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Decision

Matter of: Airwork Limited-Vinnell Corporation (A Joint Venture)

File: B-285247; B-285247.2

Date: August 8, 2000

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Gregory H. Petkoff, Esq., Sharon A. Jenks, Esq., and Robert D. M. Allen, Esq., Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee proposed specific individuals as key personnel that it did not expect, or could not reasonably expect, to use--that is, a "bait and switch," rendering the contract award improper--is denied where awardee obtained agreement from named individuals to accept employment and disclosed in its proposal that it intended to hire as many qualified incumbent employees as possible.

2. Protest by incumbent against agency's past performance evaluation, in which both protester and awardee were rated excellent/high confidence, is denied where protester has not shown how, given awardee's highly-rated relevant past performance, protester's additional, relevant past performance would contribute to better satisfying agency's stated needs so as to warrant a significantly higher rating under the past performance factor.

DECISION

Airwork Limited-Vinnell Corporation (A Joint Venture) (AWV) protests the Department of the Air Force's award of a contract to DynCorp Technical Services, Inc., under request for proposals (RFP) No. F44650-99-R0007, for War Reserve Materiel (WRM) services in Southwest Asia. AWV, the incumbent contractor, challenges the evaluation of DynCorp's past performance and alleges that DynCorp proposed key personnel it did not intend to use in contract performance.

We deny the protest.

The RFP contemplated award of a cost-plus-award-fee contract, for a base year with 6 option years, for (1) asset receipt, accountability, serviceability, storage, security, periodic inspection and test; (2) maintenance, repair, outload, and reconstitution of prepositioned WRM in several operating locations, including Oman, Qatar and Bahrain; (3) establishment of a mobile repair team to perform scheduled maintenance, inventories, condition sampling, and repair of WRM assets at storage locations where a staff of technical craftsmen is not warranted; and (4) support of scheduled exercises/events by assisting in the deployment of assets/systems from storage sites, setting-up camp at the in-use location, and assisting in camp tear-down and subsequent storage of assets/systems. Performance Work Statement (PWS), Mission Statement.

Award was to be made to the responsible offeror whose proposal conformed to the solicitation requirements and represented the best value to the government. The solicitation provided for proposals to be evaluated based on the following four evaluation factors: (1) mission capability (with subfactors for program management/organization structure; receive/ship, store and outload; maintain, repair and reconstitute; and quality control); (2) proposal risk; (3) past performance; and (4) price/cost. The solicitation stated that “[t]he first three factors are equal in value and when combined are significantly more important than the fourth factor,” that is, price/cost. RFP § M-900, ¶¶ 3.0, 3.1.

Four proposals were received in response to the RFP; all were included in the competitive range. After conducting two rounds of discussions with offerors, the Air Force requested final proposal revisions (FPR). Based on its evaluation of FPRs, the Air Force determined that DynCorp’s proposal represented the best value. Although AWW’s successful performance as the incumbent WRM contractor for the previous 14 years, and on other relevant operation and maintenance contracts, led the agency to rate its past performance as exceptional/high confidence, the evaluated most probable cost of its proposal (\$[DELETED]) was the [DELETED] of any of the proposals.

In addition, while AWW’s proposal was rated low risk for mission capability and received green/acceptable ratings under the mission capability subfactors for program management/organizational structure and quality control, the proposal was rated only yellow/marginal under the subfactors for receive/ship, store and outload, and for maintain, repair and reconstitute. The yellow/marginal ratings reflected the agency’s determination that AWW had not adequately described its approach to determining proposed staffing, such that the agency could not validate its staffing numbers. For example, the agency found that AWW had not adequately discussed the staffing required to meet the PWS requirements with respect to handling a total theater-wide outload of serviceable WRM, the worst case planning scenario. Agency evaluators noted in this regard that the answers provided by AWW during discussions indicated that AWW appeared to be relying too heavily on past peacetime experience

since 1996; they viewed this as an insufficient baseline for estimating a requirement for theater-wide outload, since the scale of material to be deployed and packaged during a theater-wide scenario was vastly larger than during peacetime. Source Selection Decision (SSD) at 3-4; Southwest Asia Prepositioned War Reserve Materiel Contract Decision Briefing, Apr. 13, 2000, at 46-47; Consensus Board Final Rating & Rationale Summaries, AWW, at 2-5. The evaluators also expressed concern that the [DELETED] proposed by AWW to support theatre-wide outloads were [DELETED] to enable 24-hour operations for an extended period of time. *Id.* at 3.

