Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Browning Ferris Industries of Hawaii, Inc.

File: B-281285

Date: January 21, 1999

Kenneth D. Brody, Esq., McMahon, David & Brody, for the protester.
Vernon F.L. Char, Esq., Char, Sakamoto, Ishii, Lum & Ching, for Honolulu Disposal Services, Inc., an intervenor.
Richard G. Welsh, Esq., and Jan E. Takamine, Esq., Naval Facilities Engineering Command, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency's evaluation of awardee's proposal was flawed and otherwise improper is denied where the evaluation was reasonable and consistent with the solicitation's stated evaluation factors. Agency was not required to conduct a more extensive investigation of the awardee's past performance as a result of False Claims Act litigation involving the awardee, where the litigation had been resolved through a settlement agreement.

2. Evaluation of protester's proposal was reasonable where it was performed in accordance with stated evaluation factors and reflected valid criticisms of protester's past performance and proposed subcontracting commitments.

3. Agency reasonably may evaluate an offer as posing a higher past performance risk where the offeror's performance history as stated in its proposal is less relevant to the solicited requirements than that of offerors rated as having a low performance risk.

DECISION

Browning Ferris Industries of Hawaii, Inc. (BFI) protests the award of a contract to Honolulu Disposal Services, Inc. (HDS) under request for proposals (RFP) No. N62755-98-R-7014, issued by the Department of the Navy, to obtain refuse collection services at various military installations on Oahu, Hawaii. BFI contends that the agency's past performance and small business evaluations were flawed and that, as a consequence, the agency failed to award the contract on the basis of the best value to the government, as required by the RFP.

We deny the protest.

The RFP, which consolidates two existing refuse service contracts, was issued on an unrestricted basis and contemplated award of a contract for a base period and four 1-year options. The solicitation provided a best value basis for award and identified the following evaluation factors: past performance, small business, and price. Past performance was of greater importance than the small business factor, and the past performance and small business factors combined were of equal importance to price. RFP, Amend. No. 0002, § M.2, M.5.

As relevant here, past performance was to be evaluated on similar contracts completed within the past 3 years or currently in progress using a past performance survey to determine the quality of work previously performed and to assess the relative capability of the offeror to effectively accomplish the solicitation requirements. In addition, the solicitation advised that the agency would obtain past information from other sources. The past performance factor was comprised of the following equally weighted past performance elements: (1) quality of service, (2) schedule, (3) business relations, and (4) management of key personnel.[1] Id.

Under the small business evaluation factor, large business offerors were to submit (1) a subcontracting plan in which the offeror identifies and commits to utilizing small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), and historically black college and university or minority institution (HBCU/MI), and (2) a past performance report on five most recently completed contracts showing compliance with the firm's plan for the utilization of SB, SDB, WOSB, and/or HBCU/MI; any ratings obtained on implementation of subcontracting plans on five recently completed Department of Defense (DOD) contracts; and information on existing or pending mentor-protege agreements. RFP, Amend. 0002, § M.5.2.

Five firms, including BFI and HDS, submitted initial proposals.[2] The agency included the proposals of the protester and HDS in the competitive range; conducted discussions and evaluated revised proposals; and requested and

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[1]The RFP contained an example of the past performance survey which would be sent to the references identified by each offeror; the survey included the past performance elements listed above.

[2]BFI and HDS are large business offerors; HDS is the incumbent contractor for one of the contracts which this protested solicitation will replace.

evaluated final proposal revisions. The final evaluation results for the three remaining competitive range offerors were as follows:

CRITERIA	**HDS**	**BFI**	**[DELETED]**
Past Performance	Satisfactory	Satisfactory	Satisfactory
Past Perf. Risk[3]	Low	Moderate	Low
Small Business	Acceptable	Acceptable	Acceptable
Total Price	$10,887,956.57	[DELETED]	[DELETED]

Post-Negotiation Business Clearance Memorandum, Sept. 30, 1998, at 5.

