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**Comptroller General
of the United States**

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

Decision

Matter of: Dependable Disposal and Recycling

File: B-400929

Date: February 3, 2009

Steven R. Borer, Esq., Procopio, Cory, Hargreaves, and Savitch LLP, for the protester.

Charles Chambers, Esq., Department of the Navy, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed where original protest argument challenging a rating of technical unacceptability is abandoned, and subsequently-raised protest argument does not challenge the unacceptability rating.

DECISION

Dependable Disposal and Recycling, in Spring Valley, California, protests the award of a contract to Waste Management of North Country, in Oceanside, California, by the Department of the Navy, Naval Facilities Engineering Command Southwest, under request for proposals (RFP) No. N62473-08-R-4313, for collection and disposal of solid waste. The protester contends that the Navy unreasonably evaluated its technical proposal.¹

We dismiss the protest.

BACKGROUND

The RFP was issued on September 4, 2008, and sought proposals to provide solid waste collection and disposal services at Camp Pendleton, California. The procurement was conducted under the commercial item provisions of Federal

¹ This protest was decided under the express option provisions of our Bid Protest Regulations, 4 C.F.R. §§ 21.9(b), 21.10 (2008).

Acquisition Regulation (FAR) part 13, and the simplified acquisition provisions of FAR part 12. The RFP anticipated award of a contract with fixed-price and indefinite-delivery/indefinite-quantity line items, for a base period of 1 year, followed by two 1-year option periods.

The RFP stated that offerors would be evaluated based on the following four evaluation factors: (1) key personnel, vehicles and equipment; (2) past performance; (3) safety; and (4) price. The RFP did not state the relative importance of the price and non-price factors.

As relevant here, the safety evaluation factor stated that the Navy would evaluate an offeror's "approach to ensuring the safety of their employees as well as the quality of the Offeror's overall safety record within the last three (3) years for the type of work stated in the solicitation." RFP at 15. The RFP stated that the safety factor evaluation would consider the following four types of data:

- (i) Experience Modification Rate (EMR)²
- (ii) [Occupational Safety and Health Administration] OSHA Lost Workday Incidence Rate (LWDIR)³
- (iii) OSHA Recordable Incidence Rate [(RIR)]⁴
- (iv) Safety Awards[,] if applicable

Id.

The Navy received six proposals by the proposal closing date of October 9. The Navy rated Dependable's proposal as "unacceptable" under the safety evaluation factor.⁵ The agency stated that the proposal had a weakness based on the failure to

² A company's EMR is used to calculate a company's insurance premiums, and is based on the average amount of claims against its insurance reported over a 3-year period. See National Council on Compensation Insurance website, available at: <http://www.ncci.com>.

³ A company's LWDIR is based on the number of lost workday cases reported per 100 employees during a given time. See Definitions of Incidence Rates, available at: https://www.rit.edu/cast/outreach/training/Module5/M5_IncidentRates.pdf.

⁴ A company's RIR is based on the number of reported recordable safety incidences per 100 employees during a given time. See id.

⁵ The agency used a rating scheme of "acceptable" and "unacceptable" for the key personnel, safety, and past performance evaluations.

provide certain required data, as follows: “The offeror failed to provide actual rates for the past three years for the Lost Workday Incidence Rate (LWDIR), and the OSHA Recordable Incidence Rate (RIR) as stated in the solicitation.” Agency Report (AR), Tab 6, Technical Evaluation Report, at 8. The agency also noted that while the protester provided the required EMR data, “[t]he EMR rate for 2005 was high at 1.18%,” with improvement during the subsequent years. Id.

Although Dependable was rated acceptable under the key personnel and past performance evaluation factors, the agency rated the protester’s proposal as unacceptable overall, based on its rating under the safety evaluation factor. The Navy eliminated Dependable from further consideration, and made award to Waste Management, which had the third-lowest price, but was the only acceptable offeror.

DISCUSSION

In its initial protest, Dependable argued that the Navy improperly determined that its proposal was technically unacceptable, based on the protester’s failure to submit the LWDIR and RIR data. The protester argued that although the RFP stated that the agency would evaluate each offeror’s safety record based on the EMR, LWDIR and RIR data, the RFP did not explicitly require offerors to submit this data. The Navy responded to this argument in its report on the protest, arguing that the RFP stated that offerors would be evaluated based on the three rates discussed above, and that offerors were responsible for providing all information required for the evaluation of proposals. The Navy further states that, although Dependable provided some raw data concerning safety incidences, these data did not permit calculation of the required LWDIR and RIR data.

In its comments on the agency report, Dependable did not address the Navy’s response to the protest concerning the failure to submit the LWDIR and RIR data. Instead, the protester raised a new argument, alleging that the agency unreasonably evaluated the protester’s EMR data. Because the protester’s comments did not address the agency’s response to the original protest argument concerning the LWDIR and RIR data, we consider this argument abandoned.⁶ See Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

⁶ In any event, we think this argument lacks merit. The RFP clearly advised offerors that the agency would evaluate offerors’ EMR, LWDIR and RIR data. An offeror has the responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements, allows a meaningful review by the procuring agency, and contains all the information necessary to demonstrate its capabilities in response to the solicitation. HydroGeoLogic, Inc., B-311263, B-311263.2, May 27, 2008, 2008 CPD ¶ 218 at 5-6.

In its new protest argument, Dependable argues that the RFP stated that the Navy would consider offerors' safety records for the "last three (3) years," and that the agency unreasonably considered information beyond that time in its evaluation of the protester's proposal. The protester notes that an EMR for a given year contains data for prior years, excluding the most recent reportable year; for example, a company's 2008 EMR is issued at the start of 2008, and contains data for 2006, 2005, and 2004. Dependable submitted EMR for the years 2008-2000, which addressed data for the years 2006-1996. In its evaluation, the Navy considered Dependable's EMR for 2007, 2006 and 2005, noting a "high" rate of 1.18% for 2005, with improvement in the succeeding years. AR, Tab 6, Technical Evaluation Report, at 8. Dependable argues that, because a given year's EMR contains data for prior years, the agency should have only considered Dependable's 2008 EMR of 0.84%, which contained data for 2006, 2005, and 2004.

We conclude that Dependable cannot demonstrate that it was prejudiced by the Navy's evaluation of the EMR data. As discussed above, the agency concluded that Dependable's proposal was technically unacceptable because it did not provide the required LWDIR and RIR data. Although the protester initially challenged this evaluation, it subsequently abandoned this argument.

Prejudice is an essential element of a viable protest; we will not sustain a protest against an alleged evaluation error unless the protester was prejudiced by the agency's actions. Kearney & Co., B-298436.2, Oct. 4, 2006, 2006 CPD ¶ 149 at 3. Here, even if we agreed with Dependable that the agency unreasonably evaluated its EMR data, the protester would remain technically unacceptable based on its failure to submit the LWDIR and RIR data. In sum, Dependable was not prejudiced by any alleged error in this area.⁷ See id. at 3-4.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

⁷ In any event, we think this argument also lacks merit. Although an EMR figure for a given year is comprised of data for prior years, the RFP stated that the agency would consider an offeror's "overall safety record within the last three (3) years." RFP at 15. To the extent Dependable argues that the 3 years in question pertain to the data which comprise a particular year's EMR rate, as opposed to the EMR rates themselves, we think this argument constitutes a challenge to a patent ambiguity in the solicitation that the protester was obligated to challenge prior to submitting its proposal. See, e.g., Poly-Pacific Techs., Inc., B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3.