



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Lynwood Machine & Engineering, Inc.

File: B-285696

Date: September 18, 2000

Nick Berkem for the protester.

Michael Briskin, Esq., and Mary E. Clarke, Esq., Defense Logistics Agency, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In evaluating past performance, agency properly considered performance record of company other than the one submitting a quotation where company submitting quotation intended to rely heavily on the other company's personnel in performing the job.
2. Agency is not required to contact all of a vendor's references, but must act reasonably in determining which ones to contact and which not to contact.
3. Agency was not required to conduct discussions with protester to allow it an opportunity to clarify its past performance information where procurement was conducted using simplified acquisition procedures.
4. Agency properly considered information concerning vendor's past performance obtained from a source not identified by the vendor in its quotation.
5. Where agency is not required to hold discussions or otherwise communicate with vendors regarding past performance information, and the contracting officer has no reason to question the validity of the information furnished by the vendor's

references, he or she can reasonably rely on the information furnished without seeking to verify it or permitting the protester an opportunity to rebut it.

DECISION

Lynwood Machine & Engineering, Inc. protests the issuance of an order to SAF Engineering Associates under request for quotations (RFQ) No. SPO833-00-Q-0137, issued by the Defense National Stockpile Center (DNSC), Defense Logistics Agency for the weighing, banding, crimping and relocation of approximately 34,000 metric tons of lead at DNSC's Hammond, Indiana depot. The protester takes issue with the agency's evaluation of its past performance.

We deny the protest.

DNSC explains by way of background that it is responsible for acquiring, storing, and maintaining various strategic and critical materials, and that it has acquired stockpiles in excess of current needs of a number of materials and is in the process of selling its excess stores. One of the materials that DNSC is selling is lead. Prior to resale, the lead must be restacked, banded, and accurately weighed. The agency notes that work around the lead, which has oxidized while being stored outside, is potentially hazardous.

The RFQ, which was issued using simplified acquisition procedures pursuant to the authority of Federal Acquisition Regulation (FAR) subpart 13.5 (Test Program for Certain Commercial Items),¹ contemplated the award of a fixed-price order to the vendor whose quotation represented the best value to the government. The solicitation, as amended, provided for the evaluation of quotations on the basis of experience, past performance, and price, in descending order of importance. To assist in the evaluation of their past performance, vendors were instructed to furnish "three (3) references with information concerning projects completed within the last two years for the same or similar work required by the solicitation." RFQ § 22.

Five vendors submitted quotations prior to the April 21, 2000 due date. Lynwood's price of \$422,514.24 was lowest, and SAF's price of \$423,197.92 was second low. The contracting officer determined that the two vendors were essentially equal in experience, but that SAF's past performance was superior to Lynwood's. Agency Report at 3-5; Recommendation for Award, May 17, 2000, at 2. The contracting officer selected SAF's quotation as representing the best value to the government,

¹ FAR Subpart 13.5 authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5 million, including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items. FAR § 13.500(a).

finding that SAF's significantly better past performance outweighed Lynwood's slightly (i.e., \$683.68) lower price. On May 19, DLA issued an order to SAF.

In its quotation, Lynwood highlighted its recent acquisition of the material handling operation of a company named Contract Procurement Services, Inc. (CPS) and advised the agency that if it were awarded this job, it would rely heavily on CPS personnel in its performance. In particular, Lynwood noted that the president of CPS would serve as project manager; it also indicated that CPS's material handlers, banders, and forklift operators would work on the job. Lynwood Quotation at 2. Lynwood listed the DNSC as its first reference, noting that CPS, under the management of the above-mentioned president, had completed four material handling contracts for the agency (which Lynwood identified by contract number and amount, dates and location of performance, and type and quantity of material handled). Lynwood also listed three commercial references for itself in the quotation. While Lynwood noted that it had "successfully moved millions of tons of materials over the past two years for [these] clients [with] which it maintains ongoing contracts," id. at 3, it did not identify any specific contracts it had performed for them.

In evaluating Lynwood's past performance, the contracting specialist sought references from the contracting officers for the two largest dollar amount contracts performed by CPS, both of which involved the handling of lead, and from the point of contact identified for Lynwood's largest commercial customer. Because of the safety issues involved in the handling of lead, the contracting officer also sought references regarding Lynwood/CPS and the two other vendors under consideration for award from DNSC's Safety and Occupational Health Manager.

The agency was unable to obtain a reference from Lynwood's largest commercial customer because the point of contact identified by the protester in its quotation did not return the contracting specialist's telephone calls. The references for CPS's two largest dollar amount contracts both rated CPS's performance as a 3 on a scale of 1-5, one noting that CPS had not been able to meet the contract's daily requirements, that it had not completed the task on time, and that it had "required constant oversight to ensure [that] the [statement of work] was being followed, i.e. placement of bands, bundles being square, etc." Agency Report, Tab 24. The Safety and Occupational Health Manager gave CPS a rating of 1, commenting that:

[CPS] had to be constantly reminded to follow the OSHA regulations on lead handling as far as personal protective equipment and respirators were concerned. They were caught with unauthorized personnel in the work area.

