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Decision

Matter of: Native Resource Development Company

File: B-409617.3

Date: July 21, 2014

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W. Kent Davis, Esq., and Jessica Lane Day, Esq., Department of Homeland Security, Federal Emergency Management Agency, 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. Protest is sustained where agency found protester's proposed level of staffing to be a weakness based on mechanical application of an undisclosed government estimate, and finding was of critical significance in agency's best value tradeoff decision.
 2. Protest challenging agency's rating of protester's past performance as satisfactory rather than outstanding is sustained where agency fails to rebut protester's allegation that its past performance met the definition for a rating of outstanding.
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DECISION

Native Resource Development Company (NRDC), of Bernalillo, New Mexico, protests the rejection of its proposal and the award of a contract to Bestway Services, Inc., of Nashville, Tennessee, under request for proposals (RFP) No. HSFE20-14-R-0001, issued by the Department of Homeland Security, Federal Emergency Management Agency for facility operations and support services for the Center for Domestic Preparedness in Anniston, Alabama. The protester challenges the agency's evaluation of proposals and best value trade-off decision.

We sustain the protest.

BACKGROUND

The Center for Domestic Preparedness is a national training facility that prepares state and local emergency response personnel to respond to terrorist attacks involving weapons of mass destruction. The services to be provided pursuant to the RFP here, which was issued on November 27, 2013, include building maintenance and repair, janitorial, and lodging (i.e., desk clerk and housekeeping) services for the Center's major facilities. The solicitation included a detailed Performance Work Statement (PWS) explaining the areas of work to be performed.

The RFP contemplated the award of a fixed-price contract for a 5-year period (1 base, plus 4 option, years).¹ The solicitation provided for award to the offeror whose proposal represented the best value to the government, with technical factors approximately equal in weight to price. Technical evaluation factors were: (1) work plan; (2) management plan; (3) staffing plan/key personnel; (4) experience; and (5) past performance. The first two factors, which were of equal weight, were more important than the last three, which were also of equal weight.

Of relevance to this protest, the solicitation provided that under the staffing plan/key personnel factor, the agency would consider the sufficiency of the offeror's proposed staffing for addressing the tasks identified in the PWS, the merits and realism of the proposed labor mix, the qualifications of the proposed key personnel, and the offeror's approach to recruiting, retaining, training, supervising, and coordinating its staff. RFP at 58. While the solicitation did not provide offerors with a staffing estimate, the agency did have an internally prepared estimate that the evaluators used in their evaluation. The agency's staffing estimate included [deleted] full-time equivalent (FTE) positions performing project management functions (e.g., project manager, quality manager), [deleted] FTEs performing maintenance functions (e.g., HVAC maintenance worker, general maintenance worker, electrician), [deleted] FTEs performing custodial functions (e.g., service manager, janitor), and [deleted] FTEs performing lodging-related functions (e.g., service and lodging managers, housekeeping staff, desk clerks), for an overall total of [deleted] FTEs.

Eight offerors, including NRDC and Bestway, submitted proposals by the January 14, 2014 closing date. The agency evaluated the proposals and included four of them in the competitive range. The protester's proposal, which the evaluators rated as good under the management plan and experience factors and as satisfactory

¹ The solicitation was set aside for Historically Underutilized Business Zone (HUBZone) small businesses.

under the work plan, staffing plan/key personnel, and past performance factors, was among the proposals included in the competitive range.²

Under the staffing plan/key personnel factor, the evaluation team identified several strengths in the protester's proposal and found that it "exceptionally demonstrate[d] the offeror's ability to staff this project with the commensurate number of qualified personnel" and "reflect[ed] full understanding of the PWS requirements." Initial Technical Evaluation Report, Jan. 28, 2014, at 16. Seemingly inconsistently, the evaluators also identified the following significant weakness in NRDC's proposed staffing plan: "The proposed staffing levels (Exhibit 2-6) appear to be low to meet the requirements of the PWS. Specifically, the staffing of some critical functions such as lodging housekeeping, laundry services, and mail appear[s] to be low." Id. at 17.

The agency conducted discussions with the four offerors in the competitive range. In response to the above identified weakness pertaining to its proposed staffing, the protester increased its staffing for each of the positions specified.

After receiving final revised proposals, the technical evaluation team rated the proposals as follows:

	NRDC	Bestway	Offeror A	Offeror B
Work Plan	Satisfactory	Good	Good	Good
Mgmt. Plan	Good	Good	Good	Good
Staffing Plan/ Key Personnel	Satisfactory	Outstanding	Satisfactory	Good
Experience	Good	Satisfactory	Satisfactory	Good
Past Performance	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Overall Technical	Satisfactory	Good	Good	Good
Price	[deleted]	\$15,122,734	[deleted]	[deleted]

Final Technical Evaluation Report, Feb. 18, 2014, at 12.

