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**Comptroller General
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Washington, DC 20548**

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Decision

Matter of: MCR Engineering Company, Inc.

File: B-287164; B-287164.2

Date: April 26, 2001

Daniel J. Kelly, Esq., and Lisa K. Miller, Esq., Gadsby Hannah, for the protester. Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Adduci, Mastriani & Schaumberg, for Rolls Royce Naval Marine, Inc., an intervenor. Vera Meza, Esq., and Arthur M. Boley, Esq., Department of the Army, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's challenge to the evaluation of past performance and experience in a competition where several of the awardee's former key employees are now employed by the protester and where those personnel, at least in part, may have had a role in the awardee's favorable past performance, is denied where the record shows that the agency reasonably: (1) credited the protester for the favorable past performance of its key employees (achieved while they were employed by the awardee), but nonetheless recognized that the protester, as a company, has not previously manufactured this item, and does not have production employees with this experience; and (2) considered downgrading the awardee's excellent past performance rating due to the loss of its key personnel, but left the rating intact based on a recognition that the company has continued to successfully perform despite the loss of its former key employees, and is doing so with production employees and a facility that has performed well in the past.

DECISION

MCR Engineering Company, Inc. protests the award of a contract to Bird-Johnson Company by the Department of the Army, pursuant to request for proposals (RFP) No. DAAE07-00-R-T110, for corner and intermediate hydraulic actuators for the

M-9 Armored Combat Earthmover (ACE) vehicle.¹ MCR argues that the agency improperly evaluated proposals in the areas of past performance, experience and small business utilization, and thus, wrongly concluded that Bird-Johnson's higher-priced proposal represented the best value to the government.

We deny the protest.

BACKGROUND

The M-9 ACE vehicle, procured by the Army's Tank-Automotive and Armaments Command (TACOM) in Warren, Michigan, is a fully-tracked and armored earthmover used to support ground forces. Among other things, the vehicle can be used to breach berms, remove roadblocks, and prepare anti-tank ditches, combat roads and access routes at water obstacles. The actuators being purchased here are the principal component of the M-9's hydraulic suspension system, and each vehicle is equipped with four corner and four intermediate actuators. As these actuators rotate they allow the vehicle's wheels to move up and down over uneven terrain, and they force fluid into accumulators, which act as shock absorbers for the vehicle. Contracting Officer's (CO) Statement, Feb. 22, 2001, at 2.

There is no dispute in this record that the manufacture and assembly of these hydraulic actuators require very tight machining tolerances, and a special bench test involving 25 separate performance tests. There is also no dispute that producing these actuators presents a significant challenge for new sources, and that past attempts at awarding contracts to new manufacturers have met with numerous problems.

For many years, the Bird-Johnson Company, in Walpole, Massachusetts, has been a source for these actuators, both as a prime contractor and as a subcontractor for the manufacturer of the M-9 vehicle. Over a 5-year period prior to the issuance of this solicitation, four individuals previously employed by Bird-Johnson--at least three of whom appear to have been significantly involved in the M-9 actuator effort--left the company to join MCR Engineering Co., Inc., in nearby North Attleboro, Massachusetts. MCR has not previously been a source for actuators, but has instead

¹Although the proposal and evaluation materials refer to the Bird-Johnson Company, the successful proposal here was, in fact, submitted by Vickers Ulstein Marine Systems Bird-Johnson Company. In December 1999, Vickers Ulstein was acquired by Rolls-Royce. After award of this contract, Bird-Johnson's name was changed to Rolls-Royce Naval Marine Inc., thus that company is the intervenor here. For consistency with the evaluation materials, we will refer to the awardee as Bird-Johnson.

provided engineering support for marine propulsion systems.² These individuals who left Bird-Johnson now serve as MCR's president, product manager and engineer, quality assurance manager, and M-9 assembly superintendent. Id.; AR, Tab 20, Letter from MCR to TACOM, Mar. 29, 2001. This migration of experienced employees from an existing source to an aspiring one is the backdrop for the evaluation discussion below.

The RFP here was issued on December 3, 1999, and anticipated award of a 5-year, indefinite-quantity contract for corner and intermediate actuators. The RFP advised offerors that award would be based on consideration of two factors, past performance and price, with past performance slightly more important than price. Id. at 74. Within the past performance factor, the RFP identified three elements: past performance, experience, and small business utilization. Id. at 3. Among these three, the RFP advised that past performance and experience would be significantly more important than small business utilization. Id. at 74.

Under the past performance element, offerors were asked to provide information on relevant contracts with some portion of performance occurring within 3 years of the date the solicitation was issued.³ There were several other instructions and requests for information relevant to this portion of the review. Specifically, the RFP requested that offerors identify any contracts that were terminated or cancelled

²Specifically, MCR's proposal explains that the company "was founded in 1988 to provide engineering service support on marine propulsion plant systems, emphasizing the strong background of the founders in hydraulically actuated controllable pitch propellers and thrusters." Agency Report (AR), Tab 6, MCR Proposal, at 1. Since its founding, MCR explains, it has expanded its capabilities to include other marine and industrial products.

³A feature of the solicitation here is that the RFP does not identify any of the criteria that will be used in the evaluation of the three past performance elements. Instead, the solicitation identifies in section L the kinds of information that should be included in the proposal so that these elements can be evaluated. Throughout these pleadings, the protester, the Army, and the awardee point to the information requested in section L, and infer that these are the criteria to be used in evaluating each element of the past performance factor. While the better practice would have been for the agency to specifically identify in the RFP (in section M, for example) the evaluation criteria for these elements, we will adopt the inference of the parties and assume that the information requested in section L under each of the three elements of past performance (past performance, experience, and small business utilization) also outlines the evaluation criteria for that element. We note for the record that the Source Selection Plan for this procurement is generally consistent with the inference drawn by the parties, and adopted by our Office; however, the Source Selection Plan was not distributed outside the government, and thus could not have been the basis for the offerors' understanding of the evaluation criteria here.

(§ L.28.1.3); identify if any listed contracts were performed by a different corporate entity, or prior to a relocation of the company, or prior to a change in ownership, and describe any changes in personnel, facilities, or equipment resulting from these changes (§ L.28.1.4); identify (if the company has no recent or relevant past performance) any key personnel who may have gained experience via their roles with a previous employer (§ L.28.1.5); and identify (if all relevant and recent past performance was as part of a predecessor company) the contracts, key personnel, etc., of that predecessor company (§ L.28.1.6).

Under the experience element, the solicitation requested information not traditionally related to offeror experience. Given the above-described inference that the information requested in section L of the solicitation represents the evaluation considerations, the experience element addressed technical experience, whether the offered actuator complies with the specification, and the extent of any modifications to be made to the offeror's existing products and production processes. To avoid confusion, the RFP's direction in this area is quoted below:

L.28.3.1. Experience as used in this solicitation will describe your technical involvement in providing M9 ACE hydraulic actuators or an equivalent. Describe the degree to which your hydraulic actuators, to the extent it currently exists [sic], meets the TDP requirements for the M9 ACE system.

L.28.3.2. Identify any or all modifications you will need to make to your existing actuators to meet the M9 ACE Hydraulic Actuators Technical Data requirements.

L.28.3.3. Describe how your proposed actuator is interoperable and interchang[e]able with the existing M9 ACE Army inventory in the field. Describe the considerations given to the interaction and compatibility between components.

L.28.3.4. Describe your current production capacity for hydraulic actuators. Describe any modification to your existing production lines which would be necessary to produce the planned monthly quantities for the M9 ACE Hydraulic Actuator, Corner and intermediate or equivalent under this contract.

RFP at 71. Under the small business utilization element, the RFP requested information on the offeror's plans and policies for subcontracting with small businesses, small disadvantaged businesses, women-owned small businesses, and historically black colleges and universities or minority institutions. Id. Finally, the RFP advised that prices would be evaluated by multiplying each offeror's unit price by the estimated quantity for each year of performance, and adding the results. Id. at 73.

By the closing date here, the Army received proposals from four offerors, one of whom later withdrew from the competition. After reviewing the proposed prices, the Army began its evaluation of past performance and noticed that all of the contracts identified for review in MCR's proposal were, in fact, Bird-Johnson contracts. Thus, the evaluators asked MCR to identify some contracts of its own for review. MCR complied with the request, while explaining that most of its key people previously worked for Bird-Johnson, so that Bird-Johnson's past performance providing actuators should be credited to MCR.

After completion of an initial review, the contracting officer prepared an evaluation and decision document selecting Bird-Johnson for award, and submitted this document to the selection authority on June 19, 2000. On the following day, the selection authority, TACOM's Deputy Director of Acquisition, rejected the proposed award decision and initiated a process of review and revision that extended until early October. In short, the initial document was broken into two separate documents--an evaluation document and an award decision document--both of which were rewritten, submitted for review, and rejected two more times. CO's Statement at 9-10. During this process, the analysis in these documents was expanded and tailored to more closely address the requirements of the RFP. In addition, the evaluation ratings of MCR, Bird-Johnson, and a third offeror were changed several times, based on feedback provided by the selection authority.

After the selection authority rejected the evaluation and decision documents a third time, he drafted alternate award documents--one supporting award to MCR; the other supporting award to Bird-Johnson--and submitted them for review to the contracting officer and other TACOM personnel. AR Tabs 37, 39. After receiving comments on the draft award documents, the selection authority chose Bird-Johnson for award on October 5.

The decision that the proposal submitted by Bird-Johnson represented the best value to the government was based on the following evaluation results and prices:

OFFEROR	PAST PERFORMANCE	EXPERIENCE	SMALL BUS. UTIL.	PRICE
MCR	Good	Adequate	Good	\$9.45 million
Bird-Johnson	Excellent	Excellent	Good	\$10.01 million

AR, Tab 39, at 2-3.⁴ Specifically, the agency concluded that Bird-Johnson's lower risk in the past performance area and superior overall experience was worth its 5.9 percent price premium, and that award to Bird-Johnson was consistent with the evaluation scheme's rating of the past performance factor as slightly more important than price. In addition, the agency noted that the potential cost of delays in performance could exceed the price premium between the two offerors. Id. at 6. This protest followed.

DISCUSSION

MCR raises detailed challenges to the agency's assessment of its and Bird-Johnson's proposals under each of the three elements of the past performance evaluation factor--past performance, experience, and small business utilization. Many of MCR's challenges repeat two closely-related themes. First, MCR argues that it should be credited with the favorable past performance of Bird-Johnson, and Bird-Johnson should not receive credit for past performance that may have been due, at least in part, to individuals who have since moved to MCR. In addition, and related to the first issue, MCR argues that the evaluation of the past performance element was flawed because of the contracts the agency considered for each company, and the conclusions the agency reached about those contracts.

Our standard in reviewing evaluation challenges like these is to examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. While we have not addressed below every contention raised by MCR in its protest, all of the contentions have been reviewed, and, for the reasons set forth below, we find the evaluation conclusions were reasonable.

As a preliminary matter, we address first the general contention, found throughout MCR's pleadings, that the record here demonstrates that TACOM officials were looking for a way not to award this contract to MCR; an allegation, essentially, of bad faith. In our view, this record--albeit problematic in several areas discussed below--shows nothing of the sort. Instead, with each revision of the evaluation and award documents prepared at the direction of the selection authority, the underlying materials more frankly address the issue of how to assess MCR's past performance and experience given the fact that several of Bird-Johnson's key employees are now employed by MCR. Compare AR, Tab 27, at 3 with AR, Tab 28, at 2-4 and with AR, Tab 35, at 2-4. In addition, MCR's ratings were increased at every step in this

⁴While there was also a third offeror in this competition, its proposal was priced higher, and rated lower, than either MCR's or Bird-Johnson's proposal. Thus, there was no reason for the Army to select it over the two proposals discussed above.

process. Compare AR, Tab 27, at 10 with AR, Tab 29, at 4 and with AR, Tab 36, at 4. Put simply, these are not the actions of an agency seeking to deprive MCR of award.

