



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Gulf Copper Ship Repair, Inc.

File: B-293706.5

Date: September 10, 2004

Robert E. Korroch, Esq., Francis E. Purcell, Jr., Esq., Megan E. Burns, Esq., and K. Lee Westnedge, Esq., Williams Mullen, for the protester.

John R. Tolle, Esq., and William T. Welch, Esq., Barton, Baker, McMahon, Hildebrandt & Tolle, for Anteon Corporation, and Peter B. Jones, Esq., and Brian J. Donovan, Esq., Jones & Donovan, for Southwest Marine, Inc., the intervenors.

Craig L. Kemmerer, Esq., and Rhonda L. Russ, Esq., Department of the Navy, for the agency.

Charles W. Morrow, Esq., John L. Formica, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency acted improperly when, in taking corrective action in response to a prior protest, it conducted discussions only with one of the previously selected awardees, rather than with all offerors whose proposals had been in the competitive range and had been considered by the agency in performing its best value analysis.

DECISION

Gulf Copper Ship Repair, Inc. protests the Department of the Navy's award of separate contracts to Anteon Corporation and Southwest Marine, Inc., under request for proposals (RFP) No. N62678-03-R-0051, for the maintenance and repair of mine countermeasures (MCM) and coastal minehunter (MHC) class ships. Gulf Copper protests, among other things, that the agency improperly favored Anteon when, in taking corrective action in response to a prior protest, it conducted discussions only with Anteon.

We sustain the protest.

BACKGROUND

The RFP provided for the award of two cost-plus-incentive-fee contracts for material, services, and facilities, as required, to perform scheduled maintenance, continuous maintenance and emergent repairs on 14 MCM and 12 MHC class ships

over a 5-year period.¹ Award was to be made to the two offerors whose proposals represented the best value to the government, considering the evaluation factors of technical, past performance, and cost. Proposals were to be evaluated under the technical factor on a pass/fail basis, and under the past performance factor, which was approximately equal to but more important than cost, on a qualitative basis.²

The RFP provided that the past performance factor was comprised of the following four subfactors: technical performance, schedule control, cost control and management. Specifically, offerors' proposals were to be evaluated under the past performance factor to determine the offeror's "expected risk of successfully" performing the contract's technical requirements, meeting the contract's schedule requirements, forecasting, managing and controlling the contract's costs, and managing the contract. RFP at M-3, M-4. Offerors were "encouraged" to furnish "any information regarding its past performance of contracts similar to the Government's requirement that [the offeror] would like the Government to consider," including "information which the offeror considers essential" to the agency's evaluation of proposals under the past performance factor, and "explanatory information of substandard or poor performance and the corrective actions taken to prevent a recurrence." RFP at L-10. The RFP cautioned that the information provided "must be in sufficient detail with points of contact to enable the Government to do an evaluation in accordance with the Past Performance subfactors." RFP at L-10. In addition, the solicitation stated that the "Government intends to review Contractor Performance Assessment Reporting System (CPARS) ratings and other existing past performance ratings on relevant contracts," and "may also review other relevant past performance information" in possession of the contracting agency, other government agencies, and commercial sources. RFP at L-10.

With regard to cost, the RFP provided that the agency would perform a cost-realism analysis of offerors' proposals, to determine the probable cost to the government,

¹ The RFP advised that "[w]ithin any given Government fiscal year, each of the two contract awardees will be entitled to receive forty percent (40%) of the scheduled repair availabilities for which options are actually exercised in that fiscal year." RFP at H-13.

² The RFP stated with regard to the technical factor that to receive a rating of "pass" an offeror must hold, or meet the eligibility requirements to hold, an agreement for boat repair, and have a facility capable of berthing the MCM/MHC vessels. Offerors were informed that a proposal that failed to receive a "pass" rating would not be considered for award. RFP at M-2. With regard to past performance, the source selection plan provided that proposals were to be evaluated as exceptional, very good, satisfactory, marginal, unsatisfactory, or neutral. Source Selection Plan at 11-12.

which would include: a comparison of each “cost proposal to the government estimate to ascertain if proposed costs are reasonable”; a review of “[e]ach category and amount of labor . . . to determine if they are realistic for the work promised in the technical proposal”; and the review of “audit information in determining if indirect costs have been accurately projected in the cost proposal.” RFP at M-4. The solicitation cautioned that a proposal that was unrealistic, unreasonable, or unbalanced could be rejected.

