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Decision

Matter of: TVI Corporation

File: B-297849

Date: April 19, 2006

Paul F. Khoury, Esq., and Michael S. Caldwell, Esq., Wiley Rein & Fielding LLP, for the protester.

Richard P. Rector, Esq., and Eric M. O'Neill, Esq., DLA Piper Rudnick Gray Cary US LLP, for 3M Canada Company, an intervenor.

Jeffery I. Kessler, Esq., and Caridad Ramos, Esq., U.S. Army Materiel Command, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of protester's proposal as moderate risk--rather than as an unknown risk--under past performance factor was unreasonable, where protester tendered a large amount of past performance information, almost all of which the agency determined to be either not recent or not relevant; solicitation required agency to assign an unknown risk rating where offeror tendered "little or no" recent, relevant past performance information.

2. Agency improperly rated awardee's proposal neutral--instead of downgrading it--under small business participation factor, where record shows that awardee did not meet criteria established in solicitation for assignment of neutral rating, and did not offer meaningful small business participation plan.

DECISION

TVI Corporation protests the award of a contract to 3M Canada Company under request for proposals (RFP) No. W52H09-05-R-0142, issued by the Department of the Army, Tank, Automotive and Armaments Command, to acquire a quantity of C2A1 filtration canisters. TVI asserts that the agency misevaluated the proposals.

We sustain the protest.

The C2A1 filtration canister is a critical life safety component used in various models of nuclear, biological and chemical protective masks. The RFP contemplated the

award of a fixed-price, indefinite-delivery/indefinite-quantity contract to provide the canisters for a base period, with four 1-year options.

Award was to be made to the firm submitting the proposal deemed to offer the “best value” to the government, considering several non-price factors—technical, past performance and small business participation—and price. The technical and past performance factors were equal in importance, while the small business participation factor was less important than the technical and past performance factors, but slightly more important than price. Agency Report (AR), exh. 2a, at 1. The technical factor was comprised of three subfactors: design, carbon fill, and manufacturing capability. The design subfactor was to be rated on a go/no-go basis, while the carbon fill and manufacturing capability subfactors were to be rated adjectivally (excellent, good, marginal, or unacceptable). Id. at 1-2. The past performance factor was to be rated as very low risk, low risk, moderate risk, high risk, or unknown risk. Id. at 2. Finally, the small business participation factor was to be rated as excellent, good, adequate, marginal, poor, or neutral. Id. at 3-4.

The agency received three proposals, including the protester’s and 3M’s. The agency determined that all three were in the competitive range, engaged in discussions, and obtained revised proposals, which it rated as follows:

Evaluation Factor	3M Canada	TVI	Offeror A
Technical			
Design	Go	Go	Go
Technical (Overall)	Excellent	Excellent	Good
Carbon Fill	Excellent	Excellent	Excellent
Manufacturing Capacity	Excellent	Excellent	Adequate
Past Performance	Low Risk	Moderate Risk	Moderate Risk
Small Business Participation	Neutral	Excellent	Excellent
Evaluated Price	\$255,001,021.92	\$258,716,465.95	\$292,709,024.59

The competition for contract award therefore was extremely close between 3M and TVI in terms of both price and non-price factors. The agency made award to 3M, finding that the firm’s proposal offered the best overall value to the government. Following the award announcement and debriefing, TVI filed this protest.

PAST PERFORMANCE

TVI asserts that the agency improperly rated its proposal moderate risk, rather than unknown risk, under the past performance factor, since the RFP contained a strict definition of “recent and relevant” past performance, and the overwhelming majority of the past performance information TVI submitted did not meet the definition. TVI

notes in this connection that it is a newly-formed concern. TVI also points out that, prior to the final evaluation, the agency had rated TVI's proposal as unknown risk.

In reviewing an agency's evaluation of past performance, we will examine the evaluation to ensure that it was reasonable and consistent with the solicitation, applicable statutes and regulations. Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3.