MCR's first theme, raised with respect to the evaluation of both its and Bird-Johnson's proposals under the past performance element, is that the agency failed to give credit to MCR for its key people, and failed to deduct credit from Bird-Johnson for people who had departed. On this subject, the final version of the evaluation document expressly considers that MCR has "a number of key personnel who have substantial recent and relevant performance" as a result of their prior employment with Bird-Johnson. AR, Tab 38, at 3. The evaluation then addresses Bird-Johnson's excellent performance (both from a technical and timely delivery standpoint) under contracts that fall within the 3-year time requirement of the RFP, and recognizes that this performance was due, at least in part, to some of the people who are now employed by MCR. Given this view of the role current MCR employees played in the favorable past performance of Bird-Johnson, the evaluation concludes that there is little risk that MCR will fail to successfully perform. Id. at 3-4. On the other hand, the evaluation also recognizes that Bird-Johnson's contracts were not performed in MCR's facility, or with MCR production employees, and thus concludes that assigning MCR a rating of "good" under the past performance evaluation element is appropriate (and that no higher rating is warranted). Id. While MCR disagrees with this assessment, it cannot claim that the Army failed to consider these issues, and it makes no showing that these conclusions are unreasonable.

Conversely, the record shows that the Army considered the effect on Bird-Johnson's past performance rating of the loss of personnel to MCR. In the first and second versions of the evaluation documents, the contracting officer expressly acknowledges that "Bird-Johnson's loss of key personnel to MCR might be of concern were it not for the fact that Bird-Johnson has been successfully producing the actuators today even though those personnel are no longer with Bird-Johnson." AR, Tab 27, at 6; Tab 28, at 6. Thus, these versions of the evaluation concluded that any concern about the departure of these key employees was mitigated by the fact that the company continued to successfully perform. While the language quoted above, admittedly, is not found in the final version of the evaluation document, the final evaluation still contains the consideration of the mitigating fact (the accuracy of which is discussed in greater detail below) that Bird-Johnson is continuing to provide actuators on time for TACOM. In addition, the final decision document (as opposed to the final evaluation document) recognizes that Bird-Johnson has continued to provide actuators as both a prime contractor and subcontractor, and notes that deliveries have generally been on time or ahead of schedule, with the exception of certain minor deficiencies. In our view, these materials do not support a conclusion that the Army failed to recognize that the loss of certain Bird-Johnson key personnel made successful performance here less likely.

The second theme--and one closely related to the first--is MCR's contention that the evaluation of the past performance element was flawed because the agency

considered contracts it should not have, and reached improper conclusions about the contracts it considered, including overlooking recent late deliveries by Bird-Johnson. In this regard, MCR argues that one of the contracts that formed the basis of Bird-Johnson's past performance review was completed prior to the departure of Bird-Johnson's key personnel to MCR, and thus should not be considered predictive of Bird-Johnson's ability to perform the effort here. MCR argues that the two other Bird-Johnson contracts were performed late, and thus cannot properly support a past performance rating of "excellent." In addition, MCR contends that the agency reached unreasonable conclusions about MCR's own contracts offered for review under this element.

The record here shows that there were three Bird-Johnson contracts related to actuators within the 3 years prior to the issuance of this RFP, but that only two of those contracts were formally considered in the evaluation of Bird-Johnson's past performance. Additional background on these contracts is set forth below.

The contract not formally reviewed was Bird-Johnson's contract to rebuild and refurbish existing actuators. MCR correctly points out that deliveries under this contract were received late. According to the contracting officer, these late deliveries were caused by government delay in providing the actuators to be rebuilt/refurbished, government delay in authorizing and funding Bird-Johnson after receiving from the company an explanation of the effort required to rebuild or refurbish each batch of actuators, and orders that significantly exceeded the contract's estimated annual ordering levels. CO's Statement at 16-17. The contracting officer explained that this overhaul contract did not appear as part of the formal past performance review because it was for services, not supplies, and thus did not get included initially. Nonetheless, the contracting officer was aware of this contract, and mentioned it in her evaluation of Bird-Johnson. Id. at 16. In the contracting officer's view, this contract is neither relevant to this procurement, nor a predictor of future success, because it was for rebuilding/refurbishing actuators, rather than manufacturing and assembling them, and because the delays were caused by the government. Id. at 17.

The other two contracts, both formally reviewed, involve manufacture and assembly of new actuators—one requires delivery to the manufacturer of the M-9 vehicle, the other was an emergency purchase of 44 actuators requiring delivery directly to TACOM. Under the contract for delivery to the M-9 manufacturer, the record shows that six incremental deliveries were required, and all six deliveries were early, with an average acceleration of 36 days. Id. at 16. This is the contract that MCR argues should not be credited to Bird-Johnson because it was largely performed prior to the departure for MCR of at least a portion of the company's key personnel.

Under the contract for the emergency purchase of 44 actuators, there were late deliveries, as explained below. The emergency purchase contract was awarded to Bird-Johnson on February 1, 2000, approximately 2 weeks after the company

submitted its proposal for this procurement. There was no mention of any late deliveries under this contract in the early (and rejected) versions of the evaluation and selection documents because the emergency purchase contract had not yet reached its delivery date. After the third rejection of the evaluation and decision documents by the selection authority, the agency undertook a new, and more formal assessment of each offeror's past performance by a TACOM industrial specialist. AR, Tabs 31-33. According to this review, dated August 14, the delivery date for the emergency purchase contract was August 2, and TACOM had been advised that 22 of the actuators would be delivered approximately 2 weeks late. Id.; AR Tab 32. Although the contracting officer made note of this 2-week delinquency in subsequent evaluation materials, she states that she did not consider the delinquency serious, and concedes that she did not later check to confirm when the items were received, despite receiving a letter from MCR on August 24 again bringing Bird-Johnson's late deliveries to her attention. CO's Statement at 16. Ultimately, the record shows that these actuators were delivered on October 10, 84 days late. Id.

Our review of these facts leads us to conclude, first, that there was nothing unreasonable in the contracting officer's decision to include within her review, and give credit to Bird-Johnson for, Bird-Johnson's contract to provide actuators to the manufacturer of the M-9 vehicle, which was performed on an accelerated basis. Although the record supports MCR's contention that much of this contract was performed while MCR's key employees were still employed by Bird-Johnson, this issue was considered by the agency as part of its review of the effect of the change in key personnel. As indicated in our discussion of that issue above, MCR was given credit for now having on board the very people who may have contributed to Bird-Johnson's favorable past performance. Even so (and just as with the discussion above), this does not necessarily translate to giving no credit to Bird-Johnson for its past performance on this contract, given that this is prior performance by the same company, in the same facility, with the same production (as opposed to key) personnel. Secondly, we see nothing unreasonable about the decision to ignore Bird-Johnson's late deliveries related to the contract for the overhaul of the actuators. As the contracting officer indicated, it appears that these deliveries were late because of delays caused by the government, not by Bird-Johnson.

With respect to the emergency purchase contract, we note that although MCR is again correct about the matter of late deliveries, there is no evidence in the record of anything other than cooperation by Bird-Johnson with TACOM in resolving problems related to the deliveries under this contract. While clearly it would have been preferable for the contracting officer to have been more diligent in following up on the issue of late deliveries, especially given the passage of time between the August 14 past performance review identifying the delinquency and the October 5 award date, the record here shows the contracting officer was involved in a significant ongoing effort to complete this procurement. Given the overall effort, we cannot say that the generally thoughtful considerations here were rendered unreasonable by the failure to make further inquiry on this matter. In addition, we

note that this delinquency by Bird-Johnson appears to have been an aberration, and the company kept the Army advised of its efforts to resolve the problem.⁵

Also within this area of prior contracts, we find nothing unreasonable in the agency's conclusion that MCR's own prior contracts were generally not relevant to its ability to perform the contract here. All of MCR's identified contracts were considerably smaller than the multi-million dollar effort here, and none involved producing this item. Rather, MCR sought credit for the manufacture of items involving analogous skills and technology. In addition, MCR's initial approach of identifying the prior contracts of Bird-Johnson for its own past performance assessment—which in the context of this procurement makes sense—provides evidence that MCR itself viewed the Bird-Johnson contracts as more relevant to this evaluation than any it could offer.

As a final matter within the agency's assessment of the past performance element, we find no basis for concluding that the evaluation was unreasonable because the agency apparently overlooked changes in Bird-Johnson's corporate ownership between the time of at least some of the performance under prior contracts, and the evaluation here. For the record, we note that MCR has made no attempt to show that future performance by Bird-Johnson might be affected by Rolls Royce's purchase of Vickers Ultstein stock, which occurred approximately 1 month before proposals were submitted. Also, there is no evidence in the record that Bird-Johnson has relocated its actuator manufacture and assembly facility. Rather, the record shows that other activities were consolidated into the same Walpole facility where Bird-Johnson has manufactured and assembled actuators for years.

The remainder of the challenges raised by MCR fall into two areas—that it should have received a higher rating, and Bird-Johnson a lower rating, under the experience element, and that the agency improperly failed to distinguish between the two offerors under the small business utilization elements of the solicitation. We have reviewed each of these contentions and conclude that none of them provides a basis for overturning this procurement. We will, however, discuss two significant examples.

⁵For the record, all three of these contracts fell within the RFP's requirement limiting the agency's consideration of past performance to performance that occurred within 3 years of the issuance of the solicitation. Despite MCR's contention that Bird-Johnson's rating of excellent is improperly drawn from the agency's experience with the company outside the 3-year limit, none of the evaluation materials relies upon contracts that fall outside the RFP's limit. In addition, as discussed above, we find that the evaluation conclusions reached regarding Bird-Johnson's past performance on contracts within the 3-year period were reasonable.

MCR complains that the Army should have given it a high experience rating for its key employees, and instead improperly considered its understanding of the RFP's requirements under the experience element of the past performance evaluation factor. MCR argues that understanding of the RFP's requirements is a consideration that must be reserved for a technical evaluation criterion, which was not included in this solicitation.

While we agree that a review of technical capability is generally not considered in an evaluation of offeror experience, the solicitation here anticipated precisely such a review. As quoted above, the solicitation's instructions for addressing the experience element required information on how the offered actuators would meet the technical data requirements, and a description of any necessary modification to existing production lines to meet the requirements of this contract. RFP at 71. Given that MCR has clearly adopted the view that section L of the RFP here identified the evaluation criteria for this solicitation,⁶ and given MCR's failure to challenge the solicitation prior to the closing date set for receipt of proposals, the Army did nothing unfair or unreasonable when it conducted the evaluation in the manner the solicitation advised.

Finally, MCR complains that the Army unreasonably failed to distinguish between its proposal and that of Bird-Johnson under the element of small business utilization. In this area, the record shows that because MCR is itself a small business, and because it uses mostly small business subcontractors, more than 93 percent of the contract dollars paid to MCR will go to small businesses. CO's Statement at 12. The record shows that Bird-Johnson expects to achieve a 55 percent small business utilization rate. Id. The evaluation gave both offerors a rating of "good" in this area.

The agency explains that since both offerors proposed a plan to exceed the agency's small business subcontracting goals, and since both plans were realistic, it based its evaluation conclusion on the realism of the plans, not a numerical comparison of the

⁶That MCR adopted this view is established throughout its protest. For example, MCR complains that the agency waived the requirements of RFP § L.28.1.4, which requested submission of information identifying whether contracts offered for evaluation under the past performance element were performed by a different corporate entity. Supplemental Comments, Apr. 11, at 8. Clearly MCR is inferring that this request for information stands in proxy for an evaluation criterion. Similarly, MCR contends that the agency was required by RFP § L.28.1.5 to consider Bird-Johnson's key personnel in evaluating that company's past performance. Id. at 8.

amount of small business contracting. In our view, there was nothing unreasonable about this assessment, and this issue provides no basis for overturning this procurement.

The protest is denied.

Anthony H. Gamboa
General Counsel