In this regard, offerors were required to complete a schedule comprised of 159 separate line items related to pre-production planning, advance planning, phase-maintenance availability (PMA), drydock phased-maintenance availability (DPMA), and various data requirements and other work “not separately priced.” The solicitation provided that the offerors’ proposed costs for these line items were to be based on two notional work item packages (one for the MCMs and one for the MHCs) provided by the agency, and which consisted of work items related to a typical DPMA, as well as some PMA non-drydocking work items.³ RFP at L-12; Supplemental Agency Report, Aug. 4, 2004, at 2. Offerors were requested to provide man-hour and material estimates for each work item listed in the notional work item packages. Offerors were required to support their proposed costs by: (1) providing detailed cost estimating sheets/information supporting the offeror’s estimates for the work items listed in the notional work item packages; and (2) “fully” explaining the estimating rationale on which the proposal is based and the rationale for proposed direct and indirect rates, including furnishing “[c]urrent forward pricing rate agreement (FPRA) rates,” historical labor, overhead, general and administrative and other proposed rates for the last four corporate fiscal years (plus year-to-date actuals), and an “[e]xplanation, quantification, and location of any significant costs that are included somewhere other than in the appropriate work item.” RFP at L-11, L-12.

The Navy received proposals from Gulf Copper, Anteon, Southwest, and a fourth offeror. After evaluating the initial proposals, the Navy conducted extensive discussions to resolve numerous concerns raised by the past performance and cost evaluations. Among the matters raised by the agency were questions regarding a

³ As explained by the agency, having offerors prepare their cost proposals against a common baseline as reflected in the items in the notional work packages was necessary because the specific maintenance and repair required for any particular vessel were unknown at the time the RFP was issued. Supplemental Agency Report, Aug. 4, 2004, at 2. Offerors were informed “that the Government intends to use the manhours and material as proposed in your notional spreadsheets . . . including appropriate adjustments when necessary, for purposes of determining probable cost to be used in making the award decision.” Agency Letters to Gulf Copper and Anteon, Sept. 25, 2003.

number of “weaknesses” identified by the agency with respect to Anteon’s past performance proposal, as well as numerous issues regarding Anteon’s and Gulf Copper’s proposed costs. At the conclusion of discussions, the agency requested final revised proposals. The revised proposals were evaluated as follows:

	Technical	Past Performance	Probable Cost
Anteon	Pass	Satisfactory	\$58,159,029.44
Southwest	Pass	Very Good	\$59,843,147.81
Offeror Four	Pass	Very Good	\$62,469,582.36
Gulf Copper	Pass	Exceptional	\$64,299,766.14

Memorandum for the Contracting Officer at 16-17.

All proposals having received a “pass” rating for the technical factor, the Navy’s best value analysis, as required by the solicitation, focused on offerors’ past performance and cost. The agency determined that the higher cost of Gulf Copper’s proposal was not “in the best interest of the government to pay,” given that “[b]oth Anteon’s and [Southwest]’s past performance history demonstrate a probability that they will be able to successfully perform the availability at a reasonable cost.” *Id.* at 16-17.

Upon learning of the resulting awards to Anteon and Southwest, and after receiving a debriefing, Gulf Copper filed a protest with our Office. At the debriefing, the agency discussed, among other things, the indirect and direct rates that Gulf Copper incorporated in its cost proposal. Gulf Copper learned that it was the agency’s view that the requirement to include current FPRA rates in explaining the estimating rationale did not bind offerors to use their FPRA rates in their cost proposals.

In the protest, Gulf Copper asserted that Anteon was ineligible for award because of an organizational conflict of interest (OCI), which allegedly had permitted Anteon to unfairly gain access to certain agency information and Gulf Copper proprietary information. In addition, Gulf Copper, based in part upon its view that offerors were not permitted by the RFP to deviate from their FPRA rates in preparing their cost proposals, also challenged the agency’s evaluation of the cost proposals. Specifically, according to the protester, the awardees had improperly deviated from their FPRA rates in preparing their cost proposals, while Gulf Copper, because it believed it was bound by its FPRA rates, proposed its FPRA rates notwithstanding the fact that its overhead rate included quality assurance, safety and other non-required or redundant personnel that were already accounted for as direct costs as required by the solicitation, and the fact that it could have justified an indirect rate for this contract that was lower than its current FPRA rate. The protester further argued here that it was deprived of meaningful discussions, claiming that the agency, during discussions, should have pointed out Gulf Copper’s erroneous belief regarding the use of FPRA rates, and should have, at a minimum, questioned Gulf Copper as to its inclusion of costs for certain personnel as both direct and indirect costs. As for the past performance evaluation, Gulf Copper argued that Anteon’s

“satisfactory” past performance rating was unreasonable, asserting that Anteon’s corporate predecessor, South Texas Ship Repair, had “performed miserably” on two recent Navy ship repair contracts for the USS HERON and the USS OSPREY, both MHC class ships.

The Navy subsequently advised our Office and the parties that “[b]ased on [the Navy’s] investigation of the allegations in the protest, together with [the Navy’s] review of the administrative record in this procurement, the [Navy has] decided to take corrective action to protect the integrity of the procurement process.” Agency Corrective Action Letter, Apr. 12, 2004, at 1-2. The agency explained that it would first investigate the facts and then reach a determination regarding the merits of Gulf Copper’s OCI complaint. The agency advised that “[i]f after fully investigating the facts, the Contracting Officer determines that an OCI exists that likely resulted in an unfair competitive advantage that jeopardizes the integrity of the procurement process,” the Navy’s contract with Anteon would be terminated and a new source selection decision would be made. The Navy further stated that if the Navy determined that Anteon need not be disqualified on account of an OCI, the agency’s past performance evaluation team (PPET) would “reconvene to reevaluate Anteon’s past performance information in light of [Gulf Copper’s] allegations concerning Navy ship repair work performed by Anteon’s subsidiary, South Texas Ship Repair, on the USS HERON and USS OSPREY in 2001.” Id. After being advised of the planned corrective action, our Office dismissed Gulf Copper’s protests.

The record reflects that the Navy conducted an extensive investigation to determine whether an OCI existed with regard to Anteon. In this regard, the Navy obtained information from Anteon regarding its corporate operations, business groups, and reporting structures; took affidavits from key Anteon employees that were the subject of Gulf Copper’s OCI allegation; and arranged for personnel from the Naval Criminal Investigative Service to examine the computer hard drives of the subject Anteon employees to determine whether they revealed any evidence of attempts to access or transfer information contained in government computer contract files. Agency Materials Relating to OCI Investigation. As a result of the investigation, the Navy concluded that there was no basis upon which to eliminate Anteon from the competition.

With regard to Anteon’s past performance, the agency explains that “in taking corrective action, the Navy sought to ensure that a comprehensive review was conducted of the circumstances surrounding [South Texas’s] performance to determine its validity as a predictor of Anteon’s performance for the instant contract.” Agency Report at 34. The Navy advises that in conducting its review, it “requested Anteon to submit any data deemed relevant regarding [South Texas] and its relationship to Anteon.” Agency Report at 34. Anteon responded with a six-page submission detailing its relationship with South Texas and the circumstances regarding the repair work on the USS HERON and USS OSPREY.

The record reflects that Anteon's response was considered by the PPET in reevaluating Anteon's proposal. PPET Memorandum, Apr. 30, 2004, at 1. The PPET determined that "[a]lthough [it] considers Anteon to be accountable for the performance of their subsidiary" during the performance of the USS HERON and USS OSPREY contracts, due "to the manner in which Anteon addressed the issues, including a wholesale change in management, workforce and operating procedures, the relevance and weight is significantly diminished for the purpose of this Past Performance Evaluation." *Id.* at 2. The PPET concluded "that the original assigned rating[] should remain unchanged." *Id.* The best value award committee's (BVAC) recommendation for award relied on the PPET's determinations, as did the SSA in determining that Anteon's and Southwest's proposals offered the best value. BVAC Memorandum for the Contracting Officer at 1-2; Amended Source Selection Assessment at 1. This protest from Gulf Copper followed.

DISCUSSION

Gulf Copper's protest here raises essentially the same issues as did its prior protest to our Office. That is, Gulf Copper again challenges the adequacy of discussions, the past performance evaluation of Anteon, particularly relating to the performance of South Texas, the cost evaluation, the best-value decision, and the eligibility of Anteon for award due to its alleged OCI. Gulf Copper also asserts, with regard to the corrective action taken by the agency in response to Gulf Copper's prior protest, that the Navy's request that Anteon provide documents regarding its relationship to South Texas and the performance of the USS HERON and USS OSPREY contracts, and Anteon's memorandum in response to this request, constituted discussions. The protester contends that the Navy, in conducting discussions only with Anteon, denied Gulf Copper the same opportunity to address the agency's concerns with respect to its own proposal.

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. In contrast, clarifications are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal and do not give an offeror the opportunity to revise or modify its proposal. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range, whereas clarifications may be requested from just one offeror. See Federal Acquisition Regulation (FAR) §§ 15.306(a), (d); Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 4; Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4. It is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. The acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. Priority One Servs., Inc., supra, at 4. As explained below, we find that the Navy's exchanges with Anteon

regarding past performance, undertaken in response to Gulf Copper's protest, constituted discussions.

The record reflects that the agency had determined, based upon its review of Gulf Copper's protest and its prior evaluation of Anteon's past performance, that it needed to reevaluate Anteon's proposal under the past performance factor, specifically considering Anteon's relationship with South Texas Ship Repair, and the work performed by South Texas on the USS HERON and USS OSPREY. Corrective Action Letter, Apr. 12, 2004, at 1-2. In this regard, the record indicates that Anteon's initial past performance rating of "satisfactory" was based largely on its performance of only one relevant contract, which was evaluated by the agency as including numerous "past performance weaknesses" due to instances of "marginal," "below average," or "less-than-satisfactory" performance. BVAC Initial Memorandum for the Contracting Officer at 5-7. In performing this reevaluation, and apparently because Anteon's proposal, according to the agency, had only "alluded to difficulties that their subsidiary, South Texas Ship Repair . . . experienced . . . on the USS OSPREY and USS HERON shortly after being acquired by Anteon," the agency first orally requested additional information and then sent the following correspondence to Anteon:

The Contracting Officer has become aware of two contracts performed by South Texas Ship Repair on the USS Heron and USS Osprey in 2001.

...

Your attorney provided minimal documentation on the relevance of the USS Heron and USS Osprey projects, but also provided other input telephonically. You are hereby requested to submit or resubmit any documents that you have that bear on the relevance of the USS Heron or USS Osprey projects to the past performance of Anteon Corporation. These documents would most likely address:

(1) Anteon's purchase of Sherikon, Inc. (and thus also South Texas Ship Repair) and how Anteon managed South Texas Ship Repair after the purchase; (2) Anteon's role in attempting to assist South Texas Ship Repair in performing the USS Heron or USS Osprey projects; and (3) Anteon's alleged shut down of South Texas Ship repair and its subsequent start up of Anteon's Ingleside ship repair division (this would include the common links or lack thereof between Anteon and South Texas Ship Repair in terms of management, manpower, equipment and facilities).

E-mail from Navy to Anteon, Apr. 22, 2004. As mentioned previously, this correspondence resulted in Anteon's submittal of a detailed six-page submission describing Anteon's relationship with South Texas and the circumstances involving the repair work on the USS HERON and USS OSPREY.

The record further reflects that Anteon's response to the Navy's request for information was considered by the PPET, as well as by the BVAC and the SSA, in making their respective decisions regarding the reevaluation of Anteon's proposal under the past performance factor and the source selection. BVAC Memorandum for the Contracting Officer at 1-2; Amended Source Selection Assessment at 1. For example, six of the seven specific reasons cited by the PPET to justify its reevaluation of Anteon's proposal as "satisfactory" under the past performance factor, notwithstanding the performance of South Texas on the USS HERON and USS OSPREY contracts, are found in Anteon's response to the agency's request for information and nowhere else in the record. Specifically, in finding Anteon's past performance to be "satisfactory," the agency relied on the following reasons cited by Anteon in its response: (1) that South Texas operated autonomously; (2) that Anteon was not involved in the day-to-day operations of South Texas during the USS HERON and USS OSPREY contracts and was not immediately aware of the performance issues; (3) that after becoming aware of the problems Anteon sent a 12 employee team to support the work effort; (4) that Anteon restructured the entire South Texas organization by terminating management and supervisory personnel; (5) that Anteon laid off the employees that had not voluntarily left and completely shut down South Texas in 2001; and (6) that Anteon formed a new organization with different management, workforce and work procedures. PPET Memorandum at 2; Anteon's Response at 1-3. Indeed, the agency, in its report responding to this protest, relies on the very reasons cited in Anteon's submission when responding to the protester's assertion that the agency unreasonably rated Anteon's past performance as "satisfactory" on reevaluation. Agency Report at 33-38.

It is thus apparent that Anteon was afforded the opportunity to revise the past performance portion of its final proposal, which had only "alluded" to South Texas's difficulties in performing the USS OSPREY and USS HERON contracts and its relationship to Anteon, and furnish information which the agency had indicated to Anteon was necessary to the reevaluation of Anteon's past performance and which, in fact, formed the basis for the agency's reevaluation of Anteon's past performance as "satisfactory." In these circumstances, we conclude that the communications between the Navy and Anteon constituted discussions.⁴ Again, where a procuring agency holds discussions with one offeror, it must hold discussions with all offerors

⁴ We recognize that the FAR provides that exchanges to address adverse past performance information to which an offeror has not had a prior opportunity to respond do not constitute discussions where such exchanges occur in the context of an award without discussions, or prior to the establishment of the competitive range. FAR §§ 15.306 (a) and (b). However, the FAR also indicates that where, as here, exchanges to address adverse past performance information to which an offeror has not had a prior opportunity to respond occur after establishment of the competitive range, they constitute discussions. See FAR § 15.306(d).

whose proposals are in the competitive range. FAR § 15.306(d); Priority One Servs., Inc., supra, at 4.

Even if the communications between the agency and Anteon were viewed as clarifications, rather than discussions, we would still find the agency's communicating only with Anteon improper. In conducting exchanges with offerors, including clarifications as well as discussions, agency personnel "shall not engage in conduct that . . . favors one offeror over another." FAR § 15.306(e)(1); Martin Elecs., Inc., B-290846.3, B-290846.4, Dec. 23, 2002, 2003 CPD ¶ 6 at 9; cf. Landoll Corp., B-291381 et al., Dec. 22, 2002, 2003 CPD ¶ 40 at 8 (recognizing that a situation may arise in which it would be unfair to request clarification from one offeror but not another).

Here, in addition to the concerns regarding Anteon's alleged OCI and the propriety of its evaluation of Anteon's past performance, the agency was also aware at the time it undertook corrective action in response to Gulf Copper's protest that Gulf Copper had claimed in its protest that it had believed that it was required by the RFP to use its FPRA rates in formulating its proposed costs even though it could have justified lower indirect rates, and also that because it used its FPRA rates, certain personnel costs were double-counted (as a result of being included both as direct and indirect costs).⁵ Protest (B-293706) at 10-13. Nevertheless, the agency engaged in exchanges only with Anteon (regarding Anteon's past performance and the alleged OCI), and did not engage in similar exchanges with Gulf Copper regarding its proposed costs. In our view, this constituted conduct that improperly favored Anteon and as such violated the provisions of FAR § 15.306(e)(1).

The agency maintains that because Anteon's rating under the past performance factor remained the same, the relative competitive position of the offerors did not change as a result of the Navy's actions, and Gulf Copper was thus not prejudiced. Supplemental Report, Aug. 4, 2004, at 9 n.9. This argument, however, ignores the fundamental purpose of discussions, which is to afford offerors the opportunity to improve their proposals "to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." FAR § 15.306 (d). In our view, the record reflects that had the agency afforded Gulf Copper discussions regarding its proposed costs, in the same manner that it did with Anteon regarding its past performance, Gulf Copper's proposal may have become more competitive, such that there would be a reasonable possibility that the agency would have selected Gulf Copper for award.

⁵ In this regard, the agency notes that it "was astounded to learn during [Gulf Copper's] debriefing that the company was under the impression that it was required to propose FPRA rates without adjustment." Agency Report at 9.

We sustain the protest on the basis that the agency's action in engaging in discussions only with Anteon was improper, and improperly favored Anteon over Gulf Copper. We recommend that the agency reopen discussions with all offerors whose proposals are within the competitive range, obtain revised proposals, evaluate the revised proposals in a manner consistent with the solicitation requirements, and make a new source selection decision. In the event that the Navy determines that an offeror or offerors other than Anteon and Southwest have submitted the best value proposals, the agency should terminate the contract(s) of the offeror(s) no longer in line for award. We also recommend that the agency reimburse the protester its cost of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. §21.8(d) (2004). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel