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Decision

Matter of: Family Entertainment Services, Inc.

File: B-298047.3

Date: September 20, 2006

Michael Bornstein, Esq., Ricketts Co. LPA, for the protester.

Johnathan M. Bailey, Esq., Bailey & Bailey, for Total Grounds Maintenance, LLC, the intervenor.

Capt. John J. Pritchard, and Lt. Col. Frank A. March, Department of the Army, for the agency.

John L. Formica, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency's evaluation of the protester's past performance was unreasonable is sustained where the record evidences that the protester and awardee were not treated equally with regard to the agency's efforts to contact past performance references, and the record does not provide a reasonable explanation for the agency's conclusions regarding the protester's past performance, including what if any impact the agency's receipt of contract performance assessment reports had on its evaluation.

2. Agency reasonably considered the past performance information set forth in the awardee's proposal where the solicitation provided for the consideration of past performance information regarding predecessor companies and key personnel, the awardee's proposal explained the relationship between it and the firm that had performed the contracts described, and nothing in the record is inconsistent with the awardee's representations; however, the agency failed to evaluate the awardee's past performance in accordance with the terms of the solicitation where there is no evidence that the agency, when rating the awardee's past performance, took into account the solicitation's provision that past performance information concerning predecessor companies and key personnel would not be as highly rated as past performance information for the principal offeror.

DECISION

Family Entertainment Services, Inc. doing business as IMC protests the award of a contract to Total Grounds Maintenance, LLC (TGM) under request for proposals (RFP) No. W911SE-06-R-0007, issued by the Department of the Army, for grounds maintenance services at Fort Campbell, Kentucky. The protester argues that the agency's evaluation of proposals was unreasonable.

We sustain the protest.

The RFP, issued on January 27, 2006 as a set-aside for small businesses in historically underutilized business zones, provided for the award of a fixed-price requirements contract for a base year with 4 option years. RFP at 4, 154. The solicitation stated that the contract would be awarded to the offeror submitting the proposal found to represent the best value to the government, based upon the evaluation factors of past performance and price. RFP at 136. The solicitation specified that in determining which proposal represented the best value, the agency would consider past performance significantly more important than price. Id.

The agency received 11 proposals by the solicitation's closing date, of which 10 proposals, including those submitted by TGM and IMC, receiving ratings of "very good" under the RFP's past performance factor. TGM submitted the lowest priced proposal, with a total evaluated proposed price of \$6,749,644; IMC's proposed total evaluated price was \$7,878,280. Agency Report (AR), Tab 11, Source Selection Statement, at 3. The agency selected the proposal submitted by TGM for award, and IMC filed this protest following a debriefing.

The protester argues that the agency's evaluation of its and TGM's proposals under the past performance factor was unreasonable. Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation factors and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the contracting agency's discretion. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 2. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. As explained below, we find that the agency's evaluation of IMC's past performance does not meet this standard.

As a preliminary matter, the Army argues that IMC is not an interested party to protest the evaluation because it would not be in line for award if the award to TGM were set aside. The agency contends in this regard that there is another proposal that was also rated "very good" under the past performance factor with a lower

evaluated price than the proposal submitted by IMC, and that this intervening offeror would be in line for award should IMC's protest be sustained. AR at 8.

In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2006); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester's proposal would be in line for award if the protest were sustained. Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290 at 3.

The agency's argument here ignores the fact that IMC challenges the propriety of the agency's evaluation of IMC's past performance as well as the evaluation of TGM's past performance. In this connection, the other proposals that were lower in price than IMC's were from offerors whose past performance was rated other than "exceptional," and it cannot be determined from the existing record that raising IMC's past performance rating to "exceptional" would not have led to the selection of IMC's proposal for award. Accordingly, we consider IMC to be an interested party for the purposes of pursuing this protest.

