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United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: All Phase Environmental, Inc.

File: B-292919.2; B-292919.3; B-292919.4; B-292919.5; B-292919.6; B-292919.7

Date: February 4, 2004

Edward J. Kinberg, Esq., for the protester.
Clarence D. Long, III, Esq., and Martin F. McAlwee, Esq., Department of the Air Force, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Information requirements provided in the solicitation's proposal preparation instructions are not evaluation criteria and do not establish minimum evaluation standards.

2. Protest challenging the agency's consideration of a contract referenced in the awardee's past performance proposal is denied where the agency's actions were within the broad discretion afforded the agency to determine whether a particular contract is relevant to the past performance evaluation.

3. Agency is not required to analyze proposals for price realism where the solicitation does not provide for such an analysis.

DECISION

All Phase Environmental, Inc. protests the award of a contract to Professional Diversified Services, Inc. (PDSI), under request for proposals (RFP) No. F08650-03-R-0032, issued by the Department of the Air Force, for grounds maintenance services for Patrick Air Force Base, Florida.

We deny the protests.

Background

The RFP, issued as a competitive set-aside under section 8(a) of the Small Business Act, provided for the award of a fixed-price contract for a base period of 1 year with four 1-year options. The contractor is required to provide all personnel, equipment,

tools, materials, and other items (with the exception of certain government-furnished property and services) to perform the grounds maintenance services required.

Offerors were advised that the agency would "make a best value award decision" using a "Performance Price Trade-off (PPT)" source selection. RFP § M-2. The RFP explained that under the PPT procedure, proposals would be evaluated on a "pass/fail basis" for technical acceptability under the technical capability factor (comprised of two subfactors--organizational effectiveness and phase-in plan), and evaluated under the past performance factor as either exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. RFP § M-3. The RFP stated that in accordance with the PPT procedure, the agency would determine which technically acceptable proposal represented the best value by performing a "trade-off of 'past performance' and 'price.'"[1] RFP § M-2.

The agency received proposals from All Phase (the incumbent contractor) and PDSI by the RFP's closing date, and evaluated both proposals as technically acceptable. All Phase's proposal was evaluated as "very good/significant confidence" under the past performance factor at a proposed price of $5,573,711.50, and PDSI's proposal was evaluated as "satisfactory/confidence" under the past performance factor at a proposed price of $4,854,157. The contracting officer found that PDSI's lower-rated, lower-priced proposal represented the best value to the government, explaining that because of the "non-complex nature" of the services, the "slight increase in performance confidence (Satisfactory to Very Good)" associated with All Phase's proposal was not worth the "very significant" difference in price. Agency Report (AR), Tab 8, Source Selection Decision, at 1-2.

Technical Capability Evaluation

All Phase argues that the agency's evaluation of its and PDSI's proposals, and selection of PDSI's proposal for award, were inconsistent with the RFP's stated evaluation scheme. The protester first argues that the RFP required that the agency conduct a "two part plan to select its new contractor," with part one consisting of an "objective evaluation" of proposals for technical acceptability, past performance, and price, and part two consisting of a "subjective evaluation of the proposed price and the contractor[']s ability to perform the contract based on [an] integrated assessment of price, technical capability, present performance and past performance." Protester's Comments (B-292919.4) at 2; see Protest (B-292919.2) at 5; Protest (B-292919.3) at 5; Protester's Comments (B-292919.2; B-292919.3) at 6.

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[1] As discussed below, the protester has a different view of the RFP's source selection scheme.

In support of this argument, the protester points out that in addition to providing that the agency would evaluate proposals under the technical capability factor on a "pass/fail" basis, and make its best value award determination using the PPT procedures described above, the RFP also provided that "[b]est value [would] be determined based on an integrated assessment of each proposal in terms of Past Performance, Technical Capability, and Price," and that "Past Performance and Technical Capability, when combined, are significantly more important than Price." RFP § M-2 (emphasis deleted). The protester also points out that the solicitation stated that the agency would "identify and review relevant technical . . . capability, present and past performance, and then make an overall risk assessment of the offerors['] ability to perform this effort." Id.

The protester concludes that because of these provisions, the solicitation indicated that "offerors with a high quality proposal and substantial high quality present and past performance would have a reasonable chance at award even though their price may be higher than an offeror with a lesser background," and that "[i]n so doing, the Agency encouraged offerors such as the Protester, who was the incumbent, to bid a price consistent with their level of experience and quality of service they were offering to provide." Protester's Comments (B-292919.4) at 2.

Where a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 5.

Although this solicitation is not a model of clarity, the protester's interpretation that the solicitation required a two-step process, with the second step providing for something other than the consideration of the offerors' technical proposals on a "pass/fail" basis, is unreasonable. As set forth above, the RFP clearly provided in a number of places that each proposal would be evaluated under the technical capability factor "on a pass/fail basis" to determine technical acceptability, and in describing the technical capability factor and the relevant evaluation subfactors, included provisions that "define[] an acceptable (pass) rating." RFP §§ M-2, M-3(a). The solicitation also referred in a number of instances to the use of the PPT procedures for the selection of the best-value proposal, referenced the relevant Air Force Federal Acquisition Regulation Supplement section that details the PPT procedure, and explained that the PPT procedure here provides for the best-value determination to be made from those "technically acceptable" proposals based upon a trade-off of past performance and price. RFP § M-2. Given the RFP's repeated references to the evaluation of proposals under the technical capability factor on a "pass/fail" basis, and the RFP's statements that only those proposals found to be technically acceptable would be eligible for award, we find the protester's argument that the RFP provided for the consideration of technical merit on a basis other than technical acceptability (or "pass/fail") to be without merit.

All Phase nevertheless argues that PDSI's proposal should have been rejected by the agency as technically unacceptable under the organizational capability evaluation subfactor because, in the protester's view, PDSI's proposal failed to comply "with the minimum requirements of the RFP." Protest (B-292919.4) at 7. In this regard, the protester points to section L.14.a(1) of the RFP, which under the organizational effectiveness subfactor to the technical capability factor provided in relevant part:

> Two submittals will be used to evaluate this subfactor; specifically the offeror shall provide a staffing summary that delineates the proposed workforce composition strategy in a matrix format and a staffing plan describing the proposed use and management of manpower resources as it relates to the skills, experience, training, and rotation of personnel. The offeror's proposal shall provide an approach for the following:
>
> a. How will you accomplish fulfilling the Statement of Work [SOW];
> b. Manning/staffing summary of employees (i.e., type of position permanent/full/part-time[;]
> c. Certification and resume of key personnel, i.e., management, superintendent[;]
> d. Type of equipment to be used[;]
> e. Quality Control Plan to effectively accomplish the work required by the SOW.

The protester argues that PDSI's proposal failed to properly describe "how it could manage the contract and how it would accomplish the work" required by the RFP. Protest (B-292919.4) at 7. In this regard, All Phase points to a checklist prepared by the agency evaluators, which notes that PDSI's proposal "quoted the SOW verbatim" rather than providing a description of how PDSI would perform the contract. Id.; AR, Tab 14, Technical Evaluation Report, attach.

Again, although the solicitation is not a model of clarity, we agree with the agency that the RFP did not provide for a qualitative evaluation of the offerors' proposed approaches to accomplishing the SOW, as argued by the protester. We first note that information requirements provided in section L of an RFP are not the same as evaluation criteria in section M; rather than establishing minimum evaluation standards, the instructions of section L generally provide guidance to assist offerors in preparing and organizing proposals. Cascade General, Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 10. The information required by section L does not have to correspond to the evaluation criteria in section M. Id.; JW Assocs., Inc., B-275209.3, July 22, 1997, 97-2 CPD ¶ 27 at 3-4.

Here, section M-3(a) of the RFP specifically informed offerors that "[t]he following defines an acceptable (pass) rating" under the organizational subfactor:

> Demonstrates a manning approach delineating all workforce composition strategy, staffing plan, position descriptions, and hiring and training plan, which ensures compliance with the SOW and contract requirements (Section L.14.a(1)).

Although, as noted by the protester, section M-3(a) refers to section L.14.a(1), we note that section L.14.a(1) (quoted above) specifically provided that proposals would be evaluated under the organizational effectiveness subfactor based upon "two submittals": a "staffing plan" and a "workforce composition strategy in a matrix format." Accordingly, we think a reasonable reading of the RFP is that it required that proposals be evaluated for technical acceptability under the organizational effectiveness subfactor based only upon each proposal's staffing plan and staffing matrix, and not the other items requested by section L.14.a(1).

All Phase asserts that the agency's evaluation of PDSI's proposal as technically acceptable under the organizational effectiveness subfactor was nevertheless unreasonable, arguing, for example, that PDSI's proposal did "not provide a 'Manning/Staffing' summary" or indicate what positions would be filled on a full- or part-time basis. Protester's Comments (B-292919.4) at 5.

Contrary to the protester's assertions, PDSI's proposal included a staffing plan, set forth in part in matrix format, which provided specific position descriptions, such as project manager and grounds maintenance laborer, as well as each position's proposed work schedule, total hours per day, total productive hours per year, primary and secondary responsibilities, and full- or part-time status. AR, Tab 26, PDSI's Proposal, at 19-20. The awardee also provided the resume of its proposed project manager and an organizational chart, and stated that its staffing philosophy includes [DELETED]. Id. at 8-9, 26-28. Based on our review, we cannot find the agency's evaluation of PDSI's proposal as technically acceptable under the organizational capabilities subfactor to be unreasonable.

Past Performance Evaluation

The protester argues that the agency's evaluation of PDSI's proposal as "satisfactory/confidence" under the past performance factor was unreasonable.

The RFP provided that the agency would "assess relevant performance on contracts of a similar nature, size, scope, dynamic environment, and complexity, utilizing a comparable number of personnel with like skills." The RFP specified that "[f]or the purposes of this evaluation, 'similar' refers to experience in providing non-personal services in operations and maintenance," that the agency would consider "each offeror's past performance experience as a prime contractor or subcontractor," and

that the "past performance of key personnel, teaming partners, subcontractors, and predecessor companies" would be considered.[2] RFP § M-3(b).

PDSI provided information regarding 10 contracts in its proposal. The agency found that none of the four referenced contracts, which had been performed by PDSI, and only one of the referenced contracts, which had been performed by PDSI's subcontractor, American Services Technology, Inc. (ASTI), met the criteria set forth in the RFP for consideration under the past performance factor. The one contract performed by ASTI that was considered by the agency was for pest management services, which the agency determined merited consideration because "many tasks (basic lawn care, herbicide application, fertilizer application, management of a large workforce on a similarly complex contract) . . . are the same, or substantially similar to tasks required" under the RFP here. The record reflects that ASTI's performance of this contract was rated as "exceptional" overall. AR, Tab 7, Summary Past Performance Evaluation for PDSI, at 2.

Although the solicitation stated that the agency "generally [would] not consider performance on an effort that concluded more than three (3) years prior to the issuance date of this solicitation," RFP § M-3(b), the agency nevertheless decided to consider the past performance information of ASTI on another contract, which had been performed in 1997-98, because in the agency's view "it was significantly relevant to th[is] acquisition." AR, Tab 7, Summary Past Performance Evaluation for PDSI, at 2. The questionnaire received by the agency for this contract rated ASTI's performance as "marginal" overall. AR, Tab 5, Past Performance Questionnaires, PDSI and ASTI; Tab 7, Summary Past Performance Evaluation for PDSI, at 2.

The agency rated PDSI's own past performance as "neutral," given the agency's determination that PDSI itself had not performed any contract similar to the contract to be awarded here. The agency noted that although "ASTI had recent and relevant exceptional ratings," ASTI's rating here "was offset to some extent by the marginal rating received 5 years ago." The agency concluded that "considering material from all sources," PDSI's proposal merited an overall rating of "satisfactory/confidence." AR, Tab 7, Summary Past Performance Evaluation for PDSI, at 2-3.

The protester contends that the agency erred in considering ASTI's performance on the pest management contract in evaluating PDSI's proposal under the past

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[2] The protester asserts that the agency improperly failed to evaluate the past performance of PDSI's key personnel. In our view, the RFP did not require the performance of a separate evaluation of the past performance of an offeror's key personnel where the offeror had submitted adequate contract references for itself and its subcontractors. We note in this regard that All Phase apparently so interpreted the RFP because the past performance volume of its proposal did not include past performance information regarding its key personnel.

performance factor. Specifically, the protester contends that "there is nothing in the record to support the evaluators' conclusion that this contract required similar tasks to the instant contract," and that because of this, the agency's "position . . . is arbitrary and capricious." Protester's Comments (B-292919.2; B-292919.3) at 10.

Where a solicitation requires the evaluation of offerors' past performance, an agency has the discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and in a manner consistent with the solicitation's requirements. Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 5.

The pest management contract, as described by the awardee in its proposal, involved the provision of pest management services at McDill Air Force Base, and included "overall responsibility [for] 129 military family housing [units], approximately 411 habited buildings, outdoor recreational facilities including tennis courts, a swimming beach, two 18 hole golf courses, man-made ponds, athletic fields, a skeet range, a marina, and playgrounds." AR, Tab 26, PDSI's Proposal, vol. II, at 14. The record reflects that this contract was similar in dollar value to the contract to be awarded under this RFP, and in our view, the agency reasonably determined that the performance of this pest management contract involved many of the same tasks, such as basic lawn care, herbicide application, fertilizer application, and management of a large workforce, as will be involved here. As such, giving due deference to the agency's broad discretion to determine whether a particular contract is relevant to the evaluation of past performance, we believe that the agency's consideration of the pest management contract was unobjectionable. See Acepex Mgmt. Corp., supra; contrast KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233 at 5-6 (protest sustained where agency failed to explain how reference contracts were relevant in past performance evaluation). Based on our review, we find no basis to question the evaluation of PDSI's proposal as "satisfactory/confidence" under the past performance factor.[3]

Price Evaluation

All Phase contends that the agency's evaluation of PDSI's proposal under the price factor was unreasonable, arguing that PDSI's price for the contract line item numbers relating to special events (such as the 4th of July), and the phase-in period, were "unrealistic." Protest (B-292919.5) at 4. The protester argues that because of this, the agency was required by the terms of the RFP to reject PDSI's proposal, because in the protester's view, "[w]hile the RFP may not have used the words 'price

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[3] We find no merit to All Phase's contention that the agency's cost-technical tradeoff gave insufficient weight to All Phase's higher-rated past performance. As indicated above, the tradeoff analysis specifically recognized this superiority and explained why it was insufficient to overcome PDSI's significant price advantage.

realism,' price realism is at the core of the evaluation procedure established by the Agency." Protester's Comments (B-292919.5) at 4.

Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation § 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted. CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4. The fact that a firm, in its business judgment, submits an offer that may not include any profit or be below-cost, or may be an attempted buy-in, does not render the firm ineligible for award. Property Analysts, Inc., B-277266, Sept. 12, 1997, 97-2 CPD ¶ 77 at 6; McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. This is so because below-cost pricing is not prohibited and the government cannot withhold an award from a responsible offeror merely because its low offer is or may be below cost. McDonnell Douglas Corp., supra. Nor can an agency, in evaluating an offeror's fixed-price proposal, make upward price adjustments for cost elements that agency contracting officials think may be priced too low. Id. Although not required, an agency may provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflected on its understanding of the contract requirements or the risk inherent in an offeror's approach. CSE Constr., supra. Where there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to successfully perform the contract at its offered price. Id.

We agree with the agency that the RFP here did not provide for the conduct of a price realism analysis, but rather, provided only for the evaluation of the "reasonableness" of the proposed price (that is, whether the price was unreasonably high). Specifically, the RFP repeatedly refers to the evaluation of price for "reasonableness" or "unreasonableness," and nowhere refers to the evaluation of price for "realism." RFP at M-2; M-3(c).

We recognize that, as pointed out by the protester, the solicitation included a single sentence--"Any inconsistency between promised performance and proposed price shall be explained in the proposal"--indicating that the agency may evaluate the offerors' price for something other than reasonableness. RFP § M-3(c)(3). However, considered in the context of this solicitation, which repeatedly referenced only price "reasonableness," and did not provide for the submission of cost or pricing information that would allow the agency to determine whether a low proposed price on a particular item reflected a lack of understanding of the contract requirements, this single (and perhaps misplaced) reference did not obligate the agency, in our view, to conduct a price realism evaluation as advocated by the protester.

Discussions

The protester argues that the agency improperly conducted discussions with only PDSI, pointing to a statement set forth in the legal memorandum accompanying the agency's report in response to All Phase's protest that referenced "[i]nformational requests to offerors." Protest (B-2929919.6) at 1; AR (B-292919.4) at 7. The protester also infers that discussions must have been conducted with the awardee, based upon a notation in the evaluators' checklist that if awarded the contract PDSI plans to [DELETED], given that PDSI's proposal did not specifically state that it intended to [DELETED] if awarded the contract. Protest (B-292919.6) at 2-3; Protester's Comments (B-292919.6) at 3; AR, Tab 14, Technical Evaluation Report.

The agency states that "[o]ne, and only one, instance of communication with PDSI was made prior to award," and that this communication was "to clarify an apparent mathematical/clerical mistake in PDSI's proposal." AR (B-292919.6) at 2. The agency denies that any other communications took place, stating that it was able to glean PDSI's plan to [DELETED] from its phase-in plan and list of equipment. Given the agency's statement and explanation here, as well as the fact that the record does not otherwise evidence in any way that the agency engaged in any improper communications with the awardee, we find this aspect of All Phase's protest to be without merit.

Alleged Bias

All Phase argues that the record here, including amendment No. 4 that extended the closing date for receipt of proposals and eliminated phase-in costs from the price evaluation, the agency's evaluation of proposals, and a purchase order issued by the agency, makes "it clear that the agency molded the evaluation in order to leave PDSI in the competition" and that "PDSI was given substantial preferential treatment."[4]

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[4] All Phase argues that the agency's modification of the solicitation by amendment No. 4, by deleting the phase-in prices from the agency's determination of each offeror's total evaluated price, was improper as well as evidencing bias in favor of PDSI. This argument, raised for the first time in All Phase's protest filed with our Office on November 6 (docketed as B-292919.3), was dismissed by our Office as untimely, given that this protest of an alleged solicitation impropriety was not raised until after All Phase had been informed that PDSI had been awarded the contract. See 4 C.F.R. § 21.2(a)(2) (2003); Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 6 n.7 (challenges to alleged apparent solicitation improprieties incorporated into the solicititation after the solicitiation's initial issuance must be filed prior to the time set forth receipt of proposals following the date of incorporation). All Phase, in a subsequent filing, attempts to revive this same basis of protest by arguing that it "is not based on the modification itself but the underlying reason for the modification, which the Protester was unaware of prior to

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Protest (B-292919.4) at 11; see Protest (B-292919.7) at 4. We have reviewed the record and find no credible evidence of bias or bad faith on the part of the agency. Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. McDonnell Douglas Corp., supra, at 28. In our view, as the above discussion demonstrates, the agency's actions during this acquisition, including the evaluation of the offerors' competing proposals, were reasonable and in accordance with the evaluation criteria set forth in the solicitation.

The protests are denied.

Anthony H. Gamboa
General Counsel

(...continued)
receipt of the Agency Report." Protest (B-292919.4) at 8. A protest that could have been filed in a timely manner but was not cannot be subsequently revived by an event--such as the protester's receipt of documents indicating the agency's reasoning for the solicitation modification--that may only serve to confirm the untimely basis of protest. See Joppa Maint. Co., B-281579, B-281579.2, Mar. 2, 1999, 2000 CPD ¶ 2 at 6-7.