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Decision

Matter of: Myers Investigative and Security Services, Inc.

File: B-288468

Date: November 8, 2001

Lawrence J. Sklute, Esq., and Nolan Sklute, Esq., Sklute & Associates, for the protester.

Benjamin N. Thompson, Esq., and Jennifer M. Miller, Esq., Wyrick, Robbins, Yates & Ponton, for Industrial Loss Prevention, an intervenor.

George U. Lane, Esq., General Services Administration, 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

1. Protest contention that evaluation was unreasonable is sustained where the record shows that the agency treated offerors unequally in its assessment of the past performance information used to justify the selection decision.
 2. Protest allegation that an agency's affirmative determination of awardee's responsibility must have been made in bad faith is denied where the record shows that, even though the agency received information raising questions about how the awardee could have properly certified to state authorities that it had taken the required steps for receiving the state permits needed to perform the instant contract, the information received was not sufficient to require a conclusion that the firm lacked integrity.
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DECISION

Myers Investigative and Security Services, Inc. protests the award of a 10-month interim contract for guard services for federal buildings in the Lumberton, North Carolina area by the General Services Administration (GSA) to Industrial Loss Prevention, Inc. This contract was awarded pursuant to solicitation No. GS-04P-01-EYC-0073. Myers argues that GSA's evaluation of its and Industrial's past performance was unreasonable because the agency had no basis for some of its conclusions, and because the companies were treated unequally. Myers also argues that the agency's affirmative determination that Industrial is a responsible contractor was made in bad faith.

We sustain the protest.

BACKGROUND

This protest is the third challenge by Myers to a series of actions by GSA related to the award of contracts for armed guard services for various federal facilities in North Carolina. The 10-month interim contract under protest here was awarded to allow GSA additional time to complete corrective action taken in response to an earlier protest by Myers of the award of a 5-year statewide guard services contract.

For clarity in discussing the series of contracts at issue in this dispute--and in discussing the differing past performance assessments associated with these contracts--we will refer to each contract action by its duration. Specifically, the contracts are: (1) the prior 5-year contract for guard services in the Lumberton area, which Myers performed until April 30, 2001; (2) the 5-year statewide contract, which was awarded to Industrial on April 25, protested by Myers, and placed on hold while GSA undertook corrective action in response to the protest; (3) a 30-day stopgap contract awarded to Myers on May 1; (4) a 60-day interim contract awarded to Industrial on May 31, again protested by Myers (our Office sustained the protest after GSA elected not to defend its selection decision¹); and (5) the instant 10-month interim contract awarded to Industrial on July 27 to follow the prior 60-day contract. (The 30-day, 60-day, and 10-month contracts were each limited to the Lumberton area while GSA completes its review of its 5-year statewide contract; separate regional contracts for the Charlotte and Ashville, North Carolina areas have also been awarded on an interim basis while GSA completes its review.)

The solicitation for the instant contract was issued on July 6, 2001, as a total small-business set-aside, and sought proposals by July 12. The solicitation anticipated award of a fixed-price requirements contract, for a 4-month base period followed by one 6-month option, to the offeror whose proposal offered "the best value to the Government, considering price and technical factors." RFP §§ F-3, M-2.1. The RFP identified two technical factors--past performance, and experience and qualification--and advised that the past performance evaluation factor would be approximately twice as important as the experience and qualification factor, and that the two technical factors combined would be more important than price. RFP § M-2.

With respect to the past performance evaluation factor, the RFP required offerors to submit reference information for all of their current security guard contracts, and for any such contracts performed within the previous 5 years similar in size to the instant contract. RFP § L-6.5. Potential offerors were advised that the information received from these references, as well as other performance information known to the agency, would form the basis for the past performance evaluation. Id.

¹ Myers Investigative and Sec. Servs., Inc., B-287949.2, July 27, 2001, 2001 CPD ¶ 129.

GSA received proposals from nine offerors in response to the RFP, four of which were not eligible for award for reasons not relevant here. Upon evaluation of the proposals, and the receipt of responses from each offeror's past performance references, the results of the evaluation were as follows:

OFFEROR	Past Performance Score (670 points)	Experience/ Qualification Score (330 points)	TOTAL POINT SCORE (1,000 points)	TOTAL PRICE
Industrial	536	330	866	\$309,073.00
Offeror A	469	330	799	\$365,734.74
Myers	268	330	598	\$223,750.84
Offeror B	201	330	531	\$380,185.46
Offeror C	335	165	500	\$285,656.30

Agency Report (AR), Tabs 7-8.

In assessing Myers' past performance for the evaluation above, GSA considered Myers' performance of the prior 5-year contract for guard services, and its performance of the 30-day stopgap contract, which ran from May 1 to May 31. The consideration of Myers' performance of these contracts was not limited to the responses received from past performance references, but also relied upon certain inspection reports and other information within GSA about Myers' performance. In addition, GSA considered past performance reports received from two additional references—one with the Environmental Protection Agency, and one with the Department of the Navy. The only negative information about Myers' past performance came from the GSA references and materials.

In assessing Industrial's past performance, GSA considered references from two GSA respondents describing Industrial's performance of the 60-day interim contract, which ran from June 1 to July 31. In addition, GSA considered past performance reports received from three additional references—one with the North Carolina National Guard, one with the Employment Security Commission of North Carolina, and one with the Cumberland County Mental Health Center. Information that was arguably negative about Industrial's past performance came from the North Carolina National Guard.

Using the results outlined above, the Source Selection Technical Evaluation Board (SSTEB) recommended award to Industrial (with its highest-rated, but third highest-priced proposal) over award to Myers (whose proposal had the lowest price, but the third-highest rating). The SSTEB based its recommendation on the "demonstrated good performance" of Industrial during the 60-day interim contract, compared to the "crucial and substantiated" performance violations attributed to

Myers during the prior 5-year contract, and the 30-day stopgap contract. SSTEBS Report at 11, July 27, 2001. In an apparent adoption of the SSTEBS Report's recommendation, the contracting officer awarded the contract to Industrial on July 27.² This protest followed.

DISCUSSION

Overview

Myers argues that the evaluation of past performance here was unreasonable as the agency had no basis for some of its evaluation conclusions, and because it and Industrial were treated unequally. Myers also argues that the evaluation and the agency's affirmative determination of Industrial's responsibility were made in bad faith.

With respect to Myers' challenges to the evaluation conclusions set forth in the SSTEBS Report—where the results of the evaluation are summarized and the basis for the selection decision is explained—the record supports the allegation that many of the evaluation conclusions do not match the underlying reference information the report claims to summarize. Our review shows, however, that GSA's selection decision was not based on the reference information collected. As such, GSA's selection decision strays from the evaluation scheme identified in the solicitation. Moreover, the conclusions drawn from the performance information used to support the selection decision—i.e., information collected in site visit reports during Myers' performance of the previous 5-year contract and the 30-day stopgap contract, and similar information collected during Industrial's performance of the 60-day interim contract—lead us to conclude that GSA has treated these offerors unequally, and hence unreasonably. Finally, as we sustain the protest on the basis that the evaluation was unreasonable, we do not reach Myers' general contention that the evaluation was performed in bad faith, and we deny Myers' specific contention that GSA made a bad faith affirmative determination of responsibility when it selected Industrial for award.

Evaluation Issues

Myers' approach to challenging the evaluation in this procurement is to focus on discrepancies between the SSTEBS Report and the underlying past performance materials upon which the conclusions in the report are based. Specifically, Myers

² For the record, there is no evidence in this record, other than award to Industrial, of any contemporaneous determination by the contracting officer (CO) that Industrial's proposal offers the best value to the government. Instead, it is not until the CO's statement prepared in response to this protest, and dated August 21, that the CO formally determined that Industrial's proposal offers the best value.

argues that the report's conclusions about Industrial's past performance include favorable information not found in the underlying materials, while excluding unfavorable information in those materials. Conversely, Myers argues that the report's conclusions about its past performance exclude favorable underlying information, while including unfavorable information not found in those materials. In addition, Myers indicates that in some areas, GSA evaluators drew unfairly different conclusions from similar past performance information.

Our standard in reviewing evaluation challenges is to examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Where a solicitation requires the evaluation of offerors' past performance, 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. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 5.

As indicated in the RFP, and mentioned above, the past performance evaluation factor was approximately twice as important as the experience and qualification factor. RFP § M-2. Consistent with this approach, a significant majority of the SSTEBS Report is dedicated to summarizing the responses received from each offeror's past performance references. In addition, the summary of each response is set out under a separate heading. As Myers alleged it would, our review showed multiple instances of conclusions appearing in the SSTEBS Report's "summary" of a performance reference response when information to support the conclusion is found nowhere in the underlying response.

To illustrate this issue, we note that the SSTEBS report on Industrial's past performance summarizes responses received from two GSA references and three outside references. Although Myers accurately cites examples of undocumented conclusions in the summaries of the responses of four of these five references, we focus here only on the summaries for two of the outside references—one from the Employment Security Commission of North Carolina, and one from the Cumberland County Mental Health Center. The report's summaries of the responses received from these references—as explained above, each summary is set forth under a separate heading—include identical statements that the "contractor is in compliance with labor standards" and that "no safety violations have been observed." SSTEBS Rep. at 3. In fact, neither reference addressed these issues. AR, Tab 4.1.1. Moreover, both summaries indicate that the reference advised that "all armed guards are equipped with all new weapons and equipment." SSTEBS Rep. at 3. Not only are these responses silent on this matter, as before, but the questionnaire completed by the reference from the Employment Security Commission of North Carolina indicates that the commission's contract with Industrial was for unarmed guards. AR, Tab 4.1.1. There is no explanation in the contemporaneous record, nor the agency's pleadings, for these discrepancies: although the agency filed an answer to

the protester's comments, where these examples were cited, it elected not to address this issue.

In our view, the unsupported conclusions in the SSTEb Report--and there are many--lend credence to Myers' allegation that the evaluation here was unreasonable. We find particularly troubling the fact that the conclusions set forth in the example above are attributed to past performance references located outside of GSA. In these instances (unlike those where the respondent is employed by agency, and might have, in some other way, communicated valid evaluation information), there is no evidence in the record of any contact between these references and the SSTEb beyond receipt of the completed past performance questionnaire.

On the other hand, we note that in this case, the unsupported evaluation conclusions did not play a significant role in the selection decision. Thus, on this issue alone, we cannot conclude that Myers was prejudiced by the unsupported information found in the report. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 154 at 3. We turn next, however, to the disconnect between the evaluation summary in the first 10 pages of the SSTEb Report, and the recommendation for award set forth at its conclusion.

As indicated above, a significant majority of the SSTEb Report is dedicated to summarizing the responses received from each offeror's past performance references. In addition, the report indicates the evaluation results for each offeror under the experience and qualification factor, and explains the methodology by which each offeror's score was calculated. These materials comprise the first 10 pages of the report. The concluding narrative (pages 11 and 12) explains the tradeoff decision underlying the recommendation that Industrial receive the award. The basis for this decision is generally not the evaluation information set forth on the first 10 pages of the report.³ Instead, the tradeoff is based on information derived from site visits during Myers' performance of the previous GSA 5-year contract and

³ When we say that the basis for the tradeoff decision between Myers and Industrial is generally not the evaluation information set forth on the first 10 pages of the report, an exception is the summary information attributed to the GSA references (as opposed to information derived from references outside the agency). During the course of this protest, Myers complained that the summaries of these GSA reference responses (as well as the summaries of responses from other references) included information not found in the response, and in fact, Myers was correct. Our review of the record shows that much of the information in the purported summaries of responses from GSA references is based on site visit reports and other sources. While we note that GSA was allowed to consider this information, see RFP § L-6.5., its SSTEb Report incorrectly indicates that this information was derived from the reference's response, when in fact it was derived from other sources.

30-day stopgap contract, and on similar information generated during Industrial's performance of the 60-day interim contract.

As a preliminary matter, before turning to the substance of the conclusions in the tradeoff decision, we note that the selection decision here is at variance with the evaluation scheme identified in the RFP. The RFP advised that the agency would seek performance information on all of the offeror's current guard services contracts, and on any guard services contracts performed in the previous 5 years similar in size to the instant contract. RFP § L-6.5. While GSA did, in fact, gather this information, use it to prepare past performance scores, and purport to summarize it in the SSTEBS Report, the information plays no discernable role in the selection decision. In addition, the selection decision does not use the results of the evaluation of the other evaluation factor, experience and qualification. Instead, the only information considered in selecting Industrial for award is how Myers and Industrial performed previously for GSA—and, as discussed above, much of that information cannot be found in the responses of the GSA references.⁴ While the agency might have a reasonable explanation for why it concludes that only past performance with GSA is relevant in this award decision, or perhaps why it is more important than any of the other information received, there is no such explanation in the record here. Accordingly, even before turning to the substance of the conclusions in the selection decision, we think the selection decision strayed from the solicitation's stated evaluation scheme.

With respect to the conclusions about the past performance of Myers and Industrial in performing the 5-year, 30-day and 60-day guard services contracts for GSA, we acknowledge first that there is information in the record supporting many of the conclusions reached. On the other hand, in several instances, our review of this record leads us to find that there has been unequal treatment of these offerors with respect to some of the conclusions reached, given the similarities of the past performance information upon which the conclusions were based. In that similar past performance information has led the agency to unfavorable conclusions about Myers, and favorable (or at least, less unfavorable) conclusions about Industrial, we cannot conclude that the selection decision here is reasonable. We set forth below examples of the agency's disparate treatment of these offerors regarding guards who were tardy, or who abandoned their posts during duty hours, and reports from customers about these incidents.

⁴ Although the RFP advised potential offerors that other performance information known to the agency could be used in its past performance evaluation, RFP § L-6.5, we do not think this provision can be read to sanction abandoning the past performance evaluation and basing a tradeoff decision solely on site visit information collected during performance of the prior GSA contracts.

In its tradeoff analysis and in its summary of Myers' performance of the 5-year and 30-day GSA contracts, the SSTEb Report indicates that guards left their posts "vacant on numerous occasions," "continuously reported to work late leaving unmanned posts," and that customers were complaining about the situation. SSTEb Rep. at 6, 11. The underlying record includes numerous site visit reports describing inspections during Myers' performance of the prior 5-year contract; these reports date to late 1998. See AR, Tab 4.2.4. In total, these reports describe one instance where a guard was one hour late, one instance where a different guard was away from her post for 20 minutes, and one instance where GSA asked that a third guard be removed for repeatedly abandoning his post. AR, Tabs 4.2.3, 4.2.4.

For Industrial, the report indicates that "[a]ll posts inspected were covered in accord with the contract, however some posts non-covered during guard's lunch period." SSTEb Rep. at 11. The information underlying this conclusion, however, is not very different from the information reported for Myers. For example, the record includes a July 17 site visit report of an inspection during Industrial's performance of the 60-day interim contract which includes two customer complaints regarding two different guards, one of whom was "not showing up on time for duty on many occasions," and one of whom was frequently abandoning her post. AR, Tab 4.1.3. In fact, one of these complaints was directly verified by the GSA inspector when the guard's post was abandoned for 15 to 20 minutes when the inspector arrived on the scene. Id. In addition, Industrial's reference from the North Carolina National Guard indicated that while guards were generally on time for work, "[t]ardy guards affect the end of day operations of the [National Guard] causing [National Guard] employees to fill in" and that "there have been cases when employees were on duty 24 hours without relief." AR, Tab 4.1.1. Given the information which provides the basis for the characterization of Myers on this issue, we fail to see how the information about Industrial's performance supports a materially different conclusion.

As a second example, we note briefly that the SSTEb Report states that the agency received complaints about Myers from several locations, but states that, for Industrial, it received favorable reports from management at all locations. SSTEb Rep. at 11. Again, the evidence in the record underlying these comments does not appear to support such materially different conclusions. First, there is no documentation in this record to support a conclusion that there have been more complaints for Myers than for Industrial. In addition, as indicated above, the July 17 report describing visits to sites guarded by Industrial contains two such complaints. These complaints contradict the SSTEb Report's conclusion that GSA is receiving "favorable reports from management at all locations."⁵ SSTEb Rep. at 11 (emphasis added).

⁵ The mention of favorable reports for Industrial from GSA customers can be found in an undated letter in the record from GSA to the president of Industrial. AR,

(continued...)

In conclusion, our review of this record shows numerous examples of discrepancies between evaluation conclusions and the underlying materials, and an award decision that, without explanation, ignores much of the information that the solicitation's stated evaluation scheme advised offerors would be considered. Under the circumstances of this procurement, we recognize that either or both of these problems might have been explained or justified, though in this case, they were not. Regardless of these issues, however, we find sufficient evidence of unequal treatment of Myers and Industrial in the agency's tradeoff decision to conclude that the evaluation here was unreasonable. See TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239 at 4-5. Accordingly, given the unequal treatment of these offerors in the selection decision, especially viewed in light of the totality of the circumstances here, we sustain Myers' protest.

Bad Faith

Myers argues that the agency's evaluation of offers, in general, and its affirmative determination of Industrial's responsibility, in particular, were made in bad faith. We need not reach Myers' general challenge of bad faith in the agency's evaluation, as our decision sustains its challenge to the evaluation on other grounds. See IGIT, Inc., B-271823, Aug. 1, 1996, 96-2 CPD ¶ 51 at 7 n.7.

With respect to GSA's affirmative determination of Industrial's responsibility, Federal Acquisition Regulation (FAR) § 9.104-1(d) requires that a prospective contractor have a satisfactory record of integrity and business ethics before it can be considered a responsible offeror. Myers argues that the GSA should have concluded that Industrial lacked the requisite integrity for a contract award, and argues that the agency's failure to reach this conclusion can only be explained by bad faith. In essence, Myers contends that GSA was on notice that Industrial had submitted improperly-certified training information to the North Carolina Private Protective Services Board (the state entity that regulates the use of firearms by armed security guards in North Carolina) in order to obtain the state-issued firearms permits required for performance of this contract.

(...continued)

Tab 4.1.3. In this letter, GSA advises that "management at all facilities are very pleased with the guards that are working at their facilities and want to retain them." We note for the record that Industrial is performing this contract with essentially the same guard workforce as Myers. Since this comment says less about Industrial than it says about the individual guards posted at the facilities covered by this contract, and since the guards are generally the same guards used by Myers during its performance, this comment provides little support for a distinction between Myers and Industrial.

The record here shows that shortly after Industrial began performing the 60-day interim contract for these services, Myers filed a complaint with the Board alleging that Industrial had hired Myers' guards, and had no valid firearms permits for the guards. Myers explains that it filed this complaint because, in North Carolina, permits for security guards to carry firearms are the property of the guard's employer, and are not transferable from one employer to another. Myers explains that Industrial certified to the Board that it provided requisite firearms training to all of its guards on May 31, 2001, the day before Industrial began performing this contract. Since most, if not all, of the guards covered by Industrial's certification to the Board were still working for Myers on May 31 (during Myers' performance of the 30-day stopgap contract), Myers contends that Industrial did not have access to the guards to train them, and that the certifications were false.

With respect to its contention that GSA was aware that Industrial had, in Myers' view, falsely certified to the Board, and silently acceded to Industrial's actions, Myers points out that firearms permits issued by the Board are valid for one year, and that GSA received copies of permits for Industrial's guards indicating that information was submitted to the Board prior to the time Industrial began performing this contract. Specifically, the record shows that GSA received from Industrial on July 13, a faxed copy of 21 newly-issued firearms permits for Industrial's guards, 19 of which have annual expiration dates of May 31, 2002. According to Myers, receipt of copies of permits with expiration dates of May 31, 2002, was sufficient to put GSA on notice that Industrial must have submitted paperwork to the Board showing a training date that fell within Myers' performance of this contract. Thus, according to Myers, agency bad faith is the only explanation for GSA's decision to award the instant contract to Industrial two weeks later, on July 27. We disagree.

Based on our review of the record, including GSA's response to this allegation, we cannot conclude that the agency made a bad faith affirmative determination of responsibility when it awarded this contract to Industrial. GSA acknowledges that its receipt, on July 13, of copies of firearms permits expiring May 31, 2002, raised questions about how Industrial had certified to the Board that it had trained its guards on May 31, 2001, when many of those guards were still employed by Myers. On the other hand, the agency explains that there were reasonable explanations for the situation other than an improper certification. In this regard, GSA states that it considered the possibility that Industrial had independently verified the training of these guards, or that the certifications might have been based on training that Industrial had provided for Myers in the past. While Myers argues that neither of these conclusions is reasonable, we see no basis to conclude that receipt of the newly-issued permits was sufficient evidence of a false certification to the Board by Industrial to demonstrate bad faith in the agency's determination of responsibility. Accordingly, we deny this basis of protest.

RECOMMENDATION

Since we conclude that unequal treatment of Myers and Industrial in the agency's tradeoff decision rendered the award unreasonable, we recommend that the agency reopen its evaluation of proposals, prepare a new evaluation report, and make a new selection decision, taking care to explain any benefits associated with any tradeoff decision. If Industrial is not the successful offeror after the revised selection decision, we recommend that the agency terminate the remainder of Industrial's 10-month interim contract. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the cost incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel