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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: American Construction Company

File: B-401493.2

Date: October 16, 2009

Michael T. Zoretic, Esq., Stanislaw Ashbaugh, LLP, for the protester.
Douglas L. Patin, Esq., and Jeremy Becker-Welts, Esq., Bradley Arant Boult Cummings LLP, for General Construction Company, LLC, an intervenor.
Deena G. Braunstein, Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's evaluation of offerors' proposals and the resulting award determination are unobjectionable where the evaluation and the award determination were reasonable and consistent with the solicitation's stated evaluation criteria.

DECISION

American Construction Company of Tacoma, Washington, protests the award of a contract to General Construction Company, LLC of Poulsbo, Washington, under request for proposals (RFP) No. W912QR-09-R-0045, issued by the Army Corps of Engineers for the demolition of the existing timber pier at Pier 23 in Tacoma and its replacement with a concrete pier. The protester maintains that the agency improperly evaluated proposals and made an improper source selection decision.

We deny the protest.

BACKGROUND

The RFP was issued on April 21, 2009, and contemplated the award of a fixed-price contract for the demolition and construction of a pier. The RFP also included options for environmental remediation and for temporary access to the outer pier during construction. Under the RFP, proposals were to be evaluated for "best value" on the basis of the following evaluation factors listed in descending order of importance: experience, past performance, management, and price. RFP § 4. All evaluation factors, other than price, when combined were equal to price.

With respect to the experience evaluation factor, the RFP advised that the agency would consider both prime contractor experience and environmental remediation experience. To address the experience requirements, offerors were required to describe up to five projects completed or substantially completed within the last 5 years similar in size, scope and dollar value to the current requirement. RFP § 5.1.1. The RFP also advised that new and/or replacement pier or wharf projects constructed in similar salt water/marine environments would be considered similar to this project.

With respect to the past performance evaluation factor, offerors were to provide references for all identified experience, to include project name, location, owner’s name, point of contact and telephone number. RFP § 5.2. Offerors were also required to include ratings, letters, and awards to support a review of their past performance. The RFP provided that the agency could also use other resources, such as, Construction Contractor Appraisal Support System (CCASS) reports, or any other relevant information, to assist in the evaluation of an offeror’s past performance. RFP § 5.2.2.

With respect to the management evaluation factor, offerors were to provide a management plan for the project that describes how their labor, resources, subcontractors and material suppliers would be coordinated and used to ensure successful completion. RFP § 5.4. Offerors were also required to provide a bar chart schedule utilizing dates, showing how the work would be performed and completed in a timely manner, and showing all construction and environmental phases of the work. The RFP warned offerors that due to limitations on the available time for “in-water work,” it was important to demonstrate a clear understanding of the schedule requirements. RFP § 5.4.2. As relevant here, offerors were reminded several times that all “in-water work” was only allowed during the period known as the “fish window,” to reduce the likelihood of adversely impacting migrating juvenile salmon and bull trout. RFP §§ 1.3.2 and 3.5.1.

After receiving and reviewing four proposals, including American’s and General’s, a source selection evaluation board (SSEB) reached the following conclusions:

FACTOR	GENERAL	OFFEROR A	AMERICAN	OFFEROR B
Experience	Acceptable	Unacceptable	Acceptable	Excellent
Past Performance	Good	Unacceptable	Marginal	Excellent
Management	Acceptable	Marginal	Marginal	Good
Performance Risk	Low	Unknown	Moderate	Low
Overall Rating	Acceptable	Unacceptable	Marginal	Excellent
Price	\$18,388,075	\$18,556,824	\$16,714,360	\$21,436,425

Agency Report (AR), Tab 10, Evaluation Report at 2 and 18.

According to the agency, the initial source selection authority (SSA) tradeoff decision focused primarily on the proposals of General and Offeror B because their proposals did not contain any deficiencies and were considered to be technically acceptable. AR, Tab 11, Source Selection Document, at 2. While Offeror B submitted the only proposal to receive an overall rating of excellent, its proposed price was significantly higher than General's. Thus, the SSA concluded that General's proposal represented the best value to the government because it was technically acceptable and priced within the amount of available funds. AR, Tab 11, Source Selection Decision, at 2. On June 5, award was made to General. After American received a debriefing, it protested to our Office.

In addressing the initial protest, the contracting officer (CO) concluded that American's lower-priced proposal had been improperly excluded from the tradeoff decision, terminated General's award, and undertook a new tradeoff analysis. In response, we dismissed the protest.

In its second tradeoff analysis, the agency focused on the proposals of General and American.¹ AR, Tab 25, Source Selection Decision, at 2. The ratings used for the new selection decision are set forth below:

FACTOR/SUBFACTOR	GENERAL	AMERICAN
Experience	Acceptable	Acceptable
Prime Contractor Experience	Good	Acceptable
Environmental Remediation Experience	Acceptable	Acceptable
Past Performance	Good	Marginal
Prime Contractor Past Performance	Good	Marginal
Environmental Remediation Past Performance	Good	Marginal
Management	Acceptable	Marginal
Management Plan	Acceptable	Acceptable
Schedule	Acceptable	Marginal
Overall Rating	Acceptable	Marginal

Id. at 3.

The SSA concluded that under the experience evaluation factor, General had a slight advantage over American because of General's prior experience with piers. With respect to the past performance evaluation factor, the SSA determined that General's proposal offered a significant advantage because American had multiple negative CCASS ratings related to scheduling, which raised concerns regarding American's

¹ The agency reports that this was because Offeror A was technically unacceptable and Offeror B, the highest rated technically, offered a price that exceeded the available funds for the project.

ability to successfully manage the critical schedule requirements for the project. Id. at 4. While the SSA expressly recognized that American's negative performance ratings involved smaller projects, she expressed concern that if American had schedule difficulties on smaller projects, there was a risk that American would not be able to successfully handle the schedule requirements on this larger job.

The SSA also determined that General's proposal offered an advantage over American's proposal with respect to the management evaluation factor. In this regard, the SSA concluded that American failed to demonstrate that it had a clear understanding of specific events associated with the project because American did not depict the so-called "fish window" on its schedule. Finally, the SSA concluded that despite American's lower price, General's proposal offered the best value because of its technical superiority and superior past performance. Award was made to General on July 1. After American received a debriefing, it again protested to our Office.

DISCUSSION

American challenges the agency's evaluation of its and the awardee's past performance, as well as its evaluation under the management evaluation factor. In addition, American argues that its lower-priced proposal should have been viewed as the proposal offering the best value to the government.

Past Performance Evaluation

The evaluation of technical proposals, including past performance, is a matter within the discretion of the contracting agency. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. In reviewing an agency's evaluation, we will not reevaluate technical proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. MAR, Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367 at 4. An offeror's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 18.

The record shows that the agency rated American "marginal" under the past performance evaluation factor primarily because the CCASS database contained two reports that American had problems meeting schedule requirements. AR, Tab 10, Summary Evaluation, at 12-13. Specifically, with respect to a dredging project valued at \$3 million, American received a rating of marginal, and comments advising that its "schedule adherence was a weak point" and that "timelines were not met which caused problems." AR, Tab 12, CCASS Report. This report also rated American's performance "unsatisfactory" for resolution of delays, cooperation, and responsiveness. The second CCASS report relied on by the agency involved a \$127,400 water pumping project for which American received an overall rating of

satisfactory, with a rating of marginal for adhering to the project's approved schedule.

The protester maintains that the agency's use of this CCASS data to evaluate its past performance was improper because the projects were small, and did not involve piers. Rather than consider these projects, the protester argues that the agency should have limited its review to the projects American identified in its proposal as similar.² We disagree.

We find nothing improper about the agency's past performance evaluation here. As explained above, the RFP specifically provided that the agency could use other resources, such as CCASS reports, or any other relevant information, in evaluating past performance. The RFP further invited offerors to provide letters, awards, and ratings to support a favorable assessment of their past performance on identified projects. In this regard, the protester provided one letter indicating that it had satisfactorily performed one project that the agency determined was not similar in size or dollar value to the project here. CO Statement at 5. When the CO reviewed the CCASS reports, the agency learned that American had difficulty adhering to the performance schedules on two smaller projects, which raised valid concerns about whether American would be able to adhere to the schedule on the larger Tacoma Pier project. Given the schedule concerns the agency specifically identified in the RFP with respect to the Tacoma Pier project, we think the agency's concerns about American's past performance were reasonable.