As to the merits of the agency's actions, the solicitation's proposal preparation instructions required that proposals include certain past performance information. RFP at 131-35. Specifically, offerors were instructed to provide information regarding at least four of their most recent and relevant grounds maintenance contracts performed in the last 3 years. This information was to include, among other things, a brief description of the services performed, the contracting agency for which the services were performed, the period of performance and contract value, as well as the name, address, and telephone number of the cognizant contracting officer's representative. Id. at 133. Offerors were also informed that the "evaluation of past performance will take into account past performance information regarding predecessor companies, key personnel with recent and relevant experience, or subcontractors that will perform major or critical aspects of the requirement." Id. at 134. The solicitation cautioned that this latter type of past performance information would "not be as highly rated as past performance information for the principal offeror." Id. at 137.

IMC's proposal included information regarding four contracts. The first contract described was for grounds maintenance services performed for the Department of the Army at Fort Campbell. The proposal included a survey completed by the cognizant Fort Campbell contracting officer's representative, which rated IMC's performance as "exceptional" under each of the numerous questions posed by the survey. IMC's proposal also included information regarding its performance of grounds maintenance services for the Department of the Army at Fort Knox, Kentucky, and the Military Academy at West Point, New York, and for the Department of the Air Force at Whiteman Air Force Base (AFB), Missouri. The

proposal included a copy of a contractor performance assessment report (CPAR) for the work performed at Whiteman AFB that rated IMC's performance as "exceptional" under each of the applicable categories set forth on the report. AR, Tab 8, IMC Past Performance Proposal and Evaluation Documentation.

The record reflects that after receiving the proposals by the due date of May 24, the agency "gathered information when possible from the submitted references," and also "obtained information from the CPAR if available." Contracting Officer's Statement at 2. With regard to IMC's past performance, the record reflects that the cognizant contract specialist contacted or attempted to contact each of IMC's four references.

Specifically, on May 31 the contract specialist spoke with an individual in the Military Academy's contracting office. During this conversation, the contract specialist states that she "relayed . . . the need of completion of the [past performance] questionnaire" and that the questionnaire needed to be completed and returned "within 24 hours." The contract specialist states that the individual at the Military Academy "understood the urgency," but that the contract specialist "never received the responding questionnaire." Statement of the Contract Specialist, Aug. 30, 2006, at 1.

With regard to IMC's reference at Fort Knox, the contract specialist adds that on May 31 she spoke with an individual there who "agreed to get the questionnaire completed," and that on May 31 she also attempted to contact the Whiteman AFB contracting officer to provide that individual with a questionnaire to be completed. Statement of the Contract Specialist, Aug. 30, 2006, at 1. The record reflects that in a subsequent e-mail to the Fort Knox reference the contract specialist requested that the completed questionnaire be returned by June 2, or within 2 days of her request. Statement of the Contract Specialist, Aug. 30, 2006, attach. 1. The contract specialist states that she did not receive a completed questionnaire from the Fort Knox reference, and never received any response from the contracting officer at Whiteman AFB. Statement of the Contract Specialist, Aug. 30, 2006, at 1.

The agency did receive a completed questionnaire from the cognizant contracting personnel at Fort Campbell, where IMC had performed grounds maintenance services from March 2001 through December 2003. AR, Tab 8, IMC Past Performance Proposal and Evaluation Documentation. This completed questionnaire rated IMC's performance as "exceptional" with regard to every question posed. Id. The record also reflects that the agency received four CPARs regarding IMC's performance, with three of the CPARs assessing IMC's performance at Whiteman AFB, and one assessing IMC's performance at Fort Knox. With regard to Whiteman AFB, the CPAR assessing IMC's performance from June 2003 through September 2003 (the "initial" CPAR) rated IMC's performance as "very good," while the CPARs assessing IMC's performance from October 2003 through September 2004 (the second "initial" CPAR), and from October 2004 through September 2005 (the

“intermediate” CPAR) each rated IMC’s performance as “exceptional.” The other CPAR received by the agency, which pertained to IMC’s performance of grounds maintenance services at Fort Knox from July 2004 through June 2005 (an “interim” CPAR), assessed IMC’s performance as “exceptional.” AR, Tab 8, IMC Past Performance Proposal and Evaluation Documentation.

