Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nomura Enterprise, Inc.

File: B-277768

Date: November 19, 1997

Al Weed, Esq., for the protester.
Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Defense Research Incorporated, an intervenor.
Vera Meza, Esq., Department of the Army, for the agency.
John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where an agency uses a traditional responsibility factor, such as past performance, as a technical evaluation factor, the comparative evaluation of proposals under such factor does not involve a matter of responsibility subject to the Small Business Administration's certificate of competency procedures.

2. In a negotiated, best value procurement, an agency may select a higher-rated, higher-priced proposal for award, where the agency reasonably determines in accordance with the stated evaluation criteria that the technical superiority of the higher-rated proposal outweighs the price advantage of the lower-rated proposal.

DECISION

Nomura Enterprise, Inc. protests the award of a firm, fixed-price contract to Defense Research Incorporated under request for proposals (RFP) No. DAAA09-97-R-0126, issued by the Department of the Army for a quantity of missile warhead metal parts. Nomura challenges as unreasonable the Army's decision to award to Defense at a significantly higher price than Nomura offered. Nomura contends that the agency's selection decision was based on the firm's low past performance evaluation rating, which Nomura maintains essentially constituted a nonresponsibility determination that the agency should have referred to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC).

We deny the protest.

The RFP was issued for warhead metal parts which the record shows are critical components of the Hawk missile. The RFP provided that the award would be made to the offeror whose proposal was determined to represent the "best value" to the government based on an integrated assessment of two evaluation factors--price and recent, relevant past performance. The past performance evaluation factor consisted of two equally important subfactors--on-time delivery and quality. The RFP stated that in determining the best value, price was more important than past performance.

The agency received three offers, including proposals from Nomura and Defense. The third firm, the prior producer of the item, failed to acknowledge a material solicitation amendment and the agency did not evaluate its offer. Defense's price for the basic contract award was $2,418,536, and if all options were exercised, $9,086,519. Nomura's price for the basic contract award was $1,639,449, and if all options were exercised, $5,616,198.[1] The agency conducted a pre-award survey of Nomura. The survey's program manager reported that "Nomura's product quality indicates a downward trend based on an increase in the number of product quality deficiency reports," and "Nomura [had] not provide[d] a plan for corrective action." The surveying official concluded that Nomura was "technically capable of being awarded this contract but due to [the firm's] delinquency rate," she recommended no award to Nomura.

The pre-award survey was reviewed by the contract specialist who also reviewed the past performance information Nomura submitted in its proposal. The contract specialist assigned Nomura a rating of "fair" under past performance.[2] Under the on-time delivery subfactor, the contract specialist found that Nomura's recent, relevant contracts for similar items showed a consistent pattern of delinquency for various reasons, subcontractor and equipment problems, and relocation of the place of performance. Under the quality subfactor, the contract specialist concluded that Nomura's workmanship on recent contracts had not been good. She noted "multiple instances of late First Article Test Reports and failed First Article Tests." She also noted numerous quality deficiency reports issued under recent contracts, including four quality deficiency reports on a single contract. Further, when the agency surveyed Nomura's customers, only one stated it would do business again with Nomura without reservation, several stated they would not do business again

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[1]The additional cost to award to Defense, rather than to Nomura, was thus $779,087 for the basic contract award; if all option quantities were purchased, the additional costs could be up to $3,470,321.

[2]Under the agency's evaluation plan, an offeror assigned a "fair" rating has recent, relevant past performance; however, deliveries are seldom on-time and there is moderate doubt whether the offeror will perform in accordance with the delivery schedule.

with the firm, and several others stated they would need a convincing pre-award survey and also would have to closely monitor Nomura's performance.

The contract specialist rated Defense's past performance as excellent overall.[3] Under recent contracts, Defense's delivery was always on time or early. Also, concerning quality, the performance records showed that Defense's workmanship on recent contracts was excellent with no quality deficiency reports on the contracts reviewed. The two customers surveyed by the agency stated that they would do business again with Defense without reservation and one noted that Defense was "an excellent contractor."

