Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: A. G. Cullen Construction, Inc.

File: B-284049.2

Date: February 22, 2000

Arlene Cullen for the protester.
Capt. Jessica D. Ursell, Department of the Air Force, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where request for proposals provided for award to offeror whose combination of past performance and price represented best value to government, with past performance of significantly more importance than price, agency reasonably selected for award higher-priced offeror with better past performance rating.

2. Where award is to be made without discussions, contracting officer must give an offeror an opportunity to clarify adverse past performance information to which the offeror has not previously had an opportunity to respond only where there clearly is a reason to question the validity of the past performance information; in the absence of a clear basis to question the past performance information, contracting officer has discretion, short of acting in bad faith, not to ask for clarifications.

DECISION

A. G. Cullen Construction, Inc. protests the rejection of its offer and the award of a contract to DiCicco Contracting Company under request for proposals (RFP) No. F36629-99-R-0001, issued by the Department of the Air Force to maintain, alter, and repair the Base Supply, Building 312 and widen Alpha Street at Pittsburgh Air Reserve Station. Cullen contends that its proposal, which was lowest in price, should have been selected for award.

We deny the protest.

The RFP, which was issued on July 15, 1999, contemplated the award, without discussions, of a fixed-price construction contract to the offeror whose proposal represented the best value to the government. Best value was to be determined

based on a "Price/Performance Trade-Off," in which past performance was significantly more important than price; offerors were explicitly advised in this regard that award might be made to a higher-rated, higher-priced offeror where the contracting officer determined that the offeror's past/present performance outweighed the cost difference. RFP § M.1, 2.

The solicitation identified five subfactors to be considered in the evaluation of performance: quality control; timely performance; management effectiveness; compliance with labor standards; and compliance with safety standards. RFP § M.2.II(e). Under each subfactor were listed areas that might be considered in the evaluation. Offerors were advised that the agency would assign each proposal a rating under each subfactor and then use the subfactor ratings to determine an overall performance rating. RFP § M.2.II(j). Possible ratings were exceptional/high confidence; very good/significant confidence; satisfactory/confidence; neutral/unknown confidence; marginal/little confidence; and unsatisfactory/no confidence.[1] RFP § M.2.II(i).

To facilitate the evaluation of past performance, the solicitation instructed each offeror to submit with its proposal a reference list identifying all contracts (both business and government) awarded to it within the past 3 years. RFP at 21. Offerors to whom more than 10 contracts had been awarded were instructed to identify only the last 6. Id. A copy of the questionnaire to be completed by the references was included in the solicitation.[2] Offerors were invited to submit with their proposals information concerning problems encountered on the identified contracts and the offeror's corrective actions. Id.

Five proposals were received by the August 26 due date. Cullen's price of $890,000 was low, and DiCicco's price of $932,300 was third low. The agency mailed copies of the performance questionnaire to each offeror's references and considered those that were returned in rating each proposal.[3] Based on the questionnaires returned by

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[1] The confidence ratings referred to the agency's level of confidence that the offeror would perform the required effort.

[2] The questionnaire listed precisely the same subfactors and areas for consideration as the solicitation. It also included the same rating scale as the RFP. References were asked to rate the offeror's performance under each area of consideration using that scale.

[3] The RFP included at section J a form entitled "Source Selection Reference List," to be completed by the offeror. The form asked the offeror to furnish the following information for each reference: contract number; type of contract; complexity of work; description, location, and relevance of work; contract dollar value; date of award and contract completion date; type and extent of subcontracting; and name, address, and phone number of point of contact. Cullen completed a copy of the form

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Cullen's references, the evaluators rated the protester's proposal as satisfactory under two subfactors (timely performance and compliance with safety standards) and as very good under the other three subfactors; overall, the proposal was rated as very good/significant confidence. DiCicco's proposal was rated as exceptional/high confidence under each subfactor and overall. The evaluators concluded that DiCicco's higher confidence rating outweighed its approximately 5 percent higher price and that the proposal represented the best value to the government. The source selection authority (SSA) concurred, and on September 27, the Air Force awarded a contract to DiCicco.

First, Cullen argues that it should have received the award because it submitted the lowest-priced, technically acceptable proposal.

The solicitation here did not provide for selection of the lowest-priced, technically acceptable proposal; it provided for award to the offeror whose proposal represented the best value to the government based on a price/past performance trade-off, with past performance of significantly more importance than price. Thus, it was consistent with the RFP's evaluation scheme for the agency to select other than the lowest-priced proposal where it determined that another offeror's combination of past performance and price represented a better overall value to the government. See Axion Corp., B-252812, July 16, 1993, 93-2 CPD ¶ 28 at 2. To the extent that the protester is arguing that the RFP should have provided for selection of the lowest-priced, technically acceptable proposal, its protest is untimely. To be timely, a protest based on an alleged impropriety in a solicitation which is apparent prior to the time set for receipt of proposals must be filed prior to the time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1999).

The protester further argues that DiCicco's higher past performance rating was not worth its higher price. Cullen's president asserts, in this regard, as follows:

> Even if . . . DiCicco is "exceptional," $42,300 is a lot of money and not worth the difference over "very good." I am a businesswoman and would not accept this kind of logic from an employee when purchasing an "exceptional" car or toilet seat over a "very good" one, for that matter.

Protester's Response to Agency Request for Summary Dismissal, Nov. 24, 1999, at 3.

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for five contracts, identifying eight points of contact. (On three of the forms, the protester identified two points of contact.) The agency sent each of the eight a copy of its questionnaire. Three of Cullen's references returned completed questionnaires, and it was on these three questionnaires that the agency based Cullen's past performance rating.

In a best value procurement, it is the function of the source selection official to perform a price/non-price factor tradeoff, that is, to determine whether one proposal's superiority under the non-price factor (or factors) is worth a higher price. Packaging Strategies, Inc., B-280814, Nov. 25, 1998, 98-2 CPD ¶ 120 at 8. Accordingly, where the RFP identifies past performance and price as the evaluation factors, it is the role of the source selection official to determine whether a proposal submitted by an offeror with a better past performance rating is worth a higher price. We will review the selection decision to ensure that it was reasonable and consistent with the evaluation scheme set forth in the solicitation. Id. at 8-9.

Here, we see nothing unreasonable or inconsistent with the evaluation criteria in the agency's determination that DiCicco's combination of past performance and price represented the best value to the government. The RFP provided that past performance would be significantly more important than price in the award decision, and DiCicco's proposal, which was only about 5 percent higher than Cullen's in price, received a higher rating than Cullen's under every past performance subfactor, as well as overall. Of particular significance to the contracting officer was DiCicco's exceptional rating under the timely performance subfactor, completion of the project on schedule being of paramount importance to the agency due to the fact the building was to remain occupied during the work. Source Selection Decision Document at 2. Given that past performance was to be significantly more important than price in the best value determination, that DiCicco received a better past performance rating than Cullen, and that the difference in price between the two offers was relatively small, we find no basis upon which to question the propriety of the agency's best value determination.

Cullen also complains that the contracting officer was not required to quantify his price/past performance tradeoff, that is, he was not required to explain how much a higher past performance rating was worth in terms of price. The protester argues that where a solicitation does not spell out a specific formula for trading off past performance against price, "[i]n essence, [the contracting officer] has total discretion in awarding contracts with no accountability." Protest at 2.

There is no requirement that in making the tradeoff resulting in an award to an offeror with a higher-rated, higher-priced proposal, the SSA provide an exact quantification of the dollar value to the agency of the proposal's technical superiority. Suddath Van Lines, Inc.; The Pasha Group, B-274285.2, B-274285.3, May 19, 1997, 97-1 CPD ¶ 204 at 10; Kay and Assocs., Inc., B-258243.7, Sept. 7, 1995, 96-1 CPD ¶ 266 at 6. The fact that such a quantification is not required does not mean that the source selection authority has total discretion with no accountability, however. As previously noted, tradeoff determinations must be reasonable and consistent with the stated evaluation criteria, and we will review such determinations to ensure that they were.

Finally, Cullen argues that it should have been given the opportunity to address the past performance information that the agency obtained from one of its references. The reference in question rated Cullen as marginal in four of the nine areas listed under the timely performance subfactor.[4]

Federal Acquisition Regulation (FAR) § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where, as here, an award will be made without conducting discussions, "offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors." Pursuant to this provision, a contracting officer has broad discretion to decide whether to communicate with a firm concerning its performance history. We will review the exercise of such discretion to ensure that it was reasonably based on the particular circumstances of the procurement.[5] Rohmann Servs., Inc., B-280154.2, Nov. 16, 1998, 98-2 CPD ¶ 134 at 8-9.

With regard specifically to clarifications concerning adverse past performance information to which the offeror has not previously had an opportunity to respond, we think that, for the exercise of discretion to be reasonable, the contracting officer must give the offeror an opportunity to respond where there clearly is a reason to question the validity of the past performance information, for example, where there are obvious inconsistencies between a reference's narrative comments and the actual ratings the reference gives the offeror. In the absence of such a clear basis to question the past performance information, we think that, short of acting in bad faith, the contracting officer reasonably may decide not to ask for clarifications.[6]

Applying this standard here, we think that the contracting officer reasonably exercised his discretion in deciding not to communicate with Cullen regarding the adverse past performance information received from one of Cullen's references. There is nothing on the face of the reference that would create concerns about its

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[4] The areas in which Cullen received a rating of marginal were: met established progress schedules; submission of updated and revised progress schedules; resolution of delays; and timely completion of work within performance period.

[5] In support of its position, Cullen cites McHugh/Calumet, a Joint Venture, B-276472, June 23, 1997, 97-1 CPD ¶ 226. That case involved application of a FAR provision--§ 15.610(c)(6), regarding discussions with competitive range offerors about certain past performance information--that is no longer in effect. Thus, the case has no relevance to the current protest.

[6] Similarly, with regard to minor or clerical errors--the other proposal aspect mentioned in FAR § 15.306(a)(2)--we think the contracting officer must give an offeror the opportunity to resolve such errors only where their existence is clear.

validity. Given the permissive language of FAR § 15.306(a)(2), the fact that Cullen may wish to respond to the reference does not give rise to a requirement that the contracting officer give Cullen an opportunity to do so.

In any event, it is clear that Cullen was not prejudiced by the agency's decision not to ask for clarifications regarding the reference. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996) (to prevail, protester must demonstrate a reasonable possibility that it was prejudiced by agency action). As noted above, Cullen received an overall rating of very good, based on its ratings of very good in three of the subfactors, and satisfactory in the remaining two subfactors, including the one area--timely performance--in which it received the negative reference at issue. Even if its rating improved in that one area to the highest possible rating--exceptional--Cullen would still have scores of very good and satisfactory in the other four areas. Under these circumstances, we see no basis to conclude that Cullen's overall rating of very good would improve even if its rating in the one subfactor at issue were increased.

The protest is denied.

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