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Decision

Matter of: B&B Medical Services, Inc.

File: B-407113.3; B-407113.4

Date: June 24, 2013

Dorn C. McGrath III, Esq., William Jack, Esq., and Scott E. Pickens, Esq., Barnes & Thornburg LLP, for the protester.

Kyle R. Jefcoat, Esq., Latham & Watkins LLP, for Rotech Healthcare, Inc., the intervenor.

Barton E. Evans, Esq., Department of Veterans Affairs, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that in making affirmative determination of responsibility, contracting officer failed to consider available relevant information pertaining to awardee's financial resources is denied where record fails to establish that contracting officer did not consider the information in question.
 2. Allegation that in making affirmative determination of responsibility, contracting officer failed to consider available relevant information pertaining to awardee's record of integrity and business ethics is dismissed where information allegedly not considered is not the sort of information that would be expected to have strong bearing on responsibility determination.
 3. Protest challenging rating of awardee's past performance as substantial confidence is denied where record demonstrates reasonable basis for the rating based of awardee's performance on two very relevant contracts.
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DECISION

B&B Medical Services, Inc., of Oklahoma City, Oklahoma, protests the award of a contract to Rotech Healthcare, Inc., of Orlando, Florida, under request for proposals (RFP) No. VA256-12-R-0059, issued by the Department of Veterans Affairs (VA) for home oxygen services. The protester argues that the contracting officer failed to consider available relevant information in determining Rotech to be a responsible

contractor. B&B also argues that the agency unreasonably rated Rotech's past performance as substantial confidence.

We deny the protest.

BACKGROUND

The RFP, issued on May 31, 2012, contemplated the award of two fixed-price requirements contracts (one set aside for small businesses and the second unrestricted), each for a base and four option years, to provide home oxygen equipment and services to VA beneficiaries in Veterans Integrated Service Network (VISN) 16.¹ The RFP provided for the unrestricted award to the offeror whose proposal was determined most advantageous to the agency based on price and the following four non-price factors, in descending order of importance: technical capability, quality control (QC) program, past performance, and service-disabled veteran-owned small business (SDVOSB) participation/commitment to small businesses.² The non-price factors, when combined, were significantly more important than price.

The agency received nine proposals by the August 13, 2012 closing date. After completing an initial evaluation, the agency established a "best value pool" consisting of [deleted] proposals (B&B's, Rotech's, [deleted]). Agency Report (AR), Exh. 5, Contracting Officer's Statement of Facts, Apr. 17, 2013, at 2. The agency conducted "exchanges" with the [deleted] offerors and sought proposal revisions from each. Id. The final proposal ratings and prices were as follows:

¹ VISN 16 includes Louisiana, Arkansas, and Oklahoma, as well as parts of Mississippi, Texas, Missouri, and Alabama. There are 10 VA medical centers and more than 60 community-based outpatient clinics in the region, which serve approximately 6,300 home oxygen patients. The solicitation set aside two of the medical centers and the regions they serve for small businesses. The remaining eight medical centers were competed on an unrestricted basis, and it is this award that is the subject of B&B's protest here.

² The second and third factors were of equal importance. Also, under the SDVOSB participation/commitment to small business factor, the solicitation provided for the evaluation of offerors' status as, and proposed use of, both SDVOSBs and veteran-owned small businesses, as well as their past adherence to goals for small business subcontracting.

	Rotech	B&B*
Tech. Capability	Excellent	Excellent
QC Program	Excellent	Excellent
Past Performance	Substantial Confidence	Substantial Confidence
SDVOSB/VOSB Participation	No Credit	No Credit
Commitment to SB	Full Credit	Full Credit
Price	\$68,300,733	[deleted]

Contracting Officer's Best Value Decision, Feb. 12, 2013, at 21-22. The contracting officer concluded that Rotech's proposal represented the best value to the agency. In comparing the protester's proposal to Rotech's, the contracting officer noted that, while the two proposals had received equivalent ratings under the non-price factors, B&B's proposal was slightly higher in price. Id. at 25. After making an affirmative determination of Rotech's responsibility, the contracting officer selected Rotech for award.

By letter of March 9, the contracting officer notified B&B of Rotech's selection. The protester timely requested a debriefing, which the agency furnished on March 13. B&B protested to our Office on March 18.

DISCUSSION

Affirmative determination of responsibility

The protester challenges the contracting officer's affirmative determination of Rotech's responsibility. B&B contends that the contracting officer failed to consider available relevant information in determining that Rotech had the financial resources to perform the contract and a satisfactory record of integrity and business ethics.

Contracts may only be awarded to responsible prospective contractors. Federal Acquisition Regulation (FAR) § 9.103(a). In making a responsibility determination, the contracting officer must determine, among other things, that the contractor has "adequate financial resources to perform the contract, or the ability to obtain them," FAR § 9.104-1(a), and that the contractor has "a satisfactory record of integrity and business ethics." FAR § 9.104-1(d). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is to make a determination of nonresponsibility. FAR § 9.103(b).

* Information pertaining to other offerors in the best value pool has been deleted from this decision.

Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, our Office will generally not consider a protest challenging such a determination. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2013). One of the circumstances in which we will make an exception to the general rule is where a protest identifies evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information. Id.; Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 3. This exception was intended to encompass protests raising supported allegations that the contracting officer had ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 14.

Here, in accordance with internal VA guidance instructing contracting officers to request Dun & Bradstreet (D&B) supplier qualifier reports to assist with contractor responsibility determinations, AR, Exh. 13, VA Information Letter 049-08-03, at 1, the contracting officer obtained a D&B report to assist her in determining whether Rotech had the financial resources to perform the contract. D&B reported that Rotech had a supplier evaluation risk (SER) rating of 9 on a scale of 1 (lowest risk) to 9 (highest risk).³ AR, Exh. 6, D&B Supplier Analysis Report for Rotech, at 1. D&B further reported that Rotech's SER rating showed a financial condition rated as unbalanced; a high proportion of past due balances to total amount owing; a low proportion of satisfactory payment experiences to total payment experiences; and a high proportion of slow payment experiences to total number of payment experiences. Id. at 2.

The report included the following entries under the heading "Special Events:"

As of 12/27/2012

LINE OF CREDIT: According to published reports, Rotech Healthcare Inc. announced that it has entered into a new term loan credit agreement with Silver Point Finance, LLC relating to a new term loan credit facility in an aggregate principal amount of \$25 million. The Company borrowed \$23.5 million under the new facility on December 21, 2012. The remaining \$1.5 million portion of the new facility not yet borrowed may be borrowed on a delayed draw basis on or before January 1, 2014, so long as certain limited conditions as set forth in the credit agreement are satisfied. The facility replaces and repays the Company's existing commitments and loans under our prior credit

³ The SER score is an indicator that measures the likelihood that a company will seek legal relief from creditors or cease operations without paying creditors in full over the next 12 months. Id. at 1-2.

agreement, and, assuming the Company will borrow the \$1.5 million portion of the facility not yet borrowed, increases our available liquidity by approximately \$15 million.

* * *

As of 11/15/2012

EARNINGS UPDATE: According to published reports, comparative operating results for the 9 months ended September 30, 2012: Revenue of \$347,300,000, Net Income of \$43,800,000; compared to Revenue of \$365,400,000, Net Income of \$7,700,000 to the comparable period in the prior year.

Id. at 4.

After reviewing the information in the D&B report, the contracting officer concluded that Rotech had adequate financial resources to perform the contract. The contracting officer documented the basis for her conclusion as follows:

Although their D&B [SER] rating reflected a score of 9 indicating they are financially sound to perform the services in accordance with the Statement of Work and performance schedule. D&B shows Rotech Healthcare Inc. would have a low risk of late payment beyond terms. According to published reports as of 12/27/2012 Rotech Healthcare Inc. announce[d] that it has entered into a new term loan credit agreement with Silver Point Finance, LLC relating to a new term loan credit facility in an aggregate principal amount of \$25 Million. As of 11/15/2012 comparative operating results for the 9 months ending September 30, 2012 show Rotech continues to grow net income. Revenue during this 9 month period was \$365,400,000 compared to \$347,300,000 in the comparable period of the prior year and Net income was \$43,800,000 compared with \$7,700,000 in the comparable period.⁴ Furthermore, the contractor is successfully performing these services for the Department of Veterans Affairs in VISN 18, VISN 20, and for the Coatesville VAMC centers and commercial entities.