The evaluation here was not reasonable. The solicitation provided that, in evaluating past performance, the agency would consider "recent and relevant" past performance information, which was defined as performance of contracts within the last 3 years that were for the same or similar items (that is, filtration items using carbon bed filling and comparable gas life testing skills) and had a value of at least \$1 million. AR, exh. 2b, at 2. The RFP further provided that, for newly-formed entities, the agency would consider information relating to contracts performed by predecessor concerns or contracts performed or supported by the offeror's key personnel. Id. The RFP also included definitions for each of the past performance risk ratings that could be assigned. For the moderate risk rating, the solicitation provided: "Based on the offerors past performance, some doubt exists that the offeror will successfully perform the required effort." AR, exh. 2a, at 2. For the unknown risk rating, the RFP provided: "The offeror had little or no recent/relevant past performance upon which to base a meaningful performance prediction." Id.

In its initial evaluation of TVI's past performance, the agency assigned the firm an unknown risk rating, finding that none of the five contract references provided by TVI in its proposal fit the definition of relevant contracts because none was for the manufacture of an item that included filters. AR, exh. 8, at 12. The agency also appears to have determined at that point in its evaluation that TVI's management team, engineering team, and key personnel had experience directly related to military canisters, but that this experience did not qualify as recent (the evaluators noted that TVI's key personnel who had experience with the C2A1 canister performed those activities from 1990 to 1996). Id.

Thereafter, the agency engaged in discussions with TVI, during which there were several exchanges relating to the firm's past performance, with a focus on recent and relevant contracts performed by TVI's key personnel and subcontractors. AR, exhs. 6-6e. Following discussions, the agency assigned the firm a past performance rating of moderate risk. The narrative portion of the agency's evaluation materials analyzing the information provided during discussions states as follows:

The offeror confirms that it has not manufactured or provided C2A1 canisters or similar items on contracts over \$1,000,000. TVI Corporation is considered to be a "newly formed entity" for the production of canisters. Although TVI has not provided relevant contract references that demonstrate they have successfully

manufactured or provided the C2A1 canister or similar items on contracts over \$1,000,000, a review of the information provided by TVI suggests that their key personnel have extensive knowledge in the manufacture of carbon bed type canisters. [Key employee No. 1] had contract experience on C2A1 awards made by the U.S. Government under Rock Island contracts during 1990 to 1997. Although they are relevant, they fall outside the definition of recent past performance. [Key employee No. 2's] experience is relevant and recent. He designed and advised on the production line for the C2A1 canisters produced by [deleted]. [Elsewhere in the agency's evaluation report, key employee 2's work is further detailed; he worked with [deleted] in connection with that firm's manufacture of the C2A1 canister under one contract for the Austrian military during 2004-05, and a second contract worth just over \$1 million with [deleted] for the manufacture of the C2A1 canister. AR, exh. 8, at 21.] [deleted] and Calgon are suppliers to TVI and do not manufacture the C2A1 canister or a similar item; however, as subcontractors they are providing their expertise to TVI. (Note: All offerors will be utilizing Calgon as a subcontractor.)

The rating of Unknown Risk that was established on 18 August 2005 is changed. Based on TVI being a "newly formed entity" and in the review of the key personnel and subcontractor expertise, supporting rationale was provided for a rating of "Moderate Risk" for TVI.

AR, exh. 8, at 22-23.

Similarly, the source selection official found that the experience of TVI's key personnel working on contracts for the production of the C2A1 canister (except for Key Employee No. 2 noted above) did not qualify as recent experience as defined in the RFP, and that TVI's subcontractors (Calgon Carbon and [deleted]) had not performed contracts that met the RFP's definition of relevant contracts. AR, exh. 10, at 16. He also found, however, that TVI's lack of past performance in manufacturing the C2A1 canister was an element in his determination that the TVI proposal merited a moderate risk rating. Specifically, the source selection official found as follows:

TVI Corporation confirmed that it has not manufactured or provided C2A1 Canisters or similar items on contracts over \$1,000,000. TVI has recently produced approximately 500 C2A1 Canisters on its automated production line. Based on TVI being a "newly formed entity" and its key employee experience and subcontractors [the experience of which was found elsewhere in the source selection decision not to be recent, relevant experience], some doubt exists that the offeror will successfully perform the required effort. I concur with the evaluator[s] that TVI merits a rating of "Moderate Risk."

