



Decision

Matter of: East Coast Utility Contractors, Ltd.

File: B-415493; B-415493.2

Date: January 16, 2018

Donald O'Connor for the protester.

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DIGEST

1. Protest that the agency failed to consider the past performance of one of the protester's managers is sustained, where the solicitation provided for consideration of the management team's past performance.
2. Protest that the source selection authority unreasonably raised the awardee's adjectival ratings is denied, where the record indicates a reasonable basis for the change.

DECISION

East Coast Utility Contractors, Ltd. (ECUC), a small business, of Williamsburg, Virginia, protests the award of a contract to American Water Operations and Maintenance, Inc. (AW), of Voorhees, New Jersey, under request for proposals (RFP) No. SPE600-13-R-0809, issued by the Defense Logistics Agency (DLA) for utility services. ECUC challenges the evaluation of its and the awardee's proposal and the agency's best-value trade-off decision.

We sustain the protest.

BACKGROUND

The RFP, issued on May 16, 2013, contemplated the award of a 50-year contract for utility services resulting from the privatization of natural gas distribution, water

distribution, and wastewater collection utility systems at Wright-Patterson Air Force Base, Ohio. Agency Report (AR), Tab 2, RFP, at 2, 33. Offerors were permitted to submit proposals for any or all of the utility services. AR, Tab 6, RFP amend. 13, at 3. The RFP advised offerors that utilities privatization consists of two transactions: conveyance of the utility infrastructure via a bill of sale, and the acquisition of utility services on the privatized systems via a utility services contract. Id. at 2. The conveyance of the utility systems is a property disposal action made by a military department in accordance with 10 U.S.C. § 2688 and not covered by the solicitation.¹ Id. The acquisition of utility services is governed by Federal Acquisition Regulation (FAR) part 41 and is the subject of this procurement. Id. The RFP cautioned offerors that the government would acquire utility services only if the military department issues a decision to convey the utility services. Id. at 29.

The RFP stated that award of the utility services contract would be made to the offeror presenting the best value to the government, considering technical capability, past performance, risk, socioeconomic plan, and price. RFP at 97. Technical capability, past performance, and risk were considered approximately equal in importance, and socioeconomic plan was considered significantly less important. AR, Tab 7, RFP amend. 15, at 11. When combined, technical capability, past performance, risk, and socioeconomic plan were considered significantly more important than price. Id. The RFP stated that the total evaluated price, which was the net present value of the stream of monthly payments the government would be expected to make over the 50-year contract period, would be evaluated for reasonableness. Id. at 10.

Offerors were required to provide past performance information for at least two but not more than six of the offeror's largest customers involving work of similar complexity and type to that required in the RFP for each system upon which the offeror intends to submit a proposal. RFP at 85. The offeror was required to have performed the work for at least one year of continuous duration within the last five years. Id. Offerors were advised that past performance would be evaluated based on the degree to which current and previous efforts indicated the probability of the offeror successfully accomplishing contract requirements throughout the performance period. RFP amend. 15, at 9. The RFP stated that the recentness and relevancy of the information, source of the information, context of the data, and general trends in offeror's performance would be considered. Id. The RFP also stated if an offeror without a record of relevant past performance or for whom sufficient information on past performance was not available, the offeror would be evaluated neither favorably nor unfavorably. Id. However, the RFP also stated that "a different rating may be achieved if the offeror proposes management personnel who have a successful record of performance on relevant, recent contracts or if a proposed subcontractor who will be

¹ Section 2688 of Title 10 of the United States Code authorizes the secretary of a military department to convey a utility system, or part of a utility system, to a municipal, private, regional, district, or cooperative utility company or other entity. 10 U.S.C. § 2688(a).

performing a significant portion of the work has a successful performance history on relevant and recent contracts.” Id.

DLA received proposals from six offerors. AR, Tab 13, Prenegotiation Briefing Memorandum, at 4-5. Four offerors, including ECUC and AW, submitted proposals to provide water and wastewater services.² Id.

ECUC submitted six past performance data sheets with its final proposal revision--three for itself and three for its vice president of operations. AR, Tab 11B, ECUC Past Performance Volume, at 1374-1403.³ As relevant here, the past performance projects submitted for ECUC’s vice president of operations were each for his performance as utility manager responsible for managing 50-year utility privatization contracts. Id. at 1386-1402. DLA concluded that two of ECUC’s past performance projects were not completed within the past five years and were not relevant, and the third, although recent, was not relevant because it did not demonstrate ECUC’s capability to own, operate, or maintain water distribution or wastewater collection systems. AR, Tab 30, Past Performance Assessment Report, at 16-17, 20.

With respect to the three past performance projects submitted for ECUC’s vice president of operations, DLA concluded that they met the recency requirement but did not meet the relevancy requirement because the experience of the vice president of operations did not demonstrate ECUC’s capability to own, operate, or maintain a water distribution or wastewater collection system.⁴ Id. at 17-20. Specifically, the evaluation states that “[t]he experience provided is of an individual and not of the company as a whole.” Id. at 18-20. Therefore, the evaluators assigned ECUC an unknown confidence rating for past performance. AR, Tab 19, Final Past Performance Evaluation Report, at 2578-2579.

² Because no protective order was issued in this matter, our discussion of some aspects of the evaluation is necessarily general to avoid reference to proprietary or source-selection information. Nonetheless, our conclusions are based on our review of the entire record.

³ Where the document did not include page numbers, we cite to the page numbers supplied by the agency.

⁴ The evaluators also concluded that one past performance project did not demonstrate that ECUC’s vice president performed under the contract for at least one year. AR, Tab 30, Past Performance Assessment Report, at 18-19.

After discussions were held, final evaluation results were as follows:

	ECUC	AW
Technical Capability	Acceptable	Good
Service Interruption/Contingency & Catastrophic Loss	Good	Acceptable
Operations & Maintenance/Quality Management	Acceptable	Good
Initial System Deficiency Corrections/Upgrades/Connections and Renewals and Replacements	Acceptable	Good
Operational Transition Plan	Acceptable	Acceptable
Past Performance	Unknown Confidence	Substantial Confidence
Risk	Low	Low
Socioeconomic	Acceptable	Acceptable
Price (2017 Net Present Value)	\$276,576,000	\$346,870,000

AR, Tab 22, Source Selection Decision Document, at 1.

The source selection authority (SSA) reviewed the findings of the source selection evaluation board and summarized the strengths and weaknesses of each offeror's proposal. The SSA noted that the technical evaluation team failed to consider identified strengths in accordance with the definitions for the adjectival ratings and agreed with the contracting officer to raise the adjectival ratings for two offerors. Id. at 5. The SSA also increased AW's adjectival rating under one technical subfactor after a clerical error was resolved through clarifications. Id. In comparing the proposals of the offerors, the SSA acknowledged that ECUC's past performance was rated as neutral but that AW and another offeror had a higher confidence level because of their recent and relevant experience owning and operating utility systems. Id. at 42. The SSA also acknowledged ECUC's lower price, but noted that the non-price factors were significantly more important than price, and the non-cost benefits of AW's technically superior proposal warranted the price premium. Id. at 42-43.

Upon learning of the award to AW, ECUC protested to our Office.

DISCUSSION

ECUC argues that DLA unreasonably assigned it a neutral past performance rating given its experience in the water and wastewater market and the strength of its proposal utility manager. Supp. Protest at 2. ECUC challenges the adjectival ratings assigned to

AW's proposal and the agency's best-value tradeoff decision, arguing that DLA unreasonably selected a higher-priced proposal. Id. at 3; ECUC Comments at 3-4.

Procedural Matters

As an initial matter, DLA asks that we dismiss ECUC's protest because the initial protest did not comply with the requirements of our Bid Protest Regulations, 4 C.F.R. § 21.1(c), which require the protest to request a ruling and to state the form of relief requested. Request for Dismissal at 2. We have reviewed the agency's arguments and decline to dismiss ECUC's protest. We do not think that dismissal of the protest based on these alleged deficiencies is warranted given that none of the omissions materially affected the agency's ability to respond to the protest. See, e.g., Air Shunt Instruments, B-293766, June 4, 2004, 2004 CPD ¶ 125 at 3 n.2.

Past Performance

ECUC contends that DLA erroneously concluded that none of its past performance references were relevant. In this regard, ECUC argues that the solicitation permitted it to use the past performance of its vice president of operations to demonstrate a successful record of past performance. ECUC Comments at 6. ECUC also argues that the company itself demonstrated relevant past performance by performing renewal and replacement and initial system deficiency corrections projects as a subcontractor to a current utilities privatization company. Id.

DLA states that it reasonably found none of ECUC's past performance references to be relevant. DLA states that although ECUC provided six past performance information sheets, only one recent and relevant reference was provided for ECUC's vice president of operations. Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 15. In this regard, DLA explains that ECUC's vice president of operations was the only manager ECUC proposed who had experience working in "Utility Privatized sector at various bases" and that ECUC failed to identify any corporate experience performing operations and maintenance work on a water and wastewater utility system. Id. DLA states that, instead, ECUC identified prior experience performing renewal and replacement and initial system deficiency corrections projects. Id. DLA further states that ECUC's past performance, which consisted of one management person and three renewal and replacement and initial system deficiency corrections projects, was appropriately determined to be not relevant. Id. In response to a request for clarification, DLA stated that it determined that one manager's past performance was not sufficient to earn a different rating. DLA Response to GAO Request for Clarification, Jan. 8, 2018.

In considering protests challenging an agency's evaluation of proposals, we will not reevaluate proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Baltimore Gas & Elec. Co., B-406057 et al., Feb. 1, 2012, 2012 CPD ¶ 34 at 6. In this regard, agencies must

adequately document their evaluations, and, where an agency fails to do so, it runs the risk that our Office will be unable to determine whether the agency's evaluation was reasonable. DKW Commc'ns, Inc., B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 9. Moreover, where an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, we generally give little weight to the later explanation. Al Raha Group for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc., B-411015.2, B-411015.2, Apr. 22, 2015, 2015 CPD ¶ 134 at 10.

Offerors were required to provide past performance information for at least two but not more than six of the offeror's largest customers involving work of similar complexity and type to that required in the RFP for each system upon which the offeror intends to submit a proposal. RFP at 85. The RFP advised that an offeror without a record of relevant past performance would be evaluated neither favorably nor unfavorably for past performance, but that a different rating "may be achieved if the offeror proposes management personnel who have a successful record of past performance on relevant, recent contracts" RFP amend. 15, at 9. Accordingly, ECUC submitted three past performance references for its vice president of operations demonstrating his experience with similar utility privatization contracts. See AR, Tab 11B, ECUC Past Performance Volume, at 1386-1402. However, nothing in the contemporaneous record shows that DLA considered the past performance of ECUC's vice president of operations. Rather, the record shows that DLA concluded that the past performance of ECUC's vice president of operations was not relevant because it was the past performance of an individual, rather than the company as a whole.⁵ See AR, Tab 30, Past Performance Assessment Report, at 18-20.

Further, the SSA stated that ECUC received a neutral past performance rating because the "Government is unable to obtain past performance feedback from any recent and relevant references for [the requirement] individually, or combined." AR, Tab 22, Source Selection Decision Document, at 22. The SSA also stated that none of ECUC's six past performance references are considered relevant since three pertain to experience with upgrade, construction and refurbishment, and three "pertain to the experience of one of its executives and not of the company as a whole; none of them demonstrate ECUC's capability to own, operate, and maintain a water distribution or wastewater collection system." Id. at 23.

The solicitation did not require the agency to assign a rating other than neutral where an offeror with no record of past performance submits past performance references for proposed management personnel. However, the solicitation did contemplate that the agency would at least consider a different rating if the offeror submitted past performance of proposed management personnel who have a successful record of past

⁵ Although DLA, in responding to the protest stated that it found one of the past performance projects for ECUC's vice president of operations to be recent and relevant, COS/MOL at 15, the contemporaneous record does not support the agency's statement. See, e.g., AR, Tab 30, Past Performance Assessment Report, at 17-20.

performance on relevant, recent contracts. On this record, we find that DLA failed to consider the past performance of ECUC's management personnel, as required by the solicitation. Therefore, on this basis we sustain the protest.

ECUC also argues that its performance of renewal and replacement and initial system deficiency corrections projects as a subcontractor to a current utilities privatization company demonstrated its past performance and should have been found relevant. ECUC Comments at 6. The protester contends that these projects are relevant because this type of work will need to be performed under the privatization contracts. Id. at 5.

We deny this protest ground. The record shows that the evaluators found both of ECUC's renewal and replacement projects to fall outside the 5-year recency requirement, and did not demonstrate the capability to own, operate, or maintain a water distribution or wastewater collection system.⁶ AR, Tab 30, Past Performance Assessment Report, at 16, 20. With respect to the initial system deficiency corrections project, the evaluators found that the project was not relevant because it demonstrated the capability to construct lift stations, force main and sanitary sewer lines and to install water distribution lines and fire lines, but does not demonstrate the capability to own, operate, or maintain a water distribution or wastewater distribution system. Id. at 17. The protester has not demonstrated that the agency's conclusions were in error.

AW's Technical Evaluation

ECUC also argues that the contracting officer unreasonably increased AW's adjectival ratings from that assigned by the evaluation team. ECUC Comments at 3. ECUC maintains that, if the SSA had considered the adjectival ratings that the evaluators had assigned to AW's proposal, the SSA would have realized that ECUC's proposal represented the best value to the government. Id. at 3-4.

DLA explains that the contracting officer disagreed with the lower adjectival ratings the evaluation team assigned to AW's proposal for two subfactors under the technical capability factor. COS/MOL at 7. DLA states that the contracting officer requested and received clarification from AW's technical proposal and on this basis recommended that the SSA increase AW's rating for the subfactors. Id. DLA also states that the contracting officer determined that the technical evaluation team incorrectly applied the adjectival rating definitions to AW's final proposal revision by failing to consider two strengths the evaluators identified that should have resulted in a higher rating for one subfactor. Id. at 8. DLA explains that the SSA concurred with the contracting officer's recommendations that AW should receive these higher ratings. Id.

⁶ The evaluators also concluded that one of the renewal and replacement projects did not meet the requirement of 1-year duration. AR, Tab 30, Past Performance Assessment Report, at 16.

Source selection officials and higher-level agency evaluators may reasonably disagree with the evaluation ratings and results of lower-level evaluators. Wyle Labs., Inc., B-311123, Apr. 29, 2008, 2009 CPD ¶ 96 at 6. In this regard, the issue is not whether the agency's final assessments are consistent with earlier assessments, but whether they reasonably reflect the relative merits of the proposals. Id. The relevant inquiry is not whether the contracting officer revised or overrode the judgments of the lower-level evaluators; rather, the issue for our Office's review is whether the agency's final evaluation was reasonable. Concurrent Techs. Corp., B-412795.2, B-412795.3, Jan. 17, 2017, 2017 CPD ¶ 25 at 18.

The record before us provides no basis to sustain this protest ground. The sole basis for the lower rating in one technical subfactor resulted from an apparent failure to meet scheduling requirements. AR, Tab 18, Final Technical Consensus Report, at 2438. The contracting officer recognized an inconsistency in AW's proposal with respect to the scheduling requirement and sought clarification from AW. AR, Tab 20, Clarification E-mail, at 2589. Upon receiving the clarification, the contracting officer recommended raising the adjectival rating for the subfactor and the SSA concurred. COS/MOL at 7; AR, Tab 22, Source Selection Decision Document, at 6. With respect to the other technical subfactor, the contracting officer recognized the strengths identified in AW's proposal with respect to quality/performance awards and certifications, and recommended that, in accordance with the definitions of the adjectival ratings, AW's proposal be rated higher; the SSA concurred. COS/MOL at 7; AR, Tab 22, Source Selection Decision Document, at 10-11. The protester has not provided any basis for our Office to find the SSA's judgment to be unreasonable.

Best-Value Tradeoff Decision

ECUC contends that DLA's best-value tradeoff decision was unreasonable in light of the \$70 million price differential and ECUC's acceptable overall rating. ECUC Comments at 2-4. We have explained that an agency's best value determination is flawed when one or more of the underlying evaluations upon which that tradeoff analysis is based are unreasonable, erroneous or improper. TeleCommunication Sys., Inc., B-408269.2, Dec. 13, 2013, 2013 CPD ¶ 291 at 7; see Ashland Sales & Serv. Co., B-291206, Dec. 5, 2002, 2003 CPD ¶ 36 at 7. Because we are sustaining ECUC's challenge to DLA's evaluation of the protester's past performance, we also sustain ECUC's overall challenge to the best-value tradeoff.

RECOMMENDATION

We recommend that the agency either reevaluate ECUC's past performance references in accordance with the terms of the solicitation and document a new source selection decision, or revise the solicitation to reflect the agency's requirements and obtain revised proposals. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claim for such costs, detailing the time expended and costs

incurred, must be submitted directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel