



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: TMI Services, Inc.

File: B-276624.2

Date: July 9, 1997

Timothy H. Power, Esq., for the protester.

Johnathan M. Bailey, Esq., Theodore M. Bailey, P.C., for Selrico Services, Inc., an intervenor.

Elizabeth Rivera Bagwell, Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that agency evaluation of past performance is unreasonable is denied where the agency performed a new past performance review in response to the initial protest filing, and protester does not acknowledge the amended review or provide any basis to conclude that the evaluation is unreasonable.

DECISION

TMI Services, Inc. protests the award of a contract to Selrico Services, Inc. by the Department of the Navy, pursuant to request for proposals (RFP) No. N00604-96-R-0052, seeking mess attendant services to clean the dining halls and serve food at the Navy Submarine Base Galley, Pearl Harbor, Hawaii. TMI claims, in general, that the Navy's past performance evaluation was unreasonable, and that TMI, not Selrico, should have been selected for award.

We deny the protest.

The Navy issued the RFP on September 19, 1996, as a total small business set-aside. The RFP anticipated award of a fixed-price contract with a base period and three 1-year options to the offeror whose technically acceptable proposal presented the best value to the government, considering past performance and price. The evaluation scheme stated that past performance would be more important than price unless the competing proposals were rated equally in the area of past performance, in which case price would be the determining factor.

The Navy received 17 proposals, and performed several initial reviews--for reasons not relevant here--before including 5 of the proposals, including those submitted by TMI and Selrico, in the competitive range. After the agency amended the solicitation, requested best and final offers (BAFO), and reevaluated, the protester's and Selrico's BAFOs were ranked as follows: TMI's proposal had the lowest price and a past performance rating of marginal, Selrico's proposal had the second lowest price and a past performance rating of exceptional.¹ As a result, the contracting officer concluded that Selrico's proposal offered the best value to the government, and on March 25, 1997, selected that company for award. Selrico's performance was to begin on April 1.

On March 28, TMI filed its initial protest of the award to Selrico in our Office, alleging that the evaluation of past performance was unreasonable. After the agency decided to reopen discussions with the offerors whose proposals were in the competitive range and request a second round of BAFOs, TMI withdrew its initial protest on April 11. Because TMI's initial protest resulted in a stay of Selrico's performance, and because the Navy had an ongoing need for these mess services, the agency held an expedited competition limited to the competitive range offerors to procure the services for the month of April only. TMI won this competition, and since it was the incumbent, TMI returned to the facility on April 2, after only 1 full day of performance by Selrico. As discussed in greater detail below, certain issues regarding TMI's past performance score raised in the current protest arise from events that took place on April 2 when TMI began performance of the interim contract.

After the agency held discussions, requested and received a second round of BAFOs, and completed its evaluation, it raised TMI's past performance rating from marginal to acceptable; TMI's proposal continued to have the lowest price of any offer in the competitive range. As before, the second lowest-priced proposal was Selrico's, which retained its exceptional rating under the past performance factor. Thus, the contracting officer based her best value decision on the following information:

OFFEROR	PRICE	PAST PERFORMANCE RATING
TMI	\$ 1,723,862.27	Acceptable
Selrico	\$ 1,911,776.23	Exceptional

By memorandum dated April 30, the contracting officer determined that Selrico's highly rated past performance outweighed the price benefit offered by TMI, and

¹Past performance was rated as unacceptable, marginal, acceptable, or exceptional.

concluded again that Selrico's proposal offered the best value to the government. On the same day, Selrico's stop-work order was canceled, and TMI was advised by letter that Selrico remained the awardee. After TMI received a debriefing on May 7, it filed its current bid protest on May 13. TMI supplemented its protest on May 16 after receiving the written debriefing materials from the agency.

In its current protest, TMI argues that the agency unreasonably evaluated past performance by basing its assessment on events that took place during the first week of April when TMI turned the mess facility over to Selrico for a day and a half, and then returned to perform the mess services for the remainder of the month of April.² TMI also argues that the past performance evaluation was unfair because TMI was reevaluated in April 1997, while Selrico's earlier past performance assessment was not revisited. In addition, TMI argues that the Navy unreasonably performed a cost realism review despite the fact that the agency was awarding a fixed-price contract, and argues that the evaluators' stated concerns about TMI's low price were, in fact, a negative responsibility determination that should have been referred to the Small Business Administration (SBA) for review.

With respect to the evaluation of past performance, the Navy's response to the protest concedes that the agency initially included information for TMI generated during the first week of April. Given the protester's contentions that this approach was unreasonable and unfairly subjected only TMI, not Selrico, to reevaluation, the Navy revisited its review of TMI's past performance. This reevaluation deleted all past performance information related to events after March 30, 1997--the last day of TMI's performance under the earlier contract--and was provided to TMI in the agency report. In its comments, TMI fails to acknowledge the reevaluation performed in response to the May 7 and May 16 protest filings, and offers no challenge to that review. Instead, TMI merely elaborates on the complaints set forth in its initial protest filing. In addition, TMI argues in its comments, for the first time, that the Navy violated the requirements set forth in Federal Acquisition Regulation § 15.610(c)(6) by failing to provide TMI an opportunity to respond during discussions to adverse information reflected in the past performance review which resulted in less than the highest possible score.

Our review of the Navy's approach to reevaluating TMI's past performance leads us to conclude that the Navy has reasonably addressed TMI's concerns about the impact of the information TMI complained about in its initial protest. By failing to acknowledge the Navy's subsequent review, and by offering no further substantive rebuttal to the evaluation conclusions set forth therein, TMI's challenge to the past

²Specifically, TMI claims that after leaving the facilities in good order, it returned after a day and a half of performance by Selrico to find the facilities unclean and in disarray. Also, TMI says that within 3 hours of its return, the facilities were inspected by senior officials who unfairly attributed the conditions there to TMI.

performance evaluation is unsupported and provides no basis to reject the Navy's selection decision.³ Datacomm Management Sciences, Inc., B-261089, Aug. 8, 1995, 95-2 CPD ¶ 259 at 4.

With respect to the argument in TMI's comments that the Navy failed to raise these issues during discussions, TMI's complaint is untimely at this juncture. In the oral debriefing, and in the written materials provided afterwards, TMI was expressly advised that its lower-priced proposal was not selected because the proposal was rated acceptable under the past performance evaluation factor, while Selrico's proposal received a rating of exceptional. If TMI wanted to challenge the adequacy of discussions on this point, it was required to do so within 10 days of the debriefing. 4 C.F.R. § 21.2(a)(2) (1997).

As a final matter, TMI's comments allege that the agency record supports a conclusion that the Navy engaged in improper discussions with Selrico about its manning requirements. In this regard, TMI points to a statement included in the April 18, 1997, cover letter submitted with Selrico's second BAFO which states:

After discussions with [the] Senior Chief and Master Chief, I was made aware that the manning hours Selrico proposes would be an advantage to the employees by allowing [a] sufficient amount of time to perform their job[s] properly, effectively and thoroughly. With this in mind, Selrico Services, Inc. is proud to resubmit our [BAFO] without any revisions.

In anticipation of a possible complaint about this statement, the contracting officer explained that the "discussions" referenced in the letter were in the context of meetings between Selrico and Navy representatives that took place after the initial award to Selrico and as part of the start-up of its performance. Contracting Officer's Statement, June 6, 1997, at 10-11. In addition, both individuals provided sworn statements submitted with the agency report addressing those meetings with Selrico. One of the individuals admitted stating that he expected Selrico to comply with the manning hours proposed; the other admitted stating that he expected Selrico to comply with the terms of the contract; neither admitted advising Selrico that its proposed manning hours were advantageous to the employees. Affidavit of Senior Chief Mess Management Specialist, June 5, 1997, at 2; Affidavit of Master Chief Mess Management Specialist, June 5, 1997, at 2. Based on these statements,

³Likewise, the two other issues raised in TMI's initial filing--that the Navy unreasonably performed a cost realism review of these fixed-price proposals, and that the concerns about TMI's low price should have been referred to the SBA--were addressed by the agency in its report, but were not answered by the protester in its comments. As a result, we consider these two issues to be abandoned. Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 at 8 n.8.

the contracting officer concluded that Selrico did not receive an unfair advantage in preparing its second BAFO.

Although TMI offers no supporting arguments or explanations about how or why Selrico might have been aided by these alleged discussions, it claims that our Office should not accept these explanations because the agency personnel have a motive to be untruthful--i.e., to avoid a finding by our Office that the agency violated the requirement that offerors be treated fairly and equally. TMI's contention in this regard is, in essence, a claim that these individuals acted in bad faith in submitting untruthful affidavits. Without strong evidence to support such a conclusion, we will not assume that agency employees act in bad faith. Indian Affiliates, Inc., B-243420, Aug. 1, 1991, 91-2 CPD ¶ 109 at 5. In addition, given the reasonable explanation set forth by the Navy officials--with no conflicting evidence provided by the protester other than its general belief that they have a motive to be untruthful--we have no basis to conclude that the Navy has acted improperly or unreasonably in its reevaluation of these proposals. Kelsey-Seybold Clinic, P.A., B-218451, Aug. 7, 1985, 85-2 CPD ¶ 139 at 2-3.

The protest is denied.

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