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Decision

Matter of: Kreative Technologies, LLC

File: B-415491.2; B-415491.3

Date: August 27, 2018

Edward J. Tolchin, Esq., and Bryan R. King, Esq., Offit Kurman, P.A., for the protester. Ronald S. Perlman, Esq., and Rodney M. Perry, Esq., Holland & Knight, LLP, for Aderas, Inc., the intervenor.

Timothy J. Haight, Esq., and Kevin E. Bolin, Esq., Department of Defense, Defense Health Agency, and John W. Klein, Esq. and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated quotations under past performance and price factors in competition for Federal Supply Schedule order is denied where the record shows the evaluation was reasonable and consistent with solicitation's evaluation criteria.

DECISION

Kreative Technologies, LLC, of Fairfax, Virginia, a small business, protests the issuance of a Federal Supply Schedule (FSS) order to Aderas, Inc., of Reston, Virginia, also a small business, under request for quotations (RFQ) No. HT0015-17-R-0013 (also identified as eBuy RFQ No. RFQ1238304) issued by the Department of Defense, Defense Health Agency (DHA), for commercial healthcare artifact and image management solution (HAIMS) sustainment services for the DHA Solutions Delivery Directorate (SDD), in Falls Church, Virginia. The protest argues that DHA misevaluated both vendors' past performance and prices, made an unreasonable source selection decision, and improperly deemed Kreative not responsible.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFQ, issued September 7, 2017, sought quotations from small business FSS contractors under Schedule 70 (the general purpose commercial information technology

equipment, software, and services schedule). The RFQ anticipated that DHA would issue an FSS order for a 6-month base period, two 6-month option periods, and a 3-month transition-out period. RFQ amend. 2 at 7-10. The requirements were described in a performance work statement and included estimated staffing levels. Id. at 7-11, 16-73. The RFQ directed vendors to submit quotations in three volumes containing a technical proposal, past performance information, and detailed pricing information. The technical proposal was to consist of a technical approach, a management approach, experience, and a quality control approach. Id. at 4-5.

For the past performance volume, vendors were instructed to list at least three, but no more than five, relevant contract references “within the past 3 years.” Id. at 5. The RFQ specified that references could be “past or current as long as the performance did not end more than 3 years prior to the due date for the submission of the task order proposal,” and could be provided by federal, state, local, or commercial customers of the vendor or its subcontractors. Id. Past performance would be assessed to identify risks to successful performance and to establish an adjectival rating based on “quality, relevance, and currency” of the past performance. Id. at 16. The RFQ also identified the “areas of relevance” as the following:

Three or more years of satisfactory on-going sustainment operations for deployed Government sites including code sustainment, issue resolution, load testing, systems administration and imaging and content management technical support and assistance.

Id.

The RFQ required vendors to quote fixed prices for contract line items (CLIN) which would be evaluated for consistency with the vendor’s FSS contract, as well as amounts for cost-reimbursement “other direct costs” (ODC) CLINs. The RFQ anticipated that the ODC CLINs would be used to reimburse the costs of a variety of items and services including hardware, licenses, equipment moving, uninterruptible power supplies, power adapters, and other miscellaneous expenses, which in total were valued at roughly \$350,000 and \$650,000 over the term of the order. Compare Supp. Agency Report (AR) at 6 with Supp. AR Tab 18, Overall Evaluation Summary, at 1. Each vendor’s price submission would be evaluated for fairness and reasonableness, consistency with (or discounts from) the vendor’s GSA Schedule contract, reasonableness of the proposed level of effort, and consistency with the firm’s technical approach and staffing. RFP amend. 2 at 16.

The order would be issued to the vendor whose quotation was evaluated as the best value considering price and five non-price factors, in descending order: technical approach, management approach, experience, quality control approach, and past performance. RFQ amend. 2 at 12-13. The first four factors would be more important than past performance, and all five non-price factors combined would be more important than price in making a best-value tradeoff. Id. at 13.

DHA received quotations from two vendors: Kreative and Aderas. After an initial evaluation of quotations resulted in an order to Aderas on September 29, Kreative filed a protest. In response, DHA announced that it would take corrective action by reevaluating the quotations and making a new source selection decision, so our Office dismissed that protest as academic.