Id. Based on the above point ratings, Lynwood was given an overall past performance score of 1.25.²

SAF, in contrast, received two ratings of 5 and a rating of 4 from the three references that it identified in its quotation. All three references responded that SAF had finished their task on time and without performance problems. The Safety and Occupational Health Manager gave SAF a rating of 3, noting that he had minor problems with its performance, which involved getting required air sampling results to DNSC in a timely manner. Based on the above ratings, SAF was given an overall past performance score of 4.25.

Lynwood protests the agency's evaluation of its past performance, complaining that DLA did not contact any of its references, but instead considered only references pertaining to CPS's performance.

When using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition, and must evaluate quotations in accordance with the terms of the solicitation. Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶140 at 4. When reviewing protests against an allegedly improper evaluation, we will examine the record to determine whether the agency met this standard and reasonably exercised its discretion. Id.

First, to the extent that the protester is arguing that the agency should not have considered information regarding CPS's performance in its evaluation of Lynwood's past performance because CPS was not the vendor submitting a quotation, we disagree. There are circumstances in which it is appropriate for an agency to consider the performance of a company other than the one submitting the quotation in evaluating past performance. See NAHB Research Ctr., B-278876.2, May 4, 1998, 98-1 CPD ¶150 at 4. In determining whether one company's performance should be attributed to another, an agency must consider the nature and extent of the relationship between the two companies--in particular, whether the workforce, management, facilities, or other resources of one may affect contract performance by the other. In this regard, while it would be inappropriate to consider a company's performance record where that record does not bear on the likelihood of successful performance by the offeror (or vendor), it would be appropriate to consider a company's performance record where it will be involved in the contract effort or

² The agency acknowledges in its report that Lynwood's overall past performance score was miscalculated and that it should have been 2.33 rather than 1.25. The contracting officer maintains that this error did not affect her source selection decision, which was based on a comparison of the individual surveys themselves. Agency Report at 4 n.2.

where it shares management with the offeror (or vendor). ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶161 at 3.

Here, as previously noted, the protester emphasized in its quotation that both CPS management and workers would play prominent roles in performance if this job were awarded to Lynwood. Most significantly, Lynwood proposed to employ CPS's president as project manager. It also proposed to rely on CPS's material handlers, banders, and forklift operators in performance. Given the extent to which Lynwood intended to rely on CPS personnel in performing this job, we think that the agency reasonably attributed CPS's past performance to the protester.

Second, regarding the protester's complaint that the agency did not obtain references from any of its commercial customers, it is clear from the record that an attempt was made to contact Lynwood's largest commercial customer and that the reason no reference was obtained was that the customer failed to respond. An agency is only required to make a reasonable effort to contact a reference, and where that effort proves unsuccessful, it is unobjectionable for the agency to proceed with its evaluation without benefit of that reference's input. Universal Bldg. Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 8 n.1. Further, while the agency did not attempt to contact the protester's other commercial references, there is no requirement that an agency contact all of a vendor's references, Oahu Tree Experts, B-282247, Mar. 31, 1999, 99-1 CPD ¶ 69 at 3, particularly where a vendor furnishes more than the number of references requested. Moreover, while the agency must act reasonably in deciding which references to contact and which not to contact, Acepex Management Corp., B-279173.5, July 22, 1998, 98-2 CPD ¶128 at 8, we see nothing unreasonable in the agency's selection of the three references to contact here. We think that it was clearly reasonable for the agency to have regarded CPS's performance on the contracts for which it obtained references as more relevant than Lynwood's performance on its commercial contracts given that the CPS contracts were for lead handling (*i.e.*, the precise service sought here), whereas the Lynwood contracts were for the movement of unspecified materials.³

³ In commenting on the agency report, the protester asserts that it has moved hazardous materials such as silicic acid, solvents, paints, gases, and oils for its commercial clients, Protester's Comments, at 1, and that if the agency had concerns regarding the relevancy of these contracts, it should have contacted Lynwood for additional information. There was no indication in Lynwood's quotation that it had moved hazardous materials for its commercial clients, however, and since this acquisition was conducted using simplified acquisition procedures, the agency was not required to conduct discussions with Lynwood for purposes of clarifying the nature of the services that it had performed. FAR §13.106-2(b)(2); CDS Network Sys., Inc., B-281200, Dec. 21, 1998, 98-2 CPD ¶154 at 3.

Accordingly, we think that it was reasonable for the agency to have decided to contact those references.⁴

Next, to the extent the protester objects to the agency's having obtained information concerning its past performance from the agency's Safety and Occupational Health Manager, a source it did not identify as a reference in its quotation, an agency may properly consider evidence of a vendor's past performance from sources that are not listed in the vendor's quotation. Environmental Tectonics Corp., *supra*, at 4. Thus, we see nothing objectionable in the agency's having obtained a reference from the Safety and Occupational Health Manager.

Lynwood also argues that it was contrary to the terms of the RFQ § 22, which instructed vendors "to provide three (3) references with information concerning projects completed within the last two years," for the agency to have considered projects completed more than 2 years ago in evaluating its past performance. In this regard, both of the CPS contracts for which the agency obtained references were completed more than 2 years prior to issuance of the RFQ here.