The record shows that the contracting officer, who was also the source selection official, reviewed all of the above-discussed information. The contracting officer selected Defense's offer at the higher price as providing the best value to the government based on her comparison of the past performance record of Nomura and Defense. The contracting officer concluded that it was significantly more likely that Defense, rather than Nomura, would successfully complete the contract on-time and deliver a high quality product.

Nomura challenges the evaluation of its proposal, asserting that the evaluation of its past performance concerns a matter of its responsibility, which Nomura, as a small business concern, has a right to have reviewed by the SBA under its COC procedures. We disagree with Nomura that the evaluation of its past performance under this RFP was a matter of responsibility subject to SBA's COC procedures. An agency may use traditional responsibility factors, such as experience or past performance, as technical evaluation factors, where, as here, a comparative evaluation of those areas is to be made. Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 3. A comparative evaluation means that competing proposals will be rated on a scale relative to each other, as opposed to a pass/fail basis. Id. The record shows that the award here clearly was based on a comparative assessment of Nomura's and Defense's past performance records. Where a proposal is downgraded or found deficient pursuant to such an evaluation, the matter is one of relative technical merit, not nonresponsibility which would require a referral to the SBA. Id.; see also Smith of Galeton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36 at 7.

Next, Nomura argues that the agency made an unreasonable best value determination by awarding to a significantly higher-priced offeror. The government in a negotiated procurement is not required to make award to the lowest-priced, technically acceptable offeror unless the RFP specifies that price will be

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[3]An offeror assigned an "excellent" rating has recent, relevant past performance where delivery is consistently on-time and there is no doubt that the offeror will perform in accordance with the delivery schedule.

determinative. See Miltope Corp.; Aydin Corp., B-258554.4 et al., June 6, 1995, 95-1 CPD ¶ 285 at 14. In a best value procurement, price is not necessarily controlling in determining the offer that represents the best value to the government. Rather, that determination is made on the basis of whatever evaluation factors are set forth in the RFP, with the source selection official often required to make a price/technical tradeoff to determine if one proposal's technical superiority is worth the higher price that may be associated with that proposal. In this regard, price/past performance tradeoffs are permitted when they are reasonable and consistent with the RFP evaluation scheme. See H.F. Henderson Indus., B-275017, Jan. 17, 1997, 97-1 CPD ¶ 27 at 2-3.

Here, we think the best value determination is fully documented and reasonable. The record contains the contracting officer's contemporaneous source selection statement. The contracting officer explains that on-time delivery of the warhead metal parts is critical to on-time delivery of Hawk missiles to the Army's various customers--the Marine Corps, Korea, and the Netherlands. The contracting officer further explains how the failure to obtain timely delivery will affect the fielding schedule of the Marine Corps and the readiness needs of Korea and the Netherlands. The contracting officer also analyzes the past performance of Nomura and Defense, which was described in detail above, and concludes that the additional costs associated with Defense's offer are justified based on a comparison of each firm's past performance in the areas of on-time delivery and quality. The contracting officer states that in her judgment, based on a comparison of past performance records, "[i]t is significantly more likely that [Defense] will successfully complete the contract on-time and deliver a high quality product."

In deciding not to award to Nomura at its low price, the contracting officer relied on the fact that Nomura has multiple instances of late deliveries and of delivery of deficient products, and that the firm had a contract terminated for default (which was reported initially in the pre-award survey as a pending action), negative customer surveys, and a pre-award survey which recommended no award because Nomura's recent product quality performance was declining and the firm's delinquency rate was increasing. Nomura did not provide any explanation or defense of its past performance in its proposal and the firm failed even now in the protest to challenge the underlying findings concerning its past performance. Given the documented excellent past performance record of Defense, in contrast to Nomura's documented declining past performance record, and the importance of timely delivery of quality products to meet the agency's program needs, we think the contracting officer reasonably decided that the award to Defense, even at a significant price premium, was justified.[4]

We deny the protest.

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[4]Nomura asserts that award was made at an unreasonably high price. However, the agency points out that the prior producer's offer, though (as explained above) not considered for award here, was approximately $1,900 per unit, while Defense's offer for the basic quantity was $2,172.98 per unit and its offer for the option quantity was $1,997 per unit. Based on this comparison, the agency reasonably concluded that Defense's price was reasonable.