Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MAC's General Contractor

File: B-276755

Date: July 24, 1997

McKinley Darden for the protester.
Diane D. Hayden, Esq., George N. Brezna, Esq., Christopher Bellomy, Esq., and Marilyn W. Johnson, Esq., Department of the Navy, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency conducting evaluation of past performance could properly consider prior termination of the protester's contract for default, notwithstanding protester's appeal of Armed Services Board of Contract Appeals decision upholding the default, since agency may rely on its reasonable perception of inadequate past performance even where the contractor disputes the agency's position.

DECISION

MAC's General Contractor protests the issuance of an order to Intra Systems, Inc. dba Historic Holdings, under request for quotations (RFQ) No. N62467-97-Q-7255, issued by the Naval Facilities Engineering Command for interior renovations and painting. MAC's primarily contends that the agency should not have considered its termination for default under a prior contract as a basis for selecting another, higher-priced offeror for award.

We deny the protest.

On February 12, 1997, the agency issued the solicitation as a set-aside for emerging small businesses, calling for issuance of a firm, fixed-price order for all material, equipment, labor, tools, transportation, and management necessary to accomplish interior renovations and painting at seven units located within the Texas Terrace family housing complex at the Naval Air Station (NAS) in Kingsville, Texas. The solicitation contained a cover page, in capital letters and boldface type, advising vendors that the agency would conduct the procurement in accordance with the simplified acquisition procedures of Federal Acquisition Regulation (FAR) Part 13. Specifically, the solicitation cover page, as well as the first page of the solicitation, advised vendors of the agency's intention to issue an order to the vendor providing the best value to the government, based upon price and past performance.

Similarly, both pages advised vendors that there would be no public opening of quotations.

The agency received nine quotations; MAC's quoted the lowest price. With respect to past performance, the contracting officer noted that a prior contract awarded to MAC's for janitorial services at Kingsville NAS had been terminated for default. The contracting officer also noted that on two prior procurements, MAC's asked and was allowed to withdraw its low quotations based on its misreading of the specifications. Taking past performance into account, the contracting officer determined that the third lowest quotation, from Intra Systems, represented the best value to the government. On April 1, the contracting officer issued an order to Intra Systems, and this protest followed.

MAC's argues that the award was contrary to FAR § 14.101, which allegedly requires agencies to consider only price and price-related factors in selecting contractors. In this regard, the protester contends, the simplified acquisition procedures of FAR Part 13, at least as followed in this procurement, contemplate a sealed bidding process requiring award based solely on price and price-related factors.

The sealed bidding process is characterized by competitive bids (all firms base their prices on the same requirements and level of services), public opening of bids, and selection of a contractor based solely on price and price-related factors (although the firm selected must be found responsible before award can be made). FAR § 14.101. As distinguished from the rigid rules applicable to sealed bidding, the simplified acquisition procedures encourage "innovative approaches," FAR § 13.103(j), and emphasize efficiency and economy in adapting the procedures most suitable for each individual procurement. FAR § 13.104(a). As noted above, the solicitation here specifically advised vendors that there would be no public bid opening and no exposure of prices and that the agency would consider a factor--past performance--other than price in its selection decision. On its face, therefore, the solicitation in this case is clearly not an invitation to submit a sealed bid.[1]

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[1]To the extent that the protester contends that the RFQ's format, evaluation plan, and selection scheme were improper or ambiguous, its protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1997), protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. Thus, MAC's should have raised its objections to the solicitation, if any, prior to March 11, rather than waiting, over a month, until the agency had selected another vendor based on the terms of the solicitation issued.

MAC's submitted the lowest quotation for the work, and it is uncontested that the principal reason for the agency's selection of a higher-priced vendor was the protester's poor performance record at Kingsville--primarily the termination for default of the janitorial contract. The protester contends that it is improper to consider the termination of its janitorial contract given that it has an appeal of the action pending in the United States Court of Appeals for the Federal Circuit.

Since the relative merit of competing proposals (or quotations, as in this case) is primarily a matter of agency discretion, we will review an evaluation of an offeror's past performance solely to ensure that it was reasonable and consistent with the evaluation criteria. Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 6. Here, the record shows no basis to conclude that the contracting officer's evaluation was improper.

MAC's received a combination fixed-price, indefinite quantity contract for janitorial services at Kingsville NAS in 1995. Four months after award, the protester demanded that the agency pay it for estimated quantities of indefinite quantity work stated in the solicitation, whether the work was ordered or not. When the agency refused, MAC's abandoned performance; the agency then terminated the contract for default. MAC's appealed its default termination to the Armed Services Board of Contract Appeals (ASBCA), which denied the appeal as without merit. Mac's Cleaning and Repair Serv., ASBCA No. 49652, 97-1 BCA ¶ 28,748. MAC's states that it has appealed the ASBCA's decision to the United States Court of Appeals for the Federal Circuit.

The termination for default clearly provides a reasonable basis for the contracting officer's concerns about the firm's past performance. See JCI Envtl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299 at 7. The fact that MAC's may be appealing the ASBCA decision upholding the termination does not mean that it was unreasonable for the agency to rely on the termination as evidence of the firm's past performance; we review not whether the contracting officer's determination ultimately proves correct, but only whether it was reasonable at the time it is made. JCI Envtl. Servs., supra; see also MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431 at 4; S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437 at 2-3, aff'd, S.A.F.E. Export Corp.--Recon., B-208744.2, July 14, 1983, 83-2 CPD ¶ 90. In this regard, an agency's evaluation of past performance may be based on its

reasonable perception of inadequate prior performance even where, as here, the contractor disagrees with the agency's position. Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 17; Pannesma Co. Ltd., B-251688, Apr. 19, 1993, 93-1 CPD ¶ 333 at 6. In any event, MAC's suggests no reason why the termination was improper or why it might be successful in its appeal from the ASBCA decision, and none appears in the record.[2]

While the termination for default was the primary basis for the contracting officer's evaluation of the protester's past performance, the contracting officer also noted that, in connection with two prior procurements, MAC's submitted quotations which did not reflect the scope of work solicited and which were withdrawn only after the agency provided oral explanations of the statement of work to the protester. MAC's argues that since quotations do not constitute offers that the government can accept to create a contract, FAR §§ 13.108 and 15.402(e), MAC's had no obligation to stand behind its quotations, and that the agency therefore cannot consider the protester's withdrawal of the two quotations. Regardless of the nature of the legal obligation arising from submission of a quotation, we think the agency reasonably could view the withdrawal of the two quotations for the reasons given by MAC's as evidence, at a minimum, of a lack of care by MAC's in its prior contracting efforts.

In its comments on the report submitted by the agency in response to the protest, MAC's raised two additional issues, alleging that the government estimate was unreasonable and that minority contractors are not receiving a fair share of awards at Kingsville NAS. These issues are untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protests, other than those alleging an impropriety in the

[2]MAC's asserts generally that its performance under the contract was outstanding before the termination for default. Although the protester's assertion, even if correct, would not make unreasonable the contracting officer's reliance on the termination for default as an indication of poor past performance, we note that the record in fact shows that there were performance problems before MAC's stopped work and the contract was terminated.

solicitation, must be filed with our Office, or with the agency, no later than 10 days after the basis of protest is known or should have been known.[3]

The protest is denied.

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[3]In any event, MAC's provides no support for its allegation regarding awards to minority contractors; in contrast, the Navy points to 34 contracts that NAS Kingsville has with small disadvantaged businesses, along with six section 8(a) contracts, and three contracts, including the protester's defaulted janitorial contract, currently being performed by minority contractors. Similarly, with respect to the government estimate, the protester provides no support for its assertion, and in fact did not respond to our request for a breakdown of its own quotation ($24,900, considerably lower than the government estimate of $87,500), in support of this allegation. Moreover, it is not clear how MAC's would be prejudiced, since its quotation was rejected based on its poor performance, not because its price was considered too low.