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Decision

Matter of: Mark Dunning Industries, Inc.

File: B-413321.4

Date: July 26, 2017

Douglas P. Hibshman, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.

Michael A. Gordon, Esq., Michael A. Gordon, PLLC, for CoSTAR Services, Inc., the intervenor.

Susan E. Sharp, Esq., Department of the Navy, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably evaluated awardee's past performance as acceptable notwithstanding some number of allegedly negative interim contract administration reports where the agency considered the contractor performance assessment reports for the contract, which assessed an overall positive rating for the awardee.

DECISION

Mark Dunning Industries, Inc. (MDI), of Dothan, Alabama, protests the award of a contract to CoSTAR Services, Inc., of San Antonio, Texas, under request for proposals (RFP) No. N69450-15-R-2106, issued by Department of the Navy, Naval Facilities Engineering Command Southeast, for regional base operations support services. The protester challenges the evaluation of CoSTAR's past performance.

We deny the protest.

BACKGROUND

The RFP, issued as a set-aside for small business concerns, contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract for regional base operation services (to include custodial, grounds maintenance, waste management, and pest control services) at Naval Air Station Jacksonville, FL, Bureau of Medicine and Surgery, Jacksonville, Blount Island, Jacksonville, FL, Naval Station Mayport, FL, and

the outlying areas supported by these commands. The contemplated contract was for a base year and four 1-year option periods.

The RFP established that proposals would be evaluated on five factors: (1) corporate experience; (2) management and technical approach; (3) safety; (4) past performance; and (5) price, and that award would be made on a lowest-priced, technically-acceptable basis. RFP at 82-83, 145. Of particular relevance, with respect to past performance, the RFP required offerors to submit past performance references, and for each reference, to provide a completed contractor performance assessment report (CPARS) evaluation if such evaluation was available. Id. at 151-152. The RFP also provided that the agency “may elect to consider data from other sources.” Id. Further, the RFP indicated that past performance would be evaluated based on the degree to which available information reflected a trend of satisfactory performance. Id.

The agency initially made award to MDI. CoSTAR, the incumbent contractor, subsequently filed a protest with our Office, which was dismissed following notification by the agency that it would take corrective action by reevaluating the protester’s proposal, conducting discussions if necessary, and issuing a new or revised source selection decision as appropriate.

Following the completion of the agency’s corrective action, the agency selected CoSTAR for award, finding that CoSTAR submitted the lowest-priced, technically-acceptable proposal. MDI challenged CoSTAR’s small business size status at the Small Business Administration (SBA) on January 20, 2017.¹ On February 22, the SBA notified the agency that it had determined that CoSTAR was a small business for the subject procurement. Agency Request for Summary Dismissal, Exhibit A, SBA Determination, at 1. The agency notified MDI that it had made award to CoSTAR on April 5, and subsequently provided MDI with a debriefing. This protest followed.

DISCUSSION

MDI challenges the agency’s evaluation of CoSTAR’s past performance, arguing that, had the agency reasonably considered CoSTAR’s past performance of the incumbent contract, it would have found CoSTAR’s proposal unacceptable.² Protest at 7-8.

¹ On January 23, prior to the SBA’s determination, MDI filed a protest with our Office. As a result of the size challenge that was pending at the time, MDI had not yet been provided a debriefing. MDI raised several grounds of protest, which we dismissed on March 2, finding that the protest grounds raised by the protester were speculative and/or did not form a valid basis for protest.

² MDI also alleged that the agency failed to conduct a proper responsibility determination with respect to CoSTAR. Protest at 8-9. Our bid protest regulations provide that we will generally not consider protests challenging such determinations. 4 C.F.R. § 21.5. As none of the exceptions contemplated by our regulation were applicable, we previously dismissed that protest ground consistent with our regulations.

Specifically, MDI provided an affidavit from a former CoSTAR employee regarding CoSTAR's alleged poor performance on the incumbent contract, including testimony that CoSTAR received some number of negative performance assessment worksheets (PAWs) and contractor deficiency reports (CDRs). Protest, Affidavit of Former CoSTAR Employee. More specifically, the former employee alleges that services such as carpet cleaning, floor waxing, lawn mowing and edging did not comply with the contract schedule, and notes one instance, among others, where a CoSTAR employee had to purchase soap for the company using the employee's own funds because supplies were not adequately provided by CoSTAR. Id. According to MDI, the agency could not reasonably ignore this information, and, once considered, the information should have resulted in a finding that CoSTAR was unacceptable. Protest at 6-8.

The agency responds by noting that the information in question was in fact considered as part of the evaluation, but, when considered in context, did not compel an unacceptable past performance rating. Agency Report (AR) at 1-2. Specifically, the agency notes that the most recent CPARS for the incumbent contract evaluated CoSTAR's performance as "very good" in all respects, and that the CPARS definition of such a rating contemplates that the contractual obligations were accomplished "with some minor problems for which corrective actions taken by the contractor were effective." Id. at 7; AR, Tab 7 CoSTAR CPARS at 1-2. The agency argues that all issues it identified with CoSTAR's performance were relatively minor in nature and effectively corrected, and therefore contends that CoSTAR's past performance information, taken as a whole, reflects a trend of satisfactory performance, justifying CoSTAR's rating of acceptable. AR at 12.

In reviewing a protest against an agency's evaluation of proposals, our Office will not substitute our (or the protester's) judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In this regard, the evaluation of an offeror's proposal is a matter within an agency's broad discretion, since the agency is responsible for defining its needs and the best method for accommodating them. Id. We have previously explained that an agency's past performance evaluation is unreasonable where the agency fails to give meaningful consideration to available relevant past performance information. See, e.g., Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, JV, B-401679.4 et al., Mar. 10, 2010, 2010 CPD ¶ 77 at 8 (sustaining protests where agency failed to reasonably consider past performance questionnaires); DRS C3 Sys., LLC, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 at 26 (same regarding a CPARS report). A protester's disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Fiserv NCSI, Inc., B-293005, Jan. 15, 2004, 2004 CPD ¶ 59 at 9.

Here, the protester's argument that the agency unreasonably ignored the negative information is groundless, because the record indicates that the agency's evaluation considered the information in question. Specifically, as contemplated by the solicitation,

CoSTAR's proposal included the most recent CPARS for the incumbent contract, one of CoSTAR's cited past performance references. AR, Tab 6, CoSTAR Factor 4, Final Proposal, CPARS, at 2. The agency also identified and considered a prior CPARS evaluation for the incumbent contract. AR, Tab 7, CoSTAR CPARS. These CPARS evaluations note in several places that issues were documented in the performance assessments during the evaluation period, but that as issues were identified, they were addressed by the contractor in a timely manner. Id. at 6; AR, Tab 6, CoSTAR Factor 4, Final Proposal, CPARS, at 2-3. Similarly, the affidavit of the contracting officer's representative, who was an assessing official for the CPARS reports prepared in connection with CoSTAR's performance on the incumbent contract and a member of the source selection evaluation board (SSEB), confirmed that the SSEB was aware of and considered the specific issues alleged in MDI's protest. AR, Tab 11, Affidavit of Contracting Officer's Representative.

The flaw in MDI's protest is that MDI fundamentally overestimates the significance of the alleged PAWs and CDRs.³ Those documents are generated as part of the ongoing process of contract administration, and do not represent the considered and final opinion of the agency concerning the contractor's performance. AR at 12. Such documents provide ongoing feedback on contract performance to resolve issues, or are created to contemporaneously document performance concerns. Id.

By contrast, the CPARS are an aggregation and reconciliation of any interim evaluations of performance previously issued by the agency. Id.; AR, Tab 10, CPARS Definition. Of note, the CPARS process provides an opportunity for CoSTAR to formally respond to any agency concerns, and provides for additional supervisory review by the agency. AR, Tab 7, CoSTAR CPARS at 3-6. The CPARS, therefore, represent the agency's considered opinion of CoSTAR's past performance. While, in prior cases, we have concluded that an agency may consider information contained in CDRs to supplement or contextualize CPARS, we have not concluded that an agency must do so. See, e.g., Del-Jen International Corp., B-297960, May 5, 2006, 2006 CPD ¶ 81 at 5-6 (agency may consider CDRs where no official CPARS had been prepared for the

³ The protester opposed the agency's objection to the production of the PAWs and CDRs in question. In this case, we agreed with the agency that the documents were not relevant to the protest. The PAWs and CDRs are, in effect, interim workpapers that were subsumed in the agency's final consensus assessment of contract performance, the CPARS. Thus, even assuming the agency had not specifically considered the PAWs or CDRs, where the agency considered the CPARS, the agency's evaluation had a reasonable basis. Moreover, contrary to protester's contention, the affidavit of the contracting officer's representative does not indicate that the PAWs and CDRs themselves were considered in documentary form, but rather that the source selection team was aware of and considered the underlying factual matters described in MDI's protest. AR, Tab 11, Affidavit of Contracting Officer's Representative. To the extent that any alleged PAWs or CDRs were issued after the relevant CPARS, the affidavit likewise makes clear that the source selection team was aware of the issues raised. Id.

relevant period); CMJR, LLC d/b/a Mokatron, B-405170, Sept. 7, 2011, 2011 CPD ¶ 175 at 9 (agency may consider CDRs in addition to CPARS).

Most importantly, as noted above, the record reflects that CoSTAR received an overall “very good” CPARS rating for its performance on the incumbent contract. Such a rating was consistent⁴ with the agency having issued some number of negative PAWs and CDRs over the period of performance, given that a “very good” rating contemplated some number of problems, such as the relatively minor types of issues alleged by the protester. Accordingly, where the record reflects that the agency considered the CPARS evaluation of CoSTAR’s performance on the incumbent contract, which subsumed the allegedly adverse information raised by the protester, or where any alleged adverse information was otherwise considered in the evaluation, we have no basis to conclude that the agency failed to meaningfully consider available past performance information, or that the agency’s evaluation was unreasonable or otherwise inconsistent with the terms of the solicitation.

The protest is denied.

Susan A. Poling
General Counsel

⁴ The protester contends that the affidavit of the contracting officer’s representative should be disregarded because its claim that the SSEB considered the issues underlying the alleged negative PAWs and CDRs is inconsistent with the SSEB’s finding that “no negative past performance information was found.” Protester’s Comments at 2, citing AR, Tab 11, Affidavit of Contracting Officer’s Representative; SSEB Report at 1. In reviewing an agency’s evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties’ arguments and explanations. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. While our Office generally gives little weight to reevaluations or judgments prepared in the heat of the adversarial process, post-protest explanations that provide a rationale for a contemporaneous conclusion, and simply fill in previously unrecorded details, will generally be considered so long as those explanations are credible and consistent with the contemporaneous record. The S.M. Stroller Corp., B-400937 et al., Mar. 25, 2009, 2009 CPD ¶ 193 at 13. In this case, there is no inconsistency between the contracting officer’s representative’s statement and the contemporaneous record because the relevant CPARS information, which the agency maintains subsumed the PAWs and CDRs, assessed very positive ratings, notwithstanding the recognition of some minor performance issues such as those alleged by the protester.