

Wolcott

149324



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

Decision

Matter of: Federal Environmental Services, Inc.

File: B-250135.4

Date: May 24, 1993

Lars E. Anderson, Esq., and J. Scott Hommer III, Esq., Venable, Baetjer and Howard, for the protester. Shawn Lavery DeJames, Esq., for Laidlaw Environmental Services (GS), Inc., an interested party. Matthew Pausch, Esq., Defense Logistics Agency, for the agency. Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In evaluating proposals for award of a contract for removal, transportation and disposal of multiple hazardous waste items, agency reasonably rated protester's past performance as "marginal" on the basis of the protester's multiple, documented deficiencies in performing two recently awarded similar contracts.
2. Agency reasonably did not consider the past performance of awardee's "sister" corporations in evaluating awardee's past performance where these entities were not privy to the proposal, the agency had never contracted with them, and other offerors' proposals were similarly evaluated.
3. Where solicitation contemplated removal, transportation and disposal of hazardous waste and provided that, in making the award determination, an offeror's past performance was the only factor that would be balanced against price, the agency reasonably determined that awardee's significantly superior past performance warranted payment of its higher price.

DECISION

Federal Environmental Services, Inc. (FESI) protests the award of a contract to Laidlaw Environmental Services (GS), Inc. (Laidlaw-GS) under request for proposal (RFP) No. DLA200-92-R-0040, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Service (DRMS), for removal, transportation, and disposal of hazardous

waste. FESI asserts that, in evaluating proposals, the agency failed to credit all of the positive factors associated with its proposal, failed to consider all of the negative factors associated with Laidlaw-GS's proposal, and failed to accord the stated evaluation factors their proper weight.

We deny the protest.

BACKGROUND

On March 27, 1992, the agency issued RFP No. DLA200-92-R-0040, for the removal, transportation and disposal of multiple hazardous waste items generated at various military facilities at or near Charleston, South Carolina. In conjunction with the removal, transportation and disposal of hazardous waste items, the solicitation required that the contractor prepare certain paperwork, including manifests and shipping labels, in accordance with regulations published by the Environmental Protection Agency (EPA) and Department of Transportation (DOT). See 40 C.F.R. Parts 260-281 (1992); 49 C.F.R. Parts 100-199 (1992).

Section M of the solicitation provided that proposals would first be evaluated to determine technical acceptability;¹ technically acceptable proposals were then to be evaluated on the basis of price and past performance, with price a "somewhat" more important factor than past performance. Award was to be made to the offeror whose proposal offered the "best value to the government in terms of price and past performance."

With regard to the evaluation of past performance, the solicitation stated:

"(3) Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances

"(5) By past performance, the government means 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

¹Section M.9 of the RFP provided that each offeror must submit a treatment, storage and disposal facility (TSDF) plan, a transporter matrix, and a management plan to be reviewed for technical acceptability.

reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer."

By the April 27 closing date, the agency received proposals from nine offerors, including FESI and Laidlaw-GS; both FESI's and Laidlaw-GS's proposals were found technically acceptable. The agency performed an initial past performance evaluation; both FESI's and Laidlaw-GS's proposals were rated "good."² Laidlaw-GS's rating was based on its past performance of numerous DRMS contracts. FESI's rating was based on data the agency had assembled a few weeks earlier to support award to FESI of two other DRMS contracts (Nos. DLA200-92-D-0016 and DLA200-92-D-0056, hereinafter "-0016" and "-0056"). In awarding the earlier contracts, DRMS' personnel had performed evaluations of FESI's past performance similar to the one performed under the protested solicitation; in those evaluations, FESI's past performance had been rated "good."

By memorandum dated May 26, the contracting officer determined that the proposals of seven of the nine offerors, including Laidlaw-GS and FESI, were in the competitive range; discussions were subsequently conducted with those offerors. On June 17, the agency requested that best and final offers (BAFOs) be submitted by July 2. Laidlaw-GS and FESI each timely submitted BAFOs consisting of only new price proposals. Laidlaw-GS's BAFO offered a price of approximately \$3.75 million; FESI's BAFO offered a price of approximately \$3.12 million.

During the first week of August, DRMS personnel conducted a post-award survey regarding FESI's performance of contract Nos. -0016 and -0056. DRMS' personnel discussed FESI's performance on those contracts with various agency contracting officer's representatives (CORs) and subsequently reviewed numerous collection summary reports (CSRs) regarding FESI's performance of those contracts. The DRMS personnel found multiple instances of deficient performance by FESI; among other things, FESI had failed to properly complete and timely submit manifests and shipping labels as required by the terms of the contracts and the applicable EPA and DOT regulations.

²In evaluating offerors' past performance, the evaluators assigned adjectival ratings of "superior," "good," "acceptable," "marginal," and "unacceptable."

For example, in CSRS regarding FESI's performance of those contracts on June 2, a COR rated FESI's performance of one of the contracts as "poor" stating:

"1. [FESI] did not provide manifests 48 hours prior to pick up, as required by [clause] C.15 of contract.

"4. [FESI] obviously did not know how to mark and label drums. I had to provide a great deal of technical assistance to accomplish this requirement, i.e. provide proper shipping names, write out abbreviations with correct technical names, and proper waste codes identified.

"5. [FESI] did not wear safety shoes.

"6. [FESI] had difficulty filling out manifests . . . note changes made. [FESI] was not familiar with proper numbering, or requirement to have applicable waste codes on manifests, or the requirement to have [the] contract number and delivery order number on each manifest. It was difficult, without this information provided to me, to relate the manifest description to the item on the correct delivery order."

Again, in a CSR regarding FESI's performance of one of the contracts dated June 4, a COR stated:

"[The FESI employee responsible for this contract] does not have the knowledge of DOT and RCRA required to do this job well. He did not understand why [certain material] did not need a [hazardous waste] label or [need to] be manifested as 'waste'. Then, after accepting my explanation, he did not know what to do in order to correct the manifest. I truly feel I am training them"

In a CSR on June 5, a COR stated:

"Once again, this contractor . . . does not have knowledge of proper manifesting, marking and labeling requirements."

In a CSR regarding FESI's performance from June 2 to June 12, on one of the contracts another COR stated:

"I have rated [FESI's] performance as poor for the following reasons:

"1. Before the first pickup, the manifests were not received in advance.

"2. Before the second pickup, the manifests were received but they were the wrong ones.

"3. The contractor scheduled trucks for the second pickup for June 8th. No show. (I called [FESI] to check on them, he then informed me that they would not be in until June 11. I received schedule time of 10:00 (first truck) and 11:00 (2nd truck)--they arrived at 3:00 and 3:30. Too late to be loaded that day. Had to stay over and load on the 12th.

"4. [FESI] was not familiar with what to fill out on the [form] 1155 or the manifest. (A portion of the manifest was filled in--computer generated.)

"5. [FESI] was not covering (DRMO) waste labels. [FESI] was attaching [its] labels along side of our labels.

"6. When overpacking a drum, [FESI] had only waste labels, was not aware that DOT labels were also required.

"7. [FESI] wanted to overpack two different proper shipping names together. One solid and one liquid.

"8. Emergency Response Guide No. was entered on the manifest in the proper shipping name line.

"9. Had a total of 3 manifests with 28 corrections.

"10. Contractor let the driver leave before he had signed [form] 1155. Was not aware that it had to be signed."

In a CSR date June 16, a COR stated:

"Once again it was a training day with [FESI]. The workers were not familiar with DOT regulations. I had to show 49 C.F.R. to them and refer to the proper shipping name for two items

. . . They did not have nonflammable gas label with them, which was required for item 63 on [delivery order] 01."

In a CSR dated June 25, a COR stated:

"Once again [FESI] is unprepared . . . The manifest paperwork was prepared poorly."

In a CSR regarding FESI's performance on June 30, a COR stated:

"[FESI] was short one manifest. 1 hour hold up."

In a CSR regarding FESI's performance on July 9, the COR stated:

"The 48 hour [manifest] information was not supplied . . . Contractor apologized and agreed to supply the information ahead of time in the future."

In a CSR regarding FESI's performance on July 15, the COR stated:

"According to the contract . . . copies of the manifest should be in hand 48 hours prior to removal date. The manifest[s] used were incorrect again"

On August 4, both the contracting officer for the protested solicitation³ and a COR telephoned the FESI representative responsible for FESI's performance of contract Nos. -0056 and -0016, calling his attention to the specific flaws in FESI's performance and seeking his responses regarding those deficiencies. By letters dated August 5, FESI separately responded to each telephone call, acknowledging the agency's "evaluation of [FESI's] contract performance to date," and stating that FESI was "adjusting [its] operating procedures to remedy any short comings as soon as possible." FESI further stated:

"We plan to institute refresher training sessions concentrating in the area of 'pre-pick-up' paper work. These training sessions will help speed up and improve the quality of manifests and shipping documentation. The sessions will stress the need for attention to detail when creating manifests and shipping documents. A concentrated effort

³The contracting officer for the protested solicitation was also the contracting officer for contract No. -0056.

will be made to provide the CORs with manifests and shipping documentation well in advance of anticipated pick-ups and before the 48 hour requirement."

