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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: JCI Environmental Services

File: B-250752.3

Date: April 7, 1993

Victor A. Muñiz for the protester.
Lou Ann Keenan-Killane, Esq., Defense Logistics Agency, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency fulfilled its responsibility to conduct meaningful discussions concerning unreasonably low proposed price by advising protester that certain of its prices were significantly at variance with the agency's price analysis.

2. Where agency had recently obtained protester's response concerning termination for default in connection with the past performance evaluation on a similar procurement, protester was not prejudiced by agency's decision to consider that response rather than requesting a new response in evaluation of protester's past performance.

3. Agency properly awarded contract to higher priced offeror which had a better rated past performance record where the price/technical tradeoff was reasonably based and consistent with the solicitation's evaluation scheme.

DECISION

JCI Environmental Services protests the award of a contract to Laidlaw Environmental Services under request for proposals (RFP) No. DLA200-92-R-0080, issued by the Defense Logistics Agency (DLA), for the removal, transportation, and disposal of various hazardous wastes located at installations in and around the Defense Reutilization and Marketing Office (DRMO) at Alameda, California. JCI protests the agency's determination to award to an offeror who submitted a higher priced, higher rated proposal.

We deny the protest.

The RFP provided for award of a requirements contract covering removal, recycling, and disposal of 59 different line items of hazardous material and waste (estimated total of 6,450,714 pounds) from the DRMO and 23 surrounding locations. Offerors were required to submit a technical proposal to be evaluated for acceptability on the basis of the treatment, storage, and disposal facility plan, transporter matrix, safety procedures, and management plan. Award was to be made to the offeror whose proposal was technically acceptable and demonstrated the "best value" to the government in terms of price and past performance.

Under the evaluation scheme, price was most important with past performance, though significant, of somewhat less importance. Price was evaluated for reasonableness based on comparison with prices proposed by other offerors, past prices, and other relevant information. Offerors submitting line item prices that were extremely high or low compared with the government's analysis would be required to demonstrate that they understood the requirement, had valid business reasons for the price, and that the price was not a mistake. Further, price evaluation was to be based on an assessment of which offer presented the optimal combination of low price and price reasonableness.

With respect to past performance,[1] offerors were invited to submit an optional past performance proposal regarding the level of performance, in terms of delivery and quality achieved, under government or commercial awards for the same or similar services within the last 2 years. The RFP explained that the assessment of past performance would be used as a means of evaluating the relative capability of the offeror and other competitors. Thus, an offeror with an exceptional past performance record could receive a more favorable evaluation than one whose record was acceptable, even though both could have acceptable technical proposals. Among other things, offerors submitting past performance proposals were to address identified deficiencies and explain corrective action taken. Offerors were advised that

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[1]According to Section M of the RFP, past performance was defined as:

> "the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer."

the agency would consider information in the proposal as well as information obtained from other sources. Offerors assumed all risk associated with the failure to provide the past performance proposal and any explanation of performance deficiencies.

Seven offerors submitted proposals by the June 23, 1992, closing date. The evaluators found JCI's technical proposal acceptable as submitted. With regard to past performance, JCI did not submit a proposal, and the evaluators found JCI's only similar experience to be a DLA contract (DLA200-92-D-0078, hereinafter DLA-0078) for removal, transportation, and disposal of hazardous waste from installations in and around the DRMO in Colorado Springs, Colorado. Based on JCI's past performance on DLA-0078, which was terminated for default, the evaluators rated JCI's past performance as "marginally acceptable."

After the conduct of discussions, JCI, Laidlaw, and three other offerors submitted best and final offers (BAFOs) on August 28. JCI lowered its prices and, with a combined base and option year price of $2,804,982.50, was the low overall offeror. Laidlaw, with a combined price of $6,363,683 was the third low offeror. In determining which proposal presented the best value, the contracting officer considered the technical proposal, past performance, and price evaluations of all competitive range offerors. The contracting officer found that Laidlaw's proposal, with a past performance rating of "good" and a reasonable price, represented the best value in comparison to JCI's proposal with a performance rating of "marginally acceptable" and a price which was found unreasonably low. Since the contracting officer concluded that the difference in performance ratings could cost the government more than the difference in prices, DLA awarded Laidlaw the contract on September 29, 1992. After receiving notice of the award and a debriefing, JCI filed this protest.