In contrast, DynCorp's proposal received green/acceptable and low risk ratings under each of the mission capability subfactors. Also, the Air Force viewed as strengths DynCorp's ability to mobilize a reconstitution team for surge actions and its proposal to make its quality control program available on-line to all employees as well as to government quality assurance personnel. In addition, the agency found that DynCorp was the only offeror that adequately described its approach to handling and staffing the PWS requirements with respect to all of the WRM assets (including bare base, transportation, supply, munitions, aerospace ground equipment (AGE), tanks, racks, adapters, and pylons (TRAP), materiel maintenance handling equipment, medical, and rations), thus demonstrating its complete understanding of the effort required by the WRM PWS. SSD at 4; Consensus Board Final Rating & Rationale Summaries, DynCorp, at 3-4. Further, DynCorp was rated exceptional/high confidence under past performance, the same adjectival rating given AWW, and the evaluated most probable cost of DynCorp's proposal (\$[DELETED]) was the lowest among the proposals. As a result, the source selection authority determined that DynCorp's proposal offered the best value to the government and award was made to DynCorp on April 20, 2000. After receiving a debriefing, AWW filed this protest with our Office.

KEY PERSONNEL

AWV alleges that DynCorp misrepresented the availability of its proposed key personnel. In this regard, the RFP's key personnel clause stated that "[c]ertain skilled, experienced professional and/or technical personnel are essential for successful contract accomplishment of the work to be performed under this contract." RFP § H-938, Key Personnel. The solicitation provided for offerors to submit resumes for the personnel proposed for certain key positions, as identified in the PWS, and indicated that the agency would evaluate, under the program management/organization structure subfactor of the mission capability evaluation factor, an offeror's "[d]emonstrate[d] ability to attract, hire, and retain qualified key personnel that possess levels of education and/or experience stipulated in the PWS, as evidenced by resumes and letters of intent." RFP § M-900, ¶ 3.1.1.3.

AWV alleges that DynCorp proposed specific individuals to fill 36 key positions identified in its proposal, even though it lacked any reasonable basis to believe that

they would be available to perform the contract.¹ Indeed, according to the protester, DynCorp had an “internal, undisclosed plan to switch the majority of its proposed personnel for the incumbent contractor’s employees--a plan which it promptly implemented after award by soliciting alternative individuals for 21 of the positions.” AWW Post-Hearing Comments, July 20, 2000, at 3.

An offeror may not propose to use specific personnel that it does not expect to use during contract performance; doing so would have an adverse effect on the integrity of the competitive procurement system and generally provide a basis for proposal rejection. CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5. The elements of such a “bait and switch” rendering a contract award improper, are as follows: (1) the awardee represented in its proposal that it would rely on certain specified personnel in performing the services; (2) the agency relied on this representation in evaluating the proposal; and (3) it was foreseeable that the individuals named in the proposal would not be available to perform the contract work. Ann Riley & Assocs., Ltd.--Recon., B-271741.3, Mar. 10, 1997, 97-1 CPD ¶ 122 at 2-3.

AWV argues that DynCorp lacked any reasonable basis to believe that its proposed key personnel would be available to perform the contract. In this regard, DynCorp furnished with its proposal a resume for, and a certification signed or approved by, each proposed key employee not already employed by DynCorp. The certification was in the form of a letter from DynCorp to the individual stating that DynCorp had reviewed the individual’s resume and determined that the individual met or exceeded the requirements for employment on the contemplated Air Force contract for WRM positioned in Oman, Bahrain and Qatar; each proposed employee signed or approved a preprinted statement at the bottom of the letter that “I am interested in being considered as a member of the DynCorp WRM Team.” DynCorp Proposal, vol. I, attach. A. During discussions, the Air Force issued an evaluation notice (EN) to DynCorp stating that “[t]he letters of intent provided seem to be letters of consideration. Please demonstrate the proposed key personnel’s intent to accept employment.” EN No. 3422/3488. The record indicates that DynCorp determined that, because the EN was issued during the holiday season at the end of the year, the company would be unable to obtain in the limited time permitted for response a further written certification from each of its proposed key personnel. DynCorp instead contacted the individuals by telephone--or, it appears, by e-mail--to ascertain their continued interest in employment on the WRM contract. For each proposed key person, including one substitute key person, DynCorp furnished to the agency in its discussion response a certification signed by its recruiting manager and its recruiter advising that one of the two had contacted the individual in question and

¹ Although DynCorp submitted resumes for 38 individuals, whom it described in its proposal as key personnel, it appears that only 36 were in fact key personnel as defined in the RFP. Air Force Comments, July 20, 2000, at 2 n.1.

that “1) the individual authorized the use of their resume in the proposal, and 2) agreed to accept employment with DynCorp.” DynCorp EN Response, Jan. 5, 2000. AWV questions whether the information submitted by DynCorp amounted to the “letters of intent” contemplated in the RFP.

In our view, the certifications signed by the proposed key employees, in conjunction with the responses furnished to DynCorp’s recruiters during discussions (as evidenced by the recruiters’ certifications as submitted to the agency), constituted an adequate indication that the individuals in question would be available to perform. The RFP did not specify that the letters of intent referred to had to be in any particular form or include any particular information. The information DynCorp submitted showed that the individuals were interested in being considered for the Air Force contract, had agreed to the use of their resumes in DynCorp’s proposal, and had specifically “agreed to accept employment with DynCorp.” *Id.* Given the lack of anything in the RFP that required more to be included in the letters of intent, there is no basis for concluding that the agency was required to find that the information communicated to the agency was inadequate to show that DynCorp would be able to properly staff the contract.

We note that testimony at the hearing our Office conducted in this matter indicated that, prior to award, DynCorp’s recruiters did not discuss salary and benefits with the proposed key personnel, and did not advise them of the specific positions for which they were being proposed. However, the fact that future negotiations over the terms of employment were required in order to conclude employment contracts with the proposed key personnel was not inconsistent with their represented interest in the WRM contract; finalization of the terms of employment, such as salary, generally is not required to establish an offeror’s good faith in submitting personnel resumes in its proposal. See Potomac Research Int’l, Inc., B-270697, B-270697.2, Apr. 9, 1996, 96-1 CPD ¶ 183 at 5; Agusta Int’l S.A., B-237724, Mar. 21, 1990, 90-1 CPD ¶ 311 at 11; Individual Dev. Assocs. Inc., B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290 at 5.

Further, the fact that a number of the proposed key personnel, when contacted after award (in April 2000), have been unable or unwilling to accept employment on the WRM contract does not establish that DynCorp’s representations in this regard were part of an improper employee substitution scheme. Where there is no evidence that the agency was misled into selecting an offeror it would not otherwise have selected, we will not overturn a selection decision merely because the awardee ultimately employs different individuals than those proposed, particularly where the substituted employees have the same qualifications and skill levels as those proposed. B & K Enters., B-276066, May 7, 1997, 97-1 CPD ¶ 166 at 3-4; Ebon Research Sys., B-261403.2, Sept. 28, 1995, 95-2 CPD ¶ 152 at 5-7. DynCorp has explained the circumstances of its inability to secure the services of each of the unavailable proposed individuals; these explanations, which we find to be credible, support the view that the employee substitutions were not part of an improper “bait and switch” by DynCorp. We note, in addition, that the Air Force has determined

that the substituted personnel meet the requirements of the PWS and are acceptable. Agency Comments, July 20, 2000, at 2 n.2.

AWV asserts that DynCorp's representations in its proposal were inconsistent with an undisclosed intention to hire AWP's incumbent employees. In this regard, the testimony at the hearing indicated that, when preparing its proposal, DynCorp contemplated substituting incumbent employees for its proposed key personnel, or at least for key personnel other than top management (such as the program manager and the five site managers), in the event that the incumbents were better qualified than the individuals proposed by DynCorp and were willing to accept employment with DynCorp.

AWV's argument is without merit. DynCorp's proposal specifically described its intention to recruit incumbent employees, stating as follows:

Except for senior management positions, all incumbent employees except those not meeting our standards, will be integrated into our hiring process. . . . The DynCorp policy is to utilize as many incumbents as possible in order to maintain stability and continuity. . . . We estimate that we will fill at least 90% of the required positions with incumbent personnel.

DynCorp Proposal, vol. I, § 1.1.3 at 57. AWP notes that DynCorp also stated in its proposal, when describing its phase-in plan, that "[i]mmediately upon contract award we will start hiring the more than 41 key personnel whose resumes were presented as part of the DynCorp proposal." DynCorp Proposal, vol. IV, § 1.9 at 17. AWP asserts that this indicated that DynCorp's stated intention to hire incumbents did not extend to filling the key personnel positions. In our view, it is not clear from the proposal that DynCorp's plan to hire incumbents is so limited; it is just as reasonable, we think, to read the latter quoted provision as being subject to DynCorp's general intention to hire as many qualified incumbent personnel as possible. At a minimum, AWP's interpretation of DynCorp's proposal is not the only reasonable one such that DynCorp can be charged with misrepresentation in this area. Further, we have previously held that the substitution of incumbent employees with an agency's permission, and where there has been no misrepresentation, is not an improper "bait and switch." A&T Eng'g Techs., VECTOR Research Div., B-282670, B-282670.2, Aug. 13, 1999, 99-2 CPD ¶ 37 at 8; USATREX Int'l, Inc., B-275592, B-275592.2, Mar. 6, 1997, 98-1 CPD ¶ 99 at 10; Ebon Research Sys., *supra*, at 5. Given the emphasis in DynCorp's proposal on hiring qualified incumbent employees, there is no basis for finding that DynCorp misrepresented its intention.

PAST PERFORMANCE

AWV challenges the evaluation of past performance. In this regard, the solicitation provided for evaluation of both the quality and relevance of an offeror's past performance. Specifically, past performance was to be "evaluated as a measure of

the Government's confidence in the offeror's ability to successfully perform based on previous and current contract efforts and offeror's effectiveness in performing similar contracts"; a rating of either exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence was to be assigned. RFP § M-900, ¶ 3.3. According to the solicitation, "[t]he recency and relevancy of past performance information is critical to the Government's evaluation." *Id.* The RFP required offerors to submit past performance references for the last eight current and completed "contract efforts similar to the Government's [Southwest Asia] Prepositioned WRM"; "explain what aspects of the contract are deemed relevant to the proposed [Southwest Asia] Prepositioned WRM effort"; and specifically "address contracts for the same or similar services and explain similarity of services, considering such areas as: the nature and complexity of the service involved, contract environment, contract type, and location of work to be performed." RFP § L-908, ¶ 1.5.1.

The Air Force assigned a rating of exceptional/high confidence to DynCorp based upon numerous exceptional and very good ratings (as well as favorable narrative comments) in questionnaires returned by DynCorp's past performance references for a number of contracts. These contract efforts included: (1) the transition phase to assuming responsibility, under the Department of the Army's Prepositioned Stocks Afloat Program (APS-3), for maintaining Army prepositioned stocks in an operational status at Charleston, South Carolina and aboard ships that store and transport Army war reserve assets; (2) aircraft operations maintenance and logistics support for Department of State (DOS) anti-narcotics enforcement operations in Central and South America; (3) aircraft maintenance, modification and logistics support for the National Aeronautics and Space Administration; and (4) contractor maintenance services and engineering technical services in support of Kuwait Air Force F/A-18 aircraft. The Air Force's evaluation under the past performance factor noted that:

the majority of DynCorp's contracts seem to emphasize aircraft maintenance. However, even though they are aircraft maintenance contracts there are many similar efforts that are relevant to the WRM requirement. These efforts range from efficient organization structures, to maintenance efforts on vehicles and AGE, to operating major supply/inventory systems. In addition, DynCorp had one contract that is very relevant, an Army contract for 'maintenance of Army prepositioned stocks afloat.' Although the government rater gave DynCorp high marks, this contract is still in its infancy stage. When the team inquired why such good ratings were given for a new contract, the government rater indicated the transition stage was exceptional

Past Performance Evaluation Report, DynCorp, § 3.

AWV generally asserts that it possesses vastly more relevant experience than DynCorp, such that the agency could not reasonably assign the same past performance rating to both offerors. In addition, AWV specifically claims that the agency improperly ignored two cure notices issued to DynCorp under its APS-3 contract.

We find that the Air Force reasonably rated DynCorp's past performance as exceptional/high confidence. As noted above, DynCorp received numerous excellent and very good ratings from its past performance references, and the Air Force determined that aspects of DynCorp's performance under these contracts were directly relevant to the contract requirements here. For example, according to the agency, DynCorp's contracts demonstrated its ability to successfully manage contracts in fluid environments in foreign countries, utilize large inventory control systems, manage parts supply and accountability, perform operations at dispersed locations, adhere to government maintenance directives, and perform at the quality levels required on the WRM contract.² In this regard, the agency reports that DynCorp demonstrated the ability to meet program requirements in a fluid environment in foreign countries under its DOS contract for aircraft operations maintenance and logistics support for anti-narcotics enforcement operations in Central and South America; according to the agency, this ability is relevant to performing the WRM contract requirements in the highly fluid political and military environment which the WRM contractor must deal with. The agency reports that DynCorp also demonstrated under the DOS contract an ability to manage large inventory control systems with high levels of accuracy and to conduct operations at dispersed, remote locations. Further, according to the agency, DynCorp demonstrated under its Kuwaiti F/A-18 aircraft contract the ability to manage parts supply and accountability, as well as control sand intrusion, salt corrosion and the impact of high heat in the same region as the WRM contract is to be performed. Agency Comments, June 30, 2000, at 2-8; Agency Comments, June 20, 2000, attach., SSET Team Chief's Memorandum for Record, July 14, 2000.

We find no basis for objecting to the agency's evaluation of DynCorp's proposal in this area. The agency rated DynCorp based on the considerations identified in the RFP for the past performance factor, and the rationale for its conclusions is well documented. There is nothing inherently unreasonable in its conclusion that DynCorp's performance of different aspects of various types of contracts--similar to aspects of the current contract--warranted the highest possible rating.

² In fact, according to the Air Force, the most demanding maintenance aspect of the WRM requirement--a generator repair facility--is significantly less demanding from a technical perspective than the aircraft maintenance and repair requirements DynCorp had been successfully performing. Agency Comments, July 20, 2000, attach., SSET Team Chief's Memorandum for Record, July 14, 2000, at 2.

We recognize that, as asserted by AWP, that company possesses extensive, relevant experience. For example, AWP is not only the incumbent Air Force WRM contractor in Southwest Asia; it has also provided base operations and maintenance services for Air Force bases in Turkey; training, logistics and related support to the Saudi Arabian National Guard; and personnel support services for United States personnel in Egypt. However, AWP received the highest possible rating under this factor, reflecting the high quality and relevance of its past performance, and the agency was not obligated to reduce the rating reasonably assigned to DynCorp even if, as AWP contends, AWP's past performance was even better. Agencies are not required to give evaluation credit for proposal features it determines will not contribute in a meaningful manner to better satisfying the agency's needs. Consolidated Eng'g Servs., Inc., B-279565.5, Mar. 19, 1999, 99-1 CPD ¶ 76 at 3-4; see Tecom, Inc., B-275518.2, May 21, 1997, 97-1 CPD ¶ 221 at 7 (agency reasonably concluded that offeror was not entitled to higher rating where requirements were not exceeded in a manner that would provide increased benefit to agency); Computer Sys. Dev. Corp., B-275356, Feb. 11, 1997, 97-1 CPD ¶ 91 at 7-8. Here, given DynCorp's highly-rated relevant past performance, it is unclear how AWP's additional, relevant past performance would contribute to better satisfying the agency's stated needs so as to warrant a significantly higher rating under the past performance factor. In any event, in view of DynCorp's higher rating under two of the four mission capability evaluation subfactors and AWP's higher evaluated cost, there is no basis for concluding that a marginally higher rating for AWP under the past performance factor would affect the outcome here. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (GAO will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, that, but for the agency's actions, it would have had a substantial chance of receiving the award); see also Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The APS-3 cure notices also do not provide a basis to question the past performance evaluation. APS-3 contracting officials advised the Air Force in September 1999 that DynCorp's performance during the transition phase of the APS-3 contract had been "exceptional" and "outstanding"; the two cure notices were not issued to DynCorp until February 15 and March 3, 2000, that is, after the Air Force's past performance evaluation had been completed. In support of its claim that the cure notices nevertheless were improperly ignored by the Air Force, AWP notes that the cover letter to a March 20 FPR submitted by another offeror in this procurement, stated as follows:

[DELETED]

[DELETED] FPR, Cover Letter, Mar. 20, 2000.

Our Office has recognized that in certain limited circumstances an agency evaluating an offeror's past performance has an obligation (as opposed to the discretion) to consider outside information bearing on the offeror's past performance, as where the information in question was simply too close at hand to require offerors to shoulder

the inequities that spring from an agency's failure to obtain, and consider, the information. See International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 5-6. However, the "close at hand" information in these cases concerned contracts for the same services with the same procuring activity, or at least information personally known to the evaluators. See TRW, Inc., B-282162, B-282162.2, June 9, 1999, 99-2 CPD ¶ 12 at 4-5; Morrison Knudsen Corp., B-280261, Sept. 9, 1998, 98-2 CPD ¶ 63 at 5-6. There has been no showing that such circumstances are present here. The record includes statements from agency evaluators and source selection officials indicating that they either did not read [DELETED]'s FPR cover letter or did not understand it to refer to DynCorp, and stating that, in any case, they were unaware of the cure notices until after award. Agency Comments, June 30, 2000, attaches. AWP has pointed to no evidence establishing that the contracting officials in fact knew of the cure notices and, moreover, the evidence on which the argument is founded consists solely of a statement that was submitted with a competitor's proposal and that neither identified DynCorp by name nor referred to cure notices. Thus, although an agency generally may not ignore negative past performance information of which it is aware, see G. Marine Diesel, supra, the record here does not establish that contracting officials were on notice of potential problems in DynCorp's performance of the APS-3 contract such that they were required to investigate further.³

The protest is denied.

Robert P. Murphy
General Counsel

³ The Air Force reports that, when it again contacted the Army APS-3 contracting officials in April 2000, after the award here, the Army advised that DynCorp is "a little behind schedule" in one case, because it is awaiting spare parts from the government supply system, and (although "a little behind schedule") is currently responsive to performance requirements otherwise. Agency Report, Contracting Officer's Statement of Facts, at 10-11 and attach. 2, Air Force Memorandum for the Record, Apr. 27, 2000, and Army Confirming E-Mail, May 1, 2000.