On August 12, the contracting officer reassessed FESI's past performance under the protested solicitation, downgrading its rating from "good" to "acceptable." By memorandum to the source selection authority (SSA) dated August 21, the contracting officer recommended that the contract be awarded to Laidlaw-GS. In documenting the basis for this recommendation, the contracting officer referred to the additional administrative costs caused by FESI's deficient performance, noted that FESI's failure to provide manifests 48 hours prior to pickup thwarted the government's efforts to monitor waste removals, and expressed concern that FESI's improper completion of manifests and shipping labels had the potential to subject the agency to fines under the Resource Conservation and Recovery Act (RCRA).

Subsequently, the SSA reviewed the documentation provided by the contracting officer and made his own assessment of FESI's past performance. By memorandum dated August 26, the SSA downgraded FESI's past performance rating to "marginal," noting FESI's repeated failures to meet contractual and regulatory requirements regarding manifests and shipping labels. The SSA concluded that award to Laidlaw-GS was in the best interests of the government and a contract was awarded on August 27. This protest followed.

FESI'S PAST PERFORMANCE RATING

FESI first objects to the agency's rating of its past performance, arguing that the performance deficiencies that occurred under contract Nos. -0016 and -0056 were "minor start-up problems regarding paperwork" which should not have been considered significant enough to affect FESI's rating.

The record does not support FESI's view of its performance record. As discussed above, FESI's performance of contract Nos. -0056 and -0016 reflected multiple, documented deficiencies in completing the paperwork required by EPA and DOT regulations. The EPA has addressed the significance of such paperwork deficiencies in the context of RCRA,⁴

⁴The EPA Administrator is authorized to conduct proceedings to determine whether a party has violated, or is in violation of RCRA, and to issue an order assessing a civil penalty for such violations. 42 U.S.C. § 6928 (1988). With regard to penalties for violations, the statute states, "[a]ny penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation." Id.

describing the required documentation as "extremely important" since that documentation provides the basis for evaluating and containing a potential hazard in the event of a hazardous waste spill. See In re City Indus., Inc., RCRA 81-6-R-DES-C, Jan. 14, 1983 (LEXIS, Envirn. library, RCRA file). Specifically, the EPA stated:

"In response to the tragedies of Love Canal and other infamous sites discovered throughout the United States, Congress enacted what is known as 'RCRA' in an effort to prevent such occurrences from happening in the future. The foundation upon which RCRA is built is the manifest or tracking system, which essentially attempts to trace hazardous waste from their initial generation to their ultimate disposal

"[Here], [t]he manifests examined by the State inspector were found to be incomplete in several details. Although one might characterize this deficiency as merely a failure to perform some government-required paperwork, the manifest information is extremely important in that the information it provides is essential for emergency response personnel who may respond to a spill of hazardous waste while it is being transported. If the manifest is incomplete or not of sufficient detail, the response personnel may be unable to properly contain or evaluate the hazard associated with the spill thereby causing the potential for harm to persons, property and livestock living in the vicinity of the spill." Id.

In view of the clear significance of the documentation at issue, FESI's multiple failures to comply with the paperwork requirements of contract Nos. -0056 and -0016 provided a reasonable basis for DLA to downgrade FESI's past performance rating.

FESI also protests that the agency's evaluation of FESI's past performance was flawed because its "marginal" rating resulted from its initial performance of only two contracts; FESI complains that the agency's rating failed to reflect either FESI's subsequent, improved performance on contract Nos. -0056 and -0016 or its performance on other, earlier contracts.

The evaluation of technical proposals is primarily the responsibility of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any

difficulties resulting from a defective evaluation. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115. In reviewing protests challenging an agency's evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals; rather, 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. Honolulu Marine, Inc., B-245329, Dec. 27, 1991, 91-2 CPD ¶ 586; Research Analysis and Maintenance, Inc., B-239223, Aug. 10, 1990, 90-2 CPD ¶ 129; Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93. A protester's mere disagreement with the agency's evaluation does not render it unreasonable. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454; Chemical Waste Mgmt., Inc., B-232276, Dec. 13, 1988, 88-2 CPD ¶ 590.

At a hearing conducted in connection with this protest, the SSA testified that, while his "marginal" rating of FESI's past performance was based primarily on FESI's deficient performance of contract Nos. -0056 and -0016, he considered the entire record of FESI's past performance, which included all of the information on which FESI's past performance had been rated "good" for purposes of awarding contract Nos. -0056 and -0016. Transcript (Tr.) at 226-233. The SSA further noted that the level of complexity in terms of multiple waste streams of those two contracts was very similar to that contemplated by the provisions of the protested solicitation. Tr. at 239.

We find it reasonable for the agency to have downgraded FESI's past performance rating on the basis of FESI's recent, documented performance problems under contract Nos. -0056 and -0016. See G. Marine Diesel; Phillyship, 68 Comp. Gen. 577 (1989), 89-1 CPD ¶ 90; Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407 (agency reasonably considered recent, negative performance of similar contract to be most relevant in evaluating offeror's past performance.) FESI's problems in performing those contracts occurred just weeks before the agency made its source selection in the protested solicitation, and those contracts were very similar in terms of complexity to the contract contemplated under the protested solicitation. Accordingly, we have no basis to question the agency's "marginal" past performance rating of FESI.

FESI next protests that the agency failed to give it an adequate opportunity to respond to the factors leading to its "marginal" past performance rating. Section M.10 of the solicitation provided that, "offerors will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response--or lack thereof--will be taken into consideration."

The agency responds that both the contracting officer and the COR advised FESI of its performance deficiencies on contract Nos. -0056 and -0016 during the phone calls made on August 4, and that FESI responded to these calls by letters dated August 5 in which it acknowledged the agency's negative evaluation of its performance and stated that steps were being taken to remedy the deficiencies. Accordingly, the agency maintains that FESI was afforded an opportunity to respond to the negative reports regarding its performance of contract Nos. -0056 and -0016, and the agency considered FESI's responses in the source selection process.

FESI asserts that it did not understand that its responses to the phone calls on August 4 would be considered in the agency's evaluation under the protested procurement. FESI maintains that the solicitation required the contracting officer to specifically advise FESI that it was being given an opportunity to respond to negative past performance reports in the context of the protested solicitation and advise FESI that its response would be considered in the evaluation of its proposal pursuant to that solicitation.

We do not find credible FESI's assertions that it was unaware that its responses to the August 4 telephone calls would be considered in evaluating its proposal under the protested solicitation.³ Further, we do not agree that, under the terms of this solicitation, the agency was obligated to specifically advise FESI that its responses regarding the problems discussed on August 4 would be considered in evaluating its proposal under the protested solicitation. Finally, FESI still has offered no additional explanation of its performance problems that would render the agency's assessment of its past performance unreasonable. Accordingly, we find no merit to this aspect of FESI's protest.

³At the hearing, the contracting officer testified that he referenced the protested solicitation during his August 4 telephone call to FESI; FESI submitted an affidavit contradicting that testimony. Even if we accepted FESI's representations that the protested solicitation was not referenced during the phone call, we find it implausible that the FESI representative called by the agency (whom FESI had specifically designated, in writing, as authorized to represent FESI in the protested procurement) would fail to understand that past performance problems brought to his attention by the contracting officer for the protested solicitation (who was also the contracting officer on one of the earlier contracts) would not be considered in the evaluation of the proposal that FESI had recently submitted.

LAIDLAW-GS'S PAST PERFORMANCE RATING

FESI also complains that it was unreasonable for the agency to give Laidlaw-GS a "good" past performance rating. In its post-hearing comments, FESI, for the first time, submitted documents obtained from the EPA under a Freedom of Information Act (FOIA) request which, according to FESI, demonstrated that Laidlaw-GS had been found to have violated RCRA during the 2-year period preceding the agency's source selection. Upon receiving FESI's documents and allegation, we sought responses regarding this matter from Laidlaw-GS and the agency.⁶

In responding to FESI's post-hearing comments, Laidlaw-GS submitted documentation demonstrating that the documents which FESI obtained from EPA referred to actions of two "sister" corporations of Laidlaw-GS, not to Laidlaw-GS. Specifically, counsel for Laidlaw-GS demonstrated that FESI's documents concerned the actions of Laidlaw Environmental Services (North East), Inc. (Laidlaw-NE), a New Hampshire corporation, and Laidlaw Environmental Services (TOC), Inc (Laidlaw-TOC), a South Carolina corporation, two corporations which are wholly owned subsidiaries of Laidlaw Environmental Services, Inc. (LESI), which also owns the awardee, Laidlaw-GS, a Tennessee corporation. Counsel for Laidlaw-GS states that there are at least 25 other wholly owned subsidiaries of LESI.

In responding to FESI's post-hearing comments, the agency states that it did not review the past performance history of any of Laidlaw-GS's "sister" corporations and, accordingly, it was not aware of the information that FESI presented in its post-hearing comments. The agency asserts that it was not unreasonable for it to be unaware of Laidlaw-NE's and Laidlaw-TOC's performance histories since DRMS has never contracted with either corporation.

⁶FESI did not file its FOIA request until after it was notified that this Office intended to conduct a hearing in this protest. The agency asserts that we should dismiss as untimely any arguments flowing from FESI's belated FOIA request. See, e.g., J&J Maintenance, Inc., B-223355.2, Aug. 24, 1987, 87-2 CPD ¶ 197 (protest untimely where protester waited more than 7 weeks to pursue basis of protest through FOIA request). However, prior to filing its FOIA request, FESI timely challenged the propriety of Laidlaw-GS's past performance rating. Since the documents obtained through the FOIA request purported to provide additional information regarding that issue, which FESI had timely raised, we decline to dismiss this portion of its protest.

As noted above, the contracting agency is responsible for defining its needs and evaluating proposals to determine the proposal that is most likely to meet those needs. Litton Sys., Inc., supra. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. See, e.g., George A. and Peter A. Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286. Here, we find it reasonable for the agency to have limited the scope of its review of offerors' past performance to that of the entities submitting proposals; the record shows that all offerors were treated equally in this regard.

FESI also identifies certain comments in the CSR's reviewed by the agency in evaluating Laidlaw-GS's past performance, which FESI asserts reflect performance problems that should have precluded a "good" past performance rating for Laidlaw-GS.⁷

At the hearing, the contracting officer and the SSA addressed the various CSRs which FESI asserted should have provided the basis for rating Laidlaw-GS's past performance lower than "good." The contracting officer and SSA each explained that, in their judgment, the comments associated with Laidlaw-GS's past performance did not reflect performance problems that were as significant as those of FESI. For example, regarding Laidlaw-GS's questioning of waste identification codes, the contracting officer and SSA stated that the waste generators often, in fact, assigned improper waste codes and that Laidlaw-GS's own, aggressive review of those codes often led to correction of improperly assigned codes.

The solicitation specifically provided that the agency's evaluation of offerors' past performance would be "a subjective assessment based on a consideration of all relevant facts and circumstances." Based on our review of the evaluation record and the testimony of the agency personnel regarding the significance of criticisms of Laidlaw-GS's performance, we find no basis to question the agency's past performance evaluation of Laidlaw-GS.

⁷A few CSR's regarding Laidlaw-GS's past performance indicated that Laidlaw-GS questioned whether the waste code designations, identified by the waste generator, were proper. Another CSR stated that Laidlaw-GS was uncooperative.


THE AGENCY'S PRICE/PAST PERFORMANCE TRADEOFF

Finally, FESI protests that, even if the agency's past performance evaluations were proper, the agency's tradeoff of price and past performance factors was unreasonable. FESI maintains that, since the solicitation provided that price was more important than past performance, and FESI's proposed price was approximately 20 percent lower than that of Laidlaw-GS, the agency was obligated to award the contract to FESI.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Here, the RFP did not provide for award on the basis of the lowest priced technically acceptable proposal but, rather, stated that the award would be made to the offeror whose proposal represented the "best value" to the government; accordingly, the contracting officer had discretion to determine whether the advantage associated with Laidlaw-GS's higher-rated proposal was worth the higher price. Such tradeoffs are subject only to the test of rationality and consistency with the established evaluation factors. Frequency Eng'g Laboratories Corp., B-225606, Apr. 9, 1987, 87-1 CPD ¶ 392.

The solicitation at issue provided that price and past performance were the only factors to be balanced and stated that price was "somewhat" more important than past performance. As discussed above, the agency reasonably concluded that Laidlaw-GS's past performance was significantly superior to that of FESI. Here, where the RFP contemplates removal, transportation and disposal of hazardous waste, and a contractor's failure to properly perform the contract may create serious risks to life and property, it was not irrational or inconsistent with the RFP's evaluation scheme for the SSA to conclude that FESI's lower price did not offset the advantage associated with Laidlaw-GS's significantly superior past performance rating.

The protest is denied.


for James F. Hinchman
General Counsel