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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: Martin Electronics, Inc.

File: B-290846.3; B-290846.4

Date: December 23, 2002

James J. McCullough, Esq., Louis D. Victorino, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

Jeffrey I. Kessler, Esq., Vera Meza, Esq., and Bradley J. Crosson, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency conducted exchanges with offerors in a manner that favored one over the other and where, in evaluating awardee's past performance, agency failed to include consideration of negative past performance information that occurred within the period defined by the solicitation as "recent" contract performance.

DECISION

Martin Electronics, Inc. (MEI) protests the Department of the Army's award of a contract to Pyrotechnic Specialties, Inc. (PSI) under request for proposals (RFP) No. DAAA09-01-R-0162 to provide M49A1 surface trip flares.¹ MEI protests, among other things, that the agency failed to properly evaluate the offerors' past performance information and failed to conduct meaningful discussions.

We sustain the protest.

¹ The agency describes the M49A1 flare as "a booby-trap type of surface flare used to illuminate infiltrating enemy troops." Agency Report, Contracting Officer's Statement at 1.

BACKGROUND

The agency issued the RFP on November 20, 2001, seeking fixed-price proposals for specified quantities of M49A1 surface trip flares.² The solicitation provided that proposals would be evaluated on the basis of the following three factors: manufacturing plan,³ past performance,⁴ and price. The solicitation further provided that manufacturing plan and past performance were of equal importance and that these factors, combined, were “significantly more important than price,” advising offerors that award would be made to the offeror “whose price, recent/relevant past performance and manufacturing plan provides the best value to the Government.” Agency Report, Tab A, RFP at 37, 40.

With regard to past performance, offerors were required to identify “recent” and “relevant” contracts they had performed.⁵ The solicitation specifically defined “recent” past performance as “occurring within the past three years to the date of the solicitation closing,” and “relevant” past performance as “having previously produced like or similar items.” RFP at 37. The solicitation advised offerors that adjectival ratings of “excellent,” “good,” “marginal” and “unacceptable” would be used to evaluate offerors under the manufacturing plan and past performance evaluation factors.⁶ Agency Report, Tab A, RFP at 40.

On or before the March 8, 2002 closing date, the agency received proposals from [deleted] offerors, including MEI and PSI. Thereafter, the agency conducted discussions, requested and received final proposal revisions, and evaluated the final revised proposals. Based on these submissions the ratings and evaluated prices for MEI’s and PSI’s proposals were as follows:⁷

² As amended, the solicitation sought proposals for a base quantity of 199,168 flares and option quantities of 398,336 flares. Agency Report, Tab L, at 2.

³ Under manufacturing plan, the solicitation established the following subfactors, listed in descending order of importance: critical delivery schedule; essential processes, procedures and skills; and quality. Agency Report, Tab A, RFP at 41.

⁴ Under past performance, the solicitation established two subfactors: on-time delivery and quality.

⁵ Offerors were directed to identify the contract number and a point of contact (that is, name and telephone number) for each contract. Agency Report, Tab A, RFP at 38.

⁶ Additionally, the solicitation provided for the possibility of a rating of “unknown” under the past performance factor. Agency Report, Tab A, RFP at 40.

⁷ The other [deleted] offerors’ proposals are not directly relevant to the protest issues and, accordingly, are not discussed.

Evaluation Factor	MEI	PSI
Manufacturing Plan		
Delivery Schedule	[deleted]	[deleted]
Essential Processes	[deleted]	[deleted]
Quality	[deleted]	[deleted]
Past Performance		
On-Time Delivery	[deleted]	[deleted]
Quality	[deleted]	[deleted]
Price	[deleted]	[deleted]

Agency Report, Tab M, at 17.

In short, the two proposals received identical ratings, except that under the past performance subfactor, on-time delivery, PSI's proposal was rated [deleted] while MEI's was rated [deleted], and their evaluated prices were very close: PSI's was approximately [deleted] than MEI's.

