



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Pacific Ship Repair and Fabrication, Inc.

File: B-279793

Date: July 23, 1998

Richard B. Oliver, Esq., and Linda S. Kayajanian, Esq., McKenna & Cuneo, for the protester.

Samuel J. Galbo, Jr., Esq., Janice Passo, Esq., Valerie A. Williams, Esq., and James Beback, Esq., Department of the Navy, for the agency.

Christine Davis, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency properly rated the protester's past performance on several contracts as satisfactory, where the agency relied on the ratings on the various elements of performance supplied by a cognizant contracting official, even though there was no supporting narrative on the questionnaire forms regarding the protester's performance of these contracts.
2. An agency improperly assigned satisfactory ratings to reflect the protester's past performance on several contracts, where the agency failed to obtain any information regarding the protester's performance of these contracts; however, the protester has not established a reasonable possibility that it was prejudiced by the misvaluation, where the protester failed to submit any evidence that its performance of these contracts was better than satisfactory.
3. An agency reasonably determined that the awardee possessed an exceptional past performance record and represented a minimal performance risk in performing the solicited ship repair contract, notwithstanding significant differences between the awardee's prior contracts and the solicited contract, where those differences did not negate the applicability of the many performance strengths possessed by the awardee that were considered in the past performance evaluation.
4. In a solicitation for a fixed-price contract that provided for a price realism evaluation, an agency reasonably questioned the realism of certain prices in the protester's proposal, where those prices were much lower than the independent government cost estimate and the prices proposed by other offerors.

DECISION

Pacific Ship Repair and Fabrication, Inc. protests the award of a contract to Todd Pacific Shipyards Corporation under request for proposals (RFP) No. N62799-98-R-0018, issued by the Department of the Navy, for repair work to be performed on the U.S.S. Constellation at the Puget Sound Naval Shipyard.

We deny the protest.

The RFP contemplated the award of a fixed-price contract based on a tradeoff between the offerors' evaluated prices and past performance ratings. RFP § L-2-6, RFP Amendment 1 § M-6(b)(1), (b)(2), (g). The price factor, which provided for an evaluation of price realism, among other things, was significantly less important than the past performance factor. RFP Amendment 1 § M-6(b)(2), (c)(2).

The past performance factor contemplated a performance risk assessment under three subfactors, technical, schedule, and management. RFP Amendment 1 § M-6(b)(1)(A), (B), (C). The offeror's performance ratings on relevant ship repair contracts were to be considered in this evaluation. RFP Amendment 1 § L-2-8(a). Contracts involving work of comparable type and complexity to the instant requirements were to receive greater consideration in the evaluation. RFP Amendment 1 § M-6(b)(1). In this regard, the "most relevant" contracts for evaluation purposes were fixed-price contracts performed within the Puget Sound Naval Shipyard for tank/void repair and preservation work, as required by this solicitation. Id. The solicitation asked offerors to list relevant ship repair contracts of more than \$500,000 performed for the government within the past 3 years and to discuss any aspect of their performance record that they desired the Navy to consider. RFP Amendment 1 § L-2-8(b), (c). The results of the past performance evaluation were represented by adjectival ratings ("exceptional," "very good," "satisfactory," "neutral," "marginal," and "unsatisfactory"), risk assessment ratings ("high," "moderate," "minimal," and "none"), and ratings to express the relevance of the evaluated contracts ("relevant," "some relevance," "barely relevant," and "not relevant").¹

Four firms submitted initial proposals, including Pacific Ship and Todd. The agency conducted oral discussions relating to price only with all offerors and requested best and final offers. Pacific Ship submitted the lowest-priced offer at \$1,998,852, and Todd submitted the next lowest-priced offer at \$2,659,035, which was close to the government estimate of \$2,638,934.

¹The RFP prescribed the adjectival ratings, RFP § M-6(b)(1), while the past performance evaluation team (PPET) developed the risk assessment ratings and contract relevance ratings.

In terms of past performance, Todd's proposal was highest-rated and Pacific Ship's proposal was next highest-rated. Todd's past performance evaluation was based on seven contracts, four "somewhat relevant" and three "barely relevant"; the relevance ratings reflected the fact that Todd predominantly performed the contracts at its private shipyard, some on a cost-reimbursement basis. The PPET identified 24 major strengths, 3 minor strengths, 4 minor weaknesses, and no major weaknesses stemming from Todd's performance of these contracts, and rated Todd's overall past performance "exceptional/minimal risk." Pacific Ship's past performance evaluation was based on 20 contracts, 14 "relevant" and 6 "somewhat relevant"; its performance record was deemed more relevant than Todd's. The PPET identified 27 major weaknesses, 3 minor weaknesses, 2 major strengths, and 1 minor strength stemming from the protester's performance of the evaluated contracts, and rated Pacific Ship's overall past performance "satisfactory/moderate risk."

Based on the results of the price and past performance evaluations, the best value advisory committee (BVAC) identified several evaluated past performance weaknesses and certain unrealistic prices in the protester's proposal as risk factors. Overall, the BVAC's conclusion was that the \$660,183 price premium associated with Todd's offer was justified to avoid the greater performance risks posed by Pacific Ship.² The contracting officer adopted the BVAC's selection recommendation. This protest followed.

Pacific Ship protests that the PPET lacked sufficient information to rate 11 of the 20 contracts that formed the basis of its past performance evaluation. The PPET assigned "satisfactory" ratings to these 11 contracts. The protester claims that its performance of these contracts was very successful and that the Navy would have rated these contracts higher, if it had sought more information from cognizant Navy contracting personnel or from Pacific Ship during discussions.

It is not the function of our Office to evaluate past performance information 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 merit of offerors' past performance information is primarily a matter within the contracting agency's discretion. See

²In its report to the contracting officer, the BVAC incorrectly stated that Todd's offer was 25 percent higher than Pacific Ship's offer, instead of stating that Pacific Ship's offer was 25 percent lower than Todd's offer (or that Todd's offer was 33 percent higher than Pacific Ship's offer). However, because the BVAC accurately reported both offerors' prices and the \$660,183 price differential to the contracting officer, any error in reporting the percentage relationship between the firms' prices was inconsequential, as the contracting officer confirmed in an affidavit submitted in response to this protest.

Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 5.

The record shows that, of the 11 allegedly misevaluated contracts, 7 were for ship repair work on the U.S.S. Constellation performed between 1995 and 1997. The record shows that the PPET assigned "satisfactory" ratings to the protester's performance of these contracts based on information obtained from a contracting official at the cognizant Navy contracting activity. This respondent completed a questionnaire asking him to rate the protester's performance as "excellent," "satisfactory," "marginal," or "unsatisfactory," with regard to four performance standards. The respondent gave the protester "satisfactory" ratings under each performance standard for all seven U.S.S. Constellation contracts; these ratings were adopted by the PPET. In an affidavit submitted during the course of this protest, the respondent explained that he based his ratings on advice from the project officer assigned to these contracts, who characterized the protester's performance under each standard as satisfactory and who recalled no distinguishing good or bad features about any aspect of the protester's performance.³ The respondent did not believe that comments were necessary because there were no notable performance strengths or weaknesses to report in the protester's performance of the seven contracts.

The protester characterizes the questionnaires as superficial and incomplete because the respondent did not justify the ratings in the "comments" block of the questionnaires, which allegedly should have caused the PPET to solicit more information about the protester's performance.⁴ Although the respondent did not justify the "satisfactory" ratings with supporting narrative, we do not agree that the agency under these circumstances was required to conduct further investigation to validate or supplement the ratings, given that the record shows that the "satisfactory" ratings reflected the judgment of a cognizant contracting official with specific knowledge of the contracts in question. See Black & Veatch Special Projects Corp., B-279492.2, June 26, 1998, 98-1 CPD ¶ 173 at 7; SDA Inc., B-256075, B-256206, May 2, 1994, 94-2 CPD ¶ 71 at 7 n.9. In any event, even assuming that the questionnaires lacked sufficient support for the ratings assigned, the protester has submitted no evidence that its performance of the U.S.S. Constellation contracts was better than satisfactory, as discussed further below.

³In its agency report, the Navy initially misstated how these contracts were evaluated, but later corrected its misstatement. The contemporaneous record supports the Navy's corrected version of this evaluation.

⁴The protester similarly notes that the PPET lacked the second page of the questionnaires, which included additional space for the respondent's comments.

With regard to the other four allegedly misevaluated contracts, we find that the PPET lacked sufficient information to support the "satisfactory" ratings assigned. The respondents who completed the questionnaires for these four contracts declined to rate the protester's performance because they were unable to locate knowledgeable contracting personnel or past performance records documenting the protester's performance. Nevertheless, the PPET assigned "satisfactory" ratings to the protester's performance of these four contracts.

The Navy has not identified, nor can we find, any precedent that would permit the agency to assign a qualitative rating--"satisfactory" or otherwise--in the absence of any information to support that rating. In our view, once the agency decided to include these contracts within the scope of its past performance evaluation, it had a duty to acquire information adequate to support an evaluation. See Northwest EnviroService, Inc., B-247380.2, July 22, 1992, 92-2 CPD ¶ 38 at 5-11. The Navy's failure to do so renders the "satisfactory" ratings assigned to the four contracts unreasonable.⁵

Although we find that the Navy misevaluated these contracts, the protester has not established the possibility of competitive prejudice arising from the misevaluation. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. 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). Based on our review of the record, we conclude that the protester would not have had a reasonable possibility of receiving the award, even if the agency had solicited more information regarding these contracts.

The protester characterizes its performance under the four contracts (as well as the seven U.S.S. Constellation contracts) as very successful, and states that the Navy could have acquired information to this effect had it discussed the matter with Pacific Ship or queried other Navy contracting personnel familiar with the contracts. During a telephone conference, our Office advised protester's counsel that the protester had not submitted any evidence to substantiate its claim that its performance of the 11 contracts was better than satisfactory, and offered the

⁵The Navy also argues that the assignment of "satisfactory" ratings benefitted the protester because the Navy could have assigned "neutral" ratings to the contracts for which it lacked past performance information. There is no merit to this argument. The RFP allowed the Navy to assign a "neutral" rating under the past performance factor to "an offeror without a record of relevant past performance or for whom information on past performance is not available." RFP Amendment 1 § M-6(b)(1). "Neutral" ratings under the RFP were thus for offerors, not for individual contracts.

protester an opportunity to submit evidence on this point, which it declined.⁶ In the absence of such evidence, we think it unlikely that Pacific Ship or Navy contracting personnel would have produced, even if requested, information that the performance of these contracts was better than satisfactory.⁷ See Black & Veatch Special Projects Corp., *supra*, at 8-9. We therefore find that no reasonable possibility of prejudice resulted from the protested "satisfactory" ratings or the lack of discussions as to those ratings.⁸

Pacific Ship also protests that Todd's past performance did not warrant an "exceptional/minimal risk" rating. Pacific Ship does not protest that the PPET misevaluated any of the seven contracts that formed the basis for Todd's past performance evaluation. Rather, the protester argues that the PPET did not take the limited relevance of these contracts into account in assigning Todd an overall "exceptional/minimal risk" rating. We disagree.

Although Todd predominantly performed the evaluated contracts at its private shipyard, some on a cost-reimbursement basis, the protester has not established that the relevance of these contracts was too limited to support the awardee's "exceptional/minimal risk" past performance rating. Pacific Ship has not, for example, shown that Todd's contracts involved work of a different type or complexity than that required by the instant solicitation. Nor has Pacific Ship protested any of the 24 major strengths and 3 minor strengths attributed to Todd's

⁶Pacific Ship argues that it did not have documents supporting the absence of problems in past contracts. Protester's June 19, 1998 Response at 19 n.31. Elsewhere, it argues that it would be "very difficult" to produce documents to prove the strength of its past performance. *Id.* at 11 n.20. We view this position as inconsistent with the protester's view that "it is ludicrous to suggest that Pacific Ship could not have presented information regarding its performance of these eleven contracts during discussions, if it had been given the opportunity." Protester's June 2, 1998 Response at 7-8. Our Office provided Pacific Ship such an opportunity, and it declined to present any evidence that its performance was better than satisfactory.

⁷The protester's proposal also included no information regarding the alleged successful performance of the contracts, even though the RFP invited offerors to discuss any aspect of their performance records that they desired the Navy to consider. RFP Amendment 1 § L-2-8(b).

⁸We also question whether better ratings on the protested contracts could have reasonably been found to offset the effect of the 27 major weaknesses and 3 minor weaknesses arising from the protester's more recent contract history, none of which were protested by Pacific Ship.

performance of its contracts, or shown these strengths to be inapplicable to the performance of a fixed-price contract at a public shipyard.

Moreover, contrary to the protester's apparent belief, nothing in the solicitation precluded the PPET from judging an offeror's past performance "exceptional" or "minimal risk" merely because the offeror's performance history did not include fixed-price contracts performed at a public shipyard. The RFP simply provided that the agency would give greater weight to contracts involving work of comparable type and complexity to the instant requirements, RFP Amendment 1 § M-6(b)(1), and the record does not support that the PPET disregarded this requirement in its evaluation of Todd's past performance.

Specifically, Todd earned nine "exceptional" ratings for its performance of the three "barely relevant" contracts; five "exceptional" and seven "satisfactory" ratings for its performance of the four "somewhat relevant" contracts; and a combination of minimal- and no-risk ratings for all contracts. Although the protester argues that the impact of the "satisfactory" ratings scored on the "somewhat relevant" contracts should have been greater, so as to reduce Todd's past performance rating to "very good," this amounts to mere disagreement with the agency's judgment, which does not establish that the evaluation was unreasonable. See Medland Controls, Inc., B-255204, B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260 at 3. Accordingly, we find no error with respect to the evaluation of Todd's past performance.

Pacific Ship finally protests that the BVAC's price/past performance tradeoff was compromised by an allegedly improper price analysis of the protester's proposal.

"Realism" ordinarily is not considered in the evaluation of proposals for the award of a fixed-price contract because the government's liability is fixed and the risk of loss is borne by the contractor. Human Resources Sys., Inc.; Health Staffers, Inc., B-262254.3 et al., Dec. 21, 1995, 96-1 CPD ¶ 35 at 5. However, because the risk of poor performance when a contractor is forced to provide products or services at little or no profit is a legitimate concern in evaluating proposals, an agency at its discretion may, as here, provide for a price realism analysis in the solicitation of fixed-price proposals. Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4; PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366 at 5. The Federal Acquisition Regulation (FAR) provides a number of price analysis techniques that may be used, including a comparison of the prices received with each other, FAR § 15.404-1(b)(2)(i) (FAC 97-02), and with an independent government cost estimate, FAR § 15.404-1(b)(2)(v). The nature and extent of an agency's price realism analysis are matters within the sound exercise of the agency's discretion. Cardinal Scientific, Inc., supra, at 4.

The BVAC criticized three areas of the protester's price proposal as unrealistic based on a comparison with the other prices received and with an independent

government estimate, techniques recommended by the FAR. We find no error with respect to the adequacy of the price analysis or the reasonableness of the findings based upon it.

First, the BVAC found that Pacific Ship's offer was significantly lower than the government estimate and the other offers received. The protester does not question this finding, but argues that its price was low because it proposed lower wages for its workforce, not because it underestimated the labor hours required to perform the contract, which are generally in line with the labor hours proposed by other offerors and used in the government estimate. We are not persuaded by the distinction advanced by the protester. In our view, the fact that the protester's labor rates were much lower than the rates proposed by the other offerors and estimated by the government, as was the case here, could be considered by the agency as increasing the risk of poor performance. See JWK Int'l, B-256609.4, Sept. 1, 1994, 95-1 CPD ¶ 166 at 6-7.

In addition, the BVAC found that Pacific Ship significantly underbid two contract line items (CLIN), a CLIN for management costs and a CLIN for material costs. The record reflects that Pacific Ship's price for the management CLIN was considered too low in relation to the government estimate, while its price for the material CLIN was considered too low in relation to the prices proposed by other offerors. According to the protester, "[t]he Navy's inconsistent cost evaluation standard demonstrates the results oriented nature of [its] analysis." Protester's June 2, 1998 comments at 20. Contrary to the protester's arguments, the FAR does not limit the agency to a single price analysis technique, but provides that the government "may use various price analysis techniques and procedures" in its price evaluation, as was done here. FAR § 15.404-1(b)(2). Because the protester does not dispute that its prices for these CLINs were very low based upon the FAR-prescribed price analysis techniques used, we cannot say that the agency erred in questioning the protester's prices.

The protest is denied.

Comptroller General
of the United States