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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Eagle-Picher Technologies, LLC

File: B-289093; B-289093.2

Date: December 27, 2001

Joseph P. Hornyak, Esq., Sonnenschein Nath & Rosenthal, for the protester.
D. Susan Spiegelman-Boyd, Esq., Department of the Navy, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protester was not entitled to higher rating than awardee for experience simply because protester previously had furnished the battery requested by the solicitation and awardee has not, where protester's experience was not recent and procuring agency reasonably found that both protester and awardee had recent experience producing similar batteries.
2. Past performance evaluation was not inequitable based on fact that agency was able to obtain information from government sources concerning awardee's delinquencies under prior contracts, but had to ask protester itself to explain its delinquencies because agency personnel did not have the contract numbers necessary to obtain the information from government sources; although result was additional burden on protester, key consideration is that protester had a meaningful opportunity to respond to agency's concerns.
3. Awardee did not improperly qualify its proposed price by reserving the right to separately cost certain work, where that work was not within the scope of the solicitation.

DECISION

Eagle-Picher Technologies, LLC protests the award of a contract to Yardney Technical Products, Inc. under request for proposals (RFP) No. N00164-01-R-0068, issued by the Department of the Navy, Naval Surface Warfare Center, for replacement silver/zinc batteries for the Minuteman Missile. Eagle principally argues that the Navy misevaluated its past performance, and failed to hold meaningful discussions with it.

We deny the protest.

The solicitation requested 20 first article silver/zinc batteries, with two options of 40 each production batteries, and associated documentation. The batteries must meet Navy specifications and drawings for the SE-13G battery, which currently is used in the Minuteman to power the stage 1 flight control hydraulics. Agency Report (AR) at 3. The solicitation provided for a “best value” award based on an evaluation of past performance and price, which were of equal weight.¹ The RFP contained two past performance subfactors: 1(a) experience in manufacturing primary, remotely activated silver/zinc batteries, and 1(b) the contractor’s record of meeting delivery schedules.

Three proposals were received, two of which, Eagle’s and Yardney’s, were included in the competitive range. Following discussions with Eagle and Yardney and receipt and evaluation of final proposal revisions (FPR), Yardney’s proposal was rated overall highly favorable for past performance, while Eagle’s was rated favorable. Eagle’s offered price was [DELETED] lower than Yardney’s. AR at 19. In its best value analysis, the agency determined that Yardney’s more favorable past performance rating was worth its additional cost, and therefore made award to Yardney. This protest followed.

EXPERIENCE

Under past performance subfactor 1(a), the Navy was to consider the offerors’:

experience in the manufacturing of primary, remotely activated silver oxide/zinc batteries. The more recent the experience and the more similarities to the battery defined in this solicitation, the more weight will be given.

RFP at 39. In its evaluation, the Navy concluded that both Yardney and Eagle had manufactured remotely activated silver/zinc batteries, and thus rated both firms highly favorable for the subfactor.² AR at 8, 12. Eagle disagrees with these ratings. Noting that the solicitation provided that more weight would be given to more similar experience, Eagle asserts that its rating should be higher

¹ The solicitation also provided for the evaluation of the small business subcontracting plan, a nonweighted factor.

² While the record does not provide separate ratings for the two subfactors, it is clear from the past performance evaluation that both offerors were considered highly acceptable under subfactor 1(a). See Past Performance Evaluation at 253 and 254; Business Clearance Memorandum at 250.

than Yardney's, since it is the previous supplier of the SE-13G battery, while Yardney has never produced this battery.

The evaluation of past performance is a matter within the discretion of the contracting agency. NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 13. In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead, will consider whether the evaluation was reasonable and consistent with the solicitation. Id.

The evaluation here was reasonable. While the agency found that Eagle had experience with a similar battery, it also found that the experience was not recent, since Eagle has not produced the battery since 1990. While the agency further found that Eagle has recent experience producing other silver/zinc batteries, the agency reports, and Eagle does not dispute, that in most cases these batteries have been based on a [DELETED] design for electrolyte delivery, which is different from the design for the SE-13G. Supplemental Agency Report (SAR) at 7. In contrast, while Yardney has not produced the SE-13G battery, the agency found that Yardney has substantial recent experience producing silver/zinc batteries based on a [DELETED] for electrolyte delivery, the same design as the SE-13G.³ Id. Given that Eagle's experience was more similar to the current requirement than Yardney's, but not recent, and that Yardney's was less similar but more recent, the agency's conclusion that the offerors merited the same rating for the subfactor was reasonable.

ON-TIME DELIVERY

Under past performance subfactor 1(b), the solicitation provided that "[p]ast performance will consider the contractor's record of meeting delivery schedules." RFP at 40. The solicitation further provided, at 41, with respect to past performance that

each offeror is required to submit a list of up to five of its most recent contracts within the past three years, either completed or on-going, for the same or similar products. . . . The Source Selection Authority

³ Eagle asserts that the contemporaneous evaluation record does not state that the silver/zinc batteries produced by Yardney were similar to the SE-13G because they used the same electrolyte delivery design, and that this aspect of the agency's rationale therefore is a post hoc rationalization that should carry little or no weight. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. We do not agree. Since the contemporaneous record does show that the agency considered Yardney's silver/zinc battery contract experience to be similar to the current requirement, the agency's stating in response to the protest that this finding was based on the design constitutes merely an explanation of its evaluation conclusions, rather than a new rationale.

(SSA)/Contracting Officer will evaluate the offeror's past performance based upon the information furnished by the offeror and/or other information obtained by the Contracting Officer. The Contracting Officer is not responsible for locating or securing any information not furnished with the offer.

In evaluating offerors' proposals under subfactor (1)(b), the agency looked at three types of information--the references provided by the offerors in their proposals, the offerors' performance on contracts that were administered locally by the contracting agency (NSWC-Crane), and contracts administered by the Defense Contract Management Agency (DCMA). AR at 9.

The protester takes issue with the agency's actions in connection with its consideration of contracts administered by DCMA. For Yardney, the agency contacted the DCMA-Hartford Office that has oversight responsibility for Yardney. AR at 9. DCMA-Hartford retrieved data from the Mechanization of Contract Administration System (MOCAS) database; this database is used by all DCMA offices to provide information about DCMA-administered contracts and any delinquencies under those contracts. *Id.* at 9-10. DCMA reported to the agency that performance was delinquent on [DELETED] of the 19 contracts Yardney performed. The agency investigated the reasons for these delays by contacting the cognizant DCMA industrial specialist and DCMA contract administrator, and learned that most of the delays resulted from some government action, and that none of the delays was completely contractor caused. *Id.* at 10-11. Based on this information, Yardney was rated overall highly satisfactory for past performance.

Regarding the protester, the Navy contacted the DCMA-Wichita Office that administers Eagle's contracts. AR at 13. As DCMA-Hartford had done, DCMA-Wichita accessed the MOCAS database. However, the information was received in a format different from that provided for Yardney, in that it was reported as a percentage of timely deliveries per month rather than the number of delinquent contracts, and did not include contract numbers.⁴ *Id.* The data showed that for a 12-month period Eagle's deliveries were on-time between [DELETED] and [DELETED] percent of the time, and that they were [DELETED] percent timely for only [DELETED] month. *Id.* at 13, 14. The Navy asked Eagle to rebut the negative past performance information for both the DCMA and locally administered contracts. Eagle initially requested that the Navy provide the contract numbers for

⁴ This resulted because the person who generally accessed the MOCAS database in Wichita was away at the time, and his temporary replacement was unfamiliar with how to retrieve data from the database. During the course of the protest, when the permanent employee returned, the information regarding Eagle's past performance was provided to Eagle and our office in the same format that it was provided for Yardney.

the DCMA delinquencies, but both the Navy and DCMA advised Eagle that this information was not available. Subsequently, Eagle provided information on four DCMA-administered battery contracts, explaining that the delinquency in one case was the fault of the government and, in the others, resulted from either a technical difficulty or a test anomaly. AR at 17-18. After reviewing this information, the agency concluded that Eagle had problems meeting delivery schedules, and rated Eagle favorable for past performance. AR at 18.

Eagle protests that the Navy treated it and Yardney differently in assessing on-time deliveries. Specifically, Eagle complains that the Navy went beyond the number of delinquencies for Yardney to qualitatively assess the reasons for the delinquencies. In contrast, Eagle complains, the Navy simply relied on the quantitative percentages of monthly delinquencies in evaluating its past performance.

This argument is without merit. As discussed, the agency's evaluation began with a quantitative analysis of each offeror's past performance. While the information assessed was in different formats for Eagle (percentages of delinquencies) and Yardney (total number of delinquent contracts), the information for both firms indicated the timelines of their past performance, the very thing the RFP stated would be evaluated under subfactor 1(b). Subsequently, and contrary to Eagle's position, the Navy performed a qualitative analysis of both offerors' past performance by looking beyond the numbers to determine the reasons for the delinquencies. We conclude that the agency assessed the two firms' past performance in the same manner.

Eagle maintains that the agency's failure to provide it with the contract numbers where delinquencies occurred, as it did for Yardney, was unfair and deprived it of an adequate opportunity to rebut the negative past performance information. We agree that a greater burden was imposed on Eagle than Yardney due to the agency's inability to furnish it with the contract numbers. However, the record shows that this occurred, not due to favoritism, but because the agency did not have the contract numbers available. In any case, this inequity did not prejudice Eagle in the evaluation. In this regard, despite its alleged difficulty in responding to the agency's request during discussions, Eagle was able to identify and provide explanations for four battery contracts on which its performance was deficient. AR at 18. For three of those contracts, Eagle attributed the delivery delays to causes that the agency viewed as tied to the firm's own actions rather than to the government's. Eagle has not shown that the agency unreasonably viewed the firm as responsible for those delays. Further, after the protest was filed, the agency provided Eagle with the contract numbers for 12 DCMA-administered contracts listed as delinquent in the MOCAS database, and an opportunity to explain those delinquencies. In responding to this information, Eagle identified [DELETED] of the 12 as silver/zinc battery contracts; [DELETED] of the [DELETED] were the contracts the delinquencies under which it had attributed during discussions to what the agency viewed as the firm's own actions. Of the remaining two contracts, DCMA, in fact, did not consider one to be delinquent, and Eagle acknowledged the late delivery, without explanation,

for the other. SAR at 10-11. We conclude that, even had Eagle been provided with the contract numbers during discussions, there is no basis for finding that Eagle might have explained the deficiencies in a way that would have resulted in a higher rating for past performance. Charleston Marine Containers, Inc., B-283393, Nov. 8, 1999, 99-2 CPD ¶ 84 at 6.

YARDNEY'S PROPOSAL

Offerors were required to propose a fixed price to perform all work requested by the RFP, including task 1, Establishment of Documentation. Under task 1, the contractor is required to provide documentation for the equipment, tooling, materials and processes used to produce the batteries. RFP at 3-4. This documentation, together with the drawing package provided in the solicitation, would be used to produce the batteries. Following discussions, Yardney submitted an FPR that included the following statement:

As previously discussed in our telcon of Aug. 14th and 16th the battery drawing package may require revision for replacement of obsolete specs and or possible material changes. Any and all of these corrections to the subject drawing package will be addressed during The 'Review of Documentation' (para 3.2.1.5) phase of task 1 of the SOW [Statement of Work]. Yardney Reserves the right to submit separate costing for the update of the documentation (as agreed during the noted telcons) prior to the start of the battery follow-on production option phase of any subsequent contract.

Yardney FPR, Aug. 30, 2001, at 1. Asked by the agency to explain the reservation language, Yardney responded that it was intended to reserve its right to submit a priced Engineering Change Proposal (ECP)⁵ for updating the drawing package. The agency concluded that, since updating the drawing package was not included in the SOW, the statement did not qualify Yardney's proposal.

Eagle argues that the language Yardney included in its FPR reserved to Yardney the right to seek an upward price adjustment to update the drawing package before proceeding to production. In this regard, Eagle does not agree with the agency that updating the drawing package was not included in the SOW. Rather, Eagle believes that an updated drawing package may be necessary to fabricate the production

⁵ An ECP is a request for modification to the contract that must be evaluated by the agency for its impact on the technical requirements, cost and delivery schedule of the contract. A contractor may submit an ECP at any time during performance of the contract, and it can be accepted or rejected by the agency. If it is accepted, the contract will be modified in accordance with the ECP. See Defense Federal Acquisition Regulation Supplement § 243.205-70; RFP § at 15; AR at 32.

quantity required, and that the RFP therefore required the contractor to accept the risk that it would have to update the drawing package at the fixed price it proposed. Eagle concludes that the reservation language qualified Yardney's fixed price and rendered its proposal unacceptable.

The statement in question did not qualify Yardney's proposal. We find nothing in the RFP that requires the contractor to update the drawing package. Rather, the solicitation only requires the contractor "to document the equipment, tooling, materials and processes used to be used to fabricate batteries," and that the batteries then be produced in accordance with the current drawings and the documentation generated. RFP §§ 3.1, 3.2.3.1. This being the case, to the extent the agency may determine that an updated drawing package is required prior to commencement of the production portion of the contract, it will have to obtain the drawing package outside of Yardney's contract (or by modifying that contract). Accordingly, Yardney's reserving the right to separately cost the updating of the drawing package did not qualify its fixed-price offer.

The protest is denied.

Anthony H. Gamboa
General Counsel