Based on these ratings, the agency concluded that PSI's proposal represented the best value to the government [deleted]. Agency Report, Tab M, at 16. MEI was notified of that decision on June 25. On July 5, MEI filed a protest challenging various aspects of the agency's source selection decision. Among other things, MEI challenged the agency's assessment of PSI's past performance, maintaining that PSI had not previously produced items that were "like or similar" to the M49A1 flares, as required by the solicitation.⁸ MEI also challenged the agency's evaluation of PSI's proposed price, identifying a mathematical error that improperly decreased PSI's evaluated price by approximately [deleted].⁹

By letter to MEI dated July 9, the agency acknowledged that the evaluation was flawed, stated that it intended to take corrective action, and requested that MEI withdraw its protest. Letter from Contracting Officer to MEI (July 9, 2002). Specifically, the agency advised MEI that "the corrective action will include reevaluation of all proposals against the solicitation criteria, to include prices." Id. In response, MEI withdrew its protest on July 12.

⁸ Although the agency rated PSI's proposal as [deleted] and [deleted] under the past performance subfactors, the agency's source selection document, dated June 14, stated: "PSI has not produced a pyrotechnic device with an assembly or ignition system as found in the M49A1 [that is, the flare to be manufactured under this solicitation]. The M49A1 is not similar to products previously produced by PSI." Agency Report, Tab M, at 7.

⁹ The agency had failed to accurately extend PSI's proposed unit prices for the option quantities.

Thereafter, the agency performed various reevaluation activities, including a reevaluation of MEI's and PSI's proposals with regard to past performance.¹⁰ In reevaluating MEI's past performance, the agency made certain negative assessments regarding the timeliness of MEI's deliveries under contracts MEI had listed in its prior proposal submissions.¹¹ Although the agency had not previously considered production of the MJU-7A/B and M206 flares to be "relevant" contract performance, in performing its reevaluation, the agency downgraded MEI's rating under the on-time delivery subfactor from [deleted] to [deleted], based on late deliveries in performing these two contracts. Agency Report, Tab N, at 4. In making this revised assessment, the agency did not seek any information from MEI, nor did it advise MEI that it was downgrading the firm's rating. Contracting Officer's Statement, Oct. 9, 2002, at 7.

The agency also reevaluated PSI's past performance in the context of MEI's assertion that PSI had not previously manufactured items "similar" to the M49A1 flares, as required by the solicitation.¹² In its prior evaluation, the agency had considered PSI's performance of certain Navy contracts to provide MK141 diversionary devices. Agency Report, Tab M, at 6. Although it relied on those contracts for purposes of evaluating PSI's past performance, the source selection document also included the following, apparently inconsistent statement: "PSI has not produced a pyrotechnic device with an assembly or ignition system as found in the M49A1 [flare being acquired here]. The M49A1 is not similar to products previously produced by PSI." Agency Report, Tab M, at 7. The contracting officer states that "upon reevaluation [of PSI's past performance,] the evaluator's conclusion or reservations about the similarity of assembly or ignition system previously produced by PSI were eliminated after reviewing a more complete drawing of the Navy's MK 141 Diversionary Charge." Supplemental Contracting Officer's Statement, Nov. 15, 2002, at 9.

¹⁰ The contracting officer states that all offerors' proposals were completely reevaluated, Contracting Officer's Statement, Oct. 9, 2002, at 3; however, no changes were made to any proposal ratings other than PSI's and MEI's.

¹¹ In MEI's proposal, dated May 17, MEI referenced various prior contracts, including contracts to provide MJU-7A/B flares and M206 flares. Agency Report, Tab P, MEI Past Performance Volume, at 8.

