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Comptroller General
of the United States
United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kevco T/A All Star Disposal & Recycling Corp.

File: B-405553.3

Date: January 13, 2012

Rebecca E. Pearson, Esq., Dismas Locaria, Esq., and Melanie Jones Totman, Esq., Venable LLP, for the protester.
William A. Shook, Esq., and Kelley P. Doran, Esq., Shook Doran LLP, for Waste Management of New Jersey, Inc., an intervenor.
Christopher S. Cole, Esq., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably rated the protester's past performance as limited confidence, where the protester's own past performance was on much smaller contracts than the agency's requirements and was reasonably considered to be not relevant, and where the agency had reasonable concerns that the protester's subcontractor (a teaming partner), which had relevant positive past performance and which was to provide significant support to the protester, was not licensed to perform the actual work, and about the terms of the teaming agreement.

DECISION

Kevco T/A All Star Disposal & Recycling Corp., of New Egypt, New Jersey, protests the award of a contract to Waste Management of New Jersey, Inc., of Trenton, New Jersey, under request for proposals (RFP) No. FA4484-11-R-0004, issued by the Department of the Air Force, for municipal solid waste collection services. Kevco challenges the evaluation of its past performance.

We deny the protest.

The RFP, issued on May 19, 2011, was to procure integrated solid waste management collection services at Joint Base McGuire-Dix-Lakehurst (JBMDL), New Jersey under a fixed-price contract for a 12-month base period with four 1-year option periods. Award was to be made on a best-value basis considering price and past performance. The past performance factor was said to be significantly more important than price. See RFP at 262.

With regard to past performance, the RFP stated that "only references for same or similar type contracts are desired" for no more than 10 of the most relevant contracts performed within the last 3 years. See RFP at 6. The RFP sought relevant performance information primarily through questionnaires provided by the references submitted by the offeror in its proposal. The RFP stated that relevant performance included "performance of all efforts involved in [integrated solid waste management collection and disposal of municipal solid waste] that are similar or greater in scope, magnitude and complexity than the effort described in the solicitation." Id. at 8. In addition, the past performance of predecessor companies, key personnel who have relevant experience, or subcontractors that would perform major or critical aspects would be considered as highly as past performance information for the principal offeror. Id. The RFP explained that the agency would evaluate the "quality and extent of offeror's performance deemed relevant to the requirements," id. at 6, and reserved "the right to give greater consideration to information on those contracts deemed most relevant to the effort described in this solicitation." Id. at 8. The possible past performance confidence assessment ratings were: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. Id.

Five offerors, including Kevco[1] and Waste Management (the incumbent contractor), submitted proposals in response to the RFP by the closing date of July 12. Discussions were conducted with all five offerors.

Kevco submitted four past performance references with its proposal, three on behalf of Kevco and one on behalf of Jenn-Kans. The Air Force found that Kevco's past performance was not relevant, and Jenn-Kans's past performance was relevant and that it evidenced satisfactory to exceptional quality performance. However, because the Air Force found that it was unable to determine from Kevco's proposal which company would perform the majority of the work, the Air Force's discussions with Kevco included requests for Kevco to clarify its teaming arrangement with Jenn-Kans. In addition, Kevco was requested to "explain how the past performance that was submitted for [Kevco] is similar or greater in scope, magnitude, and complexity to this solicitation." Agency Report (AR), Tab 11, Kevco Evaluation Notice (EN), at 2.

In response to the Air Force's discussion questions, Kevco explained that Kevco was the holder of the required New Jersey license, which was necessary to perform the contract, and would be the prime contractor. Further, Kevco explained that

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[1] Kevco's proposal was based on a teaming arrangement with Jenn-Kans, Inc., of Hyattsville, Maryland, which was to be a subcontractor to Kevco.

under the teaming agreement, Jenn-Kans would bring its substantial work history, financial strength and experience to the project, and would lease the dumpsters/trash containers and the trucks to Kevco and make sure Kevco has access to trucks and other vehicles and equipment to satisfy the terms of the contract. See AR, Tab 11, Kevco Response to EN, at 1-2. With regard to the relevance of its own past performance, Kevco stated the following:

> When the experience of Kevco and its contracting partner Jenn-Kans are combined pursuant to the written teaming agreement, the resulting experience and past performance of the two partners is more than sufficient to satisfy the requirements necessary to insure that the scope, magnitude and complexity of the solicitation will be handled to the satisfaction of the government. In fact, the combined history, work experience and financial stability of the two companies almost certainly exceeds the requirements outlined in the procurement. By way of example, Jenn-Kans experience included a full range of regional services including foreign waste transport ([Deleted] per month), front load services ([Deleted] lifts per month), roll-off services ([Deleted] pulls per month) and quality control oversight on [Deleted]. Kevco . . . is New Jersey based entity engaged primarily in Roll-Off and Solid Waste Transportation, performing on average [Deleted] roll off pulls per month.

Id. at 5-6.

The final revised proposals were evaluated as follows:

Offeror	**Price**	**Confidence Rating**
Kevco	$9,367,702.29	Limited Confidence
Waste Management	$10,358,590.23	Substantial Confidence

AR, Tab 10, Source Selection Document, at 4. Kevco's proposal was the lowest-priced and Waste Management's was second lowest-priced. The other proposals were priced higher with unknown past performance confidence ratings.

In selecting Waste Management's proposal as the best value, the source selection authority (SSA) determined that Waste Management's superior past performance outweighed Kevco's proposal's lower price. The SSA found that Kevco had no relevant past performance, as indicated by its references showing that it had provided only 10 to 25 dumpsters at a time, far less than required by this RFP. Moreover, while Jenn-Kans' past performance was "substantial," that firm was not licensed in New Jersey and was providing its support under a teaming arrangement that was subject to termination at any time. Thus, the SSA determined that Kevco's performance risk was “too high,” particularly given that Kevco’s proposal was based on leasing vehicles and obtaining financial backing from Jenn-Kans. Id. at 24.

Waste Management was awarded the contract on September 30. After Kevco received a debriefing, this protest followed.

Kevco challenges the agency’s evaluation of its past performance as not relevant, arguing that the Air Force did not properly calculate the number of dumpsters and tonnage required under its contracts, which, Kevco asserts, represented clearly relevant past performance. Furthermore, Kevco argues that the Air Force improperly discounted the relevant experience of Jenn-Kans and was unjustified in attributing a risk to its proposal based on its teaming agreement with Jenn-Kans.

Our Office will examine an agency’s past performance evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror’s past performance is primarily a matter within the contracting agency’s discretion. Guam Shipyard, B-311321, B-311321.2, June 9, 2008, 2008 CPD ¶ 124 at 3. Further, an agency’s past performance evaluation may be based on a reasonable perception of a contractor’s prior performance, regardless of whether that contractor, or another offeror, disputes the agency’s interpretation of the underlying facts, the significance of those facts, or the significance of corrective actions. L-3 Sys. Co., B-404671.2, B-404671.4, April 8, 2011, 2011 CPD ¶ 93 at 3. A protester’s mere disagreement with the agency’s judgment is not sufficient to establish that the agency acted unreasonably. Ready Transp. Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5.

According to the Air Force, JBMDL is a 42,000 acre base that spans more than 20 miles east to west across two counties and bordering ten townships and boroughs. The Air Force advises that the base has nearly 4,000 facilities with a population of over 44,000 military members, their families, and civilian and contractor employees. The RFP’s performance work statement (PWS), which detailed the estimated workload for the contract, required the contractor to provide 597 dumpsters for recurring and scheduled pick-up (from once per week to six times per week) and 2,346 dumpsters for non-recurring and unscheduled service. The dumpsters are located throughout the base. The Air Force estimated the annual tonnage of refuse at 7,000 tons. Agency Report (AR) at 3.

As noted previously, the Air Force found that the three contracts referenced in Kevco’s proposal, reflecting its own past performance, were not relevant as compared to the PWS requirements. The record reflects that the contract references were performed in New Jersey. One referenced contract had a total value of $[Deleted] since 2004. On this contract, the most dumpsters that Kevco provided in a single day were [Deleted], in sizes ranging from [Deleted]. This service was provided on an on-call basis and the reference contacted was not aware of the tonnage. The second referenced contract had a total contract value of $[Deleted] since 2004; the most dumpsters provided by Kevco in a single day was [Deleted]; and the service was provided on an on-call basis with an approximate yearly tonnage of between [Deleted]. With respect to the third referenced contract, Kevco had provided dumpsters for at least 5 years at a value of $[Deleted] per year; the most dumpsters provided by Kevco in a single day was five; and the service was provided on an on-call basis with varying tonnage. AR, Tab 10, Source Selection Document, at 4-6.

As indicated, the agency asked Kevco during discussions to explain how the past performance information that was submitted for Kevco was similar or greater in scope, magnitude, and complexity to this solicitation. AR, Tab 11, Kevco EN, at 2. In response, Kevco almost exclusively referenced Jenn-Kans' relevant past performance, with only one sentence stating that it averages [Deleted] roll off pulls per month (but without referencing any particular contract).

Based on our review, the Air Force reasonably determined that Kevco's referenced contracts were not relevant as compared to the PWS requirements. In this regard, the agency reasonably found that Kevco had no relevant past performance, as indicated by its references, showing that it had provided only [Deleted] dumpsters at a time, far less than the almost 3,000 dumpsters spread over 42,000 acres required by this RFP. See CMC & Maint., Inc., B-292081, May 19, 2003, 2003 CPD ¶ 107 at 3. Although Kevco offers during the protest calculations and other evidence to demonstrate the relevance of its contracts, Kevco did not provide this information, when it was provided a reasonable opportunity to address this issue during discussions. Under the circumstances, Kevco may not reasonably complain that the agency misinterpreted the nature of its past performance.

Kevco nevertheless argues that the agency unreasonably discounted the highly relevant past performance of Jenn-Kans in evaluating Kevco's past performance with only a limited confidence rating. In this regard, as indicated above, Kevco's response to the discussion concerns about its past performance almost exclusively referenced Jenn-Kans' past performance to address the agency concerns.

There is no requirement, however, that an agency must directly credit or otherwise substitute a subcontractor's past performance for an offeror that lacks past performance of its own, given that it is the entity responsible for performing the contract, even where the subcontractor has considerable positive past performance. J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187 at 5. Instead, an agency may consider the offeror's lack of relevant past performance and balance that information against the subcontractor's past performance. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 10-11;

Here, the Air Force recognized that Jenn-Kans provided significant support to Kevco's performance of the contract in providing vehicles and financial backing, and that its past performance was relevant and considered to be at least satisfactory. Nevertheless, the Air Force had legitimate concerns that Jenn-Kans lacked a New Jersey license for this work and thus could not perform the actual work, and about the teaming agreement, which was terminable by either party. Taking these concerns into account, the Air Force balanced Kevco's lack of relevant past performance against Jenn-Kans' relevant past performance, and reasonably determined that Kevco's past performance warranted only a limited confidence rating. While Kevco disagrees, we find this agency judgment, as well as its judgment that Waste Management's superior past performance was worth the price premium, to be reasonable.

The protest is denied.

Lynn H. Gibson
General Counsel