



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Kellie W. Tipton Construction Company

File: B-281331.3

Date: March 22, 1999

Sam Z. Gdanski, Esq., and Jeffrey I. Gdanski, Esq., for the protester.
Thomas J. Keuler, Esq., Denton & Keuler for Terry Land Development, Inc., an intervenor.

Col. Nicholas P. Retson, LTC Richard B. O'Keefe, Jr., and Fredrick M. Lewis, Esq., Department of the Army, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency termination of contract for the convenience of the government is unobjectionable where, shortly after award, the agency reasonably determined that the award had been predicated on an obviously mistaken evaluation of another offeror's past performance and that the corrected evaluation resulted in that other offeror becoming in line for award.
2. Allegation that agency misevaluated proposals with respect to past performance is denied where the record shows the agency evaluation was reasonable and did not conflict with the solicitation evaluation criteria. While the solicitation called for offerors to submit at least 10 references, and the awardee did so, the solicitation did not state that all 10 references would be evaluated, and the agency's decision to evaluate only 5 references for all offerors did not prejudice the protester and was otherwise unobjectionable.
3. Agency determination that allegedly enhanced hourly rates for two line items did not represent a risk that the government would pay unreasonably high prices is reasonable where award to offeror proposing those labor rates results in lower price because the rates apply only to two contingent labor categories which affect only a small percentage of the total price.

DECISION

Kellie W. Tipton Construction Company (Tipton) protests the termination for convenience of its contract for installation and replacement of water and sewer lines at Fort Campbell, Kentucky awarded by the Department of the Army, under

request for proposals (RFP) No. DAKF23-98-R-0219, and the Army's decision to award a contract for these services to Terry Land Development, Inc. (TLD).

We deny the protest.

The RFP, issued on August 17, 1998, contemplated the award of a fixed-price, indefinite-delivery, indefinite quantity (IDIQ) contract for a base period with two 12-month option periods. RFP § 00100, ¶ 8. The RFP contained a price list for the specific tasks to be performed which included cost for labor, materials, and equipment. RFP amend. No. 0001, § 00010, at 00010-4. Additionally the schedule required prices to be submitted for contract line items (CLIN) Nos. 0004 and 0005 for labor costs for work to be performed in Kentucky and Tennessee, respectively, to be used when required work was not included in the price list. RFP amend. No. 0005, § 00010, at 00010-3. The RFP provided for award to the offeror whose offer represents the best value after evaluation in accordance with the factors and subfactors in the solicitation. RFP § 00100, ¶ 19.c(1). The RFP stated that the technical evaluation factor was past performance, consisting of the two subfactors of customer satisfaction (CS) and experience modification factor (EMF).¹ Id. ¶ 19.c(2). Technical (*i.e.*, past performance) was significantly more important than price, and of the technical subfactors, CS was significantly more important than EMF. Id.

CS was to be evaluated based on information obtained from customer references provided by offerors.² Id. ¶ 19.b.(1)(a)(1). Offerors were required to identify a minimum of 10 contracts and subcontracts performed within the last 3 years and similar to the current requirement. Id. Specifically, the agency sent PPQs to firms identified by the offerors as references regarding prior construction work. Agency Report (AR), Tab 4, Source Selection Plan, at 1. The PPQ consisted of a series of 10 questions regarding the quality of work performed by the offeror for the firm responding to the questionnaire. The questions were answered by circling a number from 1 through 5, with 5 denoting "EXCELLENT" and 1 denoting "UNSATISFACTORY." Id. at 5th unnumbered page. The PPQ total was calculated by adding the numerical results selected for each of the 10 questions. This result in

¹EMF measures an offeror's safety record and insurance experience. Agency Report (AR), Cover Letter at 2 n.2. Each offeror's insurance carrier supplies the EMF rating. Id. The lower the EMF, the better the safety record. Id.

²Other CS input was received from governmental agencies with whom offerors had done business. Each offeror was evaluated on the basis of input from five entities. If an offeror received past performance questionnaires (PPQs) from five commercial entities, no input from governmental agencies was used. If fewer than five PPQs were received, governmental inputs were used. AR, Cover Letter at 2 n.3.

turn was averaged with other PPQ and CS results to arrive at a total CS score. AR, Cover Letter at 3.

The Army received seven proposals in response to the RFP. As a result of the initial evaluation, Tipton's proposal was ranked first and TLD's was ranked third. AR, Tab 7, Price Negotiation Memorandum, at 13th unnumbered page. The results of the initial evaluation were as follows:

Offeror	EMR/pts. ³	CS	Total	Tech. Score ⁴	Price Score	Total Score
Tipton	(.81)/40	45.6	85.6	300	204.59	504.69
Offeror A	(.87)/40	50.9	90.9	400	74.08	474.08
TLD	(.82)/40	38.8	78.8	200	266.67	466.67

AR, Cover Letter at 3.

Tipton's proposal received the high total score of 504.69 and was determined to represent the best value; award was made to Tipton on September 30. AR, Tab 7, Price Negotiation Memorandum, at 3d unnumbered page.

On October 14, TLD was debriefed by the agency. On October 19, TLD filed a protest with our Office alleging that it had submitted the lowest-priced offer and was qualified to perform the work and complaining that it had been advised that the selection of an awardee was based on considerations other than price. On October 20, we dismissed that protest for failure to state a valid protest basis. On October 23, TLD filed another protest which we subsequently dismissed as academic on November 25 because the agency determined that it would reevaluate the proposals.

The agency reports that the procurement files had been forwarded to the Army Contract Appeals Division (CAD) on November 10, to facilitate presentation of the

³Under the Source Selection Plan, an EMF of 1.0 or less received the maximum score of 40 points. AR, Tab 4, Source Selection Plan, at 1.

⁴Each offeror's raw technical score was converted into a multiplier between 0 and 4 (0 being unsatisfactory and 4 being excellent), which was then multiplied by 100 to yield the technical score. AR, Tab 7, Price Negotiation Memorandum, Evaluation Matrix. For example, a score between 60 and 79 was considered average (and therefore assigned a multiplier of 2), which would result in a score of 200 (100 multiplied by 2).

agency's position before our Office. AR, Tab 2, Memorandum of Law, at 2d unnumbered page. In reviewing the file, the CAD attorney noted that TLD had received an unusually low score (12 out of a possible 50 points) on a PPQ submitted by the Paducah & Louisville Railway Company (P&L). On 8 out of 10 questions, a P&L engineer had graded TLD as a 1 or "unsatisfactory"; on the remaining 2 questions, he had graded TLD as 2, or "below average." Because this score seemed unusual, the CAD attorney contacted the P&L engineer to verify the accuracy of the ratings. *Id.* At approximately the same time, the contracting officer in her review also noted the unsatisfactory rating and contacted the P&L engineer to determine if TLD had been informed about the unsatisfactory evaluation submitted by P&L. AR, Tab 1, Contracting Officer's Statement, at 2d unnumbered page. The P&L engineer stated that he had misread the evaluation criteria/instructions, and mistakenly thought that 1 was the highest score and 5 was the lowest score, and subsequently provided an affidavit to the same effect. The result of this transposition error was that TLD received a score of 12 when the P&L engineer's intended replies would have resulted in TLD receiving a score of 48 based on the outstanding performance of its contracts with P&L. AR, Tab 16, Affidavit of Chief Engineer, P&L, at 1.

The CAD attorney and the contracting officer then re-evaluated the TLD score based on the P&L engineer's statement, which resulted in TLD's proposal receiving an overall CS score of 47.5 instead of the 38.8 as originally computed. As a result of the re-evaluation, TLD's proposal was, not only lower priced, but also higher technically scored than Tipton's; overall, TLD's proposal was highest ranked with a total score of 566.67. Subsequently, on November 19, a suspension of work order was issued to Tipton. AR, Tab 18. On November 23, the contracting officer issued a corrective action report stating that the award to Tipton was improper and that in order to protect the integrity of the procurement system, she was terminating Tipton's contract for convenience and would make an award to TLD. AR, Tab 19, Memorandum from the Contracting Officer to the Commander, U.S. Army Legal Services Agency (Nov. 23, 1998). On December 3, the contract with Tipton was terminated for convenience and, on December 11, Tipton filed this protest with our Office.

Tipton contends that the agency's decision to terminate its contract based on the discovery of the P&L's engineer's erroneous completion of the PPQ was improper, that the evaluation of past performance was improper because some offerors submitted fewer than the required number of references, and that TLD's offer should be rejected as unbalanced.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Patriot Contract Servs., LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4; Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4. We will not object to an agency's

proposed corrective action where the agency reasonably concludes that the award was tainted by a flaw in the procurement process, so long as the corrective action taken is appropriate to remedy the flaw. See Rockville Mailing Serv., Inc., supra.

Here, shortly after award had been made, the agency discovered that an obvious error had been made in its evaluation of TLD's proposal. Once the agency learned of this error, it was appropriate for the agency to correct it and reassess the proposal. The record demonstrates that before determining to take corrective action, the contracting officer carefully analyzed the record before her, which included numerous letters of references submitted by TLD that documented its excellent record of performance, in addition to the P&L engineer's statement and affidavit, and reasonably concluded that the P&L engineer had mistakenly transposed his score of TLD's past performance. On that record, the contracting officer reasonably credited the engineer's explanation at face value, in part because she found it implausible that TLD would have intentionally submitted a reference that provided such an anomalous unsatisfactory rating. Once the contracting officer properly concluded that there was an essentially clerical error in the agency's assessment of TLD's past performance, we see nothing unreasonable in the decision to reassess TLD's proposal using corrected, accurate reference information. Because the award to Tipton was predicated on an erroneous evaluation of TLD's proposal, we see no basis to object to the agency's decision to take corrective action by terminating Tipton's contract and making an award to TLD, whose proposal was the lowest-priced offer and whose correctly evaluated technical proposal was equal to Tipton's.

Tipton also challenges the agency's proposed award to TLD on the grounds that TLD's offer is unbalanced because it allegedly proposed an unreasonably high per-hour labor rate for the line items covering certain work in Kentucky and Tennessee.

Federal Acquisition Regulation (FAR) § 15.404-1(g) (FAC 97-02) provides that unbalanced prices arise where the prices of one or more contract line items are significantly over- or understated as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(2) requires that offers with separately priced line items or sub-line items be analyzed, using cost or price analysis techniques, to determine if the prices are unbalanced and, if an offer is found to be unbalanced, the contracting officer should consider the risks to the government associated with the unbalanced pricing in making the source selection decision in order to determine whether award of the contract will result in paying unreasonably high prices for contract performance. An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government. FAR § 15.404-1(g)(3).

Here, the agency concluded that TLD's apparently high labor rates for work to be performed in Kentucky and Tennessee merely reflected TLD's erroneous entry of a

sum totaling the applicable rates for all trades rather than averaging the rates for all trades, as called for by the RFP. AR, Cover Letter at 11. However, based on its price analysis, the agency determined that the risk of paying unreasonable prices for TLD's performance was very low because these hourly rates, which will be used only when the required work is not included in the price list, apply only to approximately 10 percent of the total contract price, thus, application of TLD's stated rates results in the lowest total price. AR, Tab 1, Contracting Officer's Statement, at 7th unnumbered page. The agency's comparison of Tipton's proposed prices with the prices for the first nine delivery orders issued to TLD shows that in all but one instance, even applying TLD's allegedly overstated labor rates, TLD's prices were lower than Tipton's would have been. AR, Tab 31. Accordingly, we see no basis to question the reasonableness of the agency's conclusion that whatever unbalancing may exist in the labor rates proposed by TLD, it does not pose an unacceptable price risk. Neals Janitorial Serv., B-279633, June 3, 1998, 98-1 CPD ¶ 156 at 4.

Finally, Tipton challenges the agency's evaluation of TLD's past performance on the grounds that the RFP required offerors to submit a minimum of 10 references, and that TLD was evaluated on only three prior government jobs.

We review an agency's evaluation of proposals to ensure that it is fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124 at 3. 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. Federal Envtl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398 at 12.

The RFP provided that past performance would be evaluated using the information obtained from offerors' references provided with the proposals and from any other sources and/or records available to the government. RFP § 00100, ¶ 19.c.3. Here, the agency reports that while it requested and would have preferred to obtain completed questionnaires from 10 of the contractor's job references, not all offerors submitted 10 references and the agency determined that five past performance records were sufficient to evaluate an offeror. AR, Tab 28, Memorandum from the Source Selection Team to the Director of Contracting (Dec. 17, 1998). In evaluating Tipton's past performance the agency reviewed three government projects ratings and two customer performance surveys and concluded that there was a high probability that Tipton would perform well. AR, Tab 6A, Evaluation Factor Calculations - Tipton. Likewise, the agency reviewed three government projects and two customer performance surveys in its review of TLD's past performance. AR, Tab 6B, Evaluation Factor Calculations - TLD. Using P&L's corrected past performance questionnaire, Tipton and TLD were rated as equal under past performance.

Notwithstanding Tipton's assertions to the contrary, we see nothing unreasonable in the Army's manner of assessing TLD's and Tipton's the past performance. While the RFP requested a minimum of 10 references, it did not specify the number of references that the agency would contact for purposes of evaluation. Tipton objects to the agency's past performance evaluation because not all offerors submitted the required 10 references. However, TLD submitted 33 references, 15 of which were for jobs the agency determined were similar in scope to the current requirement--more than the 10 that were called for by the solicitation. There is no requirement that an agency contact all of an offeror's references. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 6. Since both Tipton and TLD submitted more than the required number of references, and the past performance of each was evaluated on the basis of the same number of references, we see no basis to conclude that either Tipton or TLD was improperly evaluated, or that Tipton was otherwise prejudiced, as a result of the past performance evaluation methodology applied here by the agency.⁵

The protest is denied.

Comptroller General
of the United States

⁵In its comments on the agency report, Tipton asserted for the first time that (1) the agency improperly evaluated TLD's past performance based on only three prior government projects; and (2) the past performance evaluations were improper because the agency did not use the same evaluation questionnaire for all competitors. Tipton was aware of these bases of protest, at the latest, upon its receipt of the agency report, but did not assert them within 10 days after its receipt of the report. In this regard, Tipton's comments were not received within the normal 10-day period, see 4 C.F.R. § 21.3(i) (1998), because our Office granted an extension requested by Tipton. Since a time extension for purposes of filing comments does not waive the timeliness rules with regard to new grounds of protest, Anchorage Enters., Inc., B-261922, Nov. 7, 1995, 95-2 CPD ¶ 211 at 3 n.2, we dismiss these bases of protest as untimely.