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Decision

Matter of: Beneco Enterprises, Inc.

File: B-283512.3

Date: July 10, 2000

Clark B. Fetzer, Esq., Kirton & McConkie, for the protester.
M. Dale Marsh, Esq., Cassady, Fuller & Marsh, for Hammer LGC, Inc., the intervenor.
Col. Nicholas P. Retson and Capt. Elizabeth G. Eberhart, Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination that the awardee's past performance, based on the experience of one of the awardee's proposed key personnel, was equal to the extensive, successful past performance of the protester, was unreasonable and inconsistent with the solicitation's evaluation scheme.

DECISION

Beneco Enterprises, Inc. protests the award of a contract to Hammer LGC, Inc. under request for proposals (RFP) No. DABT01-99-R-0002, issued by the Department of the Army for construction services at Fort Rucker, Alabama. We previously sustained Beneco's protest of an award to Hammer under this RFP in Beneco Enters., Inc., B-283512, Dec. 3, 1999, 2000 CPD ¶ ___, finding that the past performance evaluation of Hammer was unreasonable, and recommending that the agency reevaluate proposals under the past performance factor and make a new source selection decision. Beneco protests that the agency's reevaluation and new source selection decision are unreasonable.

We sustain the protest.

The RFP, issued March 10, 1999, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity job order contract (JOC) for the construction services for 1 year with 4 option years. RFP at B-3 to B-6 and amend. 0002, at C-1. The RFP stated that award would be based on the best overall value to the government based on the technical, past performance and price evaluation factors, with technical being "somewhat more important" than past performance, past

performance being “slightly more important” than price, and technical and past performance combined being “significantly more important than price.”¹
RFP amend. 0002, at M-2.

Under past performance, the RFP stated five subfactors--quality of service, timeliness of performance, cost control, business relations, and customer satisfaction--and provided that past performance information would be used to conduct a performance risk assessment as it relates to the probability of successfully performing the contract. RFP amend. 0002, at M-4. RFP § L.8 provided instructions on the format and content of proposals, and stated the following:

PAST PERFORMANCE

- (1) Offerors shall submit the following information as part of their proposal:
 - (a) A list of all contracts and subcontracts awarded during the past three years. Contracts listed may include those entered into with the Federal Government, agencies of the state and local governments and commercial customers. Offerors that are newly formed entities without prior contracts should list contracts and subcontracts as required above for all key personnel.
 - (b) To comply with [the above paragraph], offeror shall use the record format located at [RFP] Attachment E.
- (2) Based upon the information provided in each past performance record [RFP attach. E], the Government will issue a past performance survey to those individuals and organizations you have specified. The survey shall be used to evaluate your firm's past performance. The offeror may provide information on problems encountered on the contracts and subcontracts identified in paragraph b.(1) above and corrective actions taken to resolve those problems. Offerors should not provide general information to their performance on the identified contracts. General performance information will be obtained from the references.

¹ Also, in order to receive consideration for award, the offeror's proposed price must be considered reasonable and realistic, and any large business offeror must have a satisfactory subcontracting plan. RFP amend. 0002, at M-2.

- (3) Each offeror will be evaluated on his/her performance under existing and prior contracts for similar construction work. Performance information will be used for both responsibility determinations and as an evaluation factor against which offerors' relative ranking will be compared to assure best value to the Government. The Government will focus on information that demonstrates quality of performance relative to the size and complexity of the procurement under consideration. The Past Performance Survey identified in [RFP] Attachment F will be used to collect this information. References other than those identified by the offeror may be contacted by the Government with the information received used in the evaluation of the offeror's past performance.

RFP amend. 0002, at L-12, L-13 (emphasis added).

The top two proposals of those received and evaluated by the Army were those of Beneco and Hammer. Hammer's proposal received the highest technical score, which was approximately 10 percent higher than Beneco's, the next highest-rated proposal. Under past performance, the Army rated Hammer excellent and Beneco good. Beneco proposed the lowest evaluated price; Hammer's proposed price was approximately [DELETED] percent higher. Original Agency Report, Tab K, Source Selection Decision, at 1-2

On August 10, 1999, the Army awarded a contract to Hammer, which Beneco protested. Agency Report at 4. In part, Beneco's protest alleged that the agency unreasonably evaluated past performance because Hammer received an excellent rating, even though it had never performed a JOC as a prime contractor, and Beneco received a lower rating, even though it had successfully performed numerous JOCs as the prime contractor, including the incumbent contract.