AR, Exh. 6, Determination of Contractor's Responsibility at 1. The contracting officer also found that Rotech had a satisfactory record of integrity and business

⁴ Although not noted by the protester, the contracting officer has reversed the revenue figures--that is, D&B reported that revenue for the first 9 months of 2012 was \$347,000,000, as compared with revenue of \$365,400,000 for the comparable period in the prior year. See id. at 4.

ethics and that it otherwise met the general standards to be determined a responsible prospective contractor. In this regard, the record shows that she reviewed the Federal Awardee Performance and Integrity Information System (FAPIS), which did not contain any records regarding Rotech. Additionally, the contracting officer noted that Rotech did not appear on any of the debarred or suspended contractor lists or on the Office of the Inspector General excluded entities list.⁵ She also noted that Rotech was successfully performing other VA home oxygen services contracts of the same magnitude and scope as the contemplated contract. Id.; AR, Exh. 5, Contracting Officer's Statement at 3.

The protester argues that the contracting officer unreasonably failed to consider available relevant information in concluding that Rotech had adequate financial resources to perform.⁶ In this connection, B&B maintains that the contracting officer ignored information in the D&B report concerning Rotech's payment problems; considered only selected portions of the information pertaining to its new \$25 million loan facility; and unreasonably failed to consider financial reports filed by Rotech with the Securities Exchange Commission (SEC), which showed that Rotech had a loss of \$43.7 million, rather than a net income of \$43.7 million, for the first 9 months of 2012. The protester also argues that in finding Rotech financially responsible, the contracting officer either ignored or unreasonably failed to consider information indicating that the company had emerged from Chapter 11 bankruptcy in 2002 with a significant debt burden.

The record does not support the protester's contention that the contracting officer ignored information in the D&B report concerning Rotech's payment problems; rather, it supports the view that she considered the information and concluded that it showed a low risk of late payment. Similarly, the record fails to establish that the contracting officer ignored information in the D&B report pertaining to Rotech's new

⁵ The Department of Health and Human Services, Office of the Inspector General, maintains a list of Excluded Individuals/Entities, which provides information to the health care industry, patients and the public regarding individuals and entities currently excluded from participation in Medicare, Medicaid and all other Federal health care programs. See <http://oig.hhs.gov/faqs/exclusions-faq.asp>.

⁶ The protester also argues that the contracting officer failed to comply with VA internal agency policy, which states that if a contractor has an SER score of 7 or higher (which Rotech did), the contracting officer "must document the additional due diligence conducted to justify an award in light of the higher risk score." VA Information Letter 049-09-03, AR, Exh. 13. We will not consider this complaint because an agency's compliance with internal agency guidance is not a matter subject to our review through the bid protest process. Talon Mfg. Co., Inc., B-261687, B-261687.2, Oct. 19, 1995, 95-2 CPD ¶ 184 at 3-4.

loan facility. In this regard, the contracting officer states that she viewed Rotech's D&B report, and the mere fact that she cited only the aggregate principal amount of the loan credit facility in her responsibility determination does not show that she failed to consider other information in the report pertaining to the loan. With regard to B&B's argument that the contracting officer unreasonably failed to consider the content of financial reports filed with the SEC, the protester has not shown that the contracting officer acted unreasonably in relying on information contained in the D&B report as opposed to conducting a further investigation regarding the validity of the information in the report. In any event, to the extent B&B is challenging the adequacy and reasonableness of the contracting officer's investigation, this challenge does not present an exception to our rules barring consideration of challenges to an agency's affirmative determination of responsibility. See USS Chartering, LLC, B-407601, Jan. 15, 2013, 2013 CPD ¶ 69 at 4.

Additionally, we are not persuaded that the contracting officer unreasonably failed to consider information indicating that Rotech had emerged from Chapter 11 bankruptcy in 2002 with a significant debt burden. Rotech's involvement in bankruptcy proceedings a decade ago is not a matter that, by its nature, would be expected to have a strong bearing on whether Rotech should be found responsible now. To the extent the protester's focus is on the debt burden that resulted from the bankruptcy proceedings, the record does not establish that the contracting officer failed to consider Rotech's heavy debt burden; rather, it indicates that she thought the company had the financial resources to perform despite its debt burden.

The protester also argues that in finding Rotech to be responsible, the contracting officer failed to consider available relevant information pertaining to Rotech's record of integrity and business ethics. In this connection, B&B contends that she failed to consider that: (1) in 2002, Rotech paid the United States \$17 million to resolve allegations that the company had fraudulently overbilled government healthcare programs for respiratory equipment, supplies, and services; (2) in 2004, Rotech did not comply with all delivery schedules for medical equipment contracts within VISN 16; (3) in 2008, Rotech entered into a 3-year Corporate Integrity Agreement with the Office of Inspector General of the U.S. Department of Health and Human Services in connection with the resolution of a qui tam complaint brought by one of Rotech's former employees, which alleged false and fraudulent conduct in billing for medical equipment; (4) in 2010, Rotech had problems complying with delivery schedules and performance requirements in performing home oxygen and medical equipment contracts for VISN 21; and (5) on May 25, 2012, Rotech publicly reported that it had identified an error in its billing system that had resulted in its being overpaid in fiscal years 2009-2011.

Some of the foregoing items concern matters that occurred a number of years (i.e., approximately 10 or more) years in the past; others concern matters apparently resolved by Rotech with the government, matters that involve relatively low dollar values, and/or matters that reflect Rotech's voluntary efforts to comply with its

contractual obligations. We find that these matters fail to meet the threshold for our review since the information allegedly not considered by the contracting officer is not the sort of information that would be expected to have a strong bearing on her responsibility determination. See Wild Building Contractors, Inc., B-293829, June 17, 2004, 2004 CPD ¶ 131 at 5; The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 7. Accordingly, this aspect of B&B's protest is dismissed.

Past Performance

The protester also argues that the agency's evaluation of Rotech's past performance was unreasonable. In this connection, B&B challenges the agency's assessment of the relevance of two of Rotech's prior contracts. The protester further argues that the contemporaneous record fails to demonstrate a basis for the substantial confidence rating assigned.

The evaluation of past performance, including assessments of relevance and significance of an offeror's performance history, is a matter of agency discretion that we will not disturb unless those assessments are unreasonable. Wisconsin Physicians Serv. Ins. Corp., B-401068.14, B-401068.15, Jan. 16, 2013, 2013 CPD ¶ 34 at 10.

The solicitation here provided for evaluation of offerors' past and present experience under recent and relevant contracts. RFP at 117. The RFP defined recent and relevant contracts as contracts performed in the last three years involving (1) experience with home oxygen contracts; (2) demonstrated management of experienced/qualified professional staff and administrative support personnel; and (3) demonstrated ability providing home oxygen services in a large geographical area with up to 6,300 patients. Id. The solicitation also included the following definitions of relevance:

VERY RELEVANT: Past/present performance effort involved essentially the same magnitude of effort and complexities this solicitation requires.

RELEVANT: Past/present performance effort involved much of the magnitude of effort and complexities this solicitation requires.

SOMEWHAT RELEVANT: Past/present performance contractual effort involved some of the magnitude of effort and complexities that this solicitation requires.

NOT RELEVANT: Past/present performance effort did not involve any of the magnitude of effort and complexities this solicitation requires.

Id. at 118. Proposals were to be assigned ratings under the past performance factor of substantial, satisfactory, limited, no, or unknown confidence.

Rotech identified the following four recent relevant contracts in its proposal:

- Contract No. VA258-PC-0336 to provide home oxygen and durable medical equipment to patients in VISN 18. Contract term: March 2010-Feb. 2015. Total Value: \$95 million. Monthly patients served: approximately 7,500.
- Contract No. VA260-P-0153 to provide home oxygen services to patients in VISN 20. Contract term: Oct. 2007-Sept. 2012. Total Value: \$16.5 million. Monthly patients served: 1,631.
- Contract No. VA244-P-0491 to provide home oxygen services to patients in Coatesville, PA VAMC. Contract term: Oct. 2008-Sept. 2012. Total Value: \$1.9 million. Monthly patients served: 437.⁷
- A contract with United Healthcare to provide standard durable medical equipment, home oxygen, and services. Contract term: May 2010-Feb. 2013, followed by auto renews for 1-year terms. Total revenue of \$24.6 million for 2011. Monthly patients served: 27,109.

AR, Exh. 8.

The agency received completed past performance questionnaires for three of the above contracts; no response was received for the VISN 20 contract. The reference for the VISN 18 contract rated Rotech's performance as excellent/high confidence in all areas, with the exception of one very good rating. The point of contact for the Coatesville VAMC contract did not rate Rotech's performance on the scale provided, but furnished positive narrative comments. The reference for the United Healthcare contract assigned ratings ranging from excellent/high confidence to satisfactory/confidence.

The agency's past performance evaluation team (PPET) reviewed Rotech's past performance information and assigned a rating of substantial confidence.⁸ In her best value trade-off decision, the contracting officer explained that a rating of substantial confidence was appropriate because the contracts cited by Rotech were considered "very relevant as they involved essentially the same magnitude of effort

⁷ While Rotech indicated in its proposal that under the Coatesville VAMC contract it was currently serving around 437 patients on a monthly basis, the reference who completed the past performance questionnaire identified the number of customers served as 135.

⁸ As pointed out by the protester, the only contemporaneous documentation pertaining to Rotech's past performance makes no mention of the PPET having agreed upon a rating of substantial confidence--indeed, the only reference to the quality of the awardee's prior performance was that "past performance shows varying amounts of satisfaction." AR, Exh. 8. In the contracting officer's supplemental statement of facts, however, she states that she was present when the PPET met and this was the rating agreed upon by the evaluators. AR, Exh. 17.

and complexities as this solicitation requires,” and the performance questionnaires returned rated Rotech’s performance as “very good to exceptional.” AR, Exh. 7, Contracting Officer’s Best Value Decision, at 13.⁹

B&B argues that it was inconsistent with the definitions set forth in the RFP for the agency to identify Rotech’s VISN 20 and Coatesville VAMC contracts as very relevant, or even relevant. In this connection, the protester contends that neither contract involves “essentially the same magnitude,” or even “much of same magnitude,” as the effort here. B&B further argues that, in any event, the agency had no basis for evaluating Rotech’s performance on the VISN 20 contract because it did not receive a past performance questionnaire pertaining to this contract.¹⁰

The degree of relevance of the VISN contract 20 is immaterial since the agency did not receive information regarding the quality of Rotech’s performance of the contract; that is, regardless of the relevance of the contract, the contracting officer had no basis for evaluating Rotech’s performance on it. In addition, we agree with the protester’s position that the Coatesville VAMC contract, which is of far lesser magnitude (both in terms of patients served and dollar value) than the effort here, merited a relevance rating of no more than “somewhat relevant.” Regardless of the relevance of the two preceding contracts, however, the contracting officer had a reasonable basis for assigning Rotech a past performance rating of substantial confidence based on the positive ratings of its performance on the questionnaires

⁹ In her Statement of Facts responding to this protest, the contracting officer revised her analysis pertaining to the relevance of Rotech’s contracts, identifying the VISN 18 and United Healthcare contracts as very relevant and the VISN 20 and Coatesville VAMC contracts as relevant. According to the contracting officer, the latter two contracts were relevant because they “involved much of the magnitude of effort and complexities this solicitation required.” AR, Exh. 5, Contracting Officer’s Statement of Facts, at 5. She also revised her summary of the ratings assigned Rotech’s past performance on the questionnaires returned, noting that the ratings ranged from satisfactory to exceptional. (The ratings actually ranged from satisfactory to excellent; that is, there was no rating of exceptional on the past performance questionnaires.)

¹⁰ The protester also argues that the agency failed to consider criteria set out in the solicitation in evaluating Rotech’s past performance. In this connection, the RFP provided for the evaluation of offerors’ prior performance in providing management, technical, and administrative personnel; providing effective quality control; making timely submissions; and solving problems. RFP at 117. We find this argument to be without merit. The past performance questionnaires reviewed by the agency evaluators included questions pertaining to these areas.

pertaining to its two very relevant contracts. Accordingly, we find this basis of protest to be without merit.¹¹

The protest is denied.

Susan A. Poling
General Counsel

¹¹ While not discussed in detail in this decision, we also considered--and find to be without merit--the protester's complaint that the contracting officer did not perform a proper comparison of its proposal to Rotech's in her best value trade-off determination. In this connection, the record fails to support the protester's underlying premise that despite the two proposals having received equivalent ratings under all of the non-price evaluation factors, its proposal was superior to Rotech's.