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Decision

Matter of: Veteran National Transportation, LLC

File: B-415011

Date: October 31, 2017

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Thomas L. Walker, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, PC, for Owl, Inc., the intervenor.

Daniel McFeely, Esq., Department of Veterans Affairs, for the agency.
Peter D. Verchinski, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's past performance evaluation is denied where the evaluations and source selection decision were reasonable and consistent with the terms of the solicitation.

DECISION

Veteran National Transportation, LLC, (VNT) of Fulshear, Texas, protests the Department of Veterans Affairs' (VA) award of a contract to Owl, Inc., of St. Johns, Florida, under request for proposals (RFP) No. VA258-17-R-0101, for ambulette transportation services. VNT challenges the agency's evaluation of its proposal.

We deny the protest.

BACKGROUND

The RFP, issued on March 23, 2017, provided for the award of a fixed-price requirements contract for ambulette transportation services (wheelchair, stretcher, and ambulatory) in the Phoenix, Arizona metropolitan area for an approximately 3-month base period and five option periods, four of which are for one year and the fifth period is

for approximately 7 months. RFP at 26, 30-81.¹ Under the RFP, offerors could compete for “workload #1,” which covered wheelchair and stretcher transportation services, or compete for “workload #2,” which covered ambulatory transportation services, or offerors could compete for both workloads. RFP, amend. 1, at 557. The acquisition, conducted under Federal Acquisition Regulation (FAR) Part 12, Acquisition of Commercial Items, was set aside for small businesses using a tiered evaluation approach.² RFP, amend. 1, at 556. Award was to be made on a best-value tradeoff basis, considering past performance and price. RFP at 155. The past performance evaluation factor was composed of six subfactors (of equal importance): management effectiveness; quality of service and workmanship; timeliness/adherence to schedules; quality control; customer satisfaction; and compliance with security, labor and safety regulations. RFP at 156-157. The RFP provided that past performance was significantly more important than price. Id. at 155.

With regard to past performance, the RFP stated that the contracting officer would seek relevant performance information from the references provided by the offeror and data independently obtained from other government and commercial sources. RFP at 157. The agency would use this information to assess the offeror’s ability to perform the effort described in the solicitation. Id. The agency’s assessment would result in an overall past performance rating of exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence.³ Id. at 158. With regard to price, the RFP provided that prices would be evaluated “to determine whether an offeror’s proposed prices for the project are complete and reflect an understanding of solicitation requirements, and to provide an assessment of the reasonableness of the proposed price.” RFP at 159.

By the solicitation’s May 23, 2017 closing date, the agency received 5 proposals, including VNT’s and Owl’s, for “workload #1,” and 4 proposals, including VNT’s and Owl’s, for “workload #2.” Agency Report (AR), Tab 6, Best Value Determination (BVD), Workload #1, at 1176; AR, Tab 7, BVD, Workload #2, at 1217. A past performance

¹ References herein to page numbers are to VA’s Bates numbering in the agency report, unless the reference is to the agency’s legal memorandum or the protester’s comment on the agency’s report.

² Under this approach, the agency would first evaluate service-disabled veteran-owned small businesses, then evaluate veteran-owned small businesses, then evaluate small businesses. Here, the agency received sufficient participation among service-disabled veteran-owned small businesses (SDVOSB) concerns that competition was limited to those firms. Legal Memorandum at 1.

³ As relevant to this protest, marginal/little confidence was defined as “[b]ased on the offeror’s performance record, substantial doubt exists that the offeror will successfully perform the required effort. Changes to the offeror’s existing processes may be necessary in order to achieve contract requirements.” Id. at 158.

evaluation team evaluated the past performance of each offeror for each workload. AR, Tab 6, BVD, Workload #1, at 6-12; AR, Tab 7, BVD, Workload #2, at 6-11. With respect to VNT’s and Owl’s proposals, the agency’s past performance evaluations for “workload #1” and “workload #2” were the same. The agency evaluated past performance and price as follows:

		VNT	Owl
Past Performance		Marginal/Little Confidence	Exceptional/High Confidence
Price	Workload #1	\$10,236,498 (Not Reasonable)	\$8,136,481
	Workload #2	\$3,694,931 (Not Reasonable)	\$2,164,282

AR, Tab 6, BVD, Workload #1, at 1186; AR Tab 7, BVD, Workload #2, at 1226.

VNT’s marginal/little confidence rating was based on two references the agency found in the past performance information retrieval system (PPIRS).⁴ One reference was for special needs transportation services in San Francisco, California, from October, 2015 to October, 2106, for approximately \$500,000, which indicated satisfactory performance in all areas.⁵ AR, Tab 6, BVD, Workload #1, at 1185; AR, Tab 7, BVD, Workload #2, at 1225. The other reference was for ambulette services for the Southern Arizona VA Health Care system. This contract was “an active contract managed” by the same contracting office that was conducting the procurement at issue here. CO Statement at 2. In addition to reviewing the information for this contract in PPIRS, which covered the time frame from May 2015 to April 2016, the agency also reviewed its own contract file, which contained more recent information. CO Statement at 2. The agency noted that VNT had received a cure notice for this contract on May 19, 2017, had received a show cause letter on June 1, and the contract was terminated for cause by the agency effective June 16. AR, Tab 6, BVD, at 1185; AR, Tab 7, BVD, at 1225-1226. The agency also noted other performance issues on this contract, including letters from April 28, 2016, and May 27, 2016, each indicating a failure to meet transportation timelines, a letter from September 13, 2016, indicating a failure to report an accident on time, and a letter from November 16, 2016, indicating concern over an injured patient. AR, Tab 6, BVD, at 1185; AR, Tab 7, BVD, at 1225. Based on this information, the VA ultimately rated VNT’s past performance as “marginal/little confidence.”

⁴ The agency did not receive any past performance questionnaires from the references listed in VNT’s proposal. Contracting Officer’s (CO) Statement at 2.

⁵ According to the CO, this contract was terminated for the convenience of the government one month after it was awarded. CO Statement at 2.

With respect to VNT's price, the agency found that VNT's price was "not reasonable," as the firm had failed to respond to two agency requests asking that VNT clarify aspects of its pricing. AR, Tab 6, BVD, at 1186; AR, Tab 7, BVD, at 1226. In this regard, the agency found that, for workload #1, VNT had appeared to offer pricing for some items under contract line item number (CLIN) 0004 on a per trip basis, rather than on a per mile basis as specified in the solicitation, and that, for workload #2, VNT had included pricing for certain CLINs that were to be priced under workload #1, and not workload #2. AR, Tab 9, Request for Clarifications, at 1285, 1287.

The agency's evaluation rated Owl's past performance as exceptional/high confidence, and found that Owl's prices for both workload #1 and workload #2 were reasonable. After comparing Owl's proposal to the proposals of the other offerors' (including VNT), the agency concluded that Owl represented the best value to the agency, and selected that firm for award. This protest followed.⁶

DISCUSSION

The core of VNT's protest is a challenge to the agency's evaluation of its past performance.⁷ The protester argues that it was improper for the agency to consider VNT's termination for cause because, according to VNT, the termination was a result of the agency's failure to pay VNT for contract performance. In this regard, the record indicates that in September of 2016 the Department of Labor (DOL) began an investigation into VNT's compliance with the Service Contract Act (SCA) on its contract for ambulette services for the Southern Arizona VA Health Care system. AR, Tab 10, VNT's Response to Agency's May 19 Cure Notice, at 1301. The DOL ultimately concluded that VNT was not paying its drivers in accordance with the SCA, and estimated that the difference between what VNT paid its drivers and the amount owed to them was approximately \$450,000. Id. In April 2017, the VA, at the direction of the

⁶ The protester raises multiple protest grounds. While our decision does not specifically address every argument, we have considered all of the protester's additional arguments, and find that none provides a basis on which to sustain the protest.

⁷ In its protest, VNT raised numerous challenges to the agency's past performance evaluation. For example, VNT argued that its past performance ratings have "resulted in injury to the contractor's reputation and its ability to use ratings to illustrate its past performance when competing for government contracts," and that it has a right to file a claim under the Contract Disputes Act because the agency abused its discretion by failing to follow the Federal Acquisition Regulation (FAR) procedures found at FAR subpart 42.15 relating to past performance information. Protest at 4-5. While the protester is asserting that the agency has improperly terminated its contract, the administration of a contract is within the discretion of the agency and does not raise protest issues for our consideration. 4 C.F.R. § 21.5(a). Instead, disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. Id.

DOL, withheld payments for work performed under this contract. VNT maintains that this failure to continue to pay the firm led to its inability to pay its employees, which resulted in its failure to perform the contract. VNT asserts that its failure to perform was a direct result of the agency's actions, and thus it was improper for the agency to consider this in its past performance evaluation.

The evaluation of an offeror's past performance is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria, Erickson Helicopters, Inc., B-409903, B-409903.2, Sept. 5, 2014, 2014 CPD ¶ 288 at 6, nor will we substitute our judgment for reasonably based evaluation ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. An offeror's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. FN Mfg., LLC, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7.

Based on our review of the record, we find nothing improper about the VA's evaluation of VNT's past performance. Here, the record demonstrates that VNT received numerous letters indicating poor performance from the agency, including a cure notice and a show cause notice, and ultimately had its contract terminated by the agency. Although the protester argues that it should not be held responsible for the termination for cause, the contracting officer was aware of all the events that led to the termination, including the determination to withhold payments. While we recognize that the protester continues to assert that it has not violated the SCA--and indeed, is litigating this determination now before an administrative law judge at the DOL--we find nothing unreasonable with the agency's decision to consider this information in its past performance evaluation. In this regard, the fact that the protester disagrees with the agency's actions (including the DOL's determination that VNT violated the SCA and owed its employees back wages), does not render the agency's actions unreasonable.

The protester also raises various challenges to the agency's price evaluation. Among other things, the protester challenges the agency's finding that "VNT's pricing for both Workload #1 and Workload #2 is not considered fair and reasonable as the offeror did not respond to a clarification request." AR, Tab 1, Protest, at 5 (quoting AR, Tab 5, VNT Debriefing, at 1171). In this regard, the record shows that, on June 1, 2017, the agency sent the protester an email, with regard to workload #1, stating that "[a]s a matter of clarification, please review the 0004 line item pricing. It appears that per trip pricing may have been listed vice mileage pricing in certain instances." AR, Tab 9, Request for Clarifications, at 1285. Later that same day, the agency sent the protester an email stating, with regard to workload #2, that "[a]s a point of clarification, please review the Option 5 pricing. It appears that Workload #1 items have been included in the summary total." AR, Tab 9, Request for Clarifications, at 1287. Both emails indicated that a response was to be submitted by close of business (COB) the next day, June 2. The record also shows that the protester responded that same day, stating that it had received the messages and it would respond by the next day. AR, Tab 9, Request for Clarifications, at 1289.

VNT's argues that it responded the next day to the agency's clarification requests. Id. In support of its contention, VNT includes in its protest an email, dated June 2, 2017, providing the agency corrected pricing. AR, Tab 1, Protest, at 396-397. However, the record does not support the protester's contention. In this regard, while the protester states that it replied to the clarification request, the email the protester provided does not show that the email was sent to any agency official. Id. Indeed, the email contains no field showing whom the email was sent "To:" Id. Given this, we find that the protester has failed to demonstrate that VNT actually sent the email to the agency, and thus the record does not contain any reason to conclude that the agency erred in finding that VNT failed to submit its price clarifications.⁸ As, based on the record before us, the agency had not received clarification of VNT's prices, we find nothing improper with the agency's conclusion that it was not able to determine that VNT proposed fair and reasonable pricing.⁹

Finally, the protester argues that the totality of events surrounding this procurement demonstrate that the agency has acted in bad faith. Government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition or unsupported speculation. BAE Sys. Tech. Solutions & Servs., Inc., B-409914, B-409914.2, Sept. 16, 2014, 2014 CPD ¶ 322 at 11. Here, the protester points to a number of "facts" over the course of the prior procurement and this procurement (for example, "after VNT exhausted its resources working without payment and laid off 41 employees the VA terminated VNT for cause, ignoring VNT's responses to its cure notices") to demonstrate bad faith. Protester's Comments at 4. However, the protester merely speculates that the agency

⁸ We note that the protester does not allege that these exchanges constituted discussions, rather than clarifications.

⁹ In its comments on the agency's report, VNT argues for the first time that the agency's "clarification request concerned a component of pricing that had no price impact and was not to be evaluated." Protester's Comments at 3. VNT's argument in this regard is untimely, as the protester knew the basis for this argument prior to filing this protest. See, e.g., Lanmark Tech., Inc., B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely). Here, the protester's debriefing informed VNT that the agency found its pricing not to be reasonable because VNT did not respond to the clarification requests. Tab 5, VNT Debriefing, at 1171.

is acting in bad faith, and we do not find that any of these “facts” offered by the protester constitutes convincing proof of bad faith on the part of the agency.

The protest is denied.

Susan A. Poling
General Counsel