



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Short & Associates

File: B-406799; B-406799.4

Date: August 31, 2012

Robert J. Symon, Esq., and Lewis P. Rhodes, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Douglas W. Desmarais, Esq., and Kerstin M. Miller, Esq., Smith & Downey, P.A., for Syneren Technologies Corporation, an intervenor.

Richard S. Brown, Esq., Mark Langstein, Esq., Florence N. Bridges, Esq., and Erin Frazee, Esq., Department of Commerce, National Oceanic and Atmospheric Administration, for the agency.

Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's use of price evaluation formula, which assigned different weights to labor rates based on historical usage of labor categories, was consistent with terms of the solicitation which provided that price would be evaluated by applying estimated quantities of use to offerors' proposed labor rates.
 2. Protest of past performance evaluation is denied where record shows evaluation was reasonable and consistent with solicitation terms.
-

DECISION

Short & Associates protests the award of contracts to Innovim LLC and Syneren Technologies Corporation under request for proposals (RFP) No. DG133W-11-RP-0126 issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) for technical support services. The protester contends that the agency's price evaluation was inconsistent with the terms of the solicitation, and challenges the reasonableness of the agency's evaluation of its past performance.

We deny the protest.

The RFP, issued on August 24, 2011, requested proposals for the award of multiple indefinite-delivery, indefinite-quantity contracts for engineering, scientific, financial and administrative technical support services for the operational offices of the National Weather Service; the RFP contemplated the issuance of task orders, valued at up to \$140 million over the 5-year contract term, on a fixed-price or time-and-materials/labor hour basis. RFP at 52-69, 87 and 95. The awards were to be made to those offerors found to have submitted the proposals that offered the best value to the agency considering non-price (technical approach and past performance) and price factors. Id. at 98. The technical approach factor was slightly more important than past performance; combined, the two non-price factors were approximately equal to price. Id. Offerors were informed that the more equal proposals were under the non-price factors, the more important price would become to the award determination. Id. The RFP advised that the agency did not anticipate holding discussions and offerors were to provide their best technical and price terms in their initial proposal. Id. at 90.

As it relates to the protest, under the past performance factor, the RFP established that the agency would assess performance risk, considering relevant work performed within the past 3 years by each offeror, its key personnel and subcontractors. The agency would assess successful performance of contract requirements, quality and timeliness of delivery, effective management of subcontractors, cost management, level of communication between the contracting parties, proactive management and customer satisfaction. Id. at 99-100.

With regard to price, offerors were required to provide fully burdened (1-hour) labor rates, for all 5 years of the contract, for 169 labor categories. The RFP advised that price would be evaluated by applying “estimated quantities of use” to offerors’ proposed labor rates. Id. at 5, 98. The RFP also indicated that the agency would evaluate proposed prices to confirm that they were realistic, complete and reasonable. Id. at 100.

The agency received 19 proposals in response to the RFP. One was rejected as incomplete, and the remaining 18 proposals were evaluated. Short & Associates’ proposal was rated excellent under the technical approach factor, as were Innovim’s and Syneren’s proposals. The protester’s proposal was rated satisfactory for past performance; Innovim’s was rated excellent and Syneren’s was rated satisfactory.

The agency calculated an evaluated price for each offeror using a weighting formula based on historical data reflecting prior use of the 169 labor categories for similar work. Contracting Officer’s (CO) Statement, at 5. Specifically, the agency calculated a total labor weighted value (TLWV) per labor category as follows: rates for labor categories expected to be used more than 90 percent of the time for performance (based on historical usage) were multiplied by a factor of 9, rates for labor categories expected to be used 70-90 percent of the time were multiplied by a factor of 6, rates for labor categories expected to be used 50-70 percent of the time

were multiplied by a factor of 3, and rates for labor categories expected to be used less than 50 percent of the time were multiplied by a factor of 1. The TLWVs for all 169 labor categories were added to determine each offeror's evaluated price for the 5-year contract period. Based on this methodology, Innovim's evaluated price was \$169,314; Syneren's was \$177,344, and the protester's was \$179,494.

After completing the evaluation, the source selection evaluation board (SSEB) ranked offerors from one to eighteen (the protester was ranked fourth), and ultimately recommended awards to the top two firms (Innovim and Syneren). The source selection official (SSO) adopted these recommendations, having determined that the price premium associated with the protester's higher-priced proposal (similarly rated to the Syneren proposal and lower-rated to the Innovim proposal) did not offer any additional capability or value not already provided by the two lower-priced proposals. Awards were made to these firms on May 16. After receiving a debriefing, the protester filed this protest.

Short & Associates first challenges the methodology used by the agency to evaluate the price proposals. Noting that the solicitation required the agency to apply "estimated quantities of use" when evaluating pricing, the protester contends that the weighting formula used by the agency was improper because it is not based on a quantity estimate for the labor categories. The protester further argues that grouping many labor categories together, such as for those for which the agency assigned no additional weight (*i.e.*, anticipated to be used less than 50 percent of the time), was meaningless as it, according to the protester, inadequately distinguishes the labor categories within the grouping. In this regard, the protester asserts that there may be some actual variance in the historical levels of usage of some of the labor categories included in the group that could possibly affect the accuracy of the evaluated price calculations. To be reasonable, the protester suggests that the agency needed to apply its historical data of the specific hours worked by personnel for each of the 169 labor categories to the rates proposed for each category.

As an initial matter, we disagree with the protester's contention that the agency's weighting formula used by the agency was inconsistent with the RFP's general, and unchallenged, provision that estimated quantities of use would be applied to labor-hour rates. As explained by the agency, the weights assigned for each group of labor categories were derived from historical data as to the quantity of labor hours previously used, per labor category, to perform similar work--as such, the weighting formula is, essentially, a quantity estimate formula. See RMS Info. Sys., Inc., B-280521.3, Oct. 21, 1998, 98-2 CPD ¶ 113 at 7. Moreover, the protester's suggestion that the weighting formula did not adequately take into account the estimated usage of the labor categories provides no basis to sustain the protest. Using historical data, the agency grouped labor categories by estimated usage, and in so doing, reasonably distinguished labor categories for the price evaluation. The protester has not provided any evidence to show that the agency's methodology

was inaccurate, or that more exact historical values, as it contends, were required to reasonably evaluate the offerors' prices.

Next, the protester challenges the agency's evaluation of its past performance as satisfactory, contending that its past performance references' favorable comments instead deserve a rating of excellent. The evaluation of an offeror's past performance is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria. Concepts & Strategies, Inc., B-405930, Jan. 12, 2012, 2012 CPD ¶ 47 at 7. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's mere disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. FN Mfg., LLC, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7. Our review of the record provides no basis to question the reasonableness of the satisfactory past performance rating assigned to the protester's proposal.

As indicated above, the RFP set out several criteria to be considered in the past performance evaluation, including the contractor's and subcontractors' record of performance of contract requirements, quality and timeliness of deliveries, effective management of costs, and customer satisfaction.¹

The record reflects that the agency received several past performance reports for the protester and its subcontractors, providing favorable general comments

¹ While the solicitation did not specify the use of a particular adjectival rating scheme for the evaluation of past performance, the record reflects that the evaluators based their evaluations on definitions set forth in a source selection plan (SSP). See CO Statement at 4. The SSP defined the relevant past performance evaluation ratings as follows:

Excellent: Offeror's performance met contractual requirements and exceeded many to the customer's benefit. Performance was accomplished with no to a few minor problems for which any required corrective actions taken were highly effective. Past performance indicates a very low risk of successful performance to the Government.

Satisfactory: Offeror's performance met contractual requirements. Performance was accomplished with some minor problems for which any required corrective actions taken were satisfactory. Past performance indicates a moderate to low risk of successful performance to the Government.

SSP at 20.

(regarding, for instance, the protester's excellent performance of contract work, personnel's understanding of agency missions, good quality products, cost controls, and on-schedule performance, for which the firm was rated highly in terms of customer satisfaction). In assigning the protester a satisfactory past performance rating, the agency assessed these comments as indicating that the firm met contract requirements well, but noted that no reference identified specific instances of the firm exceeding contractual requirements.

The agency also reports, and our review of the record confirms, that some of the positive past performance references also included some less favorable comments. Specifically, a reference noted that the protester was "[u]sually on schedule" indicating that there were "[a] few glitches," while also indicating that the protester was quick to get back on schedule. Agency Report, Exh. 13, Past Performance Evaluation Report, Tab B, References for Short & Associates at 8. Another reference noted the firm's use of "[r]ather antiquated techniques" in a program review. Id. at 6. Two other past performance reports for the firm included ratings of satisfactory. Id. at 1, 4.

Additionally, while the protester's subcontractors' references generally reflected positive ratings (e.g., noting that they followed industry best practices, met user needs, and made timely deliveries within budget), no specific mention was made of those firms having exceeded contract requirements, and a reference for one of the protester's subcontractors raised concerns regarding cost control. Specifically, the reference stated that the subcontractor's accounting was "not clean," that "the accounting people were not so good" and, as to overall satisfaction, the reference indicated that it "[m]ight use [the subcontractor] again but advised to keep control of numbers and watch the management." Id. at 16.

While the protester expresses disagreement with the satisfactory rating it received for past performance, we have no basis to find the agency's evaluation unreasonable.²

The protest is denied.

Lynn H. Gibson
General Counsel

² The protester filed a supplemental protest arguing that the agency should have made three awards. We dismiss the protester's allegation in this regard since the protester, ranked fourth in line for award, was not prejudiced by the agency's decision in this regard. Moreover, the record reflects that the agency exercised its sound business judgment in determining that two, rather than three, awards should be made, and this judgment was consistent with the terms of the solicitation which indicated that the agency intended to make multiple awards, but did not require a minimum number of awards. See Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 (dismissing protest challenging number of awards made by agency). The protester also argued that all proposals should have been reevaluated for performance risk where the record indicated that the SSEB had reconsidered performance risk of the third-ranked offeror when recommending awards to only the top two firms. Because the protester has not explained how the agency's consideration of risk associated with the third-ranked offeror bears on the evaluation of any other offeror, to include the protester, we find this allegation to be without merit.