Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: T. Head and Company, Inc.

File: B-275783

Date: March 27, 1997

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Dennis J. Gallagher, Esq., Department of State, for the agency.
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DIGEST

Elimination of small business firm's offer from competitive range as unacceptable under past performance evaluation factor, without referring matter to Small Business Administration (SBA) for certificate of competency review, was proper where unacceptable rating was consistent with comparative evaluation scheme set forth in RFP and did not result from pass/fail evaluation.

DECISION

T. Head and Company, Inc. (THI), a small business, protests the rejection of its proposal as technically unacceptable under Department of State (DOS) request for proposals (RFP) No. S-OPRAQ-96-R-0600. The solicitation sought proposals to provide mail processing and handling services for DOS's Diplomatic Pouch and Mail Division.

We deny the protest.

The RFP, issued as a total small business set-aside, sought proposals on a fixed-price basis, with some indefinite quantity line items.[1] It provided for award on a best value basis, with price equal in weight to the two technical factors, technical approach and corporate experience/past performance. There were three corporate experience/past performance subfactors: (1) "performance history-how well offeror has performed on previous contracts," (2) "cost management-whether offeror has

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[1]The basic services required during normal hours of operation were to be priced on a monthly basis, with after-hours services and seasonal services separately priced on a labor hours basis for estimated hours. The RFP also called for a fixed price to cover phase-in.

provided quality services at reasonable prices," and (3) "termination history-whether offeror has had previous contracts terminated for default or otherwise terminated due to customer dissatisfaction." Proposals were to be rated exceptional, acceptable, marginal, or unacceptable.

Nine proposals were received. THI's offered price was low and, initially, the agency evaluated THI's proposal as exceptional under the technical factor and acceptable under past performance. The past performance rating was based on past performance surveys for four of THI's past contracts, including DOS contract No. 1026-950172 for mail and messenger services, performed from March 1, 1989 to August 31, 1994. Based on this initial evaluation, THI's proposal would have been ranked third. However, the agency subsequently received an offset notice from the Department of Justice (DOJ) requesting that DOS liabilities to THI under the DOS contract be paid to DOJ to offset a civil judgment and criminal fine against the firm. In this regard, DOJ advised DOS that THI had been convicted of 39 counts of false claims under 18 U.S.C. § 287 (1994) (the False Claims Act)[2] and was subject to a $256,546.56 civil judgment (entered October 3, 1995 in favor of the United States) and a $9,750 criminal fine/special assessment (imposed April 19, 1996). Specifically, THI was found guilty of inflating time records and labor costs under an Environmental Protection Agency (EPA) contract. In light of this information, the contracting officer requested a reevaluation of THI's past performance, including a resurvey of THI's performance under the DOS contract and a Dun & Bradstreet supplier evaluation.

Based on the reevaluation, the evaluators determined that THI's past performance was unacceptable; under the performance history subfactor, they noted that THI's actions under the EPA contract reflect a history of "mismanagement of contract administration requirements"; under the cost management subfactor, they noted the false claims under the EPA contract and the Dun & Bradstreet supplier evaluation rating of high risk;[3] and under the termination history subfactor, they noted that THI's DOS contract for courier messenger services "is in dispute for cost/inconsistencies." In this last regard, the cognizant DOS contract specialist noted that "[f]inal invoice payments were rejected due to insufficient obligations because of cost overruns," and that certain disputed contract costs were the subject

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[2]Additionally, Mr. Toney Head, president and sole owner of THI, was individually convicted of the same false claims under 18 U.S.C. § 287.

[3]The Dun & Bradstreet high risk supplier rating appears primarily to be based on average payments to suppliers being 25 days beyond terms, in contrast to an industry average of 9 days beyond terms.

of an audit report.[4] The contracting officer concluded that THI's past performance was unacceptable, and that this warranted excluding the firm's proposal from the competitive range.