Our Office sustained that protest on the basis that the agency's evaluation of past performance was not reasonable and not consistent with the RFP. Although the RFP clearly contemplated a qualitative assessment of the quality of performance of contracts relative to the size and complexity of the job order construction contract being procured, the agency unreasonably gave the highest possible rating to Hammer, a contractor with experience performing only relatively small dollar construction projects and with no JOC prime contractor experience, and unreasonably rated Beneco lower under past performance than Hammer, even though Beneco has an extensive record of successfully performing job order construction contracts, including the incumbent contract. Beneco Enters., Inc., supra, at 9-10. We recommended that the Army reevaluate past performance consistent with the terms of the RFP and our decision, and make a new source selection decision. Id. at 12.

Our prior decision also noted that, during a hearing on the protest, agency witnesses advanced a new explanation for evaluating Hammer's past performance through testimony, namely, that the experience of Hammer's key personnel was also evaluated as part of the agency's evaluation of Hammer's past performance. Id. at 11 n.12. Our decision stated that this testimony was not supported by the record. In addition, our decision noted that the RFP states that newly formed entities, without prior contract experience, may rely on the experience of their key personnel for the past performance evaluation; that Hammer's proposal had not provided references for key personnel for the evaluation of past performance; and that the agency had not obtained past performance surveys for Hammer's proposed key personnel. Id.

The source selection evaluation board (SSEB) reevaluated past performance for these two offerors based solely on information provided in the proposals, and the surveys that the agency had previously solicited and received from the offerors' contract references during the original evaluation; no additional information was requested from offerors or gathered by the agency. Contracting Officer's Statement at 5. Beneco's past performance was evaluated based on Beneco's stated performance of 18 contracts, 15 of which the Army considered highly relevant job order-type contracts, and on 6 surveys for 6 of these job order-type contracts.² Id. at 6. Overall, three of the surveys rated Beneco's performance as good, and the other three rated it as excellent. Agency Report, Tab E, SSEB Reevaluation of Past Performance, at 1. The SSEB stated the following:

It is apparent that Beneco Enterprises has past experience in the administration of JOC contracts to rate them in the **Good/Low Performance Risk** category.

Id.

For Hammer's proposal, the SSEB stated that, of the six past performance surveys received for that firm, five gave Hammer an overall rating of excellent and one a rating of good. Id. The SSEB stated:

One of the surveys was for a project of similar size and complexity of the procurement under consideration and documented the past experience of Hammer, LGC's, Senior Project Manager. The others were for construction work typical of the work on task orders handled under JOC type contracts. This past performance history shows an ability to perform JOC type task orders simultaneously.

² No survey was obtained for Beneco's performance under the incumbent contract. Agency Report, Tab E, SSEB Reevaluation of Past Performance, at 3-8.

Id. Concluding that Hammer was a newly formed entity, the SSEB's evaluation then focused solely on the experience of Hammer's senior project manager, relying on the statement in RFP § L.8.b(1) that "[o]fferors that are newly formed entities without prior contracts should list contracts and subcontracts as required above for all key personnel." Agency Report, Tab E, SSEB Reevaluation of Past Performance, at 2. The SSEB referenced Hammer's senior project manager's role as the top on-site manager for several years under Beneco's incumbent Fort Rucker JOC and stated:

[His] expertise cannot be overlooked inasmuch as he is now employed by Hammer, LGC. He has demonstrated the ability to manage multiple JOC task orders and will be responsible for Hammer's overall operations.

In [Hammer's proposal] Volume II, Past Performance, it is noted that [the proposed senior project manager] has managed over 20 JOC type contracts, including the Fort Rucker JOC contract. [The following text was quoted directly from Hammer's proposal:]

The ten-year direct JOC experience of our Director of Operations [name omitted]--proposed as on-site Senior Project Manager for this contract--is a valuable asset to Hammer Construction. As such [his] experience imputes directly to Hammer Construction's corporate experience. We could in this Volume list the over twenty JOC contracts that [he] has impacted with superior performance. For the sake of brevity and relevance we include only reference to the Fort Rucker [JOC]. Clearly no evaluation of the contractors past performance on the Fort Rucker JOC Contract would be complete, or accurate, without acknowledging [his] contribution.

Accordingly, the qualifications of the Senior Project Manager to overlook and manage JOC contracts of the magnitude which Beneco manages warrants a rating of **GOOD/LOW PERFORMANCE RISK**.

Id.

The contracting officer/source selection authority (SSA) noted the information identified for both offerors in the SSEB evaluation, and stated that Hammer had provided past performance information on 26 construction projects and 1 JOC, that being Beneco's incumbent JOC under which Hammer's proposed senior project manager served as project manager for the past 3 years. Agency Report, Tab F, New Source Selection Decision, at 2. She also found:

In further evaluating past performance of Hammer, the SSEB also reviewed the past performance of . . . the President of Hammer LGC,

and the former owner and manager of his own construction company. Although the survey responses received on these projects indicated an overall excellent performance, they were not for JOC type contracts and were thus given relatively less weight in the past performance rating for this contract.

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Although the companies are not equal in the number of JOC contracts surveyed nor in the amount of past corporate experience, both Hammer (through the past performance of key person, [Hammer's proposed senior project manager]) and Beneco have good to excellent past performance on JOC contracts. This review of how well these companies have performed JOC contracts in the past gives a good indication of how well they will perform in the future on Fort Rucker's JOC contract. Both companies are considered good performance risks.

[The SSA then summarized the previously evaluated technical advantages of Hammer's proposal.]

In consideration of the above, the proposal submitted by Hammer is deemed technically superior with a technical score approximately 10% above that of [Beneco's] next highest rated proposal. Although Hammer's price is approximately [DELETED]% higher than that of Beneco's, I consider the technical strengths, as discussed above, to offset the additional cost.

Therefore, my source selection decision is that Hammer LGC represents the best overall value to the government.

Id. at 2-3.

The agency awarded the contract to Hammer on March 14, 2000. Agency Report at 6. The agency conducted a debriefing with Beneco on March 22. Id. Beneco filed the present protest on March 31.

Beneco alleges that the past performance evaluation of Hammer was improperly based on the experience of Hammer's key personnel rather than on Hammer's performance under prior contracts, that the agency unreasonably evaluated the past performance of Hammer's key personnel to be equal to the past performance of Beneco's corporate past performance, and that the resulting source selection decision is unreasonable. Protest at 7-10; Protester's Comments at 4-10.

In reviewing a protest of an agency's evaluation of proposals, we examine the record to ensure that the agency's evaluation was reasonable and consistent

with the terms of the solicitation. Terex Cranes, Inc., B-276380, June 10, 1997, 97-1 CPD ¶ 209 at 3; Ogden Support Servs., Inc., B-270012.2, Mar. 19, 1996, 96-1 CPD ¶ 177 at 5.

Here, although the agency states that it considers Beneco and Hammer to be “tied” under the past performance reevaluation, Contracting Officer’s Statement at 4, we conclude that for a variety of reasons the record of the reevaluation provides no reasonable basis to support the agency’s finding.

Specifically, in the reevaluation of Hammer’s past performance, unlike the initial evaluation, the agency considered Hammer to be a new entity, apparently in order to justify evaluating past performance based on one of Hammer’s key employees under the RFP provision stating that the past performance for an offeror that is a “newly formed entity” “without prior contracts” can be based on past performance information for “all key personnel.” RFP amend. 0002, at L-13. Here, Hammer’s proposal does not represent that the offeror is a new entity without prior contracts, but rather lists many contracts awarded to Hammer for projects similar to the work to be performed under the RFP for a period even greater than the last 3 years specified in the RFP.³ Agency Report, Tab D, Hammer Proposal, vol. 2, Past Performance, Records of Prior Contracts. Although Hammer’s proposal does ask that the experience of its proposed senior project manager be imputed to Hammer’s corporate experience, it does not request, as required by the new entity past performance provision, that its past performance be based on the past performance of “all” of its key personnel, instead of its experience as a company; nor does it provide the required detailed contract information (with the single exception of the specific identification of Beneco’s incumbent contract) for any contracts under which its key personnel may have performed. Thus, the agency’s consideration of Hammer’s key personnel in evaluating that firm’s past performance, in lieu of that entity’s past performance on contracts it completed, was not consistent with the RFP evaluation scheme.⁴

³ The contracting officer/SSA states that Hammer was incorporated in September 1998. Agency Report, Tab F, New Source Selection Decision, at 2. The agency does not provide evidence of this incorporation and Hammer, the intervenor in this protest, has not commented on this matter. Hammer’s proposal states that its prior contracts were awarded to “George S. Hammer Lic. Gen. Contractor (Hammer LGC, Inc.)” as long ago as 1994. Agency Report, Tab D, Hammer’s Proposal, vol. 2, Past Performance, Records of Prior Contracts. Therefore, even assuming that Hammer was first “incorporated” in September 1998, we see no basis for the agency to find, and Hammer does not claim, that it is a newly formed entity without a history of contract performance.

⁴ The contracting officer/SSA states, “As required by the GAO decision, very little weight was given to [Hammer’s non-JOC prime contract] type projects.” Contracting Officer’s Statement at 4. Our decision did not indicate that very little weight should
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Moreover, the agency did not have substantive information on which to evaluate the past performance of Hammer's personnel.⁵ Contrary to the terms of the RFP, the evaluation accepted without support the general statement in Hammer's proposal that its proposed senior project manager had "impacted with superior performance" over 20 unidentified job order-type contracts. Although the RFP's stated evaluation plan listed five evaluation subfactors for evaluating past performance, and set forth a process for offerors to identify prior contracts and for the agency to solicit from those references survey responses pertaining to the stated evaluation subfactors, the agency collected no information concerning these still unidentified contracts.⁶

Furthermore, the agency's evaluation is based upon a material misrepresentation. While the SSEB and SSA state that a past performance survey on Hammer's proposed senior project manager's performance under Beneco's incumbent contract was obtained and evaluated in making this source selection, the record contains no such survey. The record for the prior protest showed that the agency did not evaluate the experience of Hammer's key personnel under the past performance factor, Beneco Enters., Inc., *supra*, at 11 n.12, and the agency states that it did not

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be given these obviously relevant contracts in the evaluation of Hammer's past performance. Rather, our decision found that the agency's actions of assigning Hammer the highest possible rating for its successful performance on non-JOC prime contracts of relatively small size, and of rating such performance superior to Beneco's successful performance on JOC prime contracts similar to the JOC being procured, were unreasonable, given the importance stated in the RFP of evaluating quality of performance on contracts relative to the size and complexity of the procurement under consideration. Beneco Enters., Inc., *supra*, at 7-11. It is the contracting agency's responsibility to meaningfully consider the complexity of an offeror's contracts in a past performance evaluation *vis-à-vis* the complexity of the contract to be awarded where the solicitation so provides; our Office will review the reasonableness of the agency's evaluation. PMT Servs., Inc., B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98 at 1, 6-8.

⁵ To the extent the agency may evaluate past performance of key personnel in addition to the corporate past performance of offerors, the solicitation did not so advise offerors, and thus Beneco's proposal did not include information on the past performance of its proposed personnel. Given Beneco's extensive, successful experience with similar JOCs, we presume that it would benefit from the opportunity to prepare a proposal with the actual evaluation plan in mind.

⁶ To the extent Hammer's assessment of the quality of experience of its proposed senior project manager relates to past performance, it constituted general information provided in the proposal that was specifically precluded by the RFP. RFP amend. 0002, § L.8.b(2).

gather for the reevaluation any additional information beyond that which existed for the prior evaluation. Contracting Officer's Statement at 5. The only past performance survey in the record on Beneco's incumbent contract regarding Hammer or its key personnel was prepared by the agency's contract administrator for Beneco's incumbent contract and provides an evaluation of Hammer's performance as a subcontractor under Beneco's contract.⁷ Agency's Report on Prior Protest, Tab F, Past Performance Surveys for Hammer, at 12-19. While Hammer's proposal contained a brief description of the Beneco contract as part of its past performance proposal, the agency requested no survey on this contract (other than on Hammer's performance as subcontractor), as contemplated by the RFP evaluation scheme.⁸

Finally, besides the aforementioned agency misstatements and failures to adhere to the RFP evaluation scheme, we think that the agency's judgment that one person's performance as a project manager under one of Beneco's job order prime contracts is essentially equivalent to all of Beneco's performance under that same contract and many other job order prime contracts, six of which are supported by detailed positive surveys, is fundamentally flawed and does not support a past performance rating for Hammer equal to Beneco's.

In sum, the record does not support the agency's determination that Hammer's past performance rating is equal to Beneco's, so that the source selection decision based on this evaluation is unreasonable.

We recommend that the agency appoint a new SSEB and SSA, conduct a new evaluation of proposals under all evaluation criteria stated in the RFP, and make a new source selection decision.⁹ If a proposal other than Hammer's is selected for

⁷ The agency states that this survey was previously gathered, although not considered in the prior evaluation, but was used in the reevaluation. Contracting Officer's Statement at 5. Our prior decision identified and discussed this very survey of Hammer's performance as subcontractor under Beneco's contract. Beneco Enters., Inc., supra, at 4 n.4.

⁸ The agency also could not mean that it relied upon a survey obtained for Beneco's performance under the incumbent contract to rate Beneco's former project manager, because no such survey was obtained to rate Beneco's past performance.

⁹ The record indicates that in defending the protests and performing the reevaluation, the SSEB and SSA were intent on justifying the award to Hammer, regardless of the RFP's evaluation scheme. As indicated in our prior decision, the agency advanced a number of alternate and inconsistent arguments as to how it evaluated Hammer's past performance that were not consistent with the record, and on reevaluation it has evaluated Hammer's past performance based on its proposed key personnel, even though our prior decision specifically pointed out the pitfalls of such an

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award, the Army should terminate the contract previously awarded to that firm. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

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evaluation. Beneco Enters., Inc., supra, at 11 n.12. Considering that the agency's actions have repeatedly favored Hammer without a reasonable basis, the protester's complaints of bias cannot be dismissed as mere unsupported allegations, and the agency's actions have, at the very least, cast a shadow over the integrity of this procurement process. We believe that, given the history of the procurement, this can only be addressed through a complete reevaluation of proposals and new source selection decision conducted by a new SSEB and SSA. Under the circumstances, we do not consider Beneco's challenges to the cost/technical tradeoff.