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Decision

Matter of: Federal Prison Industries, Inc.

File: B-417100

Date: January 25, 2019

Steven Thaler, Esq., Department of Justice, for the protester.
Marc Lamer, Esq., Kostos and Lamer, P.C., for Creighton AB, Inc., the intervenor.
Michael D. McPeak, Esq., Defense Logistics Agency, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's consideration of past performance information occurring after the closing of the solicitation is denied where there is no legal prohibition on an agency considering relevant, recent past performance information that is known to the evaluators.

DECISION

Federal Prison Industries, Inc. (FPI)¹, of Washington, D.C., protests the award of a contract to Creighton AB, Inc., of Reidsville, North Carolina, under request for proposals (RFP) No. SPE1C1-17-R-0111, which was issued by the Defense Logistics Agency (DLA), for shirts. FPI challenges the agency's consideration of past performance information that occurred after the RFP's closing date for proposals.

We deny the protest.

BACKGROUND

The RFP, which was issued as a small business set-aside on January 10, 2018, and subsequently amended twice, sought proposals for the manufacture and delivery of two types of shirts. The RFP anticipated the award of an indefinite-delivery, indefinite-

¹ FPI is a wholly owned government corporation within the Department of Justice, Bureau of Prisons. Protest at 4.

quantity contract, with a 1-year base period, and four 1-year option periods, against which the agency could place fixed-price orders. RFP at 6, 103. Award was to be made on a best-value tradeoff basis, considering the following evaluation criteria, in descending order of importance: (1) product demonstration models (PDM); (2) past performance; and (3) price. Id. at 79. The non-price factors, when combined, were to be significantly more important than price. Id. Only the evaluation of past performance is relevant to the issues in this protest.

With respect to past performance, the RFP established that the agency would assign offerors an integrated performance confidence assessment rating based on the equally weighted factors of the recency, relevancy, and quality of the offeror's past performance information. Id. at 83. The quality factor included two equally weighted subfactors: (1) past quality of items; and (2) past delivery of items. Id. at 79. Relevant to the issues in this protest, the RFP defined "recent" past performance as occurring "during the two year period prior to the solicitation closing date." Id. at 82. The RFP defined "not recent" past performance information as any past performance "before the two year period prior to the solicitation closing date." Id.

The RFP closed on February 9. DLA received four proposals in response to the RFP, including from FPI and Creighton. Agency Report (AR), Tab 3, Price Negotiation Memo, at 2. FPI cited four past performance references involving the manufacture of shirts for DLA in its February 7 proposal, including contracts: SPE1C1-16-D-F001 (the F001 Contract); and SPE1C1-16-D-F002 (the F002 Contract). AR, Tab 4, FPI Proposal, at 3-6. In the respective project descriptions for these contracts, FPI represented that there were no negative reports in the Past Performance Information Retrieval System for any of the contracts. Id. For the F001 and F002 Contracts, however, FPI noted that it had experienced some production delays due to issues with one of its vendors. Id., at 3, 4. FPI represented that it had removed work from the vendor, and that it anticipated resolution of the production issues going forward. Id.

After receipt of initial proposals, the contracting officer established a competitive range of three, including FPI and Creighton. AR, Tab 8, Source Selection Decision, at 3-4. On August 1, DLA opened discussions with the offerors in the competitive range. The agency, in addition to addressing certain concerns with FPI's product samples, notified the protester that it had identified 62 delivery orders across 13 contracts, including the four referenced in FPI's proposal, that had experienced inexcusable delivery delays. AR, Tab 9, FPI Discussions Letter (Aug. 1, 2018), at 2.

FPI responded to the agency's discussion concerns on August 7. In addition to responding to the identified technical concerns, FPI also addressed some of the identified late deliveries. Specifically, the protester addressed the late deliveries on four of the 13 contracts identified by DLA, which amounted to 15 of the 62 identified delivery orders. In this regard, with respect to 14 of the delivery orders, FPI explained that it had experienced issues with a sole-source vendor resulting from that firm's acquisition and closing of a facility, which resulted in a shortage in the supply chain for base materials. With respect to the fifteenth order, FPI contended that the order was not late since it

was not due until August 27. AR, Tab 10, FPI Discussions Letter Response (Aug. 7, 2018), at 2-3.

On September 21, the contracting officer decided to reopen discussions, and sent a second discussions letter to FPI. DLA afforded the protester the opportunity to address quality concerns on the F001 and F002 Contracts. AR, Tab 12, Second FPI Discussions Letter (Sept. 21, 2018), at 1. Specifically, the contracting officer, who is also the contracting officer and supervisor for the F001 and F002 Contracts, was aware of issues first arising in April 2018 involving misaligned buttons that resulted in more than 50,000 shirts requiring repair or replacement. AR, Tab 5, Contracting Officer’s Decl., at 1. On September 25, FPI responded to the second discussions letter. The protester represented that it “concur[red] that [the quality issues] did occur,” but also addressed the expeditious corrective actions undertaken to address the issues. AR, Tab 13, FPI Second Discussions Letter Response (Sept. 25, 2018), at 1-2. Additionally, for both incidents, FPI asserted that the notifications with respect to the quality issues “came well after the evaluation period for this opportunity and should not be held against FPI in determining if our proposal is most advantageous to the government.” Id., at 1, 2.

DLA evaluated the final proposals of FPI and Creighton as follows:

	FPI	Creighton
PDM	Good	Good
Past Performance - Recency	Recent	Recent
Past Performance - Relevancy	Very Relevant	Very Relevant
Past Performance - Quality	Marginal	Acceptable
Past Performance – Confidence Level	Limited	Satisfactory
Price	\$16,967,663	\$19,918,381

AR, Tab 8, Source Selection Decision, at 5.

The contracting officer, who was the source selection official for the procurement, conducted a comprehensive comparison of the FPI and Creighton proposals.² First, the contracting officer compared the proposals under the most important factor, PDM. Although acknowledging that both offerors’ respective product samples received good ratings, the contracting officer noted that Creighton’s samples included only a minor weakness that would be easily correctable, while FPI’s samples included three minor weaknesses. Therefore, the contracting officer concluded that Creighton’s proposal was superior under the most important evaluation factor. Id. at 6-7.

² The contracting officer also conducted a similar comparison between the proposals submitted by Creighton and third offeror in the competitive range. AR, Tab 8, Source Selection Decision, at 10-13.

With respect to past performance, the contracting officer found that both offerors had recent and very relevant past performance. The contracting officer found that Creighton warranted a marginal rating for the past delivery subfactor because it only delivered approximately half of its evaluated orders on time, but warranted an outstanding rating for the past quality subfactor because it had no reported quality issues. As a result of the two subfactor ratings, the contracting officer concluded that Creighton warranted an overall satisfactory rating for the quality of past performance factor, and an overall rating of satisfactory confidence. Id. at 7.

For FPI, the contracting officer found that FPI warranted a marginal rating for the past delivery subfactor because it only delivered approximately 60 percent of its evaluated orders on time. With respect to the past quality subfactor, the contracting officer similarly found that FPI warranted a marginal rating. Although recognizing that FPI had no reported quality issues during the two year period prior to the solicitation closing, the contracting officer considered the recent performance issues on the F001 and F002 Contracts, which first occurred in April 2018. Specifically, the contracting officer noted that the full extent of the problem, which required personnel from DLA, the Marine Corps (who was the end customer for the shirts), and FPI to investigate, was not fully identified until August 2018. Once the investigation was complete, the total number of defective shirts exceeded 50,000. As a result, the contracting officer noted that the Marine Corps had to reduce the number of shirts issued to soldiers, which was a direct customer impact. Id. at 7-8. The contracting officer recognized FPI's position that this past performance information post-dated the February closing of the RFP, but indicated that it would not be appropriate to ignore relevant past performance information. Id. at 5. As a result of the two marginal subfactor ratings, the contracting officer decided that FPI warranted an overall marginal rating for the quality of past performance factor, and an overall rating of low confidence. Id. at 8.

The contracting officer concluded that, although FPI's successful delivery rate was higher than Creighton's rate, Creighton's absence of quality concerns and FPI's significant quality concerns resulted in Creighton's past performance being superior. Id. at 8-9. In conducting her tradeoff, the contracting officer concluded that Creighton's superior PDM and past performance was worth the awardee's associated price premium, and selected Creighton's proposal for award. Id. at 9. Following a debriefing and agency-level protest, FPI filed this protest with our Office.

DISCUSSION

FPI's protest, relying on our decisions in American Apparel, Inc., B-407399.2, Apr. 30, 2013, 2013 CPD ¶ 113, and FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52, effectively presents a single protest ground challenging the agency's consideration, under the quality of past performance subfactor, of past performance information occurring after the February 2018 RFP closing date. Specifically, the protester argues that the agency's consideration of past performance occurring after the RFP's closing date is inconsistent with the RFP's definition of "recent" past performance as being performance occurring "during the two year period prior to the solicitation

closing date.” FPI further contends that consideration of such recent performance is inappropriate where the RFP did not include any further reservation of DLA’s right to consider other past performance information, as other DLA solicitations have included.

DLA counters that it reasonably considered the recent past performance in question. The agency argues that the RFP did not expressly prohibit consideration of such past performance information, and it was reasonable to consider significant, recent performance issues on relevant contracts that was known to the evaluators. DLA further argues that it reasonably considered recent past performance information for all offerors, and provided the protester with a fair opportunity to address the adverse past performance information during discussions. For the reasons that follow, we find no basis on which to sustain the protest.

An agency’s evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror’s performance history, is a matter of agency discretion which we will not disturb unless the agency’s assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. Cyber Protection Techs., LLC, B-416297.2, B-416297.3, July 30, 2018, 2018 CPD ¶ 270 at 6. In conducting a past performance evaluation, an agency has discretion to determine the scope of the offerors’ performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Guam Shipyard, B-311321, B-311321.2, June 9, 2008, 2008 CPD ¶ 124 at 3. An agency is generally not precluded from considering any relevant past performance information, including the evaluators’ personal knowledge of an offeror. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 9; NVT Techs., Inc., B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36 at 5. Here, we find no basis to conclude that the RFP prohibited consideration of FPI’s recent performance issues, or that the agency evaluators were otherwise required to ignore direct, first-hand knowledge of such performance issues.

As addressed above, the RFP specifically provided that past performance occurring within two years of the RFP’s closing date would be considered recent, while the RFP defined not recent past performance to mean past performance occurring more than two years before the RFP’s closing date. RFP at 82. There is no question that at least some portion of FPI’s past performance on the F001 and F002 Contracts was recent. Indeed, FPI itself specifically cited the F001 and F002 Contracts in its proposal as examples of recent and relevant past performance. In the absence of an express prohibition on the agency’s consideration of past performance information that became known to the agency prior to award, we find no credible basis to conclude that the agency was required to ignore the information.

In this regard, we find that FPI misplaces its reliance on our decisions in American Apparel, Inc., and FR Countermeasures, Inc. Those decisions found that it is within an agency’s discretion whether to consider past performance information arising after solicitation closing, and both involved instances where we denied protests asserting that the agency committed prejudicial error in declining to consider such recent information.

Neither of those decisions, however, stands for the proposition that an agency is prohibited from considering recent, relevant past performance information.

Furthermore, we do not find that an express reservation was necessary in order to allow DLA to consider the information at issue. Here, DLA was aware of additional information pertaining to contracts that FPI itself identified as being relevant, and, therefore, indicative of FPI's ability to perform the resulting requirements. In this regard, FPI's position is counter to our long recognized principle that an agency's evaluation is not generally limited to the four corners of an offeror's proposal. In this regard, we have recognized that an agency may properly use information known by its own evaluators, as with any other references, to aid in the evaluation of proposals. Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 11; Paragon Sys., Inc., B-299548.2, Sept. 10, 2007, 2007 CPD ¶ 178 at 8; NVT Techs., Inc., supra.

Here, the contracting officer for this RFP, who is also the contracting officer and supervisor for the F001 and F002 Contracts, through her personal knowledge and first-hand experience was directly aware of the quality issues arising on the F001 and F002 Contracts. We find no reasonable basis to conclude that the RFP prohibited her consideration of FPI's ongoing performance on relevant contracts, or that she was otherwise prohibited from considering such information. See Federal Acquisition Regulation § 15.305(2)(i) (requiring evaluators to consider the currency, relevance, source, and context of past performance information, as well as general trends in the contractor's performance).

The protest is denied.

Thomas H. Armstrong
General Counsel