



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

Decision

Matter of: Federal Environmental Services, Inc.
File: B-260289; B-260490
Date: May 24, 1995

Karen S. Byers, Esq., for the protester.
James R. McKoon, Esq., and Stephen G. Anderson, Esq., Baker, Donelson, Bearman & Caldwell, for Tri-State Government Services, Inc., an interested party.
Matthew Pausch, Esq., Defense Logistics Agency, for the agency.
Daniel I. Gordon, 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 contracts for removal and disposal of hazardous waste, agency reasonably rated protester's past performance as "marginal" on the basis of significant deficiencies in performance by the protester and its subcontractor.
2. Award determinations under two solicitations that identified only past performance and price as the criteria for source selection are unobjectionable where supported by reasoned analysis finding that, in each instance, awardee's superior past performance warranted payment of its higher price.

DECISION

Federal Environmental Services, Inc. (FESI) protests the award of one contract to Tri-State Government Services, Inc. under request for proposals (RFP) No. SP4400-94-R-0066 and another contract to ENSCO, Inc. under RFP No. SP4400-94-R-0069, both issued by the Defense Logistics Agency, Defense Reutilization and Marketing Service (DRMS), for the removal and disposal of hazardous waste. FESI contends that the agency evaluated FESI's and the awardees' past performance improperly and selected the awardees' higher-priced proposals for award by according past performance more weight than permitted under either RFP.

We deny the protests.

The agency issued the RFPs for award of a fixed-price requirements contract for an 18-month base period with options. In conjunction with the removal, transportation, and disposal of hazardous waste, the RFPs required that the contractor prepare certain paperwork, including manifests and shipping labels, in accordance with regulations published by the Environmental Protection Agency (EPA) and the Department of Transportation.

Section L of both RFPs required the offerors to provide detailed information about performance within the preceding 2 years under government and commercial contracts for services similar to those covered by the current procurements. The information was to reflect the offeror's conformance to specifications, adherence to contract schedules, reputation for reasonable and cooperative behavior, and commitment to customer satisfaction. If performance deficiencies were identified, the offeror was to describe them and relate corrective actions taken.

Section M of the RFPs stated that past performance would be evaluated to assess the capability of the offeror relative to the competitors. In this context, the RFPs advised that the agency would consider "an offeror's performance on the same or similar contracts in terms of waste quantities, variety of pick-up locations and waste streams, and disposal time frames." The solicitations explained that, although the evaluation would be based on "a consideration of all relevant facts and circumstances," it would not be scored and would be a "subjective assessment" rather than a comparison with "absolute standards of acceptable performance." The RFPs advised that, in evaluating past performance, the agency would not limit itself to the information in the offeror's proposal; instead, the agency would consider information obtained from past and present customers and their employees, other government agencies, former subcontractors, and others who may have useful information.

Also, section M of both RFPs stated that price and past performance were the only two evaluation factors. For the RFP under which award was made to Tri-State, "[p]ast performance, though significant, is a somewhat lesser factor of importance." For the other RFP, price and past performance were equally important.

After evaluation of initial proposals, discussions, and evaluation of best and final offers (BAFO), the agency rated FESI's past performance "marginal," while Tri-State's was rated "good" and ENSCO's was rated "acceptable." Under each RFP, there was a significant price difference between the

protester's and the awardees' prices. For the RFP under which Tri-State was selected, FESI's BAFO price of \$3,317,000 was the lowest among the six offerors, while Tri-State's was next low at \$4,312,000. For the other RFP, FESI's price of \$5,603,000 was the lowest of the eight BAFOs submitted, while ENSCO's price of \$6,470,000 was next low.

In each procurement, the contracting officer found that the second low-priced offeror's higher past performance rating justified paying the difference between its price and that of FESI. The source selection authority (SSA) reviewed the file and concurred with the contracting officer's finding in both instances. He specifically found that Tri-State's "good" past performance rating and ENSCO's "acceptable" rating merited paying the price premium represented by those firms' higher prices relative to FESI's prices. Accordingly, the agency awarded contracts to Tri-State and ENSCO. These protests followed.

FESI challenges the reasonableness of the ratings assigned to its own and the awardees' past performance. It also contends that, in the tradeoff between superior past performance and lower price, the agency gave more weight to past performance than was permitted under either RFP's evaluation criteria.

The evaluation of technical proposals, including the evaluation of past performance, 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 solicitation's evaluation criteria and applicable statutes and regulations. Honolulu Marine, Inc., B-245329, Dec. 27, 1991, 91-2 CPD ¶ 586. 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.

Here, FESI contends that the performance record did not justify the significant difference in rating assigned to it and the awardees. Although the protester raises numerous specific challenges to its "marginal" rating, the parties agree that one dispute involving a subcontractor of FESI performing under another DRMS contract was central to the agency's rating, and we therefore focus our discussion on that dispute.

Before turning to that matter, however, we note that a prior protest before our Office confirmed the reasonableness of some of the same critical comments by the agency on FESI's past performance which were considered in these procurements. Federal Env'tl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398. In that decision, we found that the agency had reasonably evaluated FESI's past performance as "marginal" due to repeated failures to meet contractual and regulatory requirements regarding manifests and shipping labels. Our review of the record confirmed that under two major contracts with DRMS, FESI was responsible for multiple, documented deficiencies in completing the paperwork required by regulation.

In the dispute that was cited by the agency as the primary basis for the marginal rating assigned to FESI in the procurements at issue in these protests, the agency contends that FESI improperly sent hazardous waste to its subcontractor, which then disposed of the waste improperly. As a result of those actions, the agency believes that it is highly probable that EPA will find DRMS responsible for the acts of FESI and the subcontractor and therefore liable for substantial costs. In the agency's view, FESI violated the terms and conditions of its DRMS contract when it shipped hazardous waste to the subcontractor and did not adequately oversee the subcontractor's performance.

FESI does not dispute the gravity of the subcontractor's allegedly fraudulent certifications and mishandling of the material at the site in question, and it does not deny that the subcontractor's actions could result in a finding of liability. The protester argues, however, that the material was not actually hazardous waste and that FESI did nothing wrong. While conceding that it, not DRMS, is responsible for overseeing its subcontractor, FESI contends that it did everything it could to control its subcontractor, who had been approved by the agency. In FESI's view, "such actions by less than honorable contractors in this regulated business [are] difficult, if not impossible to prevent." FESI also questions the probability of a finding of DRMS liability by EPA (although it concedes that EPA is currently in the process of investigating the matter), and contends that DRMS could be reimbursed by FESI for any liability.

It is not within the scope of the bid protest jurisdiction of our Office to determine whether particular materials constitute hazardous waste under environmental statutes and regulations, and we need not reach such a determination to resolve this protest. Regardless of whether the materials that FESI shipped did not constitute hazardous waste and the only improper actions were committed by the subcontractor (as FESI contends), or the materials were hazardous waste and improper actions were committed by FESI directly as well

as by the subcontractor (as the agency found), and notwithstanding FESI's doubt that DRMS will ultimately be liable for significant costs as a result of the actions, DRMS could reasonably conclude that the actions established that there were problems with FESI's performance. A prime contractor is responsible for the performance of its subcontractors. See Integrated Waste Special Servs., B-257057, Aug. 25, 1994, 94-2 CPD ¶ 80. In view of the seriousness of the subcontractor's misconduct here--a fact not in dispute--the agency had a reasonable basis to conclude that FESI had not properly monitored and supervised its subcontractor. Under the circumstances, DRMS reasonably determined that FESI's past performance was marginal.

In light of this finding, the other contentions raised by FESI are essentially academic. For example, while FESI alleges that the agency failed to raise during discussions its concern about FESI's performance under other contracts, it concedes that the agency did discuss the problems with the particular subcontractor referenced above. Since those problems were the ones critical to the agency's evaluation, the failure to discuss the less important performance issues had no impact on the reasonableness of the overall marginal rating.

While the protester alleges that the agency overstated the size or currency of several of Tri-State's prior contracts, any such overstatement was of no consequence in relation to the overall past performance evaluation. Equally minor, in the context of the overall evaluation, was any difference between the performance reports which were considered by the agency during the evaluation and those which were not.¹ While the protester argues that those considered included a disproportionate share of negative reports, our review indicates that consideration of all the performance reports would not have required the agency to change its ratings.²

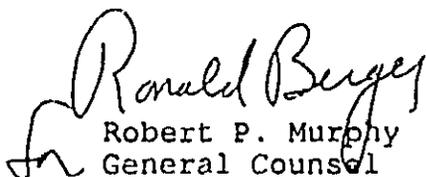
¹The agency obtained, and then relied on, only some of the potentially available performance reports. During the course of these protests, our Office requested that DRMS obtain and produce all performance reports, including the ones not considered during the evaluation.

²We also need not address FESI's complaints about the allegedly unequal treatment of the protester's and Tri-State's subcontractor's experience, since FESI cannot establish that Tri-State's subcontractor's performance was as egregious, particularly in terms of potential impact on DRMS, as the action by FESI's subcontractor referred to above. Similarly, the fact that the awardees may have had performance problems did not render their higher performance
(continued...)

Notwithstanding FESI's argument about the many positive comments in the performance reports (whether or not actually considered by the agency in the evaluation), raw numbers could not establish that the "marginal" rating assigned to FESI was unreasonable.³ Significant problems can reasonably lead to an overall negative evaluation, even if, in absolute terms, there are far more positive than negative reports. This is especially true here, where even a small number of improper actions could cause substantial environmental pollution and endanger people's health and safety.

Finally, FESI protests the agency's price/past performance tradeoff and argues that the difference in performance ratings could not justify the selection of a proposal at a significantly higher cost than FESI's. As noted above, under one RFP price and past performance were equally important in the source selection; in the other, price was somewhat more important. In both cases, FESI's allegation is largely predicated on its argument, which we have found without merit, that the past performance evaluations were improper. In view of the reasonableness of those evaluations, it was neither inconsistent with the evaluation criteria nor otherwise unreasonable for the agency to conclude that FESI's lower price did not offset the advantage associated with the awardees' higher past performance ratings. See Federal Env'tl. Servs., Inc., supra.

The protests are denied.


Robert P. Murphy
General Counsel

²(...continued)

rating unreasonable. Finally, FESI's complaint that the agency did not have an adequately structured plan for reviewing and evaluating past performance does not suggest prejudice, even if we assume, arguendo, that the complaint is justified, since the actual performance ratings were reasonable.

³FESI also focuses on its having eventually resolved most, and perhaps all, of the problems to the satisfaction of the agency. We agree with DRMS that FESI's solving the problems after they arose did not preclude the agency from being concerned that the problems arose in the first place.