The contracting officer completed the evaluation of IMC’s past performance on June 8, and found all of IMC’s past performance information “recent in accordance with the solicitation criteria” and “relevant for both similarity of scope and magnitude of service.” AR, Tab 8, IMC Past Performance Proposal and Evaluation Documentation. As mentioned previously, the agency evaluated IMC’s past performance as “very good.”

In response to the protester’s argument that its past performance should have been rated as “exceptional” based upon the information it submitted with its proposal, as well as the completed questionnaire and the CPARs the agency received, the contracting officer explains as follows:

While the protester, IMC[,] did submit four listings for past performance, the evaluator was able to verify one of these references after several attempts. A search of the government’s [CPAR] system found two initials, one interim and one intermediate report, no final reports were found on IMC. Even though this one reference resulted in an “exceptional” referral, in the evaluator’s judgment this did not warrant an exceptional rating when at least four references were required by the solicitation.

Contracting Officer’s Statement at 7.

In our view, the agency’s explanation as to why it rated IMC’s past performance “very good” is unreasonable in a number of respects. First, it appears from the contracting officer’s statement that IMC’s record of past performance “did not warrant an exceptional rating” because only one reference returned a completed questionnaire and “at least four references were required by the solicitation,” that IMC was effectively penalized because not all of the four references it identified in its proposal submitted completed questionnaires in accordance with the agency’s requests. To the extent that the agency believes that the references’ failure to each return a completed past performance questionnaire to the agency mandated a downgrading of IMC’s proposal, this belief is in error. That is, the RFP required that offerors furnish, among other things, descriptions of work performed and points of contact; it in no way required that offerors ensure that their past performance references received, completed and returned the questionnaires. Cf. American Floor Consultants, Inc., B-294530.7, June 15, 2006, 2006 CPD ¶ 97 at 4-5 (past performance evaluation which assigned a “neutral” rating to the protester’s proposal was unobjectionable where the agency did not receive completed questionnaires from

any of the protester's references listing relevant work and the solicitation provided that it was the protester's obligation to ensure that the past performance questionnaires were completed and returned). With regard to the agency's responsibilities, our Office has long recognized that there is no requirement that an agency contact all references furnished by an offeror. Advanced Data Concepts, Inc., B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 at 10. Accordingly, to the extent that the agency believed that because of the references' failure to each submit a completed past performance questionnaire it was precluded from evaluating IMC's past performance as "exceptional" by the terms of the RFP, statute, or regulation, the agency was in error.

Additionally, the agency's explanation regarding its evaluation of IMC's past performance, while recognizing that IMC's Fort Campbell reference returned a questionnaire evaluating IMC's performance as "exceptional," provides no explanation for the agency's apparent failure to meaningfully consider the four CPARs pertaining to IMC's past performance. In this regard, the CPARs covered three of the four contracts described by IMC in its proposal (Fort Knox, Fort Campbell, and Whiteman AFB), and with one exception, evaluated IMC's performance as "exceptional."¹ However, there is no explanation in the record as to whether or how these CPARs were considered in evaluating IMC's past performance, or why the contracting officer believed that she was only able to "verify one of [IMC's] references," even though she had received CPARs pertaining to IMC's performance of three of its described contracts. That is, the agency does not explain why these CPARs were not considered as "verification" of IMC's performance of the work described in its proposal, or, to the extent that the agency felt it needed "final" CPARs to consider, why the agency's position in this regard is reasonable.

It also appears that the agency did not treat the offerors equally in its efforts to contact their references. As explained above, although the contract specialist attempted to contact each of IMC's references by telephone, and was able to forward the agency's past performance questionnaire by e-mail to the Fort Campbell, West Point, and Fort Knox references, these references were instructed that they were to return the completed questionnaires in 1 to 2 days. The record provides no explanation as to why the contract specialist imposed these deadlines on IMC's references, nor does the record provide that the contract specialist made any attempt to contact any of IMC's references after June 1.

¹ The exception, of course, was the "initial" CPAR completed by contracting personnel at Whiteman AFB. However, we note in this regard that two subsequent CPARs completed by Whiteman AFB both evaluated IMC's performance as "exceptional." AR, Tab 9, IMC Past Performance Proposal and Evaluation Documentation; see Federal Acquisition Regulation (FAR) §15.305(a)(2)(i) (in a past performance evaluation "general trends in contractor's performance shall be considered").

In contrast, the record shows that a different contract specialist called and forwarded the past performance questionnaire by e-mail to TGM's references on May 31. While the references were requested to complete the questionnaire, no deadline for the return of the completed questionnaires was established. With regard to two of the three TGM references that subsequently returned completed questionnaires, the record establishes that on June 2 these references each received a second e-mail from this contract specialist "following up" on his request that the references complete the questionnaire, and requesting that they "respond by June 5, 2006." AR, Tab 10, Total Grounds Maintenance Past Performance Proposal and Evaluation Documentation.

While one may question whether the agency's actions in contacting or attempting to contact IMC's references constituted a "reasonable effort,"² we need not resolve this issue, given the disparate methods by which the agency attempted to obtain completed past performance questionnaires from the offerors' references. That is, as set forth above, the record reflects that the agency imposed relatively tight deadlines on IMC's references for their submission of completed past performance questionnaires and no follow-up contacts were attempted when IMC's references did not respond within the deadlines imposed, whereas no deadlines were initially imposed on TGM's references and follow-up contacts were made (and less stringent deadlines were subsequently imposed) when TGM's references did not respond as initially requested. It is fundamental that a contracting agency treat all offerors fairly, and based upon this record, the agency simply did not do so here.³ See Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 ¶ 65 at 5.

The protester also argues that TGM's "very good" past performance rating was unreasonable because TGM is "a new entity and does not have the requisite past experience." Protest at 3; see Protester's Comments at 4-9. The protester concludes that TGM's proposal should have received a "neutral" past performance rating.

² Agencies are required to make a reasonable effort to contact references. Universal Bldg. Maint., Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 8 n.1.

³ In reaching this conclusion, we are mindful that there is no requirement that an agency make the same number of attempts to contact each offeror's references. See OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 9. However, as indicated above, the disparate treatment here, which includes the imposition of tight deadlines for the submission of IMC's references' questionnaires in contrast to no deadlines for TGM's references' questionnaires, extends beyond the consideration of the number of contacts attempted.

The awardee's proposal, in setting forth the firm's past performance, explained that the owner and president of TGM "is also the owner and president of Wimsco, Inc. which has been continuously involved in grounds maintenance contracts with the U.S. Government since 1989." TGM's proposal stated that TGM would be "bidding all future contracts," and that "[o]nly the name has changed as all key personnel will remain the same." AR, Tab 9, TGM Past Performance Proposal and Evaluation Documentation.

In evaluating TGM's proposal, the agency found, consistent with TGM's representation, that each of TGM's references was for a contract that had been actually performed by Wimsco. The agency explains that during its evaluation of TGM's past performance it "considered Wimsco and TGM one in the same company . . . with the same owner and same employees." Contracting Officer's Statement at 7. The agency argues in its report that in its view, regardless of whether its conclusion that Wimsco and TGM were "one in the same" is correct, it properly considered Wimsco's record of past performance as that of a "predecessor company." Id.