JCI first contends that the agency failed to discuss with the protester its unreasonable prices and past performance. Generally, the requirement for discussions with offerors is satisfied by advising them of weaknesses, excesses, or deficiencies in their proposals and by affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation (FAR) §§ 15.610(c)(2) and (5); Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21. The degree of specificity required in conducting discussions is not constant and is primarily a matter for the procuring agency to determine. Saturn Constr. Co., Inc., B-236209, Nov. 16, 1989, 89-2 CPD ¶ 467. Our Office will not question an

agency's judgment in this area unless it lacks a reasonable basis. From our review of the record, we find no basis to sustain JCI's protest based on this issue.

With regard to JCI's unreasonable prices, the evaluators compared the line item prices proposed by JCI with those proposed by other offerors, with the incumbent contract prices, and with three recent, similar contracts. The evaluators found JCI's prices to be unreasonably low in 56 line items (28 each in the base and option years). Both prior to and with the request for BAFOs, the agency notified JCI that the 56 identified line item prices were significantly lower than the government's analysis of prices for the same line items. These notices provided JCI an opportunity to revise its pricing to demonstrate its understanding of the requirement; any valid business reasons for the prices; and the absence of any mistake. In its BAFO, JCI reduced its prices, and in its protest argues, without elaboration, that the prices are reasonable and valid. Under the circumstances, the price discussions were sufficient to lead JCI into this area and fulfilled the agency's obligation to provide meaningful discussions.

With regard to JCI's past performance, the evaluators found that JCI's only similar experience was DLA-0078, which was terminated for default in April 1992 (see below). The evaluators did not contact JCI concerning the default since JCI had recently addressed the matter in a June 15 discussions letter to the contracting officer in a pending, similar solicitation (DLA200-92-R-0039, hereinafter DLA-0039). Ordinarily, a contracting agency is not required to seek an offeror's comments concerning past performance information which, as here, involves matters of historical information, not subject to change. See Saturn Constr. Co., Inc., supra. JCI relies on the RFP's provision that offerors would be given an opportunity to address "especially unfavorable reports of past performance." Assuming that the default termination constituted such an "especially unfavorable report," as discussed below, we do not agree that JCI was prejudiced by the failure to seek JCI's comments. Competitive prejudice is an essential element of a viable protest; where no prejudice is shown or is otherwise evident, our Office will not sustain a protest, even if a deficiency, such as a lack of meaningful discussions, is evident. See MetaMetrics, Inc., B-248603.2, Oct. 30, 1992, 92-2 CPD ¶ 306.

In discussions concerning its proposal for DLA-0039, JCI was specifically asked for its "rationale as to why [the agency] should consider JCI for award" in view of the default termination of DLA-0078. In its response, submitted approximately 2 weeks before the closing date for this procurement, JCI stated that it considered the termination

to be an "arbitrary decision." JCI had appealed the termination and requested that its response in connection with DLA-0039 not be communicated to agency officials administering DLA-0078. JCI contended that the DLA-0078 solicitation statement of work was "misleading and deceptive" regarding the large amount of small items disposal and in the practice of combining numerous small quantity line items at one facility with a pick-up at another facility to meet the appropriate dollar threshold. JCI also noted that there were "extenuating circumstances and internal problems between the generators [of the waste] and [the agency] which JCI . . . [would] evidence at the appeal." While JCI outlined the differences between DLA-0039 and DLA-0078, it did not explain the circumstances surrounding the performance which formed the basis for the default termination. Taking this response into consideration, the agency found JCI's proposal technically acceptable, but with a marginally acceptable past performance rating.[2] JCI argues that it should have been advised of the agency's consideration of the default and, in response under this protest to the agency's listing of the default grounds, provides some rebuttal information. In view of JCI's response in discussions on DLA-0039, we do not believe the agency was unreasonable in concluding that JCI would not have provided a more detailed response if provided another opportunity in discussions under the instant RFP. Since the agency already had JCI's previous response for review and, as discussed below, JCI's rebuttal is unpersuasive, we find that JCI was not prejudiced.

JCI next contends that the award to Laidlaw was unreasonable because of the great price difference between the technically acceptable offers.[3] Since the relative merit

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[2]We do not agree with JCI that this evaluation represents an inconsistent finding. The issues of acceptability of the technical proposal and past performance are separate evaluations under the criteria in the RFP.

[3]JCI also complains that the agency erred by not using cost data to determine price reasonableness. We disagree. The RFP advised offerors that price reasonableness would be evaluated on the basis of comparisons with the offerors' proposed prices and past contract prices, among other things. Further, FAR § 15.804-3 provides that cost data is not required where prices are based on adequate price competition. Since there was adequate price competition here, we find no error in the agency's determination not to use cost data. JCI's additional complaint, that offerors could obtain prices of previous contracts under the Freedom

(continued...)

of competing proposals is primarily a matter of agency discretion, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Instrument Control Serv., Inc., B-247286, Apr. 30, 1992, 92-1 CPD ¶ 407. In a negotiated procurement, award may be made to a higher rated, higher priced offeror where the decision is consistent with the RFP's evaluation factors and the agency reasonably determines that the technical superiority of the higher cost offer outweighs the price difference. Id. Agency officials have broad discretion in making price/technical tradeoffs and the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44; CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454. In this case, the record supports the contracting officer's decision to award the contract to Laidlaw as the technically superior offeror, even though Laidlaw proposed a higher price than JCI.

In making the best value determination, the contracting officer considered the price and past performance evaluations for all acceptable offerors. Laidlaw's past performance was rated as "good" based on the offeror's performance meeting all specific requirements of its prior contracts. In this regard, the contracting officer noted that Laidlaw had performed dozens of DLA hazardous waste disposal contracts and was the incumbent on the Alameda contract.[4] He also noted that research revealed no violations of Environmental Protection Agency (EPA) regulations. JCI's past performance was rated as "marginally acceptable," based on its defaulted performance on DLA-0078, a contract less complex and involving less waste for disposal than the RFP at issue. He noted that before being terminated for default, JCI had violated various EPA regulations and that government hazardous waste

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[3](...continued)
of Information Act (FOIA) 5 U.S.C. § 552a (1988), provides no basis for complaint. Whatever information was available under the FOIA to JCI's competitors was available to the protester.

[4]JCI questions the agency's consideration of Laidlaw's incumbency in the evaluation. We find no error since an agency may properly consider the advantages offered by an incumbent contractor, and the agency need not equalize competition with respect to these advantages, where, as here, the advantages do not result from preferential or unfair government action. Bendix Field Eng'g Corp., B-241156, Jan. 16, 1991, 91-1 CPD ¶ 44.

had been returned from disposal facilities and other waste was unaccounted for. The contracting officer found that these violations exposed the government to many potential liabilities. He concluded that a potential risk for damage or harm to property and personnel would exist under any contract award to JCI.

We do not agree with JCI that the agency improperly based its past performance evaluation on the terminated contract.[5] According to the record, JCI was terminated for a number of reasons, including repeated late pickups (13 delivery orders); failure to correctly complete manifest and waste profiles; and the return of hazardous waste to the government. While JCI responded to these grounds in its comments to the agency report, its explanations are unpersuasive. For example, with regard to untimely removal, JCI argues that as to 7 of the 13 delivery orders, the agency "breached its contract" by sending the orders to an unauthorized address. JCI offers no explanation for the other six delivery orders, and the record establishes that the agency sent the delivery orders to the address provided by the JCI employee managing the contract. Based on our review of the various show cause notices and improperly completed manifests, we find the agency's determination of "marginally acceptable" past performance was reasonable and rationally based. The fact that JCI has appealed the default termination does not render the agency's consideration of the termination improper. See MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431.

With regard to price, the contracting officer agreed with the evaluators that JCI's prices were unreasonably low. On a majority of the line items, JCI's unit prices were significantly (95 percent) below the other offerors' prices. These low prices indicated a strong possibility of failure and unsatisfactory contract results, since there was doubt that JCI's prices represented actual costs. We also note that although JCI was advised of its significant variance from the government's analysis, its BAFO lowered its unit prices without any demonstration of valid business reasons

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[5]We also do not agree with JCI's contention that DLA-0078 contract and the instant procurement are not similar enough to be considered for past performance. Our review of the statements of work for both procurements discloses that, apart from the scope of the efforts (the instant procurement involves some 10 times the amount of hazardous waste), the procurements are sufficiently similar in requirements that the agency reasonably considered DLA-0078 in its past performance evaluation.

for the price or other information to indicate JCI's understanding of the requirement. The contracting officer found Laidlaw's prices reasonably based on the price analysis and merits of the proposal.

Although Laidlaw's price was third lowest, the contracting officer found that it represented the best value to the government. After determining that JCI's proposal offered the least value, considering its past performance and unreasonably low prices, the contracting officer compared Laidlaw with the second low offeror. While that offeror had prices 8 percent lower than Laidlaw's, its performance rating was only "acceptable" and was based on contracts less complex than the work at Alameda. In view of the second low offeror's rating, the contracting officer determined that award to other than Laidlaw could cost the government more than the price difference.

Given the documented superiority of Laidlaw's past performance and the risk associated with the protester's proposal, we have no basis to question the reasonableness of the contracting officer's determination that Laidlaw's proposal offered the best value to the government. CORVAC Inc., supra. While the price difference is great, we do not believe that alone is reason to question the determination. See Dynamics Research Corp., B-240809, Dec. 10, 1990, 90-2 CPD ¶ 471.[6]

JCI asserts that it is being discriminated against by DLA and, in this regard, that it was de facto debarred by the agency's use of JCI's past performance to eliminate it from consideration for award in this and other similar

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[6]JCI also contends that the agency has acted in a discriminatory manner by failing to establish any small disadvantaged business (SDB) goals or programs for this and other solicitations. More specifically, JCI argues that as an SDB, it should have been given a preference in the evaluation of its proposal. This aspect of JCI's protest is untimely. The RFP was plainly identified as unrestricted, with no SDB preference available. Protests of alleged solicitation improprieties must be raised prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992); Hersha Enters. Ltd., t/a Quality Inn-Riverfront, B-244863, July 25, 1991, 91-2 CPD ¶ 93. Here, JCI did not raise its protest until after award of the contract.

procurements.[7] We disagree. A contracting agency may not exclude a firm from contracting with it without following the procedures for suspension or debarment by making repeated determinations of nonresponsibility as part of a long-term disqualification effort. Bannum, Inc., B-249758, Nov. 24, 1992, 92-2 CPD ¶ 373. Here, the agency has not found JCI nonresponsible. Rather, in each solicitation under which JCI has submitted a proposal, it has been considered eligible for award. JCI has not been selected for award because it did not present the best value in part due to the agency's assessment of JCI's past performance. The agency's determinations were based upon technical evaluations, and not responsibility, and JCI's failure to receive the awards does not constitute de facto debarment. Id. While JCI cannot change its past performance, it can submit a past performance proposal to highlight its relevant experience and explain its prior unacceptable performance. Moreover, we find no evidence of bias or discrimination on this record. Where a protester alleges bias on the part of procurement officials, the protester must prove that the officials intended to harm the protester. Advanced Sys. Technology Inc.; Eng'g and Professional Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153. In the absence of such proof, contracting officials are presumed to act in good faith. Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.

The protest is denied.

James F. Hinchman
General Counsel

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[7]JCI also claims discrimination in the agency's decision to challenge JCI's small business size status under a similar solicitation, even after JCI "withdrew" its proposal. According to the agency, it filed the challenge after a preaward survey indicated that JCI was not small under the standard industrial classification (SIC) code specified in that solicitation. Since the size challenge was subject to the Small Business Administration's (SBA) authority to conclusively determine JCI's business size, it does not constitute a de facto debarment. See Pittman Mechanical Contractors, Inc., B-242499, May 6, 1991, 91-1 CPD ¶ 439. Likewise, we do not believe the agency's action constitutes discrimination. We note that the SBA has determined, and affirmed on appeal, that JCI was not small for purposes of the applicable SIC code. We further note that the same SIC code was specified in the instant RFP.