfaction in terms of contract management and execution; and that DMI exceeded contract requirements and customer expectations. RFP-0042, Tab IV.H.

The contracting officer reviewed the results of the SSEB’s evaluation and rated Diaz and DMI as follows:

	Diaz	DMI
Past Experience	Marginal	Satisfactory
Past Performance	Satisfactory	Exceptional
Capability	Marginal+	Satisfactory+

Diaz’s price was approximately 6 percent lower than DMI’s price. AR-0042, Tab IV.I.

In making her source selection decision, the contracting officer was concerned that while Diaz proposed a lower price, it had only three current residential contracts ranging in annual value from approximately \$10,000 to \$40,000. She noted that while Diaz is satisfactorily performing these contracts, none of them is near the magnitude nor complexity of the RFP requirements for West Point which, as a national historical landmark, has millions of visitors every year and supports, among other things, residences for more than 1,300 military personnel assigned to the USMA, military buildings and facilities, an elementary and a middle school, a child development center, the cadet mess, and several other food facilities. The contracting officer determined that despite its low price, Diaz presented too high of a performance risk. Consistent with the terms of the RFP, which provided that an offeror’s capability was more important than price, the contracting officer concluded that it was worth paying an approximate 6 percent price premium to DMI, the incumbent contractor, which had a higher capability rating. Id.

Under RFP-0047, the SSEB used the references provided for Diaz under RFP-0042. In addition, the SSEB considered references for each of Diaz’s three current residential contracts; each reference reported that Diaz performed “container,” but not “curbside,” service. AR-0047, Tab IV.E.

⁶ Three of the other DMI references (a paint store, a rehabilitation/nursing center, and a nursing home) rated the firm’s overall performance as exceptional and the other reference (a school district) rated the firm’s overall performance as satisfactory. AR-0042, Tab IV.H.1.

Under RFP-0047, the SSEB contacted six references for WMI. AR-0047, Tab IV.C; AR-0047, Tab IV.G.1-6. Most relevant here is the reference provided for WMI as the incumbent contractor at STAS. The reference rated WMI's overall performance for the 4-1/2 year contract period as exceptional (noting that during the first 3 months of the contract, a deduction was assessed and a cure notice was issued for unsatisfactory performance, but since that time, no deductions have been taken and service has been excellent). AR-0047, Tab IV.G.2. The reference pointed out that WMI's management was excellent and responsive to the RFP requirements; that during heavy pick-up days, WMI added extra personnel to ensure that all contract requirements were met; and that WMI was an above-average contractor whom the reference would pay a premium to contract with again. *Id.* Based on the STAS reference and two other relevant references,⁷ the SSEB concluded that WMI had acceptable and satisfactory experience and past performance. AR-0047, Tab IV.G.

The contracting officer reviewed the results of the SSEB's evaluation and rated Diaz and WMI as follows:

	Diaz	WMI
Past Experience	Marginal	Satisfactory
Past Performance	Satisfactory	Satisfactory+
Capability	Marginal+	Satisfactory

Diaz's price was approximately 10 percent lower than WMI's price. AR-0047, Tab IV.H.

As under RFP-0042, the contracting officer was concerned that while Diaz proposed a lower price, it had only three current, low dollar value residential contracts for container, but not curbside, service as required by RFP-0047. The contracting officer determined that despite its lower price, Diaz presented a performance risk that did not exist with WMI, the incumbent contractor (after taking over this contract as a successor-in-interest from the original awardee), which did an excellent job in performing the STAS requirements. The contracting officer noted that WMI's contract representative has established an excellent working relationship with the agency and that the firm has established an above-average performance record notwithstanding the successive corporate mergers which ultimately resulted in WMI performing the STAS (and some West Point) requirements. Consistent with the

⁷ Two of these references apparently were for contracts awarded to corporate entities other than the WMI corporate entity which submitted a proposal here, AR-0047, Tab IV.G.3, 4, and another reference was for DMI, not WMI. AR-0047, Tab IV.G.6. The other two appropriate WMI references (a school district and a shopping mall) rated the firm's overall performance as satisfactory, stating that they would not hesitate to award again to WMI. AR-0047, Tab IV.G.1, 5.

terms of the RFP, which provided that an offeror's capability was more important than price, the contracting officer concluded that it was worth paying an approximate 10 percent price premium to WMI, which had a higher capability rating. Id.

ISSUES AND ANALYSES

Diaz objects to the contracting officer's assignment of a lower capability (experience and past performance) rating (marginal+, as opposed to satisfactory or exceptional) on the basis that it had not performed contracts of a "similar cost and complexity" to the requirements of these RFPs.

In reviewing an agency's evaluation of proposals, our Office will question the agency's evaluation only where it violates a procurement statute or regulation, lacks a reasonable basis, or is inconsistent with the stated evaluation criteria for award. See Suddath Van Lines, Inc.; The Pasha Group, B-274285.2, B-274285.3, May 19, 1997, 97-1 CPD ¶ 204 at 5. Here, while the protester alleges that the agency's evaluations of its proposals were not reasonable or consistent with the evaluation criteria in the RFPs, our review of the record leads us to conclude that the protests are without merit.

The record shows that while Diaz has provided container and curbside service, Diaz has not performed contracts of a "similar cost and complexity" as compared to the requirements of these RFPs. With respect to the "similar cost" requirement, under RFP-0042, the government estimate for the base year was approximately \$778,000, and under RFP-0047, the government estimate for the entire 1-year contract term was approximately \$144,000. CO Statement-0042 at 6; CO Statement-0047 at 6. For both procurements, the contracting officer primarily focused on Diaz's three current contracts as being the most relevant indicators of the firm's overall capability. These contracts, for which Diaz received outstanding and satisfactory past performance reviews, ranged in annual value from approximately \$10,000 to \$40,000. Based on the values of these current contracts, we believe the contracting officer reasonably concluded that Diaz had not performed contracts similar in terms of cost to the requirements of these RFPs.⁸

⁸ We point out that from 1987 through 1990, Diaz performed a container service contract at a 650-unit apartment complex for approximately \$90,000 per year, and from 1987 through 1991, Diaz performed a curbside service contract for 400 single-family residential clients for \$100,000 per year. AR-0042, Tab IV.B; AR-0047, Tab IV.B. These were Diaz's two highest dollar contracts, and they were still significantly less in value than the requirements covered by these RFPs. Moreover, although Diaz argues that from 1990 through 1993, its cumulative contracts were valued from \$266,000 to \$344,000 per year, Protester's Comments, Nov. 23, 1999, at 3, it was not unreasonable, pursuant to the terms of the RFPs, for
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With respect to the “similar complexity” requirement, the RFPs required the collection, transportation, and disposal of all solid waste and/or recyclable materials from the 15,000 acre West Point site and from the STAS. Among other things, RFP-0042 required twice weekly residential container and curbside pickups at 900 stations; refuse can collection service from 77 government installation buildings one to six times per week; refuse compactor/roll-off collection service; and refuse collection for off-post ranges, training areas, buildings, and camps. RFP-0042 also required biweekly on- and off-site recycling (transportation and disposal) from residences and from installation and government buildings. CO Statement-0042 at 1. In addition, RFP-0047 required the collection of contractor-provided containers and residential curbside pickup of government-provided containers (900 trash cans behind 301 pick-up points two times per week). CO Statement-0047 at 1.

According to Diaz’s “Partial List of Pertinent Contract Experience,” the firm has three current, low dollar value residential contracts under which it is providing “container,” but not “curbside” or “recycling,” service.⁹ Moreover, over the past 10 years, Diaz has provided container or curbside service limited to residential complexes ranging from 80 to 650 units; the firm listed no commercial, and very limited institutional (three 50-acre school complexes), experience. Since the RFPs required a significant amount (*i.e.*, buildings and acreage) of residential and institutional container, curbside, and recycling service, we believe the contracting officer reasonably concluded that Diaz had not performed requirements similar in complexity to the requirements for either West Point or STAS.