In their final evaluation of NRDC's proposal, the evaluators noted that while the protester proposed to increase staffing by 4 FTEs, NRDC's overall staffing

² The agency's technical evaluation plan provided that proposals would be rated as outstanding, good, satisfactory, or unsatisfactory under the work plan, management plan, staffing plan/key personnel, and experience factors, and as outstanding, satisfactory, unsatisfactory, or neutral under the past performance factor.

remained a weakness. According to the evaluators, NRDC proposed [deleted] FTEs,³ which was over [deleted] percent below the government estimate and represented a “shortage of staff that would potentially cause delays in responding to work orders and issues with overall quality of work performed.” Id. at 10. Bestway, in contrast, was assigned a staffing/key personnel rating of outstanding, based in part on its proposal of [deleted] FTEs overall, which was very close to the government estimate.

In comparing NRDC’s proposal to the proposals of Bestway and Offeror A, the evaluators found that the weakness of the protester’s staffing plan, in terms of the number of FTEs proposed, represented a performance risk that outweighed NRDC’s price advantage, and the protester’s proposal thus did not represent the best value to the government. The evaluators then compared the proposals of Bestway and Offeror A, and determined that technical advantages associated with the former outweighed the minor difference in price between the two proposals. As a result, the technical evaluation team recommended award to Bestway, and the source selection official concurred.

By letter of March 10, the agency provided the other competitive range offerors with preaward notification of Bestway’s selection to give them the opportunity to challenge Bestway’s HUBZone small business status. NRDC responded by filing a HUBZone status protest, which the agency forwarded to the Small Business Administration (SBA). By decision of April 2, SBA denied the protest, and on April 3, the agency awarded a contract to Bestway. After receiving a debriefing, NRDC protested to our Office on April 10.

DISCUSSION

NRDC argues that the agency improperly evaluated the adequacy of its proposed staffing based on a comparison of the overall number of FTEs proposed to an undisclosed government estimate, which resulted in a downgrading of the proposal’s rating under the staffing plan/key personnel factor. As explained below, we agree with the protester.

While an agency may rely on its own estimates of the staffing levels necessary for satisfactory performance in evaluating proposals for the award of a fixed-price contract, it is improper for an agency to downgrade a proposal simply because the offeror’s overall proposed FTEs differ from the government’s estimate, where the government’s estimate was not disclosed to the offerors, the agency failed to

³ Of minor significance, the protester disputes the accuracy of this number, and correctly notes that its technical proposal, as amended, proposed [deleted] FTEs. Protester’s Comments, June 30, 2014, at 3, citing NRDC Final Proposal Revision at replacement page 65.

conduct discussions with the offeror concerning the discrepancy, and the agency did not look beyond the bottom line numbers to determine whether there were specific areas in which the offeror's proposed staffing was inadequate. See Olympus Bldg. Servs., Inc., B-285351, B-283351.2, Aug. 17, 2000, 2000 CPD ¶ 178 at 10; see also NCI Info. Sys., Inc., B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 7.

This is precisely what happened here--NRDC's proposed staffing was found to present a performance risk solely because the protester's overall number of FTEs was below an undisclosed agency estimate, without discussions providing adequate notice of the agency's concern or analysis of whether the protester's proposed staffing in particular areas was sufficient.

Regarding the FTE comparison, there is simply no evidence of any analysis as to specific areas in which the protester's final staffing numbers were considered insufficient, notwithstanding the fact that NRDC's proposal included a breakout of its FTEs by labor category and functional area, as did the agency estimate. Rather, the record reflects that the agency mechanically compared NRDC's total FTE count with the total FTE set forth in the government estimate where the contracting officer simply explained that the agency had concerns with NRDC's staffing because it provided "over [deleted]% fewer personnel than identified in the Government estimate of [deleted] FTE's." Contracting Officer's Statement of Facts at 14. Such a comparison, without any analysis or explanation was fundamentally unreasonable.⁴

We recognize that the agency raised the issue of inadequate staffing with the protester during discussions. During those discussions, however, the agency specifically identified as too low the number of proposed FTEs for lodging