The RFQ did not limit the scope of the projects to be considered in evaluating a vendor's past performance; it provided simply for evaluation of the vendor's past performance. Although the RFQ requested references for projects completed within the last 2 years, it did not indicate that the evaluation of past performance would be based exclusively on such projects. See Young Enters., Inc., B-256851.2, Aug. 11, 1994, 94-2 CPD ¶159 at 5. Accordingly, we do not think that it was inconsistent with the terms of the solicitation for the agency to have considered projects completed more than 2 years previously in evaluating Lynwood's past performance. We also think that it is unreasonable for the protester to object to the agency's consideration of these contracts in its past performance evaluation, since the protester itself identified them on the list of references submitted with its quotation.

The protester also takes issue with certain of the references' criticisms of CPS's performance. Specifically, Lynwood denies that CPS failed to meet the daily production requirements under one of the contracts. The protester also disputes the statement by the Safety and Occupational Health Manager that CPS required

⁴ We also note that it does not appear that Lynwood was in fact prejudiced by the agency's failure to contact its commercial references. In this regard, the contracting officer states that even if she had obtained past performance surveys from one or more of Lynwood's commercial customers, her award decision would not have been affected because "[e]ven stellar performance on all of Lynwood's commercial contracts would not have eliminated the concerns [she] had over CPS's past performance and Lynwood's inexperience with hazardous material." Agency Report at 7.

constant reminders to follow regulations regarding personal protective equipment and respirators.

Notwithstanding the challenges to the validity of the reference-furnished information that Lynwood now raises, the protester has not alleged--nor is there anything in the record to suggest--that at the time the contracting officer made her award decision, she had any reason to question the accuracy of the information provided to her. Where an agency is not required to hold discussions or otherwise communicate with vendors regarding past performance information, as is the case where simplified acquisition procedures are employed, see FAR § 13.106-2(b)(2), and the contracting officer has no reason to question the validity of the past performance information, we think that he or she can reasonably rely on the information furnished without seeking to verify it or permitting the protester an opportunity to rebut it. See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5.

It also appears that the contracting officer would have reached the same conclusion regarding the superiority of SAF's quotation over Lynwood's even had she not taken the criticisms that the protester now disputes into consideration in evaluating Lynwood's past performance. In other words, it appears that Lynwood was not prejudiced by the contracting officer's consideration of the negative comments in question. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3, Statistica, Inc. v. Christopher, 102 F. 3d 1577 (Fed. Cir. 1996) (to prevail, protester must demonstrate a reasonable possibility that it was prejudiced by agency action). In this regard, the criticisms that the protester disputes were not the only significant negative comments made regarding CPS's past performance,⁵ whereas no significant negative comments were made about SAF's past performance. Accordingly, it appears to us that even if the contracting officer had not considered the negative comments with which Lynwood takes issue, she still would have concluded that SAF's past performance was sufficiently superior to Lynwood/CPS's to outweigh Lynwood's miniscule price advantage.

Next, Lynwood objects to the fact that this procurement was conducted using an RFQ, as opposed to an invitation for bids or a request for proposals. The protester contends that the use of RFQs enables DLA "to inappropriately award . . . contracts to its favorites, with minimal evaluation, explanation and documentation." Protester's Response to Agency Request for Dismissal, June 28, 2000, at 3.

⁵ For example, the protester does not dispute the reference's statement that under one contract CPS required constant oversight to ensure that the statement of work was being followed with regard to the placement of bands and bundles being square. Moreover, the protester concedes the correctness of the Safety and Occupational Health Manager's statement that on one occasion it was found to have an unauthorized worker in the work area.

We will not consider this argument because it was not raised in a timely manner. Our Bid Protest Regulations require that protests based upon alleged improprieties in an RFQ be filed prior to the date set for receipt of quotations. See 4 C.F.R. § 21.2(a)(1) (2000); Envirodyne Sys. Inc., B-279551, B-279551.2, June 29, 1998, 98-1 CPD ¶ 174 at 3. This means that to be timely, any objection to issuance of the solicitation as an RFQ had to have been raised prior to April 21. Since Lynwood instead waited until June 28 to raise the issue, its protest of the matter is untimely.

Finally, the protester complains that in performing the order, SAF has not been using the same workforce that it uses to provide the same services to the general public. According to Lynwood, use of the same workforce is required by paragraph (e) under the definition of “commercial item” set forth at FAR § 2.101. The agency responds that Lynwood’s argument is based on a definition which does not apply here, and that in fact the services sought under this RFQ meet the definition that does apply, set forth at paragraph (f) of the same FAR provision. We will not consider the protester’s complaint because it concerns a matter of contract administration over which we do not exercise jurisdiction. See 4 C.F.R. § 21.5(a). In any event, we note that, in contrast to the provision on which the agency relies (which defines what services generally are considered “commercial”), the provision on which Lynwood relies applies by its terms only to procurements of services provided in support of commercial items, such as installation, maintenance, repair, and training. It is not clear why Lynwood believes that definition would apply here, given that the services being procured do not constitute support services of the type listed in that provision.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel