GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Northrop Grumman Technical Services, Inc.

File: B-286012; B-286012.2

Date: November 1, 2000

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DIGEST

1. Protester's assertion that an agency failed to distinguish between offerors by assigning identical color and risk ratings under the mission capability and risk evaluation factors is denied where the record shows that the ratings assigned were reasonable, and where the selection official was apprised of the distinctions between the proposals and made his selection accordingly.

2. Contention by incumbent contractor that the awardee should have been assessed a risk of workforce disruption because it does not have a collective bargaining agreement with the incumbent workforce is denied where: (1) the agency reasonably concluded that this approach would provide an unfair advantage to the incumbent; (2) the awardee met its legal obligations under the Service Contract Act to match the wage and fringe benefits paid to incumbent employees under the agreement; and (3) the agency reasonably concluded, based on its review of the awardee's proposed approach, that the approach did not present a risk of disruption.

DECISION

Northrop Grumman Technical Services, Inc. (NG) protests the award of a contract to DynCorp Technical Services, Inc. by the Department of the Air Force pursuant to request for proposals (RFP) No. F41689-99-R-0028, issued to procure aircraft maintenance and base operating support services at Vance Air Force Base (AFB), Oklahoma. NG argues that the Air Force unreasonably selected DynCorp for award

after: (1) failing to distinguish between proposals by giving all three competitive range offerors the same ratings; (2) ignoring the risks associated with DynCorp's lack of a collective bargaining agreement with the Vance AFB employees; and (3) failing to either upwardly adjust DynCorp's price or assess a risk against the company for its lack of escalation of healthcare costs over the life of the contract.

We deny the protest.

BACKGROUND

Vance AFB has used a single contractor to perform aircraft maintenance and base operating services (BOS) since 1961. Contracting Officer's (CO) Statement at 2. In the area of aircraft maintenance, the contractor provides, among other things, ground support, scheduled and unscheduled maintenance and repair, and management support of all assigned T-1, T-37 and T-38 aircraft. In the area of BOS, the contractor provides operating services, including: operations and maintenance; fire protection; custodial, engineering, and environmental services; management and maintenance of space and housing; information technology support; transportation; lodging; and aviation operations support. Memorandum of Law at 2. NG has held the contract to perform these services since 1972.

The RFP here was issued on October 21, 1999, and anticipated award of a fixed-price, incentive-fee contract for one base year, followed by up to six 1-year options, to the offeror whose proposal was deemed most advantageous to the government. RFP §§ B, M-902. To determine the most advantageous proposal, the RFP identified four evaluation factors: past performance, mission capability, proposal risk and price/cost. RFP § M-903. Of these factors, past performance, mission capability, and proposal risk were equal in importance, and combined, were significantly more important than price/cost. Id.

Under the past performance evaluation factor there were no subfactors. The RFP advised that an offeror's past performance would receive one of the following six ratings: (1) exceptional/high confidence; (2) very good/significant confidence; (3) satisfactory/confidence; (4) neutral/unknown confidence; (5) marginal/little confidence; and (6) unsatisfactory/no confidence. Id.

Under the mission capability factor, there were five subfactors, listed in descending order of importance: (1) performance management; (2) workforce; (3) technical capability; (4) mobilization and changeover; and (5) small business programs participation. The RFP advised that each subfactor would be assessed a separate rating for both aircraft maintenance and BOS (except for the least important subfactor, small business programs participation, which was to receive only one overall rating), that aircraft maintenance and BOS would be equal in importance, and that these ratings would not be "rolled up" to the factor level. Id. In addition, the RFP advised that each subfactor would be assigned a separate risk rating. Under

mission capability, the RFP anticipated color ratings of blue/exceptional, green/acceptable, yellow/marginal, and red/unacceptable; under risk, the RFP anticipated ratings of high, moderate, and low risk.

Under the factor of price/cost, the RFP advised that prices would not be rated, but would instead be reviewed for realism and reasonableness. In addition, the RFP identified a weighted formula for determining an offeror's evaluated price which included the price for the base period and all option years, as well as weighted samples of each proposal's offered incentive for costs that exceed, or do not reach, the proposed target price. Id.

After receiving four proposals in response to the RFP, holding three rounds of discussions, and eliminating one offeror from the competitive range, the agency held a fourth round of discussions before completing the final evaluation and preparing a briefing for the source selection authority (SSA). CO's Statement at 4. The results of the final evaluation, as presented to the SSA, are set forth below:

EVALUATION FACTORS	DYNCORP	NORTHROP GRUMMAN	OFFEROR A
PAST PERFORMANCE	Exceptional	Exceptional	Very Good
MISSION CAPABILITY/RISK			
Performance Mgmt/Risk			
-- Aircraft Maint.	Blue/Low	Blue/Low	Blue/Low
-- BOS	Blue/Low	Blue/Low	Blue/Low
Workforce/Risk			
-- Aircraft Maint.	Green/Low	Green/Low	Green/Low
-- BOS	Blue/Low	Blue/Low	Blue/Low
Technical Capability/Risk			
-- Aircraft Maint.	Blue/Low	Blue/Low	Blue/Low
-- BOS	Blue/Low	Blue/Low	Blue/Low
Mobilization Changeover/Risk			
-- Aircraft Maint.	Blue/Low	Blue/Low	Blue/Low
-- BOS	Blue/Low	Blue/Low	Blue/Low
Small Business Participation	Blue/Low	Blue/Low	Blue/Low
TOTAL EVALUATED PRICE	$303,021,554	$303,367,347	$320,923,700

Source Selection Evaluation Technical (SSET) Team Report, at 90, 93.

In making his selection decision, the SSA first eliminated Offeror A from further consideration because of its lower past performance rating and higher evaluated price. Source Selection Decision at 1. As between NG and DynCorp, the SSA noted the exceptional/high confidence past performance ratings given both offerors, but concluded that he placed "greater value" on the customer ratings and comments submitted for DynCorp. Id. at 2. With respect to the equal color and proposal risk ratings assessed under the mission capability subfactors, the SSA again decided that DynCorp's proposal offered the greater value. Specifically, the SSA stated:

> [NG] provided an advantage in the host base contingency support area in aircraft maintenance and a slight advantage in the base operating support workforce area. However, I determined the skill mix balance of DynCorp's aircraft maintenance workforce composition is more advantageous in that they propose a greater number of mechanics and workers compared to the number of specialists proposed by [NG]. In addition, over the life of the contract, DynCorp offers [deleted] more man-years priced than [NG]. I also consider DynCorp's flat, tailored work teams to be slightly superior to [NG's] staffing approach.

Id. In addition, the SSA noted DynCorp's slightly lower overall total evaluated price, and noted that the company proposed a general and administrative (G&A) rate capped at [deleted] percent. Based on these conclusions, the SSA selected DynCorp for award. This protest followed.

DECISION

NG's predominant claim in this protest[1] is that the Air Force evaluators failed to capture any of the meaningful distinctions between offerors by assigning all three competitive range proposals identical color and risk ratings for each of the 18 categories under the mission capability and risk evaluation factors. In pursuing

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[1]NG raised numerous other challenges in its initial protest, and in two supplemental protest filings, that it ultimately abandoned. Of particular importance, NG alleged procurement integrity violations based on its receipt of an anonymous letter from an individual who claimed to be familiar with this procurement, and who claimed that there were irregularities in the evaluation process. The Air Force conducted an internal investigation of the allegations raised by that letter, and provided a copy of its investigation report to the parties here, and to our Office, under the terms of a General Accounting Office protective order. Given the findings of the investigation, and the failure of the letter's author to come forward, NG expressly abandoned this area of its protest. Protester's Comments at 1. As a result, we have not pursued this matter further.

its claim, NG generally does not argue that the specific color and risk ratings assigned in any particular instance are unreasonable, but that the agency failed to note the distinction between the offerors, or that it was unreasonable to give both offerors the same rating. In this regard, NG argues that the resulting evaluation "left the SSA without any clear indication of which proposal was superior and caused him to search on his own for some basis to select one of the proposals for contract award." Id. at 2.

In its comments filing, NG cites 11 separate instances where it contends there was a basis to draw a distinction between its proposal, and other proposals in the competitive range. Our standard in reviewing such evaluation challenges is to examine the record to determine whether the agency's judgments were reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Here, we have considered the proposals, the evaluation materials, each of NG's 11 specific arguments, the Air Force's response to those arguments, and NG's reply. As a result of our review, we find no basis for concluding that the evaluation here unreasonably blurred the distinctions between proposals, or was not in accordance with the stated evaluation criteria.

For example, one of the 11 instances involves an assessed strength in NG's proposal in the area of host base contingency support. Despite its strength in this area, NG complains that the SSA was given no basis to distinguish between competing proposals on this issue, and that it was unreasonable to assign the same color/risk rating to both offerors under the mission capability/risk subfactor related to this area. A close look at the record shows otherwise.

As a preliminary matter, we note that in 8 of the 11 instances--including this one--where NG argues that the strengths in its proposal were obscured by the assignment of identical color and risk ratings, the cited strength was expressly included in the Source Selection Briefing for the SSA's consideration. Moreover, in this case, the SSA specifically noted NG's strength in the area of host base contingency support, as indicated in the above quote from the Source Selection Decision. Source Selection Decision at 2. Given that these distinctions were expressly noted for the SSA, and in this case, noted by the SSA in making his selection decision, we fail to see how NG can contend that the distinctions were obscured, or otherwise lost in the evaluation process.

Our review of this example also leads us to conclude that NG's strength in the area of host base contingency support was reasonably integrated into the overall evaluation. As explained above, the third subfactor under the mission capability and risk evaluation factors was technical capability. Under this subfactor, the RFP identified five areas of consideration; the fifth area identified was whether the proposal indicated "[a] clear understanding for supporting host base contingency plans." RFP § M-903 at 6.b(3)(e). In the area of host base contingency plans, under

the aircraft maintenance portion of the evaluation, DynCorp received a rating of "+" (indicating a "more than satisfactory" rating), while NG received a rating of "+++" (indicating an "exceptional" rating). Source Selection Briefing at 84.

Despite this difference in ratings, both offerors received overall ratings of exceptional under the aircraft maintenance portion of the technical capability subfactor. The briefing presenter explained to the SSA that NG was given an exceptional rating for the subfactor because it received exceptional ratings under all five of the areas of consideration. Id. at 83. The presenter explained that DynCorp was given an exceptional rating for the subfactor because it received exceptional ratings under four of the five areas of consideration, and a rating of "more than satisfactory" under the fifth area for consideration, host base contingency support. Id.

Presented with these facts, NG offers no argument for why it was unreasonable for DynCorp to receive an exceptional rating when it was assessed as exceptional under four of the five areas of consideration for this subfactor. Nor is NG correct when it argues that the distinction was obscured by the method of the evaluation. Under these circumstances, we see nothing unreasonable about the decision to give both NG and DynCorp ratings of exceptional, and we disagree that the SSA was not made aware of this relatively de minimis distinction between the two offerors in this area.

In another of NG's 11 areas where it claims the strengths in its proposal were obscured--the area of skill mix under the aircraft maintenance portion of the workforce subfactor--the SSA expressly rejected the distinction perceived by the evaluators as part of his selection decision.[2] As above, the SSA's conclusion that he viewed the skill mix area differently than the evaluators demonstrates that this distinction between the proposals was neither obscured, nor lost, by the agency's evaluation approach.

For the record, we will also address the three instances where NG argues that the strengths in its proposal were unfairly obscured by the evaluation, and where it is less clear (than in the other 8 instances described above) that the strength was

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[2]Compare Source Selection Decision, July 21, 2000, at 2 ("However, I determined the skill mix balance of DynCorp's aircraft maintenance workforce composition is more advantageous in that they propose a greater number of mechanics and workers compared to the number of specialists proposed by [NG].") with Source Selection Briefing at 19 ("[NG's] skill mix is exceptional as they propose to use a highly exceptional number of leads, senior mechanics and specialists in their overall aircraft maintenance workforce.") and Source Selection Briefing at 23 ("[DynCorp's] skill mix is adequate and should provide satisfactory mission support.").

expressly presented to the SSA. One of these instances is the issue of NG's collective bargaining agreement with the employees of Vance AFB, which is the subject of the next portion of this decision. The remaining two instances are immaterial to the propriety of the selection decision here. First, NG argues that the evaluation was unreasonable because NG and Offeror A got the same color/risk rating under the small business program participation subfactor despite a distinction between the two proposals in this area. Second, NG notes that DynCorp received more initial deficiency notices than NG, which, NG claims, shows that its proposal was the stronger of the two throughout the procurement process.

In our view, NG's contention about a blurred distinction between it and a third offeror provides no basis for our Office to conclude that the selection of DynCorp over NG was unreasonable. See BioClean Med. Sys., Inc., B-239906, Aug. 17, 1990, 90-2 CPD ¶ 142 at 7 n.2. We also consider irrelevant NG's argument that the proposals are not as equal as they might appear because NG's proposal was initially found to be stronger than DynCorp's. This argument fails to address changes made to DynCorp's proposal in response to discussions with the agency, and provides no basis to conclude that NG's proposal was stronger than DynCorp's at the conclusion of negotiations.

The second major area of NG's protest is that the Air Force should have assessed a performance risk against DynCorp because it does not have a collective bargaining agreement (CBA) with the incumbent workforce. NG's five arguments related to this issue fall into two categories: one of the arguments is general to any non-incumbent offeror, while four of the arguments are specific to acceptance of DynCorp's proposal. In our view, none of these five contentions has merit.

The RFP, at clause B-11, advised potential offerors that any contract resulting from this solicitation was subject to the requirements of the Service Contract Act, and that there was a CBA in place between the incumbent contractor and a union representing much of the incumbent workforce. Under the Service Contract Act, successor contractors generally are required to pay at least the wages and fringe benefits set forth in the CBA. See 41 U.S.C. § 353(c) (1994); The Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52 at 2-3. To implement the Act, the RFP incorporated the CBA. RFP § J. There is no dispute that DynCorp proposed wage and fringe benefits in accordance with the CBA.

In its general argument, NG contends that since its CBA with the incumbent workforce includes a no-strike clause, any other offeror's proposal should have been assessed as posing a greater risk of workforce disruption than NG's proposal. As indicated above, this is also 1 of the 11 areas where NG argues its proposal offered a benefit to the government that was obscured, or lost, during the course of the evaluation.

While there is no disputing that an incumbent that has negotiated a no-strike clause with its union workforce probably presents less risk of workforce disruption than a new contractor--especially after 28 years of incumbency--we think there are several reasons why it was proper for the agency not to consider a change of contractors, without more, as a performance risk. First, the protections of the Service Contract Act itself reduce the risk of disruption by requiring successor contractors to match the wage and fringe benefits paid under an existing CBA. Second, assessment of a risk of disruption for any offeror but the incumbent places an obstacle in the path of full and open competition that, at a minimum, should require a showing of necessity. Finally, we fail to see how an incumbent is harmed by the Air Force approach here, other than being forced to compete on a more level field. Since the purpose of our bid protest function is to ensure that agencies obtain full and open competition to the maximum extent practicable, we will generally favor otherwise proper actions--like this one--which are taken to increase competition. See Hughes Missile Sys. Co., B-257627.2, Dec. 21, 1994, 94-2 CPD ¶ 256 at 16.

NG next sets out four areas where it argues that DynCorp's proposed approach will increase the risk of workforce disruption. Specifically, NG argues that DynCorp's plans to award performance bonuses and its reduced reliance on middle management, which could result in union employees supervising other union employees, both violate the terms of the current CBA. In addition, NG contends that DynCorp may elect not to honor the accumulated sick leave, or the seniority status, of incumbent union employees.

As an initial matter, we note that the regulations implementing the Service Contract Act provide that "[t]he obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's [CBA] and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc." 29 C.F.R. § 4.163(a) (2000). Thus, it appears that none of the issues raised by NG involve an obligation of DynCorp under the Service Contract Act. On the other hand, we agree with NG's underlying assertion that selection of a contractor that will engage in harsh labor practices, even if generally compliant with the requirements of the Service Contract Act, could increase the risk of workforce disruption for the agency. When such practices are clearly shown, we will sustain a protest that the agency has failed to properly consider the risks associated with its selection decision. See Management Servs. Inc., B-184606, Feb. 5, 1976, 76-1 CPD ¶ 74 at 8-16.

Here, however, NG has not shown that DynCorp's practices will lead to disruption and the record does not support a conclusion that the agency erred in its assessment of the DynCorp proposal. First, the Air Force points out that the solicitation did not require offerors to provide details concerning their union negotiation strategies. Nonetheless, the agency's review of DynCorp's proposal satisfied the evaluators that DynCorp has experience in dealing with unions and has experience assuming a contract where the previous contractor had a CBA with a union. CO's Statement at 21. In addition, during the course of this protest, DynCorp cited several examples

of its experience in assuming contracts covered by CBAs. DynCorp's Comments at 4-5. In short, there was nothing in DynCorp's proposal, or elsewhere in this record, to support a conclusion that DynCorp would fail to deal reasonably with the incumbent workforce.

Second, we note that NG's arguments regarding DynCorp's approach are speculative. Despite having access to DynCorp's proposal under the coverage of a protective order issued by our Office, NG has proffered no statement by DynCorp, nor any other evidence, to support its claim that the company might strip employees of their seniority and/or their accrued sick leave. Under these circumstances, without more, we think the Air Force's evaluation of DynCorp's proposal was reasonable.

The third and final area of contention in NG's protest is that the Air Force failed to properly assess DynCorp's lack of escalation in the cost of health and welfare (H&W) benefits for exempt employees, and lower H&W benefits for wage determination employees, neither of which is covered by the CBA. In this area, NG argues that the agency should have made an upward adjustment to DynCorp's evaluated costs, or alternatively assessed a risk against the proposal. We disagree on both counts.

With respect to the alleged need for a cost adjustment, we note first that the RFP here anticipates award of a fixed-price, incentive-type contract. Simply put, there were no adjustments to proposed prices as are required in the evaluation of cost-reimbursement contracts. While NG points out that the RFP anticipates calculation of an "evaluated" price, we note that the RFP clearly explains what that evaluation entails--i.e., application of a formula to assess the benefits of an offeror's incentives by including a sample of the price generated above and below the target price. RFP § M-903. This limited formula for generating an evaluated price did not convert this fixed-price contract to a cost-type contract, and the calculation of evaluated prices other than as anticipated by the solicitation would have been improper.

With respect to the alleged need for a risk assessment, the protester has failed to show how the Air Force evaluation was unreasonable. We note first that NG's arguments in this area are stated only in broad and general terms in its comments filing. Protester's Comments at 12-13. At no point in this limited discussion are we advised which evaluation factor or subfactor should be assessed this risk. Even if we assume that NG means the risk would be one of workforce disruption, NG does not advise whether the risk should be applied to the aircraft maintenance portion of the evaluation, the BOS portion, or both.[3]

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[3]To fill in the details, NG directs our Office to a detailed statement prepared by its consultant and appended to its comments; however, even this statement fails to state where the risk should be assessed. This approach to pleading places protesters at risk of failing to clearly explain their positions. See University of Dayton Research Inst., B-245431, Jan. 2, 1992, 92-1 CPD ¶ 6 at 5. In addition, the appended point-by-

(continued...)

Moreover, our substantive review of the Air Force materials in this area leads us to conclude that the agency's evaluation was reasonable. In essence, the CO explains that the agency reviewed DynCorp's proposed H&W costs for each of the three categories of employees covered by this contract: those under the CBA; those not covered by the CBA, but covered by a wage determination; and management employees covered by neither, and termed "exempt." CO's Statement at 28. As discussed above, the CO explains that DynCorp was required by the Service Contract Act to match the H&W rate of CBA employees, and it did so--in fact, it exceeded that rate by a small amount. Id. For wage determination employees, the CO explains that DynCorp proposed an H&W rate equal to the minimum required by law, although the CO concedes that the amount is $.37 lower than NG proposed. Id. For exempt employees (largely management employees), the CO acknowledges that DynCorp proposed lower H&W than NG, and that DynCorp did not include escalation of H&W benefits for exempt employees. Id. On the other hand, the CO points out that DynCorp is not required to provide its exempt employees with the same level of H&W benefits as NG. Given that DynCorp met its legal obligations for CBA and wage determination employees, and given that a lack of escalation in one category of fringe benefits for management employees does not create any significant risk of workforce disruption, we see nothing unreasonable in the Air Force decision not to assess a risk against the proposal based on its planned H&W expenses.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

(...continued)
point listing of every instance in which the consultant agrees or disagrees with the contracting officer is an ineffective substitute for a prioritized and cogent argument about why the agency's evaluation was unreasonable and how the result would be different if it were corrected. See Ann Riley & Assoc., Ltd., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ 120 at 9, recon. den., Ann Riley & Assoc., Ltd.-Recon., B-271741.3, Mar. 10, 1997, 97-1 CPD ¶ 122.