For the above-discussed reasons, we have no basis to object to the agency’s conclusions that Diaz had not performed contracts similar in terms of cost and complexity to the requirements of these RFPs and that the firm, therefore, merited a lower overall capability rating.¹⁰

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the agency to consider individual, as opposed to cumulative, contract values under the capability factor.

⁹ Diaz states that from 1987 through 1991, it had a contract for \$100,000 per year to provide curbside service for 400 single-family residential clients. The contracting officer did not consider this contract because it was not current (it was at least 8 years old) and in any event, Diaz did not list a contract reference, instead inserting “Not Applicable” for a reference name. AR-0042, Tab IV.B; AR-0047, Tab IV.B.

¹⁰ Contrary to Diaz’s position, the record shows that the agency did not evaluate the firm’s capability (experience and past performance) on a pass/fail basis, which would have constituted a nonresponsibility determination requiring a referral to the Small Business Administration for the possible issuance of a certificate of competency. *See, e.g., Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38 at 6.

While the capability evaluation factor encompassed traditional responsibility

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Diaz further objects to the contracting officer's conclusions in her tradeoff decisions that there was a greater performance risk associated with Diaz, as opposed to DMI and WMI, the successfully performing incumbent contractors at West Point and STAS. Diaz believes that as the low priced offeror, it should have received both awards and that the price premiums to DMI and WMI were not justified.

In a negotiated procurement, where the solicitation does not provide for award on the basis of the lowest priced, technically acceptable proposal, an agency has the discretion to make an award to an offeror with a higher technical score and a higher price where it reasonably determines that the price premium is justified and the result is consistent with the evaluation criteria. Allied Tech. Group, Inc., B-282739, Aug. 19, 1999, 99-2 CPD ¶ 45 at 8-9.

In the determination of which proposals represented the best values, the RFPs provided that an offeror's capability was more important than price, and that if one offeror had the better capability and higher price, then the agency would determine whether the marginal difference in capability was worth the marginal difference in price. As explained above, we believe that the agency had a reasonable basis for its conclusion that DMI and WMI merited higher capability ratings than Diaz based on their successful performance as the incumbent contractors at West Point and STAS as well as their successful performance of other comparable institutional and commercial contracts.¹¹ Under RFP-0042, DMI's price was approximately 6 percent higher than Diaz's price, and under RFP-0047, WMI's price was approximately 10 percent higher than Diaz's price. The contracting officer concluded that despite Diaz's lower prices and its history of satisfactory performance, Diaz presented a greater performance risk because, as addressed above, its experience was basically in providing service to relatively small residential complexes, compared to the large-scale requirements contemplated by these RFPs. Accordingly, we have no basis to

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considerations, the RFPs provided for a comparative/best value, rather than a pass/fail, evaluation scheme, and Diaz's proposals were evaluated accordingly.

¹¹ Diaz, which acknowledges that DMI's incumbent contract was valued at \$300,000 per year for each of two years, complains that DMI did not comply with the RFP instructions to list contract dollar values in its proposal for its prior contracts. However, we believe that DMI's failure in this regard is of no consequence since there was no requirement for the agency to consider all offeror-provided references and since the information concerning DMI's performance as the incumbent contractor at West Point was so "close at hand." See International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. DMI's successful performance of the West Point contract reasonably provided the primary basis for the contracting officer's selection of DMI for award under RFP-0042.

question the contracting officer's decisions, consistent with the terms of the RFPs, to pay price premiums to DMI and WMI in order to retain successfully performing incumbent contractors.

The protests are denied.

Comptroller General
of the United States