⁴ The unreasonableness of the agency's approach (of evaluating the sufficiency of offerors' staffing based solely on a comparison of total FTEs to the agency estimate) is further demonstrated by the fact that it resulted in a rating of outstanding for Bestway's staffing plan, despite significant discrepancies between Bestway's proposed labor mix and the agency's. Put another way, Bestway's overall number of FTEs was close to the agency's estimate--but not because Bestway proposed a staffing mix that closely mirrored the agency's mix. Rather, Bestway's overall FTE number was close to the agency's number because despite proposing significantly fewer FTEs for management and supervisory functions than the government estimate, Bestway proposed FTE numbers significantly exceeding the government estimate for three of the least-skilled, lowest-paid positions (i.e., janitor, mail room clerk, and general clerk). Indeed, when the staffing in excess of the government estimate in these categories is subtracted from the awardee's overall number of FTEs, the resulting number is very close to the protester's proposed number of FTEs.

housekeeping, laundry services, and mail; that is, the agency did not advise NRDC that it considered the protester's staffing numbers in other areas to be too low. The protester addressed the identified staffing shortfalls in its final proposal. NRDC increased its proposed FTEs for mail handling to a level in excess of the number in the agency estimate, and increased its number of housekeeping/laundry workers to a level that, while below the agency staffing estimate, was apparently sufficient given that it exceeded the number of FTEs proposed by Bestway.

In sum, we conclude that the agency acted unreasonably in finding NRDC's overall level of staffing to be a weakness representing performance risk without providing the protester with reasonable notice of, and the opportunity to address, the discrepancy between the agency's overall staffing estimate and its own overall number, and without providing any analysis as to specific areas in which the protester's final staffing numbers were considered insufficient. As a result, we sustain the protest.

NRDC also takes issue with the evaluators' rating of its past performance as merely satisfactory. The protester contends that in view of the evaluators' findings pertaining to its past performance--including that it had been "recognized on numerous occasions for above average performance;" that two of its prior contracts had been "rated exceptional across the board in their CPARS report, demonstrating exceptional execution of the contracts;" and that it had demonstrated the "ability and willingness to exceed PWS requirements," Initial Technical Evaluation Report, at 18--a rating of outstanding for the factor was deserved.

As previously noted, the technical evaluation plan [TEP] provided that offerors' past performance would be rated as outstanding, satisfactory, unsatisfactory, or neutral, with the first two ratings defined as follows:

Outstanding: Based on an offeror's past performance record, essentially no doubt exists that the offeror will successfully perform the required effort.

Satisfactory: Based on an offeror's past performance record, some doubt exists that the offeror will successfully perform the required effort.

TEP, attach. 2.

In its initial agency report, FEMA furnished no meaningful response to this argument, and in its supplemental agency report, FEMA simply asserted, without any explanation, that if we were to agree that NRDC's past performance merited a rating of outstanding, "the same argument would have to be applied to Bestway's Past Performance rating as well, with commensurate and equal elevation to Outstanding," meaning that "a change in the rating of NRDC's past performance

would not necessarily improve its relative position.” Supplement to Contracting Officer’s Statement of Relevant Facts, May 29, 2014, at 9.

We regard the agency’s response as tantamount to a concession that it cannot defend its rating of the protester’s past performance as merely satisfactory. With regard to the agency’s assertion that if the agency rated NRDC’s past performance too low, it must also have rated Bestway’s past performance too low, the record fails to establish that the evaluators regarded the two offerors’ past performance as essentially equivalent (and thus deserving of identical ratings). In this regard, as noted above, the evaluators identified as past performance strengths for the protester its demonstrated ability and willingness to exceed PWS requirements and its across-the board ratings of exceptional in the CPARS for two of its prior contracts, whereas the evaluators’ findings of strength regarding Bestway’s past performance were more limited in scope, *i.e.*, the contractor worked with the customer to identify areas for cost reductions/savings and demonstrated the ability to grow its “span of responsibility and capability.” Initial Technical Evaluation Report, at 8. Moreover, the propriety of Bestway’s past performance evaluation is a matter addressed as part of a reevaluation; our Office gives little weight to new evaluation judgments made in response to a protest. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. We accord lesser weight to such post hoc arguments or analyses because we are concerned that judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. *Id.* Accordingly, we also sustain the protester’s complaint pertaining to the evaluation of its past performance.⁵

RECOMMENDATION

We recommend that the agency reevaluate the proposals, taking into account our findings above. In the event the agency concludes that a reopening of discussions and the submission of another round of revised proposals is required as part of that process, it should do so. We further recommend that based on the results of the reevaluation, the source selection official make a new source selection decision, and that if an offeror other than Bestway is selected for award, the agency terminate the contract awarded to Bestway and make a new award. We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1)(2014). The

⁵ NRDC raised other issues in its protest in addition to those discussed above. We have considered all of the other issues raised and conclude that they do not provide a basis to sustain the protest.

protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel