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Decision

Matter of: Northeast Military Sales, Inc.

File: B-404153

Date: January 13, 2011

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GAO, participated in the preparation of the decision.

DIGEST

An agency's assessment of awardee's past performance as exceptional was not reasonable where the agency failed to consider adverse past performance information of which it was aware.

DECISION

Northeast Military Sales, Inc. (NEMS), of Sterling, Massachusetts, protests the award of a contract to Nanyarsons Corporation, of Williston Park, New York, under request for proposals (RFP) No. HDEC02-10-R-0005 issued by the Department of Defense, Defense Commissary Agency (DeCA), for deli and bakery resale operations. NEMS broadly challenges the agency's technical, past performance, and price evaluations, as well as the adequacy of discussions.

We sustain the protest.

BACKGROUND

The RFP, issued on June 22, 2010, provided for the award of a requirements-type, fixed-price-award-term contract for deli and bakery resale operations at six commissaries in DeCA's Great Lakes Cluster/East Region for a 2-year base period with two 1-year option periods and four 1-year award term periods. See RFP at 1-3, 27, 37. The contractor is required to provide commissary customers with a core list of deli and bakery food items at costs below those of the same or similar items from comparable commercial supermarkets (excluding membership clubs, specialty stores, and convenience stores) within 10 miles of each commissary. See id. at 3; Performance Work Statement at 46. The agency will provide the contractor

with operating space, equipment, supplies, utilities, and storage. See Agency Hearing Comments at 1.¹

Offerors were informed that award would be made on a best value basis considering the following evaluation factors: technical capability, past performance, and price. RFP at 14-15. The RFP stated that the technical capability factor was significantly more important than past performance and, when combined, the technical capability and past performance factors were significantly more important than price. The technical capability factor included the following five subfactors: customer satisfaction; increasing sales; continuing customer savings; quality assurance program; and transition approach (the first four subfactors were of equal weight and significantly more important than the transition approach subfactor). The past performance factor included the following two equally weighted subfactors: quality history/overall customer satisfaction, and business relations.

With regard to the technical capability factor, offerors were required to describe their practices for increasing sales, including marketing strategies and adjusting to customer demographics, and propose a percentage of combined deli and bakery sales increases per commissary. See id. at 13. Offerors were informed that the increased sales percentage would be calculated using the previous year's sales as a base and, in this regard, the RFP provided offerors with historical sales data, namely, monthly sales data from each commissary for the prior year. See RFP amend. 3, attach. 3, Deli/Bakery & Commissary Historical Sales Data. The RFP provided that the proposed percentages of increased sales would be incorporated into the contract and considered in making future award term decisions. Offerors were also instructed to describe their long-term approach to continuing customer savings, their quality assurance process, and their transition approach.

With regard to past performance, offerors currently performing contracts for DeCA were permitted, but not required, to provide references from outside the agency. See RFP at 11. Non-DeCA contractors were required to provide past performance information on three to five contracts and/or subcontracts completed during the last 3 years, or currently in progress, that are similar in nature to the requirements of the solicitation and that demonstrate the offerors' ability to perform the services sought.

With regard to the price factor, offerors were instructed to provide their proposed customer savings for core items. Id. at 3. The savings were to be proposed as a discount percentage. The RFP provided that the proposed discount percentage would be assessed for realism in relation to the total requirements of the solicitation and the offeror's technical proposal.

¹ Our Office conducted a telephone hearing to receive testimony from the contracting officer (CO), who was the source selection authority for this procurement, regarding the agency's evaluation and source selection decision.

DeCA received five proposals, including those from Nayyarsons and NEMS. CO's Statement at 2. The agency's technical evaluation team rated proposals by assigning both points and adjectival ratings.² AR, Tab 5, Decision Summary, at 3, 14. With respect to the past performance subfactors, proposals were rated as either exceptional (19-20); very good (15-18); satisfactory (8-14); marginal (1-7); or unsatisfactory (0). An exceptional rating reflected past performance "accomplished with few minor problems for which corrective actions taken by the contractor were highly effective."³ *Id.* at 4.

The agency established a competitive range of four proposals, including those of Nayyarsons and NEMS, and conducted discussions with those offerors. At the conclusion of discussions and after receipt of revised proposals, the evaluation results for protester and awardee were as follows:

| | NEMS | Nayyarsons |
|---|-------------|-------------------|
| Customer satisfaction | 23 / VG | 24 / E |
| Increasing sales | 23 / VG | 23 / VG |
| Continuing customer savings | 23 / VG | 23 / VG |
| Quality assurance program | 21 / VG | 25 / E |
| Transition approach | 8 / VG | 9 / E |
| OVERALL TECHNICAL CAPABILITY | 98 | 104 |
| Quality history / overall customer satisfaction | 19 / E | 19 / E |
| Business relations | 19 / E | 19 / E |
| OVERALL PAST PERFORMANCE | 38 | 38 |

AR, Tab 5, Decision Summary, at 14.

² The evaluation team was to be comprised of two program managers and a quality assurance food specialist. *See* Agency Report (AR), Tab 14, Evaluation Plan. Ultimately, one of the program managers was unable to participate in the evaluation of proposals, and the quality assurance food specialist only participated in the evaluation of Nayyarsons' proposal. *See* Hearing Transcript (Tr.) at 23-26. The agency proceeded with the evaluation of technical proposals to keep the procurement "on track" and because the agency did not have "back-up" evaluators with relevant expertise. *See id.* at 25.

³ With respect to the technical capability subfactors for customer satisfaction, increasing sales, continuing customer savings, and quality assurance program, proposals were rated as either exceptional (24-25), very good (20-23), satisfactory (11-19), marginal (1-10), or unsatisfactory (0). With respect to the technical capability subfactor for transition approach, proposals were rated as either exceptional (9-10), very good (7-8), satisfactory (4-6), marginal (1-3), or unsatisfactory (0).

NEMS proposed customer savings of [DELETED] percent and sales increases, ranging, by commissary, between [DELETED] percent in the first base year, to between [DELETED] percent in the fourth award term. See NEMS' Proposal, vol. 1, at 4-7; vol. 2, at 54. Nayyarsons proposed customer savings of [DELETED] percent and sales increases of [DELETED] percent or more at five of the six commissaries through both option years and all award terms.⁴ See Nayyarsons' Proposal, vol. 1, at 4-7; vol. 2, at 17.

The CO evaluated the offerors' prices, that is, their proposed customer savings discount percentages. See AR, Tab 5, Decision Summary, at 14-21; Tab 8, Price Evaluations. She found that Nayyarsons' proposed customer savings were realistic, namely, that Nayyarsons' proposed discount percentage was in line with its technical proposal. See Tr. at 8, 15. The CO also found that Nayyarsons' exceptional technical and past performance ratings indicated the firm's thorough understanding of the solicitation requirements. AR, Tab 5, Decision Summary, at 23. The CO determined that Nayyarsons' proposal provided the best overall value. Award was made to Nayyarsons, and this protest followed. Performance of the contract has been suspended pending our decision in this matter.

DISCUSSION

NEMS contends, among other things, that the agency ignored adverse past performance information concerning the awardee's performance at a number of DeCA commissaries. See Protest at 5; Comments at 9-12; Protester's Hearing Comments at 6.

The record here shows that the technical evaluation team received past performance information from DeCA commissaries and from two other federal agencies.⁵ See AR, Tab 9, Past Performance Information, at 92-185. Although this information included a number of favorable comments regarding Nayyarsons' past performance, e-mails from several DeCA commissaries also indicated that Nayyarsons had a number of performance problems. Specifically, the evaluation team was provided with e-mails from various commissaries which reported staff and product shortages during transition periods; unsanitary conditions; employee tardiness and cleanliness; and problems with sushi, including use of expired products and pre-dating products. See, e.g., id. at 147-48 (June 25 e-mail reporting "serious problems" with sushi at

⁴ Nayyarsons' proposal also states that, in the past 5 months, the firm "increased sales overall in [its DeCA commissary] accounts an average of 7.67 percent" and that "[i]n June 2010 we enjoyed an overall increase of 12.14 [percent]" by introducing new products and programs. See Nayyarsons' Proposal, vol. 2, at 16.

⁵ Nayyarsons first began providing delivery/bakery services at DeCA commissaries in February 2010. See CO's Statement at 10; Tr. at 12.

Memphis commissary which “nee[d] to be addressed immediately”); 145-46 (July 15 e-mails reporting an “ongoing problem” and that “there are still significant issues” with sushi at Memphis commissary); 154 (July 18 e-mail reporting problems “once again” with sushi at Scott AFB).

As a general matter, the evaluation of an offeror’s past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. See MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. While we have recognized that such judgments are often subjective by nature, the exercise of these judgments in the evaluation of proposals must be documented in sufficient detail to show that they are not arbitrary. That is to say, in order for us to review an agency’s evaluation of proposals, an agency must have adequate documentation to support its judgment. Northeast MEP Servs., Inc., B-285963.5 *et al.*, Jan. 5, 2001, 2001 CPD ¶ 28 at 7. See American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53 at 6.

Where a protester challenges the past performance evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable and consistent with the solicitation’s evaluation scheme and procurement statutes and regulations, and to ensure that the agency adequately documented the basis for the selection. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6; S4, Inc., B-299817, B-299817.2, Aug. 23, 2007, 2007 CPD ¶ 164 at 9. When an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. Southwest Marine, Inc.; American Sys. Eng’g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.⁶

The contemporaneous record here shows no consideration by the technical evaluation team or the CO of the awardee’s recent performance problems identified in these e-mails. Rather, the evaluation team rated Nayyarsons’ proposal “exceptional” for each of the two past performance subfactors, despite the team’s receipt of numerous e-mail reports of problems with Nayyarsons’ performance.⁷ See

⁶ Moreover, while we consider the entire record in a protest, including the parties’ later explanations and arguments, we accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. Southwest Marine, *supra*.

⁷ The evaluators’ notes also state that no problems or issues were presented to the technical evaluation team and that no negative comments were found in the offeror’s past performance file. AR, Tab 9, Evaluators’ Notes, at 89-91. (The evaluators also noted that Nayyarsons proposed expanding sushi products to other commissaries. *Id.* at 83, 85.)

AR, Tab 9, Past Performance Information, at 89-92. Moreover, the record shows that several of the e-mails identifying problems with Nayyarsons' performance were originally addressed to the CO here, and, during the hearing, the CO testified that she reviewed all of the information that was provided to the evaluation team. See, e.g., id. at 132, 145, 148, 150-54 (e-mail reports of awardee's adverse past performance addressed to CO); Tr. at 74.

In our view, Nayyarsons' past performance rating is inconsistent with the agency's stated rating scheme, which provided that an "exceptional" rating would only be assigned for past performance reflecting few minor problems for which corrective actions taken by the contractor were highly effective. As discussed above, nothing in contemporaneous record shows that the agency considered whether the firm in fact took effective steps to correct the performance problems reported by DeCA commissaries.⁸ See AR, Tab 9, Evaluators' Notes, at 75-91; Tab 5, Decision Summary, at 1-23. For example, the record shows that the Memphis commissary reported serious problems with Nayyarsons' sushi products on June 25, but that significant problems with sushi were ongoing as of July 15. The record also shows that on July 18, the commissary at Scott AFB reported renewed problems with Nayyarsons' sushi products.

Based on this record, we conclude that the agency ignored adverse past performance information and—in assigning a past performance rating of exceptional to the awardee—deviated from the agency's evaluation scheme. See G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 6-7 (protest sustained where agency ignored awardee's performance problems); Apptis, Inc., et al., B-299457, May 23, 2007, 2008 CPD ¶ 49 at 11 (evaluation cannot be determined to be reasonable where record lacks documentation that agency considered deficiencies in awardee's proposal); Midland Supply, Inc., B-298720.3, May 14, 2007, 2007 CPD ¶ 104 at 5-6 (past performance evaluation unreasonable and inconsistent with awardee's record and agency's rating scheme); International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5 (past performance information too close at hand for agency to fail to consider the information). Accordingly, we sustain the protest on this basis.

NEMS raises a number of other protest grounds, which we considered, but find no basis to sustain.⁹ For example, NEMS complains that the agency did not analyze

⁸ To the extent that the CO testified that the awardee took timely and appropriate actions to address sushi problems at one commissary, her testimony did not show that she considered all of Nayyarsons' past performance problems or whether Nayyarsons' proposed improvements were effective. See Tr. at 65-66.

⁹ In addition, the protester challenges the agency's evaluation of NEMS' proposal under the quality assurance and transition approach subfactors, as well as the adequacy of discussions. See, e.g., Protest at 5; Comments at 6, 8-9. The protester also complains that the agency did not verify the awardee's business size status; that
(continued...)

whether Nayyarsons' proposed percentages of increased sales were viable, or verify the claims of recent increases in sales. See Comments at 7; Protester's Hearing Comments at 9.

The agency disputes NEMS' complaint. The CO states that she evaluated the awardee's proposed percentages of increased sales, including for the latter years, by comparing the percentages to other contractors' performance over the last 3 years. See Agency Hearing Comments at 3-4; Tr. at 50-56. In this regard, the CO stated that she found that some contractors far exceeded Nayyarsons' proposed [DELETED] percent increases, for example, by changing product lines, using innovative marketing strategies and subject matter experts, and improving processes. See CO's Supp. Statement at 2; Tr. at 50. The CO also testified that the technical factors overlap and contribute to sales increases. See Tr. at 62-64. In this respect, the CO stated that she considered customer service and quality assurance factors in evaluating Nayyarsons' proposed increased sales. With regard to Nayyarsons' claims of recent increased sales, the CO stated that these claims were not given a lot of weight because the agency does not average sales growth across stores to evaluate sales projections.¹⁰ See id. at 48-52; CO's Supp. Statement at 2. In this respect, the agency points out that the awardee averaged its supposed sales increase at all 37 commissaries under its two DeCA contracts. See Supp. AR at 4.

We find that the agency's evaluation of Nayyarsons' proposed increased sales was reasonable and consistent with the RFP's stated evaluation criteria. As discussed above, the RFP required offerors to describe their practices for increasing sales, including marketing strategies and adjusting to customer demographics. The RFP

(...continued)

the awardee did not submit a small business subcontracting plan; and that the awardee's North American Industry Classification Code and non-DeCA past performance are not relevant to the solicitation requirements. We reviewed these protest grounds and find them to have no merit.

¹⁰ During the hearing, the CO testified that she evaluated NEMS' proposed increased sales by, among other things, comparing DeCA-generated monthly sales reports, but that such reports were not reliable for Nayyarsons' commissaries because of computer software problems. See Tr. at 53-58. However, the agency states that the monthly sales reports are generally used for purposes of award term packages to determine whether incumbent contractors met or exceeded their projected increased sales. See id. at 52-62 Supp. AR at 5. In this respect, the agency points out that Nayyarsons began performing as a DeCA contractor in February 2010, and did not have any award term packages as of this solicitation. See id. Moreover, the agency points out that, because NEMS is the incumbent contractor for the cluster of stores under this solicitation, the agency has sales data and award term evaluations since the beginning of NEMS contracts.

also informed offerors that the increased sales percentage would be calculated using historical sales data provided in the RFP. In this respect, Nayyarsons proposed a number of methods to increase sales, including take-out services; daily specials; new products; discounts for frequent purchases; internet and print advertising; nutritional labeling and analysis by a dietitian; hot soups; baked goods; rotisserie, smoked and barbequed meats; and prepared holiday meals for families. See Nayyarsons' Proposal, vol. 2, at 17-18. Here, the contemporaneous evaluation record shows that the agency considered such factors in evaluating the awardee's proposed increases in sales. See, e.g., AR, Tab 5, Decision Summary, at 18 (Nayyarsons' proposal for internet and faxing for placing orders; internet advertising; customer taste panels; cooking classes; and regular as well as seasonal promotions); Tab 9, Evaluators' Notes, at 83-84 (Nayyarsons' proposed take-out concept; dietitian; soups; and holiday meals).

With regard to the protester's challenge of the agency's price realism analysis, we find that the analysis was reasonable and consistent with the RFP's evaluation criteria. The CO testified that she conducted price realism analyses by considering each offeror's technical proposal and whether the offeror could accomplish what "they said they were going to do." See Tr. at 8-11; see, e.g., AR, Tab 5, Decision Summary, at 17-18. In this regard, her decision was based on her institutional knowledge of deli/bakery operations and what other contractors had done. See RFP at 3; see, e.g., Mark G. Anderson Consultants, B-403250, B-403250.2, Oct. 7, 2010, 2010 CPD ¶ 241 at 6 (nature and extent of agency's price realism analysis a matter of agency discretion and GAO's review limited to determining whether analysis was reasonable and consistent with solicitation's evaluation criteria).

Although NEMS disagrees with the agency's technical and price evaluations, the protester's disagreement does not demonstrate that the agency's judgments with regard to those factors were unreasonable.

RECOMMENDATION

We recommend that the agency reevaluate Nayyarsons' past performance consistent with our decision and make a new source selection determination. If, upon reevaluation of proposals, another offeror's proposal is found to offer the best value to the government, DeCA should terminate Nayyarsons' contract for convenience of the government and make award to that other firm. We also recommend that NEMS be reimbursed the costs of filing and pursuing the protest, including reasonable

attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2010). NEMS should submit its certified claims for costs directly to the contracting agency within 60 days after receipt of this decision. Id., § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel