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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Veterans Elite, Inc.

File: B-409233

Date: February 10, 2014

Robert J. Symon, Esq., and Aron C. Beezley, Esq., Bradley Arant Boult Cummings LLP, for the protester.

W. Michael Rose, Esq., Department of the Air Force, for the agency.

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DIGEST

1. Agency reasonably assigned protester a past performance rating of satisfactory confidence where past performance questionnaires completed by protester's references rated protester's performance as satisfactory.
 2. In solicitation providing for comparative evaluation of proposals under past performance and price factors only, contracting officer's selection of higher-priced proposals with higher past performance ratings for award reflects her reasonable conclusion that higher performance confidence is worth a price premium.
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DECISION

Veterans Elite, Inc. (VEI), of Brick, New Jersey, protests the award of contracts to Mellor Contracting (Mellor), of Manasquan, New Jersey; American Commercial Group (ACG), of Bethesda, Maryland; and M.E.R.I.T. Investigative Services, Inc. (MERIT), of Newark, New Jersey, under request for proposals (RFP) No. FA4484-13-R-0013, issued by the Department of the Air Force for mechanical work at Joint Base McGuire-Dix-Lakehurst, New Jersey. The protester argues that the agency improperly evaluated its past performance and the best value decision was flawed.

We deny the protest.

BACKGROUND

The RFP, which was issued on June 21, 2013, contemplated the award of three indefinite-delivery/indefinite-quantity (IDIQ) task order contracts for inspection,

testing, construction, maintenance, and repair of heating, ventilation, air conditioning, and refrigeration equipment, systems and subsystems at Joint Base McGuire-Dix-Lakehurst.¹ RFP at 1, 50. The contracts were to cover a base period of one year, with four 1-year option periods. Id. at 1. The solicitation described a seed project, to be awarded to the best value offeror, with subsequent task orders to be competed among the awarded contractors. Id.

The RFP advised offerors that by submitting an offer, they were “acced[ing] to all solicitation requirements, including terms and conditions, representations and certifications, and technical requirements;” thus, proposals were to be comparatively evaluated with regard to past performance and price only. Id. at 45. The solicitation provided that past performance would be more important than price in the evaluation; it also provided that the price evaluation would be based on offerors’ prices for the seed project. Id.; RFP, amend. No. 0002, at 1. For purposes of evaluation under the past performance factor, offerors were to provide a list of no more than five relevant contracts performed for federal agencies and commercial customers within the past three years. RFP at 42.

The RFP explained that the agency would begin its evaluation by ranking the proposals based on price. Id. at 45. The contracting officer would then seek relevant past performance information regarding the lowest-priced offerors and use this information to assign performance confidence assessment ratings of substantial, satisfactory, limited, no, or unknown confidence. Id. The solicitation advised that in the event the lowest-priced offer was judged to have a substantial confidence performance assessment, that offer would be considered to represent the best value to the government, and the evaluation process would stop. The RFP further advised that if the lowest-priced offer was judged to have a performance confidence assessment of satisfactory confidence or lower, the government reserved the right to award to other than the lowest-priced offeror and would make an “integrated assessment best value award decision.” Id.

The agency received five proposals by the August 9 closing date. The protester’s evaluated (i.e., seed project) price was lowest, and its past performance was rated as satisfactory confidence. In this connection, while VEI identified six projects in its proposal, the agency received completed past performance questionnaires (PPQs) for only two of them, and in both cases, the ratings were primarily satisfactory. The agency also conducted a search of the Past Performance Information Retrieval System (PPIRS), but found no Contractor Performance Assessment Reports under the protester’s Data Universal Numbering System (DUNS) number. Based on the completed PPQs that she received for the other offerors, as well as information that she retrieved from the PPIRS pertaining to their prior performance, the contracting

¹ The solicitation was set aside for service-disabled veteran-owned small businesses.

officer assigned three other offerors--i.e., Mellor, ACG, and MERIT--performance confidence assessment ratings of substantial confidence. The fourth offeror, like the protester, received a performance confidence rating of satisfactory.

Because the protester, as the lowest-priced offeror, had not received a past performance rating of substantial confidence, the contracting officer conducted an integrated best value assessment. After considering offerors' prices and past performance ratings, she concluded that the proposals of Mellor, MERIT, and ACG represented the best value to the government. On September 23, she awarded contracts to these firms and notified the unsuccessful offerors of their non-selection.

After timely requesting and receiving a debriefing, the protester filed an agency-level protest, which the Air Force denied on October 28. VEI protested to our Office on November 6.

DISCUSSION

VEI argues that the agency's evaluation of its past performance was flawed and inconsistent with the terms of the solicitation. In this regard, the protester complains that the agency failed to consider its performance on projects described in its proposal for which its references failed to return completed PPQs. VEI, argues, citing our decision in Family Entertainment Servs., Inc., B-298047.3, Sept. 20, 2006, 2007 CPD ¶ 59, that the agency's failure to consider its performance on these projects resulted in an unfair downgrading of its performance confidence rating. The protester further argues that the agency unreasonably failed to consider its performance on a prior project for replacement of a sump pump at McGuire Air Force Base. Although a completed PPQ was not returned for this project, the protester contends that its performance on the project was too close at hand for the agency to ignore. The protester also argues that the solicitation required the agency to seek information concerning its past performance from commercial sources, yet the agency failed to do so.

The evaluation of past performance is a matter within the discretion of the contracting agency. In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation. Maywood Closure Co., LLC, B-408343 et al., Aug. 23, 2013, 2013 CPD ¶ 199 at 5.

First, the protester's complaint that the agency unfairly downgraded its performance confidence rating is without merit. In Family Entertainment, the case cited by the protester, we sustained a protest where an agency downgraded a firm's past performance rating simply because the firm's references failed to return requested questionnaires. Here, however, the record does not demonstrate that the agency downgraded the protester's past performance rating because its references failed to return PPQs. Rather, VEI received a satisfactory confidence rating because the

only independent qualitative ratings of the protester's past performance were reflected in the two PPQs received, both of which assigned the protester satisfactory ratings.

Second, we are not persuaded by the protester's argument that information pertaining to its performance on the sump pump replacement project at McGuire AFB was simply too close at hand for the contracting officer to ignore. While our Office has previously recognized that there are certain limited circumstances in which an agency has an obligation (as opposed to the discretion) to consider past performance information that is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information, Exelis Sys. Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 at 22, we have generally limited application of this principle to situations where the alleged "close at hand" information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. Id. Here, the contract that, according to the protester, should have been considered involved work at the joint base under the solicitation, but it was not for the same services as required under the solicitation. Moreover, the record fails to establish that information concerning the protester's performance on that contract was personally known to the contracting officer who conducted the evaluation here. Under these circumstances, we cannot conclude that information pertaining to the protester's performance on the sump pump contract was so close at hand that the contracting officer was obligated to consider it.

Next, VEI argues that the agency failed to adhere to the terms of the RFP by failing to seek information concerning its past performance from databases that include information about commercial contracts. In support of its argument, the protester points to the following excerpt from the solicitation section explaining the agency's evaluation methodology:

Using questionnaires, the contracting officer shall seek relevant performance information on the lowest priced offerors (the lowest 5 to 7) based on (1) the past and present efforts provided by the offeror and (2) data independently obtained from other government and commercial sources.

RFP at 45. The protester contends that the foregoing language required the contracting officer to seek information from commercial databases regarding its past performance.

We do not view the language cited by the protester as requiring the agency to independently seek past performance data for the protester from both government and commercial sources, as the protester contends. In reaching this conclusion, we note that aside from the language quoted above, the solicitation also established that the agency would evaluate the quality and extent of an offeror's past

performance using information submitted by the offeror, as well as other sources, “such as other Federal Government offices and commercial sources.” RFP at 42. Where a dispute exists as to the meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions. ArmorWorks Enters. LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3. Reading the foregoing language together with the language cited by the protester, the solicitation established that the government would consider the information provided by the offeror (the referenced contracts) and additional data, such as data from government and commercial sources, not that the agency would necessarily solicit additional data from both government and commercial sources. Thus, consistent with the terms of the RFP, the agency considered the protester’s performance on its referenced contracts through the past performance questionnaires it received for these contracts, and it sought additional sources of information through PPIRS, a past performance resource available to the government. Moreover, even assuming that the agency was required to seek and consider relevant information from commercial databases, the record fails to establish that the protester suffered any prejudice as a result of the agency’s failure to obtain such data. See The Electronic On-Ramp, Inc., B-407303, B-407303.2, Dec. 18, 2012, 2013 CPD ¶ 234 at 6 (prejudice is a required element of any viable protest). In this regard, the protester has offered no evidence that such a search would have revealed any information regarding its performance on relevant contracts.

Finally, the protester argues that the contracting officer failed to perform an integrated assessment of best value considering both past performance and price, as required by the RFP. Rather, VEI contends, after determining that it, as the lowest-priced offeror, had not received a past performance rating of substantial confidence, the agency “simply defaulted to an evaluation methodology under which it awarded contracts to all offerors with a Substantial Confidence Past Performance rating.”² Protester’s Comments, Dec. 13, 2013, at 2. In a related vein, the protester argues that the contracting officer failed to document the basis for her determination

² Along similar lines, the protester argues that it was removed from consideration for award once it received a past performance rating of satisfactory confidence, and thus the rating of satisfactory confidence constitutes adverse past performance information that it should have been given the opportunity to address.

We are not persuaded by this argument. While it is true that the past performance rating of satisfactory confidence had an adverse impact on the protester’s chances for award (since other offerors received higher ratings), that does not mean the rating itself was adverse. Consistent with the definition set forth in the solicitation, see RFP at 46, adverse past performance information is past performance information that supports a less than satisfactory rating.

that the higher performance confidence ratings of the higher-priced offerors were worth a price premium.

In our view, the contracting officer adequately documented the basis for her best value determination here. While she did not explicitly state that she considered the higher performance confidence associated with the proposals of the three awardees to be worth a price premium, such a finding is implicit in her conclusion that taking both price and past performance into account, the proposals of Mellor, MERIT, and ACG represented the best value to the government. Moreover, because the tradeoff was limited to those two factors, there was no need for her to identify technical differences between the proposals and to decide which, if any, were worth a higher price.

The protest is denied.

Susan A. Poling
General Counsel