The summary of the reevaluation of quotations during corrective action was as follows:

	Aderas	Kreative
Technical Rating	Acceptable	Good
Past Performance Rating	Acceptable/Reasonable	Acceptable/Reasonable
Price	\$13.6 million	\$14.9 million

Supp. AR Tab 18, Excerpt of Evaluation Summary Document, at 29.¹

In discussing the tradeoff judgment, the contracting officer explained that the evaluation showed that both firms had equally impressive technical solutions, and that both had weaknesses under the experience factor. Id. at 28. The contracting officer agreed with the evaluation finding that Kreative's technical rating was better than Aderas's, but explained that closer review of each firm's strengths and weaknesses showed that Kreative's technical quotation was, in the contracting officer's judgment, only slightly better. Id. at 29. With respect to each vendor's past performance, the contracting officer noted that the evaluation concluded that each firm had provided high quality performance, and the past performance record supported a high expectation that either would perform successfully, but that Aderas's record nevertheless provided a higher expectation of successful performance. Id. In making a tradeoff, the contracting officer concluded that the firms' technical solutions were "about equal . . . with the slight edge going towards Kreative," while the past performance record showed that either firm would perform successfully but justified "slightly more confidence" for Aderas. Id. Taken together, the contracting officer determined that the two vendors' quotations were "mostly equal in benefit and risk," and therefore the price difference of \$1.3 million, representing a premium of 9.52 percent, was "largely the ultimate determining factor" that drove the selection of Aderas's quotation as the best value. Id.

On May 17, DHA notified Kreative that the reevaluation had again resulted in the selection of Aderas's quotation. Protest at 4; Agency Dismissal Request, attach. 3, Letter from Contracting Officer to Kreative, May 17, 2018, at 1. This protest followed.

¹ Kreative's challenges are directed at the past performance and price evaluations. Nevertheless, as a clarification we note that the contracting officer's tradeoff rationale uses "Technical Rating" to combine the technical, management approach, experience, and quality control factor ratings, which specifically identifies Kreative's factor ratings in narrative form. See id. at 28.

PROTEST

Kreative argues that the selection of Aderas was improper because DHA misevaluated the quotations under the past performance and price factors, made an unreasonable best-value tradeoff, and improperly determined that Kreative was not responsible and failed to refer that negative responsibility determination to the Small Business Administration (SBA) under that agency's certificate of competency process.²

This protest involves an evaluation of quotations in a competition for an FSS order under a solicitation that provides a statement of work, so the evaluation of quotations was performed pursuant to Federal Acquisition Regulation (FAR) § 8.405-2. Contracting Officer's Statement (COS) at 1. That regulation imposes limited documentation requirements, although the agency's evaluation judgments still must be documented in sufficient detail to show that they are reasonable. FAR § 8.405-2(f); Neopost USA Inc., B-404195, B-404195.2, Jan. 19, 2011, 2011 CPD ¶ 35 at 7; Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151.

Past Performance Evaluation

Kreative first challenges the evaluation of the quotations under the past performance factor. Kreative submitted past performance information for two contracts it had performed, and one contract performed by each of its two subcontractors. AR Tab 10, Kreative Quotation, Past Performance Volume, at 5-37. Kreative's first reference was for its support of HAIMS business objects migration from September 2016 through March 2017. Id. at 5. The second reference was for the firm's work as a subcontractor to provide HAIMS enhancement and maintenance support from September 2014 through January 2016. Id. at 14. The third reference was for Kreative's subcontractor performing as the incumbent HAIMS sustainment contractor from September 2013 to present. Id. at 22. The final reference was for a second subcontractor performing development and sustainment services for a separate system that leveraged the HAIMS repository, from September 2015 to March 2018. Id. at 32.

In evaluating Kreative's past performance, the agency first concluded that all four of Kreative's references had been within the previous 3 years. Next, the agency assessed the relevance of each reference by determining whether the reference showed "3

² DHA requested dismissal of the protest, arguing that Kreative was ineligible for award, and thus not an interested party to file a protest, by operation of 38 U.S.C. § 4212. Specifically, DHA argued that the protester had failed to file the required report on employment of veterans with the Department of Labor, and that the statute prohibited DHA from issuing an FSS order to such a firm. Dismissal Request at 4. Our Office determined that the issues involved could not be resolved without further development of the record through an agency report. After developing the record, as explained below, we do not reach these issues because Kreative was not prejudiced by DHA's conclusion about Kreative's eligibility for award.