Based on the final evaluation results, the contracting officer, who served as the source selection authority (SSA), selected HDS for award as providing the best value to the government. In this regard, the Post-Negotiation Business Clearance Memorandum, approved by the SSA, noted that:

> HDS and [DELETED] received overall Satisfactory ratings with low risk. BFI received an overall Satisfactory rating with moderate risk since the projects listed in their references were smaller in size to the subject solicitation, and some doubt exists that they can perform satisfactorily. None of the proposals contained anything exceeding the requirements, so there are no tradeoffs to consider or benefits associated with a higher price. Since all offerors are equal for past performance, HDS's lower price provides the best value to the Government.

Id.

Accordingly, on October 2, the agency awarded the contract to HDS. After receiving notice of the award and a debriefing, BFI filed this protest.

BFI challenges nearly every aspect of the agency's evaluation that led to the selection of HDS for award. BFI argues that its ratings under the past performance and small business factors, in every instance, should have been higher, while HDS's corresponding ratings should have been lower. In addition, it argues that its past performance risk rating should have been better than the rating given to the awardee; and that the SSA's selection decision was flawed. The overarching focus

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[3][DELETED]

of BFI's protest is its allegation that the Navy failed to properly consider fraud charges brought against HDS under several of its government contracts.

Where there is a challenge to the evaluation of proposals in a negotiated procurement, it is not the function of our Office to evaluate the proposals de novo. Rather, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of competing proposals is primarily a matter within the contracting agency's discretion. Alcan Env't, Inc., B-275859.2, Apr. 11, 1997, 97-1 CPD ¶ 139 at 3. We have examined the evaluation here and conclude that it was both reasonable and consistent with the evaluation scheme. We discuss some key areas of the evaluation below.

PAST PERFORMANCE

As noted above, offerors were to provide references for similar projects within the past 3 years. For purposes of rating proposals under this factor, the RFP designated the following adjectival rating system: exceptional, very good, satisfactory, marginal, and unsatisfactory. RFP, Amend. 0002, § M.5.B.1a(3).

Past performance information for each offeror was obtained by the agency through the use of past performance surveys. Although BFI's proposal identified four references, the agency sent past performance surveys only to the three references with the largest contract value (i.e., (1) a 5-year contract with an average yearly value of $483,433, to be completed in September 2002; (2) a contract valued at $425,153 per year, to be completed in July 1999; and (3) a contract valued at $195,000 per year, completed in June 1998). Based on responses from each of the three references, BFI was rated "very good" under quality of service and "satisfactory" under the schedule, business relations, and management of key personnel areas of the past performance factor. Since the four areas are equally weighted, BFI's proposal received an overall past performance rating of "satisfactory." BFI received a "moderate" performance risk rating because the agency concluded that some doubt exists that the firm could perform the requirements of this solicitation, since its past and present contracts were much smaller in size than the anticipated contract.

In contrast, HDS submitted references for three contracts which are similar in size and complexity to this solicitation. Based on the survey responses, HDS received a "satisfactory" rating for each of the four areas under the past performance factor although some minor problems were noted, for which the corrective actions taken were satisfactory. For example, under quality of service, one reference responded that a "few [deficiency reports] were issued throughout the course of this contract due to nonperformance of services and unsatisfactory condition of containers. Contractor [HDS] took corrective action and provided measures to prevent recurrence." Contractor Performance Survey for Contract No. N62755-93-D-2982,

July 8, 1998, at 2. HDS's proposal received an overall past performance rating of "satisfactory" with "low" risk since the agency concluded that little doubt exists that HDS--the incumbent--can satisfactorily perform the required services.

BFI takes issue with the agency's conclusions regarding HDS's past performance. The protester insists that the agency improperly failed to consider information concerning allegations of fraud against HDS under 20 government contracts. The protester states that on May 20, 1997, the United States Attorney for the District of Hawaii decided to take over two separate qui tam relator suits filed under the False Claims Act, 31 U.S.C. § 3729-33 (1994), in connection with HDS's performance of its Army, Navy, and Coast Guard contracts for refuse collection and disposal services. See 31 U.S.C. § 3730(b)(4)(A). According to the protester, the government's decision to take over the litigation was the result of an investigation by Army, Navy and other agency investigators into HDS's alleged practice of commingling government and commercial waste in violation of its government contracts, resulting in an alleged overstatement of the monthly refuse tonnage used to bill the government for reimbursement of landfill fees. Subsequent to the government's decision to take over the litigation, HDS entered into a settlement agreement on May 21, 1997. Under the terms of the agreement, HDS denied any wrongdoing but agreed to pay double damages in connection with the disputed overcharges under these 20 contracts, and the cases were dismissed with prejudice.

In the context of the broad discretion afforded contracting officials in the evaluation of past performance, the agency's determination that the past performance of HDS was satisfactory and posed a low performance risk is unobjectionable, notwithstanding the False Claims Act litigation. See University of Dayton Research Inst., B-260709, July 10, 1995, 95-2 CPD ¶ 17 at 7. As the protester points out, the contracts listed in HDS's proposal for purposes of evaluating its past performance were included in the qui tam litigation. As discussed above, the agency obtained and reviewed performance survey responses regarding the firm's work under these contracts with the government. Even though the survey responses included some negative comments concerning HDS's performance, the responses were consistently positive regarding the firm's past performance in spite of the False Claims Act litigation. When the Navy subsequently requested a past performance survey from the Army activity that was primarily involved with the False Claims Act litigation, the survey responses (which included a copy of the settlement contract modification resolving the False Claims Act suits) were generally positive. After considering all of the information in the past performance survey response, the agency concluded that HDS's past performance under this Army contract was satisfactory overall, and that the survey comments were consistent with those received from the three references listed by HDS, i.e., the local Navy and Coast Guard activities which also had contracts included in the False Claims Act suits.

Moreover, we do not think the agency was required to do a more extensive investigation of HDS's past performance than it did here, notwithstanding BFI's contentions that the False Claims Act litigation warranted a more in-depth review than that obtained through the use of past performance surveys. On the basis of the record before us, it appears that the contract references were aware of the False Claims Act litigation when they prepared their survey responses; likewise, the contracting officer/SSA was also aware of the litigation, given the information provided by the references and a Dun & Bradstreet report that was obtained by the agency in August 1998. Thus, our review shows that the Navy's evaluation of past performance was reasonable.

Similarly, the agency's past performance evaluation supported the determination of a "low" past performance risk rating for HDS. In our view, it is reasonable to give a better evaluation rating to offerors with successful performance on more relevant contracts. See, e.g., Ogden Support Servs., Inc., B-270012.4, Oct. 3, 1996, 96-2 CPD ¶ 137 at 3; University of Dayton Research Inst., supra, at 7. Since HDS reported more relevant successful experience than BFI, the better performance risk rating assigned to its proposal was reasonable.

SMALL BUSINESS

Section L of the RFP stated that large business offerors such as BFI and HDS should submit a subcontracting plan as described in FAR § 52.219-9, "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan."[4] RFP, Amend. 0005, § L.10c(2)(a). As previously stated, the RFP supplied offerors with specific guidance as to what should be included in these plans and the source selection plan, which was not disclosed to offerors, described how proposals would be rated. In evaluating proposals, the Small Business Specialist would assign ratings, of which the two that are relevant to this protest are as follows:

[DELETED]

BFI objects to the agency's evaluation of its own and the awardee's revised proposals under this evaluation factor. According to the protester, the agency "unfairly minimized or simply ignored the unassailable fact that BFI demonstrated a commitment to small business subcontracting that was nine times greater than the virtual noncommitment of HDS"; as such, the protester claims that the agency's rating of "acceptable" for both firms was "flawed and irrational." Protester's Additional Comments, Dec. 10, 1998, at 1. In its view, had the agency properly evaluated its revised subcontracting plan, which demonstrated firm commitments to utilize certain small businesses, its proposal would have received the higher rating of "exceptional." Protester's Comments, Nov. 23, 1998, at 21.

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[4]The solicitation contained a sample subcontracting plan.

The record shows that the protester's and the awardee's initial subcontracting plans were rated "marginal" under this factor. BFI was assigned a "marginal" rating because its proposal did not address the solicitation's SDB and WOSB participation goal of 5 percent of the value of the contract. Following discussions, the protester's proposal was rated "acceptable" based on its revised subcontracting plan which satisfied the statutory goal for SDBs and WOSBs and included firm commitments with named subcontractors.

Our review of the record indicates that the Navy did not consider that the small business subcontractors proposed or the firm commitments of these subcontractors included in BFI's revised subcontracting plan was a sufficient basis to rate BFI's revised proposal "exceptional" rather than "acceptable." We note that nothing in the protester's revised subcontracting plan evidences "extensive efforts and commitments in subcontracting" as contemplated by the rating scheme quoted above. Offerors also were required to meet a past performance requirement--the extent to which the prime has historically been successful in establishing realistic yet challenging goals and evidences ability to achieve them. In its revised subcontracting plan, however, the protester noted that since it had not been awarded a large military refuse contract it could not provide a record of past performance on DOD contracts to demonstrate its ability to meet the subcontracting goals. Nonetheless, the protester's proposal was rated "acceptable" under the past performance subfactor based on its approval to participate as a mentor in DOD's pilot mentor-protege program. However, the Small Business Specialist noted that one of the conditions for approving a mentor-protege agreement is that the contractor has demonstrated its ability to meet its subcontracting goals, which BFI could not show. Thus, contrary to BFI's assertions, while its subcontracting plan was properly credited for the subcontracting goals, firm commitments with subcontractors, and participation in the mentor-protege program mentioned here, nothing in the evaluation record or BFI's revised proposal suggests that a higher rating under this factor was justified.

With regard to the evaluation of HDS's proposal under this factor, the record shows that HDS was advised during discussions that it had not provided any information under the past performance small business subfactor, and that its proposed plan to subcontract a minimal amount of the maximum dollars awarded was below the agency's 20-percent goal. As a result, HDS revised its proposal and increased the percentage of the total contract price to be subcontracted and specifically identified the subcontractors with which it has firm commitments. With regard to the historical rate of subcontracting under prior agency contracts, HDS disclosed that it had no subcontracting plan under its previous Navy contract because its policy under that contract was to perform the services in-house; therefore, its subcontracting goal for that contract was zero. The record indicates that the Small Business Specialist reviewed the documentation provided by HDS and the explanation contained therein regarding the firm's prior policy on subcontracting and assigned a rating of "acceptable."

While the protester asserts that the Small Business Specialist's rating of "acceptable" under the past performance small business subfactor is not supported by HDS's response to discussions, the record shows that HDS's revised subcontracting plan fully disclosed its lack of a subcontracting plan under that prior Navy contract, and provided an explanation for the lack of subcontracting. The record shows that the agency clearly considered HDS's response to the discussion questions and decided not to penalize HDS because the firm did not use subcontractors under the prior contract and performed all work in-house. Thus, the Small Business Specialist simply rated HDS acceptable primarily based on its subcontracting plan submitted for this contract. In short, this is a matter the agency clearly considered, and our review of the record, and of the protester's contentions, does not lead us to conclude that the agency's assessment was unreasonable or inconsistent with the RFP.

Nonetheless, even if, as BFI argues, its rating should have been higher than HDS under the small business factor, we do not believe that this change could have reasonably affected the selection decision. Nothing in the record supports the reasonableness of the agency paying approximately [DELETED] more for a somewhat better subcontracting plan, especially where price was the most important factor, and the small business factor, the least important.

The protest is denied.

Comptroller General
of the United States