THI asserts that the rejection of its proposal based on unacceptable past performance was improper because this determination amounted to a finding that THI was not a responsible prospective contractor, and the matter thus had to be referred to the Small Business Administration (SBA) for review under the certificate of competency procedures.

This argument is without merit. THI is correct that the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1994), provides that the SBA has conclusive authority to determine the responsibility of a small business concern, and that when a procuring agency finds a small business concern nonresponsible it must refer the matter to the SBA for a final determination. Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257. In a negotiated procurement, however, SBA referral is mandatory only where a traditional responsibility-type factor, such as past performance, is evaluated on a pass/fail basis and the contracting agency has determined that a small business's proposal should be rejected for failure to "pass" that factor; this is so because the agency is viewed as having made a nonresponsibility determination notwithstanding its use of and reliance on a technical evaluation criterion. Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

The agency's rejection of THI's proposal was not tantamount to a nonresponsibility determination that had to be referred to the SBA. While the past performance factor did encompass traditional responsibility considerations, the RFP provided for a comparative (i.e., best value)--rather than a pass/fail--evaluation under this factor, and the record shows that the agency evaluated THI's proposal in accordance with this scheme. Specifically, the agency did not automatically reject THI's proposal but, rather, considered the effect of the new information on the proposal in the context of the three past performance subfactors. The proposal ultimately was assigned the lowest of the four available adjectives--unacceptable--based on the agency's conclusion that the substantive problems revealed in connection with the EPA (primarily) and DOS contracts, as well as the Dun & Bradstreet rating, were substantial. The agency then eliminated the proposal from the competitive range based on its conclusion that, with the unacceptable past performance rating, THI's overall evaluation rating was too low for the firm to have a reasonable chance for the award. As this conclusion was reached precisely in accordance with the best value evaluation scheme set forth in the RFP, there is no basis for concluding that it

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[4]The record indicates that the disputed contract costs on THI's DOS contract pertain to inadequate documentation of claimed costs, notably transportation costs unsupported by usage logs.

amounted to a pass/fail determination. See Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166; Smith of Galeton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.

There also is no basis for questioning the agency's finding that THI's proposal was unacceptable under the corporate experience/past performance factor, since the considerations that led the agency to this conclusion clearly were encompassed by the factor. In this regard, we will review a proposal evaluation only to ensure that it was reasonable and consistent with the RFP. Professional Software Eng'g, Inc., B-272820, Oct. 30, 1996, 96-2 CPD ¶ 193. The performance history subfactor encompassed how well an offeror had performed on prior contracts; THI's performance under the EPA contract, including its fraudulent overbilling, therefore properly was considered under this subfactor. The cost management subfactor encompassed whether the offeror had provided quality services at reasonable prices. THI's fraudulent overbilling was directly related to the reasonableness of its prices under the EPA contract, and also indicated that THI's cost management controls had been deficient. Indeed, the fraudulent overbilling was particularly relevant given that THI's proposed project manager, Mr. Head was found personally responsible for the intentional false overbilling, and the subject solicitation includes indefinite quantity items that could be overbilled. The Dun & Bradstreet high risk rating also was encompassed by the subfactor since it indicated late payments to suppliers under prior contracts, which, again, could suggest lax cost management.[5]

As for the termination history subfactor, we agree with THI that because the concerns relating to the DOS contract did not involve an actual termination, as contemplated by the subfactor, THI's performance under that contract technically should not have been considered under this subfactor. However, since it is clear that THI's performance under the DOS contract properly could be considered under the performance history and cost management subfactors (i.e., since it was a prior contract and the problems uncovered concerned undocumented claimed costs), these concerns properly were factored into the agency's reevaluation conclusion. Nothing in the record suggests, and there is no reason to believe, that consideration of the DOS contract under different subfactors would have led the agency to reach a different conclusion regarding the acceptability of THI's past performance.

The protest is denied.

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[5]While the protester argues that unspecified sections of the Dun & Bradstreet supplier evaluation are based on data several years old, it does not dispute that its average payments were past due considerably more days than the industry average.