Continuous Years (Y/N)” and whether the reference included five substantive elements (code sustainment, issue resolution, load testing, systems administration, and imaging and content management). AR Tab 8, Past Performance Assessment Form, at 1-2. For Kreative, the relevance evaluation concluded as follows:

Kreative provided four references. References one, two [both for Kreative] and four [for Kreative’s second subcontractor] did not meet the 3 continuous years of performance as outlined in the Solicitation and have been found Not Relevant. Reference three [for Kreative’s subcontractor, the incumbent HAIMS sustainment contractor] met all of the criteria and was found to be relevant.

Id. at 2.

The past performance evaluation recorded adjectival ratings under four criteria (technical & mission needs met, milestone and project dates, quality of services performed, and forecasting & controlling costs) for each of Kreative’s first three past performance references. The evaluation indicated that no information had been received regarding the fourth reference. Id. at 3. The evaluation then assessed the past performance record using an adjectival rating of either acceptable or not acceptable, and rated Kreative’s past performance acceptable. Id. at 2.

Kreative argues that DHA failed to evaluate past performance using a comparative assessment of “quality, relevance, and currency” as provided in the RFQ, and instead improperly limited the evaluation to deeming past performance to be acceptable or unacceptable. Protest at 5-6; Protester’s Comments & Supp. Protest at 4-5. Kreative also argues that DHA’s evaluation of three of the firm’s four past performance references as not relevant, based on the lack of 3 continuous years, misapplied the evaluation criteria in the RFQ. Protester’s Comments & Supp. Protest at 2.

DHA responds that notwithstanding the evaluation of overall past performance ratings as either acceptable or unacceptable, the source selection decision reflects that the contracting officer properly considered the relative quality of Kreative’s past performance record, and compared Kreative’s record to Aderas’s. AR at 5-6. In particular, the agency points to the contracting officer’s observation that both firms had “great” past performance records, that the contracting officer had a high expectation of successful performance by either vendor, but also a “higher expectation that Aderas would successfully perform our work.” Id. at 6. DHA argues that, regardless of any inadequacy in the past performance evaluation, the contracting officer’s decision documented a proper consideration of the quality of each vendor’s past performance in the context of this procurement. Id. at 7-8. Additionally, DHA argues that the RFQ listed as “areas of relevance” that a vendor’s past performance should show 3 or more years of “on-going sustainment operations.” Supp. AR at 2. DHA argues that the evaluation of references that lacked at least 3 continuous years of performance as not relevant was a direct application of the expressly-stated evaluation criteria. Id. at 3.

When an agency conducts a formal competition under the FSS program, we will review the evaluation of quotations to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. SI Int'l, SEIT, Inc., B-297381.5, B-297381.6, July 19, 2006, 2006 ¶ CPD 114 at 11. A past performance evaluation is a matter within the agency's discretion, so this Office will not substitute our judgment for reasonably based past performance ratings. We will question such conclusions where they are not reasonably based, or are inconsistent with the terms of the solicitation or applicable statutes and regulations. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 9. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the stated evaluation terms, and whether it is based upon relevant information sufficient to make a reasonable determination of the offeror's overall past performance rating. University Research Co., LLC, B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 14. Where both a protester and awardee have relevant performance experience, an agency is not required to weight their past performance differently; in other words, we have found no requirement that an agency assess relative relevance. Id. at 19-21.

The contemporaneous record shows that the contracting officer's evaluation of Kreative's past performance was reasonable and consistent with the RFQ. Even though the past performance evaluation assessed each vendor's past performance record only as acceptable or unacceptable overall, the record also documents the contracting officer's proper qualitative comparison of the quality of both firms' records of relevant past performance. Although Kreative also challenges the exclusion of three of its references as not relevant, our review shows that the evaluation was reasonable and consistent with the RFQ criteria in this regard. In particular, the agency assessment of whether each past performance reference showed 3 ongoing (or "continuous") years was stated in the RFQ as the "areas of relevance." The evaluation of past performance references that lacked 3 continuous years as not relevant was thus consistent with the RFQ criteria. Accordingly, we deny Kreative's challenges to the past performance evaluation.³

³ Although Kreative also argues that its past performance was superior in quality to Aderas's, see Protester's Comments & Supp. Protest at 5, its argument amounts to mere disagreement with the contracting officer's evaluation judgment. As discussed above, the contemporaneous record of the past performance evaluation describes the relevance and reported quality of each vendor's past performance. The contracting officer expressly considered that record, as well as Kreative's "very good" work supporting the incumbent contractor, and Aderas's "very successful" performance of two relevant contracts, and found that both firms' records provided a high expectation of successful performance. AR Tab 7, Evaluation Summary Document, at 14-17; Supp. AR Tab 18, Excerpt of Evaluation Summary Document, at 29. Although Kreative argues that the record of Aderas's past performance was incomplete, its objections do not provide a sufficient basis for our Office to conclude that the contracting officer's judgment regarding Aderas's performance record was unreasonable or inadequately documented.

Price Evaluation

Kreative next challenges the evaluation of the vendors' prices, arguing that the inclusion of ODC amounts in the evaluated prices was improper, and that DHA failed to assess the realism of the amounts that each vendor quoted for ODCs. Protest at 6-7; Protester's Comments & Supp. Protest at 6-8. ODCs should have been excluded from the evaluated prices, Kreative argues, so that the price evaluation would be based only on the fixed FSS CLIN prices, whereas the inclusion of ODCs allegedly favored Aderas. Kreative contends that a realism assessment of the ODC amounts would have confirmed Kreative's understanding of the requirement and Aderas's contrasting lack of understanding, which would have lowered the technical evaluation of Aderas. Id. at 7.

DHA responds that, contrary to the premise of Kreative's argument, Aderas's ODC amount was actually higher than Kreative's, so excluding ODCs from the evaluated prices actually would have disadvantaged Kreative. Supp. AR at 11. As a result, DHA argues that Kreative was not prejudiced by the inclusion of ODC amounts in the evaluated prices. Id. at 12. Additionally, while DHA acknowledges that Aderas used what the agency describes as "differing approaches" regarding ODCs, it also argues that it considers the RFQ to designate the order as fixed price, and therefore no realism analysis was required. Agency Report (AR) at 10. DHA notes that the RFQ stated that prices would be evaluated to assess price "fairness and reasonableness," and more specifically, that reasonableness would be assessed in terms of whether the prices were consistent with the vendor's FSS contract and its technical approach, and whether the prices reflected reasonable assumptions about labor mix and hours. The RFQ did not state that price realism would be evaluated. AR at 8-9. DHA argues that Kreative's challenge to the realism of Aderas's ODC amounts is, in effect, a claim that the RFQ should have included a price realism evaluation criterion, and is thus an untimely challenge to the terms of the solicitation. Id. at 9-10.

Our review of the record confirms that Kreative was not prejudiced by the inclusion of the ODC CLIN amounts in the price evaluation because Aderas's ODC amount was greater than Kreative's. Supp. COS at 6. The exclusion of ODC's from the price evaluation would have increased Aderas's evaluated price advantage, rather than benefitting Kreative, so Kreative's argument does not provide a basis to sustain its protest. We also agree with DHA that the RFQ did not provide for the quotations to be assessed for price realism, and instead expressly characterized the RFQ as a fixed-price procurement. RFQ amend. 2 at 2. In these circumstances, it would have been improper for DHA to assess the realism of the vendor's prices. URS Fed. Servs., Inc., B-412580, Mar. 31, 2016, 2016 CPD ¶ 116 at 7. Accordingly, we agree with DHA that Kreative's argument that the realism of the ODC amounts should have been assessed is thus an untimely challenge to the terms of the RFQ, which we dismiss. 4 C.F.R. § 21.2(a).

Determination of Kreative's Responsibility

During corrective action in response to Kreative's earlier protest, DHA became aware that Kreative had not made a filing regarding the firm's employment of veterans with the Department of Labor. Based on that fact, the contracting officer found Kreative was not responsible and, in any event, noted that the firm was not the best value vendor here. AR Tab 11, Contracting Officer's Memorandum for Record, at 1. In informing Kreative of the selection of Aderas, the agency also indicated that Kreative had been found not responsible pursuant to 38 U.S.C. § 4212 and 31 U.S.C. § 1354.

Kreative's protest therefore challenges DHA's determination that the firm was not responsible under the agency's application of 38 U.S.C. § 4212. Kreative argues that the statute is inapplicable to this commercial item procurement under the FSS program, and that even if it were applicable, the determination that it was not responsible had to be referred to the SBA under its certificate of competence process.

A decision on these issues is not necessary because, even if DHA's actions in this regard were improper, Kreative has not shown that it was prejudiced by them. As discussed above, the contracting officer determined that Aderas's quotation provided the best value based on a reasonable evaluation, including Aderas's lower evaluated price. Since the evaluation and source selection decision were reasonable, there is no likelihood that DHA would have issued the order to Kreative, regardless of the alleged inapplicability or misapplication of 38 U.S.C. § 4212. In short, Kreative was not prejudiced by the agency's actions.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel