Decision

Matter of:   James J. Dean, doing business as Dean's Paving

File:   B-412454.2

Date:   February 8, 2016

Evan A. Rossi, Esq., Rossi & Rossi Attorneys at Law, PLLC, for the protester.  
Col. Matthew J. Mulbarger, and Heather M. Mandelkehr, Esq., Department of the Air Force, for the agency.  
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably evaluated the awardee as having relevant past performance is denied where the agency noted that the response to a past performance questionnaire for a potentially relevant contract was unclear, the agency contacted the person who completed the questionnaire and obtained more specific information, and the agency evaluated the contract as relevant based on the person’s response.

DECISION

James J. Dean, doing business as Dean's Paving, of Marcy, New York, a small business, protests the award of a contract to Mohawk Valley Materials, Inc. (MVM), also of Marcy, New York, by the Department of the Air Force, under request for proposals (RFP) No. FA8751-15-R-0022, for snow and ice removal services. Dean argues that the Air Force misevaluated MVM’s past performance, and therefore deviated from the RFP criteria for award.

We deny the protest.

BACKGROUND

On October 7, 2015, the Air Force issued the RFP as a combined synopsis and solicitation for commercial items, seeking fixed-price proposals to provide snow and ice removal services at Air Force Research Laboratory Information Directorate and the Defense Financial Accounting Service facilities in Rome, New York, for a base year and four option years. The RFP provided that award would be made to the
offeror whose proposal was technically acceptable, based on a consideration of past performance and price. RFP at 3-4. More specifically, the RFP provided that the Air Force would consider past performance for the offeror whose acceptable proposal offered the lowest price. Id. If that offeror’s past performance was rated substantial confidence, the Air Force would make award to that firm; that is, without evaluating other proposals or making tradeoffs. Id. at 4. If the lowest-priced acceptable proposal failed to obtain a past performance rating of substantial confidence, the Air Force would select an awardee based on a tradeoff of past performance and price. Id.

The RFP also provided a standard to be used in the evaluation of past performance. In order to be relevant, past performance had to involve snow/ice removal for “roadways, parking lots, sidewalks and entranceways or loading docks,” and had to show “an area to be serviced of 100,000 Square Yards (SY) or greater.” RFP at 3.

The Air Force received proposals from five firms, including MVM and Dean (the incumbent contractor). Agency Report (AR) at 4. The Air Force ranked the proposals according to their evaluated prices. The evaluation determined that all five offerors had submitted “reasonable and realistic” prices, and then ranked them from lowest priced to highest. Id. MVM’s proposal was the lowest-priced acceptable proposal at $1.67 million, and Dean’s was the second-lowest, at $1.71 million. Id. at 4 n.4.

As provided in the RFP, the Air Force then evaluated MVM’s past performance. Id. at 4. Although MVM submitted five past performance references, and the Air Force received five questionnaire responses, the agency viewed only one as being recent and potentially relevant: a contract for snow removal and deicing for the operator of two bus terminals. Id. In its proposal, MVM described that contract as providing service for an area of approximately 107,000 SY. AR Tab 7, MVM Proposal, at 18. Although the past performance questionnaire did not specifically ask for the area covered, the response submitted by the bus terminal operator mentioned that MVM’s services were at three sites and “over 20 acres.” AR Tab 8, MVM Past Performance Questionnaires, at 1. The questionnaire went on to describe the firm’s work as excellent, and stated that MVM was the best snow/ice removal contractor the bus terminal operator had found. Id. at 3. In reviewing MVM’s past performance, the Air Force evaluators observed that 20 acres was 96,800 SY, which raised a question of whether “over 20 acres” satisfied the relevance standard in the RFP. AR at 4, 7; Contracting Officer’s Statement at 5.

1 To receive a substantial confidence rating, the highest adjectival rating available, the offeror’s relevant past performance had to show “a high expectation that the offeror will successfully perform the required effort.” RFP at 4. An offeror without relevant past performance was to be rated unknown confidence. Id.
In order to clarify the relevance of MVM’s past performance, the contracting officer contacted the person who had completed the past performance questionnaire: the vice president of operations for the bus terminal operator. AR at 4-6; Contracting Officer’s Statement at 5; AR Tab 9, Contracting Specialist Memorandum to File (Oct. 26, 2015), at 1. The Air Force asked for more specific information about the acreage, and the bus terminal operator’s vice president responded that the areas actually totaled approximately 25 acres (or 121,000 SY). AR at 5; Contracting Officer’s Statement at 6; AR Tab 9, Contracting Specialist Memorandum to File (Oct. 26, 2015), at 1. Having thus clarified the relevance issue, the Air Force considered the reference, which as mentioned above, described excellent performance by MVM on the contract.² Contracting Officer’s Statement at 4. On that basis, the Air Force again assigned a rating of substantial confidence to MVM’s proposal under the past performance factor. Id. at 5.

On October 30, the contracting officer awarded the contract to MVM as the offeror that had submitted the lowest-priced acceptable proposal with a past performance rating of substantial confidence. AR Tab 10a, Award Decision Document, at 4. Dean then filed a timely protest at our Office, arguing (among other things) that MVM lacked relevant past performance, and thus, could not have been properly rated substantial confidence. While the protest was pending, the Air Force announced that it would take corrective action, and our Office dismissed the protest as academic. AR at 6.