Disparate Treatment of General

To the extent the protester argues that the agency ignored negative past performance information pertaining to General, we think the record does not support this assertion. Specifically, American points to a performance survey addressing General's work on a military pier project for the Navy in Bangor, Maine.

² Of the five projects submitted by American to demonstrate its experience, only two were considered by the agency to be similar in size, scope and dollar value. American did not submit any information supporting its past performance with respect to these projects. CO Statement at 4. American did submit a letter of review regarding a Port of Bellingham project which included a "satisfactory" rating of American's performance, however, the letter did not provide details about American's performance, and the project was considered too small in dollar value and size to be given significant weight in the evaluation of experience. As set forth above, the RFP here explained that in the evaluation of experience the agency would consider projects completed or substantially completed within the last 5 years similar in size, scope and dollar value to the current requirement. RFP § 5.1.1. In contrast, the evaluation of past performance considered a broader range of projects, including smaller projects.

While American concedes that General received an overall rating of good, the survey assigned a marginal rating for adherence to schedule, with a comment that there were a number of unforeseen conditions and change orders on the project.

Our review of the record shows that General received good past performance ratings from the references General submitted with its proposal, including a CCASS report for another Navy pier project valued at \$6 million for which General received an “above average” performance rating. As the protester notes, General also included the performance survey for the Bangor project in which it received an overall rating of “highly acceptable.” The agency explains that it did not view this report as negative past performance information because the evaluator’s comments were very positive, and because the CO there commended General for its outstanding performance. In addition, the CO there specifically noted as a significant accomplishment that General finished the pier deck and utility demolition exactly on schedule. General’s Proposal at 26. In our view, this information does not support American’s assertion that it and General received disparate treatment.

Management Plan Evaluation

American next challenges the agency’s decision to assign its proposal a rating of marginal under the management evaluation factor, based on an acceptable rating under the management plan subfactor and a marginal rating under the schedule subfactor.

The record shows that the agency considered American’s proposal weak under the management plan subfactor because the proposal did not mention the closeout report process or the limited “in-water work” window. American received a marginal rating under the schedule subfactor because, among other things, American’s schedule did not indicate that all of the required sampling would occur after dredging, and more importantly, did not depict the limited schedule for “in-water work” related to the so-called “fish window.”

American admits that it did not expressly identify the “fish window” in its schedule but maintains that its schedule for all “in-water work” complied with the requirements related to the “fish window.” American also maintains that its bar chart schedule showed all of the key milestone dates for this effort.

As previously stated, the RFP here specifically warned offerors that due to the limited time available for “in-water work,” a clear understanding of the schedule requirements was very important, and schedules would be evaluated to determine whether the proposal demonstrated this understanding. We have reviewed American’s proposal in this area and compared it with the proposal of General. As an initial matter, we note that American appears to be correct in its assertion that its proposed schedule complied with the limitations of the “fish window”—even though the window was neither mentioned nor acknowledged in any narrative, nor

expressly shown on the schedule. In contrast, General's proposal is explicit about the window and how it impacts the work schedule here. General's Proposal at 79, 85-86. In short, given the emphasis on, and significance of, adhering to the schedule in the RFP, we think the agency reasonably rated more highly the proposal that expressly acknowledged and referenced the "fish window" to demonstrate its understanding of the specific time constraints for this project.

Best Value Tradeoff Determination

American also protests the agency's best-value tradeoff determination. Specifically, the protester argues that the agency's decision was improper because it failed to properly consider General's higher price and because it failed to sufficiently document the rationale for the tradeoff determination.

Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6. Where, as here, the RFP allows for a price-technical tradeoff, the selection official retains discretion to select a higher-priced but also technically higher-rated submission, if doing so is in the government's best interest and is consistent with the solicitation's stated evaluation and source selection scheme. University of Kansas Med. Ctr., B-278400, Jan. 26, 1998, 98-1 CPD ¶ 120 at 6.

In making her source selection decision, the SSA prepared a detailed decision document comparing American's and General's proposals. The SSA then specifically concluded that General's proposal was worth the additional price premium because of its greater technical merit, and superior past performance. The fact that the protester disagrees with the SSA, does not establish that the SSA's determination was unreasonable. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44 at 11 (award to offeror whose technically superior proposal was 125 percent higher in cost than the lower technically rated proposal was proper).

The protest is denied.

Lynn H. Gibson
Acting General Counsel