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Decision

Matter of: Cooley/Engineered Membranes; GTA Containers, Inc.

File: B-294896.2; B-294896.3; B-294896.4

Date: January 21, 2005

Thomas L. McGovern, III, Esq., Michael J. Vernick, Esq., and Richard W. Arnholt, Esq., Hogan & Hartson, for Cooley/Engineered Membranes; and Steven M. Masiello, Esq., Stephen M. Sorett, Esq., and Phillip R. Seckman, Esq., McKenna Long & Aldridge, for GTA Containers, Inc., the protesters.

Richard D. Lieberman, Esq., and Karen R. O'Brien, Esq., McCarthy, Sweeney & Harkaway, for MPC Containment Systems, Ltd., an intervenor.

Clarence D. Long, III, Esq., and Paul S. Davison, Esq., Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of awardee's proposal of an alternative test method to determine compliance with technical requirements is sustained where the record shows that the alternative test proposed by the awardee is not comparable to the tests required by the specifications and, thus, the agency lacked a reasonable basis to conclude that the awardee's proposal was technically acceptable.

2. Protests challenging agency's evaluation of offerors' past performance are denied where the record reflects a reasonable evaluation and the offerors were given adequate opportunities to address negative past performance information during discussions.

DECISION

Cooley/Engineered Membranes and GTA Containers, Inc. protest the award of a contract to MPC Containment Systems, Ltd. under request for proposals (RFP) No. FA8518-04-R-71516, issued by the Department of the Air Force for collapsible fuel containment bladders. Cooley and GTA each challenge the Air Force's evaluation of offerors' proposals and the source selection decision.

We sustain the protests in part and deny them in part.

BACKGROUND

The RFP was issued on May 28, 2004, as a total small business set-aside, and anticipated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a 1-year base period and up to four 1-year option periods. The RFP sought proposals for two sizes of collapsible fuel containment bladders – 50,000 gallon and 210,000 gallon capacities – for use in the storage of various types of aircraft fuels.

The RFP provided for award to the offeror who provided a technically acceptable proposal that represented the “best value” to the agency based on an assessment of price, proposal risk, and past performance. RFP § M-900, ¶ A, at 64. The proposal risk factor and the past performance factor were of equal importance and, when combined, were “significantly more important than [the] price” factor. Id.

Offerors were required to demonstrate technical acceptability based on the following definitions:

- a. A technically acceptable proposal shall meet the requirements of paragraph 3.3.4 “Coatings” to ensure that they are suitable for use with hydrocarbon fuels conforming to MIL-DTL-5624, MIL-DRL-25524E, MIL-DTL-83133 and AA52557 and use temperatures to 170°F.
- b. A technically acceptable proposal shall provide an adequate method of bonding the seams and fittings to attain the required strengths as specified in Tables I, II, III and IV.

RFP § M-900, ¶ B.1, at 65.

The purchase description, attached to the RFP, outlined the technical requirements for the fuel bladders, including Tables I-IV, which set forth strength requirements for the bladder fabric coating, bladder fabric, bladder seams, and bonded fittings. RFP Purchase Description, at Tables I-IV. The tables also prescribed tests for determining compliance with the strength requirements. Id. The tests are described in the purchase description and by reference to American Society for Testing and Materials (ASTM) protocols. Id. The contractor is required to provide first articles for both the 50,000 gallon and 210,000 gallon sizes, to conduct first article tests (FAT) consistent with the purchase description, and to provide the agency with the test results. RFP at 4-10.

The agency received proposals from MPC, Cooley, GTA, and a fourth offeror. After initial technical evaluations, the agency found all offerors’ proposals to be technically unacceptable. Agency Report (AR), Tab 11, Initial Technical Evaluation Report, at 1. The agency conducted discussions with each of the offerors and received revised proposals. The proposals of MPC, Cooley and GTA were each

found technically acceptable and the remaining offeror's proposal was found technically unacceptable. AR, Tab 11, Final Technical Evaluation Report, at 1. For the three offerors with technically acceptable proposals, the agency evaluated the proposals as follows:

	MPC	Cooley	GTA
Risk	Low	Low	Low
Past Performance	Exceptional/ High Confidence	Satisfactory/ Confidence	Satisfactory/ Confidence
Evaluated Price	\$49,244,710	\$(deleted)	\$(deleted)

AR, Tab 13, Source Selection Decision, at 6.

The agency concluded that although MPC's proposal offered [deleted] MPC's "exceptional/high confidence" past performance evaluation merited its selection for award. Id. The contract was awarded to MPC on September 30, 2004. AR, Tab 14, Contract, at 1. Following their respective debriefings, GTA and Cooley filed protests of the award to MPC.

DISCUSSION

Cooley alleges that the agency improperly determined that MPC's proposal was technically acceptable, and that the agency improperly evaluated MPC's past performance record and proposal risk. GTA also alleges that the agency improperly evaluated MPC's past performance record and proposal risk, and further argues that the agency improperly evaluated its own past performance and failed to provide it an opportunity for meaningful discussions.

In reviewing protests challenging an agency's evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals; rather, we will examine the agency's evaluation only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and with procurement statutes and regulations. Cerner Corp., B-293093, B-293093.2, Feb. 2, 2004, 2004 CPD ¶ 34 at 10. As with any evaluation review, our primary focus is whether the record supports the agency's conclusions. Innovative Logistics Techniques, Inc., B-275786.2, Apr. 2, 1997, 97-1 CPD ¶ 144 at 9.

MPC's Technical Acceptability

Regarding Cooley's contention that MPC's proposal was technically unacceptable, our review of this protest allegation begins with the detailed technical specifications set forth in the RFP evaluation criteria and the purchase description. Offerors were required to "provide an adequate method of bonding the seams and fittings to attain the required strengths as specified in Tables I, II, III and IV." RFP § M-900, ¶ B.1, at 65. The RFP required the contractor to provide first articles for each fuel bladder

size, and to conduct and submit test results that demonstrate that the first articles meet the requirements of the purchase description, including Tables I-IV. RFP at 4-10. Table IV identifies strengths that the bonded fittings must meet during testing, as well as methods for conducting the tests. The tests listed in Table IV are contained in the purchase description specifications and require the evaluation of samples cut from the fittings and samples of the metals used for the fittings and their bonds to the bladder fabrics. RFP Purchase Description, ¶¶ 4.5.2.17-19. These tests involve clamping samples in mechanical jaws and subjecting them to stress as measured in pounds/inch, to measure the strength of the bonds between the fittings and the bladder fabric, the dead load shear resistance, and the peel adhesion strength of the coated fabric to the metal used for the fittings. The samples are tested to determine their strengths as manufactured, followed by tests performed on samples that have been immersed for various periods of time in the fuels to be used in contract performance. Table IV identified different strength requirements for each fuel bladder size, as well as different strength requirements for samples with and without fuel immersion.

The agency informed MPC during discussions that its initial proposal did not “provide a technically acceptable method of bonding the fittings to the fabric bladder to achieve the strengths required in table IV as required by [RFP] clause M-900, item B. (1) b.” AR, Tab 10C, MPC Evaluation Notice (EN) M-TECH-01, at 4. In response, MPC provided information regarding its fittings and further explained that the test methods outlined in Table IV were inapplicable to MPC’s proposed product due to MPC’s fitting method. AR, Tab 10C, MPC Evaluation Notice Response, at 1. In lieu of the Table IV test methods, MPC stated that it would use an “alternative pressurized soap bubble test.” *Id.* The agency concluded that “MPC’s EN response provided a technically acceptable method of bonding the fittings to the fabric bladder to achieve the strengths required in Table IV.” AR, Tab 11, Final Technical Evaluation Report, at 3-4.

Cooley argues that MPC’s response (and therefore its proposal) was unacceptable because MPC failed to address the detailed testing requirements set forth in Table IV of the purchase description, which established the required strengths for bonded fittings. The agency contends, however, that “[b]ased on [MPC’s] design, and their proposed alternate test method, [MPC] will meet the requirements” of the purchase description in Tables I-IV. Supplemental Contracting Officer’s Statement at 4.

The agency argues that the tests identified in Table IV are not “the ultimate goal,” but rather are a way of demonstrating that the “critical requirement” of meeting the strengths in Table IV is satisfied. Supplemental Memorandum of Law at 8. Thus, the agency contends, an alternative test, such as the soap bubble test, as proposed by MPC, is acceptable if, as the result of the test, MPC is able to demonstrate

compliance with the Table IV strength requirements.¹ Id. The agency, however, did not evaluate the acceptability of MPC's alternative soap bubble test and did not address in its technical evaluation whether the soap bubble test would be appropriate for determining whether the strength tests in Table IV were met. Id.

MPC explains that the test methods set forth in Table IV are inappropriate for its proposed method of [deleted] because the design of MPC's [deleted]. MPC's Supplemental Comments at 4. MPC acknowledges that, given the design of its product, "some other test must be used to determine" whether the product meets the strengths in Table IV. Id. As described by MPC's technical consultant in its supplemental comments, [deleted]. Id.²

The record clearly shows, however, that the soap bubble test will not demonstrate compliance with the strength requirements because that test does not measure the strength of the bonding between the fittings and the bladder fabric, but merely determines whether the bladder leaks air after inflation. RFP Purchase Description, ¶ 4.5.2.1. As evidenced by the purchase description and as described by MPC's technical consultant, the leak test does not evaluate the strength of the bond between the fittings and the fabrics with specific pounds/inch loads exerted on the samples as contemplated by Table IV's strength requirements and the required tests contained in the specifications and referenced in the table. At best, the soap bubble test will determine whether, after inflation with air, the tanks leak at the areas where the fittings are bonded to the fabric. Additionally, the soap bubble test, as described in the purchase description and by MPC, does not involve subjecting the product sample to fuel immersion as required by the tests set forth in Table IV; thus, no information will be provided regarding the strengths that samples must demonstrate after immersion in the fuels. Consequently, since MPC's revised proposal fails to reasonably address the test requirements, we find that the agency improperly determined that MPC's proposal was technically acceptable and we sustain this basis of Cooley's protest.³

¹ Although MPC did not specifically style its proposal as an alternative to, or deviation from, the RFP, we note that the RFP did allow offerors to take exception, at their own risk, to the terms of the RFP. In this regard, the RFP stated that "Volume I will consist of the completed and signed RFP with a cover letter delineating any exceptions taken to the RFP terms and conditions. However, offerors are cautioned that any noncompliance with the terms and conditions of the RFP may cause their proposal to be determined unacceptable." RFP § L-900, ¶ b, at 52.

² MPC's reference to the "Air leakage" test confirms that its proposed alternative test is essentially a test that is already required under the purchase description.

³ Cooley raises several other protest grounds challenging the agency's conclusion that MPC's proposal was technically acceptable. We find that, aside from the

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Past Performance Issues

GTA argues that the agency improperly evaluated its past performance record as meriting only a “Satisfactory/Confidence” rating, and further failed to provide it an opportunity for meaningful discussions. Additionally, Cooley and GTA each argue that the agency improperly evaluated MPC past performance record as meriting an “Exceptional/High Confidence” rating.

The evaluation of past performance, including the agency’s determination of the relevance and scope of an offeror’s performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable, inconsistent with the solicitation criteria, or undocumented. Family Entm’t Servs., Inc., d/b/a/ IMC, B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5.

GTA argues that the agency improperly relied upon negative past performance information regarding its 210,000-gallon fuel bladder contract with the Army Tank-Automotive and Armaments Command (TACOM) because that information was unreliable and was not sufficiently documented in the record. The record shows that the agency received an initial past performance reference from TACOM, which was supplemented with additional information concerning GTA’s difficulties in performing the FATs for that contract. AR, Tab 8B, GTA Past Performance Reference for Support IPDS, at 2-3. The supplemental information was based on a conversation with a TACOM point of contract and was recorded in handwritten notes by the agency performance risk assessment group (PRAG) chair. Id.; Second Supplemental Agency Report at 1. The details of the conversation, its date, and the

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requirements at Table IV as discussed above, Cooley’s disagreement with the agency regarding the adequacy of MPC’s proposal does not provide a basis to challenge the award to MPC and, thus, we deny these protest grounds. For example, Cooley alleges that MPC’s proposal was technically unacceptable because MPC did not provide adequate data to support its proposed technical approach. This argument is without merit as the RFP was specifically amended to delete the requirement for test data. RFP amend. 1, at 2. Cooley also argues that its own test of the fabric it believes MPC intends to use in contract performance demonstrates that MPC’s fabric will not meet the RFP strength requirements and that a letter in the GTA proposal regarding [deleted] provide the coated bladder fabric, should have put the agency on notice that the MPC fabric was not ready for production. Cooley’s arguments on both these counts lack merit as both are based on mere supposition. In this regard, Cooley does not cite any evidence establishing that the material it tested or the material that [deleted] may provide to GTA is the same material that MPC plans to use in the performance of the contract. Accordingly, we deny these grounds of protest.

identity of the TACOM source are documented in the evaluation record and, in our view, provided a reasonable basis for the agency's evaluation of GTA's past performance.

GTA additionally argues that it was not given an adequate opportunity to address the negative TACOM contract past performance information during discussions. The record shows, however, that GTA was explicitly told during discussions that the agency had received negative information regarding the performance of its 210,000 gallon fuel bladder contract. Specifically, GTA was told that "210k gallon fuel bladder: The respondent indicated you were experiencing some problems with the First Article." AR, Tab 10B, GTA EN G-PR-2, at 1. GTA was also provided a summary that stated "performed first article test 3 times and rejected all three." AR, Tab 10B, GTA Briefing Slides, at 2.

When conducting discussions, an agency must advise offerors of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond, and must afford offerors an opportunity to revise their proposals to fully satisfy the agency's requirements. Federal Acquisition Regulation § 15.306(d)(3). Clearly, based on the discussion here, GTA was aware that the agency had received negative past performance information concerning the TACOM contract and that the information received by the agency was characterized as a FAT "failure." GTA, in fact, responded with a discussion of its performance on the TACOM contract, explaining difficulties in performing the FAT requirements and its efforts to correct the various problems. AR, Tab 10B, GTA EN Response G-PR-2, at 1-2. Based on this record, we find that the agency conducted meaningful discussions.

With regard to MPC's proposal, GTA argues that the agency failed to consider alleged negative information regarding MPC's past performance on a 200,000 gallon fuel bladder contract with the United States Central Command Air Forces (CENTAF). GTA argues that MPC should have been evaluated on the CENTAF contract, which GTA alleges has been marred by negative performance. The agency states, however, that it was aware of the existence of the contract itself, but determined that because MPC had not yet undertaken performance of that contract, there was nothing for the agency to evaluate. Contracting Officer's Statement at 9. GTA has failed to demonstrate that there was negative information that the agency knew, or should have known, regarding MPC's performance and thus we conclude that there is no basis to challenge the agency's evaluation of MPC's past performance.

Cooley argues that the agency unreasonably evaluated MPC's past performance because MPC provided only three references, instead of what Cooley argues is a four-reference minimum set forth in the RFP. A plain reading of the RFP, however, demonstrates that offerors were not required to provide a minimum of four past performance references. The RFP stated as follows:

Offerors shall complete a separate “FACTS Sheet” for each active or completed contract (with preferably at least one year of performance history) in the past [ten] years, that the offeror considers relevant in demonstrating its ability to perform the proposed effort. If the total number of such contracts exceeds four (4), the offeror shall address its four (4) most relevant contracts.

RFP § L-900, ¶ d.1, at 53.

The plain language of the RFP does not require that offerors furnish a minimum number of past performance references. Accordingly, there is no basis to find that the agency improperly evaluated MPC’s proposal based on MPC’s submission of only three past performance references.⁴

Finally, we find no merit to either protester’s arguments that the agency’s evaluations of their respective past performance were inconsistent with the agency’s evaluation of MPC’s past performance. To the extent that Cooley and GTA disagree with the agency’s conclusions, their disagreement does not render the evaluations unreasonable. Kathryn Huddleston & Assoc., Ltd., B-294035, July 30, 2004, 2004 CPD ¶ 142 at 2.

CONCLUSION

Based on the record, we find that the agency unreasonably determined that MPC’s proposal was technically acceptable and sustain Cooley’s protest of the agency’s evaluation of MPC’s proposal. In light of our conclusion that the evaluation was flawed in this regard, we need not address the protesters’ arguments regarding the evaluation of the proposal risk factor and the best value determination, since the selection of MPC cannot stand. The balance of the protest allegations are denied.⁵

⁴ Cooley notes that the PRAG report discusses the RFP as requiring four past performance references. To the extent that the PRAG report conflicts with the terms of the RFP, such a conflict must be resolved in favor of the stated RFP, as the evaluation requirements set forth in a solicitation take precedence over an internal agency evaluation document. Eccles Assoc., Inc.; Deloitte Touche Tohmatsu ILA Group Ltd., B- 260486, et al., Oct. 17, 1995, 95-2 CPD ¶ 179 at 7.

⁵ The protesters have alleged several other grounds of protest, in addition to the technical acceptability and past performance issues discussed above. MPC also raises several concerns that Cooley is not an interested party to pursue the protest. We have reviewed all of these issues and do not find any to have merit.

RECOMMENDATION

From the record, it is not clear whether the agency is willing to accept a product that does not comply with the testing requirements set forth in Table IV, since the agency appears to believe that the leak test meets the requirements of the purchase description. Supplemental Contracting Officer's Statement at 4. Accordingly, we recommend that the agency first determine what testing requirements in Table IV are necessary to meet the agency's needs. If the solicitation terms do not express the agency's actual requirements, then the agency should amend the solicitation, obtain revised proposals, and make a new source selection decision. If an offeror other than MPC is selected, we recommend that the agency terminate the contract with MPC and award the contract to the successful offeror. If the solicitation terms are appropriate, we recommend that the agency terminate MPC's contract and make award to the technically acceptable offeror whose proposal represents the best value under the RFP's evaluation scheme. We further recommend that the agency reimburse Cooley the reasonable costs, including reasonable attorneys' fees, with respect to the issue sustained in this decision. Cooley's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2004).

The protests are sustained in part and denied in part.

Anthony H. Gamboa
General Counsel