The contracting officer prepared a new source selection document, which concluded that the evaluation of MVM’s past performance justified a rating of substantial confidence, and that the firm has submitted the lowest-priced acceptable proposal. AR Tab 10b, Amended Award Decision Document, at 4. On December 15, the Air Force announced that it had completed the corrective action, and that the award to MVM had been confirmed as correct. Id. Dean then filed this protest.

ANALYSIS

The issue raised in Dean’s protest is that MVM had no experience performing snow/ice removal services for 100,000 SY or greater, and therefore MVM could not have been rated substantial confidence under the past performance factor, under the terms of the RFP. Protest at 1, 4. Dean argues that its own proposal would have been selected for award instead, if the Air Force had properly evaluated MVM as having no relevant past performance. Id. at 5.

² The RFP also provided that the Air Force would also consider information “reported . . . in PPIRS,” RFQ at 3, and so the agency also researched the Federal Awardee Performance Integrity Information System/Past Performance Information Retrieval System (PPIRS) for records of MVM’s performance, and found no negative reports. AR at 5.
In its response, the Air Force argues that it reasonably determined that MVM’s past performance met the relevance standard in the RFP for one contract, and that the agency properly assigned MVM’s past performance a rating of substantial confidence. AR at 7. The agency explains that the past performance questionnaire did not clearly indicate whether the total area for which MVM was performing snow/ice removal services actually exceeded 100,000 SY. Id. As a result, the agency decided to seek more information to determine whether the past performance was relevant. AR Tab 9, Memorandum to File (Oct. 26, 2015), at 1. The agency argues that it was proper for the contracting officer to contact the person who had completed the questionnaire for more precise information. That person was in a position to answer authoritatively, and clarified his questionnaire response by describing the effort as covering approximately 25 acres, which the Air Force argues was sufficiently precise to show that the total serviced area clearly exceeded 100,000 SY. Id.; AR at 7. As a result, the Air Force argues, the evaluation of MVM’s past performance as relevant, and the resulting assignment of a substantial confidence rating, were reasonable. AR at 8.

Dean contends that the Air Force’s evaluation was unreasonable because agency personnel did not “make an effort to discover the true square yardage of the [bus terminal operator] contract area.” Comments at 5. Dean argues that the Air Force should have had made an “independent inquiry as to the true size of the [DELETED] [bus terminal] lots.” Comments at 7. Dean maintains that such an inquiry would have found that MVM performed services for less than 100,000 SY, thereby precluding that past performance from being considered relevant. Id. As support, Dean submitted a declaration from a surveyor “who measured the two [sic] properties,” which states that the total area requiring snow/ice removal was at most 86,000 SY. Comments at 6.

The evaluation of an offeror’s past performance is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method for accommodating them, and we will not substitute our judgment for past performance ratings that have a reasonable basis in the record. OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 5. With regard to the relevance of past performance, in particular, such determinations “are within the sound discretion of the agency.” McRae Indus., Inc., B-403335, Oct. 20, 2010, 2010 CPD ¶ 266 at 9.

As noted above, Dean bases its arguments on the lack of an independent investigation by the Air Force into the relevance of MVM’s past performance, and on Dean’s own expert surveyor’s measurement of two locations. It bears noting, first, that the surveyor did not seek admission as a consultant to the protective order issued by our Office in this protest, and thus appears to have been unaware that the
past performance questionnaire identified three locations as totaling over 20 acres.\(^3\) Even assuming that the surveyor’s calculations actually considered all three locations, we would be unable to sustain the protest unless there was a legal requirement for the Air Force to question the veracity of the past performance reference. There was no legal requirement that the Air Force conduct its own investigation into the relevance of MVM’s past performance, and we have held in analogous circumstances that an agency may rely on information from a past performance reference “unless there is a clear reason to question the validity of the information.” See Rod Robertson Enters., Inc., B-404476, Jan. 31, 2011, 2011 CPD ¶ 129 at 3 (where agency elects not to hold discussions, agency is not required to seek clarification of adverse past performance information unless agency has a reason to question its validity); Universal Fid. Corp., B-294797.2, Feb. 7, 2005, 2005 CPD ¶ 88 at 6 (same). We think the analogous principle applies here. The Air Force had no reason to question the statement by the vice president of operations of the bus terminal operator that MVM had provided services at three sites totaling approximately 25 acres. Therefore, our review of the record shows that the Air Force evaluators properly determined that MVM had relevant past performance.\(^4\)

The protest is denied.

Susan A. Poling
General Counsel

\(^3\) The arguments by the protester’s counsel do not resolve this discrepancy.

\(^4\) Dean argues that the original area in the questionnaire was described as “about” 20 acres, and that the claimed area was only increased to 25 acres after some prompting by the Air Force that the bus terminal operator should provide an increased number. Comments at 5. Dean has provided no evidence to support this allegation, which also misstates the record. As quoted above, the original statement in the original handwritten questionnaire was that services were provided for “over 20 acres.” AR Tab 8, MVM Past Performance Questionnaires, at 1. The later clarification that the total area was “approximately 25 acres” was thus consistent with the original statement.