AR, exh. 10, at 17.

We find the agency's assignment of a moderate risk rating to be problematic. As noted, the agency determined that only one of TVI's key employees' work was both relevant and recent within the meaning of the RFP's definition. To the extent that the agency found any of TVI's past performance information recent and relevant, it was limited to this one individual's performance in connection with two contracts, only one of which was specifically identified as meeting the RFP's \$1 million threshold for relevance. In particular, the record shows that he worked to design a production line for [deleted], and also advised in the design and manufacture of C2A1 canisters by [deleted]. [deleted] manufactured C2A1 canisters under two prior contracts (only one of which is noted as meeting the \$1 million relevance threshold), which were completed without any performance problems; at least one of the contracts was described as resulting in deliveries ahead of schedule, with excellent quality. AR, exh. 8, at 21. There does not appear to be anything negative in the information reviewed by the agency with respect to this individual's work.

The RFP specifically provided for the assignment of an unknown risk rating where the offeror was found to have "little or no" recent or relevant past performance upon which to base a meaningful performance prediction. While "no" past performance information is easily understood as a complete absence of past performance information, the question of what constitutes "little" past performance information is at issue here. As noted, the agency considered the past performance of only one of TVI's key employees (out of 11 individuals whose resumes were included in the firm's proposal), while rejecting the remaining information relating to its other key employees, all of its prior subcontractors, and its prime contracts as either not relevant or not recent. To the extent that this individual's past performance information was reviewed, there is nothing in the record to show why the agency considered the information as predictive of a moderate risk of unsuccessful performance of the requirement by TVI; the agency simply did not articulate a nexus between the information reviewed with regard to this individual's experience and its evaluation conclusion. It certainly is not clear how the positive past performance information found in connection with this individual could reasonably translate into the negative past performance rating assigned; while a limited quantity of positive information might not be sufficient to warrant assigning an offeror a positive, rather than neutral, past performance rating, absent some compelling justification, positive information should not result in a negative rating. Under the circumstances, we conclude that the agency should have assigned an unknown risk rating to TVI, since there was little information to consider, and the information considered apparently did not provide the basis upon which the agency made its performance prediction. We therefore find the agency's assignment of a moderate risk rating unreasonable given the terms of the RFP.

SMALL BUSINESS PARTICIPATION PLAN

TVI protests that the agency improperly assigned the 3M proposal a neutral rating under the small business participation evaluation factor. In this regard, the solicitation provided for a neutral rating where:

Foreign firm (offeror) has held no past government contract(s) subject to FAR § 52.219-8 or 52.219-9. Foreign firm (offeror) indicates no opportunity for using SBs [small businesses], VOSBs [veteran-owned small businesses], SDVOSBs [service-disabled veteran-owned small businesses], HUBZone SBs [historically underutilized business zone small businesses], SDBs [small disadvantaged businesses], WOSBs [women-owned small businesses], and HBCU/MIs [historically black colleges and universities/minority institutions] as all contract work will be performed completely outside the United States and no meaningful subcontract opportunities exist.

AR, exh. 2a, at 4. TVI asserts that 3M does not meet any of the criteria outlined in the RFP for the assignment of a neutral rating under the small business participation factor. According to the protester, 3M has had prior contracts that were subject to Federal Acquisition Regulation (FAR) §§ 52.219-8 (utilization of small business concerns) and 52.219-9 (small business subcontracting plan); 3M plans (indeed, is required) to have at least a portion of the contract performed within the U.S. because all offerors were required to use Calgon Carbon, a U.S. concern, as a supplier of one of the canister's components; and 3M actually states in its proposal that, if necessary, it has meaningful opportunities to subcontract some of the work to small business concerns.

The agency, while conceding that the applicable FAR clauses have been incorporated into two prior 3M contracts, states that it did not consider 3M to have been "subject to" those clauses, since the clauses were not enforced due to 3M's status as a foreign concern. As for the subcontracts with U.S. concerns, the agency states that 3M was directed by the terms of the solicitation to use Calgon Carbon, a large U.S. business, and that a second subcontract, with another large U.S. concern, Lydall Corporation, is necessary because Lydall is the primary approved source for a component that it manufactures (the particulate filter media); the agency notes in this respect that TVI also proposed Lydall as a subcontractor for the particulate filter media. Finally, as for opportunities to use small U.S. concerns, the agency maintains that 3M's proposal states that, because it has developed a supply chain of Canadian concerns, it does not have meaningful opportunities to subcontract with small U.S. concerns. The agency notes further that, because the offerors were directed to use Calgon Carbon as a subcontractor, this cannot be viewed as presenting a meaningful opportunity for subcontracting with a U.S. small business and, as for Lydall, since its subcontract represents only 2.5 percent of the total contract values, it also does not represent a meaningful subcontracting opportunity.

We agree with the protester that 3M meets none of the criteria outlined in the RFP for a neutral rating. First, as noted, the agency concedes that the applicable FAR small business subcontracting clauses were included in two prior 3M contracts. Thus, while the agency may have chosen not to enforce the clauses, we do not think it was reasonable for the agency to conclude that 3M has never held past government contracts that were “subject to” the applicable FAR clauses. Second, the record shows that the current contract will not be performed entirely outside of the U.S. At least two U.S. concerns--Calgon Carbon and Lydall--are participating in performance of the contract as 3M subcontractors, and even if those firms are large businesses, it remains that a portion of the contract is being performed within the U.S.

Finally, as TVI notes, 3M’s proposal does indicate that the firm has the ability to make meaningful small business subcontracting opportunities available, should it elect to do so. In this regard, the 3M proposal specifically states:

3M Canada does have access to 3M Company. 3M Company is our US parent company and 3M Company has an established Small Business plan that could be leveraged to access potential small business concerns. Within this solicitation, 3M Canada is not committing to achieving any U.S. small business participation but certainly, should opportunities arise where 3M Canada can take advantage of a small business concern(s), then that opportunity will be investigated and evaluated against existing suppliers.

AR, exh. 4a, at 1. It is therefore clear that meaningful subcontracting opportunities existed for 3M through its parent company.

Since we find that 3M did not satisfy the RFP criteria for a neutral rating under the small business participation plan factor, it was unreasonable for the agency to assign 3M that rating.¹ Accordingly, we also sustain this aspect of TVI’s protest.

¹ Given 3M’s failure to meet the criteria for a neutral rating and the fact that it offered no small business subcontracting participation in its proposal, it appears that it would have been appropriate to downgrade 3M under this factor. In this regard, we note that the RFP provided for a rating of poor where

[o]fferor demonstrates little or no commitment to using SBs, VOSBs, SDVOSBs, HUBZone SBs, SDBs, WOSBs, and HBCU/MIs. There is no evidence that the offeror met his prior goals and/or shows no serious commitment and did not provide adequate justification for not doing so. Based on the proposal and/or past performance history, there is negligible likelihood that anything other than a token portion of the work will be performed in this sector. . . .

(continued...)

Given that TVI's proposed price was only approximately 1.45 percent higher than 3M's (and price was the least important evaluation factor); that the proposals were ranked equal under the technical evaluation factor; and that TVI's proposal was rated excellent under the small business participation factor, it is not possible to determine from the record which proposal would be found to be the best value after the evaluation errors are corrected. We therefore conclude that there is a reasonable possibility that the evaluation errors resulted in competitive prejudice to TVI; that is, but for the evaluation errors, TVI would have had a substantial chance of receiving the award. See McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

RECOMMENDATION

We recommend that the agency reevaluate the proposals in a manner consistent with the discussion above and make a new source selection decision based on the results of that reevaluation. Should the agency conclude that an offeror other than 3M is in line for award, we recommend that the agency terminate 3M's contract for the convenience of the government and make award to that other offeror, if otherwise proper. Finally, we recommend that TVI be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2005). TVI's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

(...continued)
AR, exh. 2a, at 4.