



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Oregon Iron Works, Inc.

File: B-284088.2

Date: June 15, 2000

James F. Nagle, Esq., Oles Morrison Rinker & Baker, for the protester.
James J. McCullough, Esq., Deneen J. Melander, Esq., and Timothy W. Staley, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Appleton Marine, Inc., an intervenor.
Arthur Thibodeau, Esq., and Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency advised protester of specific evaluated past performance weaknesses, and solicitation amendment stated that subsequent discussions would be limited to issues other than past performance, post-award protest that agency improperly failed to provide protester an opportunity to address agency's past performance concerns during those discussions is not timely filed.
 2. Protester's complaints that its proposal should have been evaluated more favorably with regard to various non-price evaluation factors are without merit where they merely reflect protester's disagreements with the agency's evaluation.
 3. Agency's consideration of past performance information regarding contract performance completed more than 3 years prior to source selection does not provide a basis to sustain the protest where the contracts were submitted by the protester as part of its proposal, in response to a solicitation requirement that offerors provide up-to-date past performance references and information.
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DECISION

Oregon Iron Works, Inc. (OIW) protests the Department of the Navy's award of a fixed-price contract to Appleton Marine, Inc. under request for proposals (RFP) No. N47408-99-R-3924, to provide ship-to-shore amphibious bulk liquid transfer (ABLT) systems. OIW protests that the agency improperly failed to discuss its concerns regarding OIW's past performance and otherwise improperly evaluated proposals.

We deny the protest.

BACKGROUND

The solicitation for this procurement was issued on August 12, 1999, seeking proposals for engineering, fabrication, testing, inspection and delivery of eight ABLT systems, with four options for an additional four systems under each option. The systems will be used to transfer fuels and potable water between ships and shore stations. Each system includes flexible hoses, from 5,000 to 10,000 feet in length, along with hose reels on which the hoses are stored.

Under a prior contract, OIW developed a prototype ABLT system along with related product specifications. The agency provided the specifications to potential offerors with the solicitation, but specifically stated that “[t]his Statement of Work requirements takes precedence over the Product Specifications,” further explaining that “[t]he requirements established within Section C.3 of this Statement of Work take precedence over the requirements delineated in the attachments to the SOW.” RFP § C.3.0.2. Consistent with these provisions, RFP § C.3 made certain changes to the specifications, among other things, stating: “Change the materials for the hose reel assembly and the bow ramp assembly to stainless steel, and the preferred Type is 316L for its marine atmosphere resistance characteristics.” RFP § C.3.2.1.

On August 30, the agency issued RFP amendment No. 2, again addressing the structural material to be used, but now mandating use of the particular type of steel it had previously identified as “preferred,” stating: “316L stainless steel shall be used for [various specified portions of the ABLT systems.]” RFP amend. 2, at 3-4.

On September 15, the agency issued RFP amendment No. 4, in which it responded to a question regarding the required structural material. Specifically, a potential offeror asked: “Since the . . . Solicitation requires the substitution of 316L stainless steel . . . will [there] be a requirement to perform a reanalysis of the structure components, and possibility of redesign of the structure to maintain the same structural strength[?]” The agency responded: “No[,] as long as the sizes and thicknesses as indicated on the drawings are kept or maintained.” RFP amend. 4, at 2.

On September 29, the agency issued RFP amendment No. 8, again addressing the required structural material and associated strength requirements, reprinting the following question and response in the amendment:

[Question:] The question is to resolve the concern about the structural integrity of the hose reel frame with the change from carbon steel to 316L stainless steel. By example. The lifting eyes are specified as $\frac{3}{4}$ ” ASTM A572 Gr 50 steel plate with a min. yield of 50000 psi. A $\frac{3}{4}$ ” 316L stainless plate will produce to ASTM A240 and has a min. yield of 25000

psi. This would be typical of most structural components of the frame. Is the lower strength acceptable?

Response: For the non-mild steel load bearing members, such as padeyes (ASTM 572 Grade 50), the thickness of the plate must compensate for the difference in strength between the high-strength structural steel and stainless steel.

RFP amend. 8, at 1.