Agencies properly may consider the relevant experience and past performance history of key individuals and predecessor companies in evaluating the past performance of a newly-created company, since that experience may be useful in predicting success in future contract performance. Trailboss Enters., Inc., B-297742, Mar. 20, 2006, 2006 CPD ¶ 64 at 4; United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 at 7; see FAR § 15.305(a)(2)(iii). Here, the solicitation specifically stated that past performance regarding key personnel and predecessor companies would be considered. Given this and the awardee's representations in its proposal regarding the relationship of Wimsco and TGM, we see nothing unreasonable or improper in the consideration of Wimsco's past performance in evaluating TGM's proposal under the past performance factor. Trailboss Enters., Inc., supra.

The protester nevertheless notes that despite the representations made by TGM in its proposal regarding the relationship of Wimsco as a predecessor company, one of the references listed in TGM's proposal referred to Wimsco's performance of a current contract, and that a CPAR for a contract that Wimsco completed in September 2003 identified as the "Contractor Representative" an individual that is not listed in TGM's proposal. The protester argues that this is inconsistent with TGM's representations regarding the relationship of TGM and Wimsco both as entities and with regard to key personnel. The protester concludes that "[t]he Agency's position that TGM and Wimsco are one and the same or in the alternative a predecessor firm must fail as the facts show there has been no merger, purchase, novation or other legal transaction between the two companies which would support this conclusion." Protester's Comments at 7.

We do not find the protester's argument persuasive. TGM's proposal, as set forth above, acknowledged that Wimsco was the entity to which the past performance

information applied, but that TGM would be “bidding all future contracts” and that “all key personnel will remain the same.” AR, Tab 9, TGM Past Performance Proposal and Evaluation Documentation. Contrary to the protester’s view, we do not see these representations as necessarily inconsistent with the fact that Wimsco is currently performing a contract or that an individual employed by Wimsco in 2003 is not listed on TGM’s current organization chart.

Nevertheless, we do not agree with the agency’s determination during the evaluation process that its consideration of Wimsco’s past performance in evaluating TGM’s proposal was appropriate because the firms were “one in the same.” See Contracting Officer’s Statement at 7. It is apparent from TGM’s proposal, which states that the “owner and president of Total Grounds Maintenance, LLC . . . is also the owner and president of Wimsco, Inc.” and that “Total Grounds Maintenance, LLC will be bidding all future contracts,” that Wimsco and TGM are in fact distinct entities. While we have no basis on this record to disagree with the agency that it could consider Wimsco’s past performance information as that of a “predecessor company” to TGM with the same or similar “key personnel,” we do not agree that TGM and Wimsco can properly be considered “one in the same.” This distinction is important because of the solicitation’s provision that while past performance information regarding key personnel and predecessor companies would be considered, such past performance information would “not be as highly rated as past performance information for the principal offeror.” RFP at 137. In this regard, there is nothing in the record to suggest that the agency took this latter provision into account when concluding that TGM’s proposal merited a rating of “very good” under the past performance evaluation factor.

The protest is sustained.

Because we find that the Army did not treat IMC fairly with regard to the efforts made in contacting or attempting to contact IMC’s references and to receive completed past performance questionnaires, we recommend that the agency again attempt to contact IMC’s references in a manner consistent with the efforts made in contacting and receiving past performance questionnaires from TGM’s references. We also recommend that the agency reevaluate the past performance of IMC based upon any completed questionnaires received and the past performance information already in the record. In doing this, the agency should consider the CPARs it has received regarding IMC’s performance, and provide a reasonable explanation as to how the CPARs affect the agency’s past performance evaluation. The agency should also reevaluate TGM’s proposal under the past performance factor, and in doing so should consider the provision in the solicitation stating that past information regarding predecessor companies and key personnel will not be as highly rated as past performance information for the principal offeror. Based on these reevaluations, we recommend that the agency make a new source selection determination. If the agency determines that the proposal of an offeror other than TGM represents the best value to the government, we recommend that the agency

terminate the contract awarded to TGM and award a contract to the offeror whose proposal is selected. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f) of our Regulations, IMC's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

Gary L. Kepplinger
General Counsel