¹² As noted above, the solicitation stated that the agency would evaluate an offeror's "recent" and "relevant" past performance, stating that "[r]elevant is defined as having previously produced like or similar items." The solicitation further added, "Like or similar items are defined as items that have been produced utilizing the same manufacturing processes, essential skills and unique techniques need to produce the M49A1. A like item shall also have been produced under similar performance parameters and environmental conditions as the M49A1." Agency Report, Tab A, RFP at 37.

In reevaluating PSI's past performance, specifically with regard to on-time delivery, the agency also found that the record was "not complete." Agency Report, Tab F, at 7. Accordingly, the agency contacted both Navy and PSI personnel, requesting that both the Navy and PSI submit additional documents regarding PSI's prior contract performance.¹³ The agency states that, even after the additional documents were submitted, "several questions remained" and that these questions "were clarified in a phone conversation with [the chief executive officer] CEO of PSI." Agency Report, Tab F, at 7. At the hearing conducted by GAO,¹⁴ the evaluator responsible for evaluating PSI's on-time delivery testified that the record contained "several discrepancies," elaborating that certain PSI deliveries "appeared to be late,"¹⁵ and stating, "I called [PSI's CEO] and asked him why they were [late]." Hearing Transcript (Tr.) at 121. The evaluator further testified that "he [the CEO] said that [PSI was] waiting for a waiver," and that the CEO "associated the waiver to ruggedness testing." *Id.* Finally, the evaluator testified: "I used the contract and the amendments provided by PSI . . . and determined that where there was a request for waiver, if it involved ruggedness testing or a design change, I did not hold that against PSI." Tr. at 118. Thereafter, based in part on the explanations provided by PSI's CEO, the agency again evaluated PSI's proposal as [deleted] for on-time delivery.

In reevaluating proposals the agency also corrected its mathematical error, increasing PSI's evaluated price by approximately [deleted]. Other than correcting

¹³ The agency sought and received copies of Department of Defense (DD) Form 250, Material Inspection and Receiving Report, for PSI's various deliveries under the Navy contracts, as well as the contracts and amendments, the contracting officer's delivery schedule, and a summary worksheet. Agency Report, Tab N, at 9.

¹⁴ In resolving this protest, GAO conducted a hearing on the record, during which testimony was provided by the contracting officer and two agency evaluators.

¹⁵ For example, the documents showed that, with regard to Navy contract No. N00164-98-D-0049, deliveries were scheduled for March 24, 1999 and April 23, 1999, but were not made until June 2, 1999. Additionally, deliveries were scheduled for October 2, 2000, but were not made until October 17, 2000; similarly, deliveries were scheduled for January 1, 2001, but were not made until March 28, 2001. Agency Report, Tab N, at 21. Regarding an unidentified contract (or contracts), PSI's proposal shows that deliveries were scheduled for December 17, 1999, but not made until December 28, 1999; deliveries were scheduled for January 3, 2000, but not made until January 13, 2000; deliveries were scheduled for April 9, 2001, but not made until April 18, 2001; and that deliveries were scheduled for September 26, 2001, but not made until September 27, 2001. Agency Report, Tab K, PSI Past Performance Proposal, at 8-9.

this error and downgrading MEI's on-time delivery rating from [deleted] to [deleted], no changes were made to the prior evaluation ratings. Accordingly, following the reevaluation, MEI's and PSI's ratings and evaluated prices were as follows:

Evaluation Factor	MEI	PSI
Manufacturing Plan		
Delivery Schedule	[deleted]	[deleted]
Essential Processes	[deleted]	[deleted]
Quality	[deleted]	[deleted]
Past Performance		
On-Time Delivery	[deleted]	[deleted]
Quality	[deleted]	[deleted]
Price	[deleted]	[deleted]

Agency Report, Tab F, at 20.

On August 29, the contracting officer again selected PSI's proposal as representing the best value to the government. In documenting that decision, the source selection decision document (SSDD) specifically referenced MEI's performance of the contracts for MJU-7A/B flares and M206 flares as the basis for downgrading MEI's on-time delivery rating from [deleted] to [deleted]. Agency Report, Tab F, at 9. Nonetheless, the contracting officer states that she "recognized the discussions previously held with Martin had not included any discussion of these contracts." Contracting Officer's Statement, Oct. 9, 2002, at 7. Consistent with this recognition, the SSDD asserts that the contracting officer performed her comparison of MEI's and PSI's proposals without considering the MJU7-AB and M206 flare contracts, concluding that, because MEI's rating for on-time delivery "would still be [deleted] than PSI's rating [deleted] for on-time delivery . . . the outcome of the award would not change." Agency Report, Tab F, at 18-19. Nonetheless, following this conclusion, the SSDD states: "Based upon PSI's rating of [deleted] for on-time deliveries (past performance), [PSI's rating] shows less risk to the Government than Martin's rating of [deleted] in this area. Therefore, PSI's proposal shows less risk to the Government for on-time deliveries." Agency Report, Tab F, at 19. The SSDD does not discuss any distinguishing considerations between MEI's and PSI's proposals other than their differing ratings for on-time delivery. Id.

On August 29, the agency notified MEI that it had, again, selected PSI's proposal for award. This protest followed.

DISCUSSION

MEI first protests that the agency improperly failed to consider various late deliveries of PSI that occurred within the 3-year period specified by the solicitation for consideration. We agree.

As noted above, the record reflects various instances where PSI failed to meet the stated delivery schedules. Agency Report, Tab N. The agency states that, based on the information PSI provided, it determined that some of the late deliveries were due to circumstances beyond PSI's control. However, the agency also states that PSI's past performance evaluation did not include consideration of certain late deliveries that actually occurred within the 3-year period which the solicitation defined as "recent" contract performance.¹⁶ Specifically, the agency states that it did not evaluate the basis for any late deliveries of PSI where delivery was scheduled to occur more than three years prior to submission of final proposal revisions -- even if the delivery actually occurred during the 3-year period. At the GAO hearing, the responsible agency evaluator testified as follows:

Q. Do you remember how you calculated it [the three-year period] and what that period was?

A. It was from the end of the closing [date for submission of proposals, and extending] three years back. . . . [I]t changed as we opened discussions again. . . . I believe initially it would have been like March 8th of [19]99. Then I believe it changed to May 20th of [19]99.

Q. Now, let's say that an original required delivery date was outside [prior to] that three-year period . . . but the actual delivery for that item occurred within the three-year period. So it was late. Would that delivery be recent past performance?

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A. [I]f items came in within the three-year period but they were late versus the actual date? . . . Would I count those within the three-year period?

Q. Yes.

A. Would I count those within the three-year period? I believe I would have counted those -- let's see -- as being outside the three-year period.

Q. Even though the actual deliveries were within the three-year period?

¹⁶ As noted above, the solicitation defined "recent" past performance as "occurring within the past three years to the date of the solicitation closing."

A. Yes, because they relate to the original delivery date, but they should have been delivered prior to the three-year [period]. So I wouldn't have counted those.

Tr. at 124-25.

In reviewing a protest of an agency's evaluation and source selection decision, we will not re-evaluate proposals, but will review the record to determine whether the evaluation and selection decision are reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 at 6. A source selection decision based on inconsistent or inaccurate information concerning the relative merits of the offerors' technical proposals is not reasonable. OneSource Energy Servs., Inc., B-283445, Nov. 19, 1999, 2000 CPD ¶ 109 at 10; New Breed Leasing Corp., B-259328, Mar. 24, 1995, 96-2 CPD ¶ 84 at 4.

Here, the solicitation specifically contemplated evaluation of past contract performance within a specified 3-year period. It is clear that, when PSI made late deliveries within the 3-year period, the firm was still engaging in contract "performance" at the time the late deliveries were made. In our view, the fact that the originally scheduled delivery date was prior to the beginning of the 3-year period does not provide a reasonable basis for excluding that contract performance from consideration—particularly in the context of evaluating "on-time delivery."

Further, where PSI's evaluated price was [deleted] than MEI's, and the only non-price discriminator between the two proposals was PSI's [deleted] rating for on-time delivery, we cannot find reasonable the agency's selection of PSI's [deleted] proposal when that decision incorporates the agency's unreasonable failure to consider delinquent deliveries by PSI. Accordingly, we sustain the protest on this basis.

PSI also protests that the exchanges between PSI and the agency regarding PSI's record for on-time delivery, and the agency's failure to engage in similar exchanges with MEI, constituted agency conduct that improperly favored PSI. We agree.

As discussed above, in reevaluating PSI's past performance information, the agency found the record was "not complete," Agency Report, Tab F, at 7, requested that PSI submit additional documents relating to its past performance, sought PSI's explanation regarding late deliveries and, based in part on PSI's explanations, evaluated PSI's proposal as [deleted] for on-time delivery. Tr. at 121. In contrast, the agency's reevaluation of MEI's proposal resulted in the agency downgrading MEI's rating for on-time delivery from [deleted] to [deleted], yet the agency opted not to communicate with MEI in any way regarding this matter.

The FAR provides that, in conducting exchanges with offerors, agency personnel “shall not engage in conduct that . . . favors one offeror over another.” FAR § 15.306(e)(1); see Chemonics Int’l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61 (agency conducted discussions in manner which unreasonably favored awardee over protester in violation of FAR 15.306(e)).

On the basis of the record here, we find that the agency’s exchanges with PSI regarding its delivery record, when viewed together with the agency’s failure to conduct similar exchanges regarding MEI’s delivery record, constituted conduct which improperly favored PSI and violated the provisions of FAR § 15.306(e)(1). The agency apparently recognizes that it should have communicated with MEI regarding its reevaluation of MEI’s proposal.¹⁷

The agency argues, however, that we should not sustain the protest on this basis because MEI was not prejudiced by the agency’s actions. Specifically, the agency relies on the contracting officer’s statement in the SSDD that, even without considering the MJU7-AB and M206 flare contracts, MEI’s rating for on-time delivery “would still be [deleted] than PSI’s rating [deleted] for on-time delivery . . . [and] the outcome of the award would not change.” Agency Report, Tab F, at 18-19. The agency’s arguments regarding prejudice appear to be based on the premise that there was no possibility that MEI’s prior rating of [deleted] for on-time delivery could have been enhanced, had the agency engaged MEI in the same type of exchanges that were conducted with PSI. The basis for the agency’s assumption in this regard is not clear, since its exchanges with PSI clearly addressed both information that had been initially submitted and previously evaluated, along with newly-submitted information. On the record here, we cannot conclude that, if the agency had conducted exchanges with MEI that were similar to those conducted with PSI, there would not have been a reasonable possibility of MEI’s proposal being rated [deleted] for on-time delivery, which could well have led to selection of MEI’s [deleted] proposal for award.

The protest is sustained.¹⁸

¹⁷ The contracting officer, after noting that the agency did not conduct discussions with MEI, states “[w]ith the advice of counsel, I determined that I could not consider [MEI’s performance of contracts that were not discussed].” Supplemental Contracting Officer’s Statement, Nov. 15, 2002, at 13-14.

¹⁸ MEO also protests that the agency miscalculated PSI’s proposal with regard to each of the subfactors under management plan. We have reviewed all of its arguments in this regard and find no merit in them.

RECOMMENDATION

Since the agency's evaluation was flawed and the agency engaged in unequal exchanges that improperly favored PSI, we recommend that the agency reopen discussions with all offerors whose proposals are within the competitive range, seek revised proposal submissions, evaluate those revisions in a manner consistent with the solicitation requirements, and make a new source selection decision. If an offeror other than PSI is selected for award, the agency should terminate the contract previously awarded to that firm. 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) (2002). 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).

Anthony H. Gamboa
General Counsel