On September 30, the agency realized that RFP amendment No. 8, which required that the proposed thickness of load bearing members compensate for the difference in strength between the previously specified steel and the now-required stainless steel, conflicted with RFP amendment No. 4, which specifically stated that no redesign of the structure would be required. The agency states that, “[because] there were only a few days before the closing date . . . [i]t was considered too late to issue a written amendment[,] so offerors were notified orally not to include any engineering and analysis costs in their proposals.” Agency Report at 3.

Three offerors, including OIW and Appleton, submitted proposals by the October 6 closing date. Appleton submitted the lowest price of \$37,286,748. OIW’s proposed price was [deleted]. The third offeror’s price was substantially higher than either Appleton’s or OIW’s price.

Section M of the RFP provided for contract award on the basis of four primary evaluation factors: (1) proposal acceptability;¹ (2) capability of the offeror; (3) risk associated with an offeror’s capability; and (4) proposed price. RFP § M.1. The RFP also stated that the non-price factors combined were “significantly more important than price.” RFP § M.6.

Under the “capability” factor, the RFP identified four subfactors: experience; past performance; understanding of the requirements; and compliance with instructions. RFP § M.4. Under the “risk” factor, the RFP provided that the agency would use its findings regarding offerors’ capabilities to establish level of confidence assessment ratings (LOCAR) which would reflect the agency’s subjective assessments regarding the likelihood that offerors would keep the promises made in their proposals. RFP §§ M.4, M.5.

¹ The acceptability determination was performed on a pass/fail basis and was based on an assessment of whether the proposal manifested the offeror’s assent, without exception, to the terms and conditions of the RFP. RFP § M.2. All of the offerors’ proposals were determined to be acceptable and the agency’s evaluation of proposals under this factor is of no further relevance.

In evaluating the proposals under the “capability” factor, the agency created a “capabilities assessment report” for each offeror in which it documented its assessments for each subfactor. With regard to three of the subfactors--experience, understanding the requirements, and compliance with instructions--the agency evaluated the Appleton and OIW proposals as being virtually identical.

In order to evaluate the fourth “capabilities” subfactor, past performance, the agency contacted the references each offeror had identified in its proposal.² With regard to Appleton, the agency found that “[a]ll previous customers contacted . . . indicated that Appleton Marine provided very good administrative and engineering services and outstanding products.” Agency Report, Tab 12, attach. 4, Capabilities Assessment Report for Appleton, at 1. With regard to OIW, the agency found that, while OIW’s past performance was [deleted].

Consistent with the provisions of RFP § M, the agency used its findings regarding the offerors’ capabilities to develop a risk rating, or LOCAR, which reflected the agency’s assessment of the likelihood that each offeror would keep the promises contained in its proposal. Based on the differences in the agency’s evaluation of Appleton’s and OIW’s past performance, Appleton’s proposal was assigned a LOCAR of [deleted], and OIW’s proposal was assigned a slightly lower LOCAR of [deleted].³

No discussions were conducted (consistent with the RFP’s notification in this regard) and based on Appleton’s more favorable past performance evaluation and its resulting higher LOCAR, along with its lower price, the agency selected Appleton for award on October 29. OIW was subsequently advised of the award and, thereafter, requested a debriefing which the agency conducted on November 4. During the debriefing, the agency advised OIW of its various evaluated past performance [deleted].

² The RFP required that each offeror “[p]repare and submit [an] Offeror Qualifications Statement . . . which includes relevant experience and the names of references . . . who will provide information about the quality of your past performance.” RFP § L.2. The RFP further required that offerors “[m]ake sure that your reference information is up to date.” Id.

³ In assigning LOCAR scores, the agency used an evaluation scheme under which 1.0 represented certain success; a .8 or .9 was assigned if the agency believed the offeror was “[m]ore likely to succeed and closer to certain success”; a .6 or .7 was assigned if the offeror was considered “[m]ore likely to succeed, but closer to 50-50”; a .5 was assigned if the offeror was considered “equally likely to fail or succeed”; a .3 or .4 was assigned if the offeror was considered “[m]ore likely to fail, but closer to 50-50”; and a .1 or .2 assigned if the offeror was considered “[m]ore likely to fail and closer to certain failure.” Agency Report, Tab 12, Source Selection Plan, at 10.

On November 9, OIW filed a protest with our Office challenging the October 29 award. The agency responded to that protest on December 7, stating that, in light of the conflicting provisions in the solicitation amendments, the agency could not be certain as to what material it was to receive for the prices offered and, therefore, that the contract would be cancelled, an RFP amendment issued, and the procurement reopened for the offerors that had submitted initial proposals. Letter from Department of Navy to GAO (Dec. 7, 1999). Based on this corrective action, we dismissed OIW's protest as academic. Oregon Iron Works, Inc., B-284088, Dec. 15, 1999 (unpublished decision). On January 19, 2000, Appleton executed a no-cost termination of the contract with the agency. Agency Report, Tab 17.

On January 19, the agency issued RFP amendment No. 9, clarifying the agency requirements regarding the type of steel to be used and applicable strength requirements, and sought revised price proposals from offerors consistent with those requirements. Additionally, RFP amendment No. 9 provided for discussions which were explicitly limited in scope, stating:

The prices submitted will only include changes due to this amendment from the prices previously submitted on October 6, 1999. All contractors will include revised spreadsheets as required in the solicitation and a revised Section B as modified above. If any other changes have occurred since the last submission, please include those changes too (such as small business status, debarment . . . etc). Contractors will also include vendor quotes for steel from the original pricing submitted in October and vendor quotes for the Best and finals submitted by 27 January at 2:00 PST. The final day to submit questions is 24 January at 4:00 pm PST. Discussions will be held with each contractor that submitted an original proposal. The discussions will be limited to the items in this amendment, all other questions should be submitted in writing to [the source selection board chair], Contracts office.

RFP amend. 9, at 17.

OIW did not protest or otherwise object to the provisions of RFP amendment No. 9; it did not submit any questions to the agency as specifically authorized by that amendment; and it submitted its final revised proposal by the January 27 due date. In its final revised proposal, OIW slightly decreased its price from [deleted] to [deleted]; Appleton slightly increased its price from \$37,286,748 to \$37,720,601.⁴ Because the offerors had not revised anything in their proposals other than price, the agency relied on the same evaluation documentation of non-price factors that it

⁴ Again, the third offeror's price was substantially higher than either OIW's or Appleton's price.

created during the first evaluation. However, because OIW had decreased its price to be slightly lower than Appleton's, the agency performed a cost/technical tradeoff, comparing the advantages reflected by Appleton's higher non-price factor rating with OIW's lower price. The agency concluded that the higher level of confidence that Appleton would perform as promised was worth the slightly higher price ([deleted]) the agency would pay. In performing this tradeoff, the agency referred to precisely the same past performance concerns that it had identified to OIW during the November 4 debriefing--specifically, concerns regarding OIW's [deleted]. On February 28, 2000, the agency again selected Appleton for award. This protest followed.

DISCUSSION

OIW first protests that the agency failed to conduct discussions regarding OIW's evaluated past performance weaknesses. OIW's protest regarding this issue is not timely filed and is not for consideration on the merits.

In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (2000).

Here, as set forth above, the agency specifically advised OIW during the November 4 debriefing of its evaluated past performance weaknesses. Further, the source selection documents show that the weaknesses discussed with OIW at that time were the precise concerns on which the agency relied in performing the relevant cost/technical tradeoff. Amendment No. 9 to the RFP specifically advised offerors that the agency intended to limit discussions to items in the amendment, which did not include past performance--a solicitation provision to which OIW did not object prior to submitting its revised proposal by the established closing date. Accordingly, OIW's post-award protest that the agency failed to conduct discussions regarding its evaluated past performance weaknesses constitutes a protest of an alleged apparent solicitation impropriety which was not timely filed. Id.

OIW also challenges the agency's evaluation and source selection on various other bases, first complaining that the agency's best value determination was improper in that, "[i]n the first evaluation, the government had decided that all three offerors were technically equivalent," and suggesting that the later technical evaluation was revised after receipt of OIW's lower price. Protest at 8. OIW is factually mistaken.

As discussed above, the record contains clear, contemporaneous documentation of the agency's October 1999 evaluation--documentation on which the agency relied for the subsequent best value determination--which indicates that Appleton's proposal was rated higher in the initial evaluation and was not subsequently altered in any way. Accordingly, this portion of OIW's protest fails to state a factually valid basis.

OIW also complains that award to Appleton may have been motivated by the government's desire not to "waste" termination costs, noting that "[u]nder the termination for convenience rules . . . Appleton Marine is entitled to reimbursement for [the] costs that it incurred in preparing to perform the original contract plus any settlement expenses and reasonable profit," and suggesting that the agency was motivated to select Appleton "so that those original [settlement] costs would not be wasted." Protest at 9. In fact, as noted above, Appleton executed a no-cost termination with the agency prior to the issuance of RFP amendment No. 9. Agency Report, Tab 17. Accordingly, OIW's assertions regarding the agency's consideration of termination costs is also without factual basis.

Next, OIW complains that its proposal should have been rated higher than Appleton's with regard to experience and past performance. OIW argues that its experience in developing the prototype ABLT system "could not be matched by anyone--specifically including [Appleton]," and concludes that "any evaluation that rendered Appleton Marine on a level comparable to OIW in experience and past performance is fatally flawed." Protest at 9.

The determination of the relative merits of proposals is primarily a matter of agency discretion. Saco Defense, Inc., B-252066, May 20, 1993, 93-1 CPD ¶ 395 at 5. In reviewing a challenge to an agency's technical evaluation, we examine the record to ensure that the evaluation is reasonable and consistent with the stated evaluation criteria. Id. A protester's mere disagreement with the agency's judgment does not render that judgment unreasonable. Id.

We have reviewed the agency evaluation record regarding the aspects of the evaluation about which OIW complains and conclude that OIW's assertions represent mere disagreements with the agency regarding the agency's evaluation of proposals. Accordingly, we find this portion of OIW's protest without merit.

Finally, OIW complains that the agency's evaluation of OIW's past performance violated the provisions of Federal Acquisition Regulation (FAR) Subpart 42.15-- which establishes policies and procedures for recording and maintaining contractor performance information--because of a provision directing that past performance information subject to the regulation not be retained for longer than 3 years following contract completion. FAR § 42.1503(e). Specifically, OIW complains that two of the contracts which the agency considered in evaluating OIW's past performance were completed more than 3 years prior to the agency's source selection decision.

To the extent OIW is asserting that FAR § 42.1503(e) establishes a blanket prohibition precluding source selection officials from considering any past performance information for contracts completed more than 3 years prior to the source selection, we decline to reach this conclusion. In this regard, FAR Part 15--

the portion of the FAR which establishes source selection policies and procedures applicable to negotiated procurements--does not establish any such requirement. Rather, in the portion of the regulation specifically addressing an agency's evaluation of past performance information, FAR Part 15 provides that "[t]he currency and relevance of [past performance] information, source of the information, context of the data, and general trends in contractor's performance shall be considered." FAR § 15.305(a)(2)(i). More specifically, FAR Part 15 states:

The solicitation shall describe the approach for evaluating past performance . . . and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement. . . . The Government shall consider this information

FAR §15.305(a)(2)(ii). See also Advanced Data Concepts, Inc. v. United States, 43 Fed. Cl. 410, 421 (1999) (recognition of distinction between past performance data generated pursuant to FAR Subpart 42.15 and past performance data submitted by an offeror pursuant to FAR Part 15).

Here, as noted above, the solicitation required offerors to submit references "who will provide information about the quality of your past performance." RFP § L.2. The RFP also advised offerors to "[m]ake sure that your reference information is up to date." Id. Relying on the information OIW submitted, the agency contacted the listed references regarding the identified contracts. OIW now complains because one of the contracts it identified in its proposal had been completed approximately 3½ years earlier and another had been completed approximately 4½ years earlier.

We find no merit in this portion of OIW's protest. Consistent with the provisions of FAR § 15.305(a)(2)(ii), the agency sought past performance information from OIW--then complied with the FAR requirement that "[t]he Government shall consider this information." On this record, we do not question the agency's consideration of OIW's performance on contracts completed approximately 3½ and 4½ years prior to the source selection.

The protest is denied.

Comptroller General
of the United States