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Decision

Matter of: Herley Industries, Inc.

File: B-400736.2

Date: January 15, 2009

Brian A. Bannon, Esq., Andrew W. Dyer, Esq., and Brian S. Gocial, Esq., Blank Rome LLP, for the protester.

Richard Sauber, Esq., and Deneen J. Melander, Esq., Robbins Russell Englert Orseck Untereiner & Sauber LLP, for Amherst Systems, Inc., the intervenor.

Marvin D. Rampey, Esq., and Angela J. Cosentino, Esq., Naval Sea Systems Command, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to consider past performance of an affiliated subsidiary company is denied where the record shows that, even if considered, the past performance information offered was incomplete, and the agency's past performance rating of neutral was therefore reasonable.

DECISION

Herley Industries, Inc., of Lancaster, Pennsylvania, on behalf of its wholly-owned subsidiary Micro Systems, Inc. (MSI), of Fort Walton Beach, Florida, protests the award of a contract to Amherst Systems, Inc., of Buffalo, New York, under request for proposals (RFP) No. N00164-08-R-WM01, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), Maritime Electronic Warfare Division (MEWD), for a multi-spectral simulator (MSS) system.¹ Herley asserts that the Navy

¹ The RFP requires the development and delivery of an MSS system, along with installation and maintenance. The MSS system in this procurement includes a fixed radio frequency (RF) stimulation subsystem, a portable RF stimulation subsystem, an infrared (IR) simulation subsystem, a synchronization and control subsystem, and a signal management subsystem. RFP at 15.

improperly failed to consider the past performance of Herley subsidiary Electronic Warfare Simulation Technology (EWST), submitted in support of MSI's proposal.²

We deny the protest.

BACKGROUND

The Navy issued the RFP on January 24, 2008, with a proposal due date of April 30. The RFP included five evaluation factors: Factor 1, price; Factor 2, past performance; Factor 3, subcontracting plan; Factor 4, quality assurance program; and Factor 5, standard commercial warranty. Past performance included three subfactors: previous experience in developing and delivering similar systems; reliability of previous similar systems sold (reliability); and a record of meeting previous delivery schedules for similar systems (timeliness of delivery). RFP at 70. Offerors were instructed to address all three past performance subfactors. *Id.* at 72. The first two past performance subfactors were equal in importance and more important than the third. Price and past performance were equal in importance. Factor 4 was to be evaluated on a go/no-go basis. Factors 3 and 5 were not rated but would "not be ignored in determining the 'Best Value' to the Government." *Id.*

Both the awardee and MSI submitted timely proposals. After the initial evaluation, the agency conducted two rounds of discussions with all offerors; MSI and the awardee submitted revised proposals in response to each round. In its original proposal, MSI submitted contractor performance data sheets for five contracts, including information addressing each of the three subfactors. AR, Tab 11, MSI Proposal, Attach. 2. The agency found that the past performance for all three subfactors was lacking for three of the five subsystems. During the first round of discussions, the agency indicated to MSI that "[t]he references you provided relate to RF experience. The lack of past performance information related to three of the five

² An earlier protest by Herley (B-400736) was dismissed as premature because it was filed prior to the protester's debriefing. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2008). In that protest, Herley argued that, during discussions, the agency improperly directed MSI to move certain pricing from one line item to another, thereby increasing MSI's evaluated price. The protester asserts generally that the initial protest ground was incorporated into the current protest, which was filed after it received its debriefing. *See* Protester's Letter, Nov. 26, 2008, at 2. In none of its multiple filings, however, did the protester address its initial protest ground or respond to the agency's and intervenor's arguments that the initial protest was untimely filed and/or failed to state a valid basis of protest. *See* Supp. Agency Report (AR), Dec. 12, 2008, at 2 n.2; AR, Nov. 17, 2008, at 1 n.2; Intervenor's Comments, Dec. 4, 2008, at 2. *See also* Protester's Comments, Dec. 4, 2008, at 2. Accordingly, we consider the protester to have abandoned the issues raised in the initial protest.

subsystems of the MSS [is] something you may want to address (IR, synchronization and control, and signal measurement).” Protest, Oct. 15, 2008, Attach. H, E-mail from Agency to MSI, July 1, 2008. In its revised proposal, MSI submitted a narrative description of past performance for EWST—another wholly-owned subsidiary of the protester that was to deliver a critical piece of equipment—that contained information for three additional contracts.³ See id., Attach. K, Proposal Supplement, July 9, 2008, at 23. MSI’s second proposal revision did not address the issue of past performance.

After reviewing the revised proposals, the Navy assigned MSI a neutral (“Neither Favorable nor Unfavorable”) overall past performance rating. This conclusion was based on the Navy’s decision not to impute EWST’s past performance information to MSI; in the absence of EWST’s information, the agency concluded that MSI lacked the past performance called for by the RFP. AR, Supp. Document Prod., MSS Re-Evaluation of Final Revised Proposals, Aug. 20, 2008, at 1, 3. In this regard, while the agency ultimately decided not to take EWST’s information into account in rating MSI’s past performance, the record shows that the evaluators nonetheless did review that information and assigned EWST a rating of “favorable” for subfactor one under past performance. Id., Encl. 1 at 8-9. However, because the EWST information did not address either of the other two past performance subfactors—reliability and delivery—the evaluators rated EWST neutral for these two subfactors. Id.

The offerors’ past performance ratings became the evaluation discriminator; MSI’s proposal offered a price advantage over the awardee’s proposal, but the agency considered Amherst’s proposal, with its higher past performance rating of “highly favorable,” to be worth the approximately [DELETED] premium. See AR, Supp. Document Prod., MSS Re-Evaluation of Final Revised Proposals, Aug. 20, 2008, at 3-4. Award was made to Amherst, and this protest followed.

ANALYSIS

The protester challenges its past performance rating of “neutral,” asserting that, based on the supplemental past performance information regarding EWST⁴ that MSI

³ The information was not submitted on contractor performance data sheets. It was the protester’s responsibility to complete the data sheets, RFP at 62, 67, and the contracting officer was not responsible for locating or securing any information not furnished with the offer. RFP at 71.

⁴ The intervenor argues that the supplemental past performance information should not be considered, because the three additional contracts it references are in excess of the maximum of five required under the RFP, and because the information was not submitted on contractor performance data sheets, as required by the RFP. The RFP states that the “Government reserves the right to not consider any information submitted exceeding the five-contract limitation.” RFP at 62. This language does not
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submitted after the first round of discussions, the only reasonable past performance rating was at least “favorable.” While the parties’ arguments focused on the agency’s decision not to consider EWST’s past performance in its evaluation of MSI, we do not need to resolve that issue. Rather, as discussed below, even if the agency had included in its evaluation the information MSI submitted concerning EWST’s past performance, we see no basis to conclude that the agency’s neutral past performance rating of MSI would have changed. Accordingly, the protester was not prejudiced by the agency’s decision not to consider EWST’s past performance information. See LexisNexis, Inc., B-299381, Apr. 17, 2007, 2007 CPD ¶ 73 at 6-7 n.6.

In reviewing an agency’s evaluation of past performance, we examine the record to determine whether the evaluation was reasonable and in accordance with the stated evaluation scheme and applicable procurement statutes and regulations. The MIL Corp., B-294836, Dec. 30, 2004, 2005 CPD ¶ 29 at 5. Here, consistent with Federal Acquisition Regulation § 15.305(a)(2)(iv), the RFP stated that “[o]fferors who do not have same or similar past performance information reasonably available to the Contracting Officer will not be rated either favorable or unfavorable.” RFP at 71.

As noted above, the RFP required offerors to submit past performance data that addressed all three subfactors and indicated that the agency would not be responsible for seeking out missing information. The record shows, however, that the information regarding EWST that MSI furnished to the agency after discussions was incomplete, addressing only one of the three past performance subfactors—previous experience in developing and delivering similar systems, but not reliability and timeliness of delivery. AR, Supp. Document Prod., MSS Re-Evaluation of Final Revised Proposals, Aug. 20, 2008, Encl. 1 at 8-9. In light of the lack of information to establish the offeror’s past performance history under the two subfactors, the agency’s decision to assign MSI a past performance rating of neutral was reasonable and consistent with the RFP, even taking into account the information regarding EWST.

The protester argues that the lack of information regarding EWST’s past performance under two of the three subfactors is immaterial, because the other five past performance references MSI provided in its initial proposal did in fact address subfactors two and three. We disagree. MSI’s five original references themselves were incomplete in the sense that they addressed only two of the five MSS subsystems; MSI’s omission of the requested past performance information relating to the other three MSS subsystems was the subject of the agency’s discussion question to MSI, asking it to address its past performance as it relates to the other

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prohibit an agency’s decision, as in this case, to consider more than five contracts. Further, the agency did not specifically require that the requested supplemental information be submitted on contractor performance data sheets.

three subsystems. The RFP, in requesting past performance information the way that it did, that is, by setting out the three subfactors relevant to the past performance evaluation, asked offerors to describe not only their experience with particular system components, but also, specifically, the reliability and timeliness of delivery of those components. In discussions, the protester was explicitly advised that the firm had not addressed its past performance for three of the five subsystems. Simply, the protester failed to furnish any information with regard to reliability and timeliness of delivery for those subsystems identified during discussions.

The protester also asserts that, in discussions, the agency asked only for information related to subfactor one.⁵ We find such a narrow interpretation of the agency's request unsupported. The discussion question identified "lack of past performance information" generally and did not limit it to subfactor one.

The RFP called for, but MSI did not provide, information on the reliability and timeliness of delivery of the equipment that was the subject of the supplemental past performance information offered in response to the concern raised during discussions. Because MSI failed to provide the information necessary to assess the past performance under these three contracts, we see no basis on which to question the reasonableness of the protester's past performance rating of "neutral."

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ The protester also challenges the adequacy of the discussions, alleging that the agency improperly failed to inform MSI during the second round of discussions that the agency's evaluation would not credit MSI with the past performance of EWST. Protester's Letter, Nov. 26, 2008, at 5. We fail to see how MSI was prejudiced by the action it challenges; the protester has offered no persuasive explanation of how MSI would have changed its proposal had the agency told it that it would not consider EWST's past performance information. See, e.g., Protester's Comments on Supp. AR, Dec. 19, 2008, at 7 (stating that "if the Agency chose to persist with such a circumscribed view of Past Performance, MSI would have had to protest the Agency's interpretation and, if justice prevailed, the Agency would have issued a new solicitation."). In any event, where, as here, the nature and relevance of past performance information is clear to the agency and the offeror receives a neutral rating, the agency need not conduct discussions with the offeror regarding the information. Standard Commc'ns, Inc., B-296972, Nov. 1, 2005, 2005 CPD ¶ 200 at 8.