



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Oceaneering International, Inc.

File: B-278126; B-278126.2

Date: December 31, 1997

Daniel J. Riley, Esq., and Stan Hinton, Esq., Baker & Botts, for the protester.
Buel White, Esq., and Brian Cohen, Esq., Bell, Boyd & Lloyd, for Phoenix Marine, Inc., an intervenor.

Veronica Murtha, Esq., and James Menapace, Esq., Department of the Navy, for the agency.

Jacqueline Maeder, Esq., Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated technical proposals is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation factors; protester's mere disagreement with the agency's conclusion does not render the evaluation unreasonable.
2. Allegation that awardee should have been disqualified as nonresponsible for failure to demonstrate possession of a specific line of credit is dismissed where the requirement for financial capability at issue is not set forth in the form of a definitive responsibility criterion.

DECISION

Oceaneering International, Inc. protests the award of a contract to Phoenix Marine, Inc. under request for proposals (RFP) No. N00024-97-R-4025(Q) issued by the Department of the Navy's Naval Sea Systems Command (NAVSEA) for world-wide diving and diving-related services. Oceaneering challenges the agency's evaluation of technical proposals and argues that Phoenix Marine did not comply with a definitive responsibility criterion.¹

¹Oceaneering also alleges that Phoenix Marine is ineligible for award because it improperly obtained Oceaneering's proposal information before the award of the contract in violation of the Procurement Integrity Act, 41 U.S.C. § 423 (1994). Specifically, Oceaneering protests that several of its key employees who played significant roles in the development of Oceaneering's proposal were also involved,
(continued...)

We deny the protest.

The RFP, issued via the Internet on October 18, 1996, contemplated the award of a combination cost and fixed-price/indefinite quantity, indefinite delivery contract for various diving-related services, including underwater maintenance on ships' hulls and structures, dry- and wet-welding, and salvage assistance. All services will be performed in response to task orders issued on a per-diem cost plus award fee basis (for operational services, including emergency or field operations) or a firm, fixed-price basis (for non-operational services not requiring field deployment).

The RFP called for the submission of separate technical and cost proposals and advised that technical considerations were more important than cost. The RFP provided that award would be made, without discussions, to the offeror whose proposal, conforming to the solicitation, was determined to be most advantageous to the government. The evaluation factors and subfactors and the weight of each factor or subfactor are listed below:

¹(...continued)

without Oceaneering's knowledge, in the preparation of Phoenix Marine's proposal. Thus, Oceaneering maintains that Phoenix Marine improperly obtained proprietary information concerning Oceaneering's proposal and used that information to Oceaneering's detriment in the competition.

In response to these allegations, the Navy conducted an investigation and concluded that the allegations were unsupported by Oceaneering. However, the Navy advises that, because of the severity of the charges and the conflicting testimony offered, the agency requested that the Navy's Inspector General investigate further. We have contacted the Navy's Office of Inspector General and confirmed that it is actively investigating the allegations. In view of the Inspector General's ongoing investigation, we are dismissing the protest issues under investigation, pending completion of the Inspector General's investigation. See Hazeltine Corp., B-235239, June 22, 1989, 89-1 CPD ¶ 592 at 3; Usatrex Int'l, Inc., B-231815.4, Oct. 31, 1988, 88-2 CPD ¶ 413 at 2. Upon completion of the investigation, the protester may reinstate its protest regarding these issues.

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| 1. Personnel | 33 percent |
| 2. Quality Assurance Plan and Procedures | 27 percent |
| a. Quality Assurance Plan | 8 percent |
| b. Welding and NDT Procedures ² | 7 percent |
| c. Welding Certification Plan | 6 percent |
| d. NDT Personnel Certification | 6 percent |
| 3. Corporate: Past Performance, Organization, Management | 27 percent |
| a. Past Performance | 17 percent |
| b. Organization | 6 percent |
| c. Management | 4 percent |
| 4. Equipment and Facilities | 13 percent |
| a. Equipment | 9 percent |
| b. Shore-based Support Facilities | 4 percent |

Two proposals, Oceaneering's and Phoenix Marine's, were received by the January 24 closing date.³ The proposals were reviewed individually by each of the three members of the technical evaluation review panel (TERP).⁴ The evaluators rated each factor and subfactor using adjectival ratings and corresponding point values on a scale of 0 to 10 (9.5 to 10 for "outstanding"; 8.5 to 9.4 for "excellent"; 7.5 to 8.4 for "good"; 6.5 to 7.4 for "acceptable"; 3.5 to 6.4 for "marginal"; and, 0 to 3.4 for "unsatisfactory").⁵ The individual scores assigned were averaged to arrive at

²"NDT" refers to Nondestructive Testing.

³Oceaneering, the incumbent, has been the prime contractor for these services for most of the past 20 years; Phoenix Marine is a newly incorporated company.

⁴An initial TERP evaluation was completed in April. However, this panel had difficulty confirming the scores assigned and, while it was in the process of reaching consensus and preparing a final report, two members became unavailable for continued service. Thus, two new members were assigned to the TERP. New members were not shown the draft report of the initial TERP. The newly-constituted TERP completed a reevaluation of the proposals on July 1, which is the evaluation at issue in the protest.

⁵The adjectival ratings were defined in detail. For example, an adjectival rating of
(continued...)

a composite numerical score for each of the subfactors. The numerical rating was multiplied by the weight for the subfactor and the scores for each subfactor were totaled. A proposal that received all outstanding ratings would receive a maximum weighted point score of 10. The TERP awarded the following scores for the proposals:

	Maximum	Oceaneering	Phoenix Marine
Personnel	3.3	2.89	3.09
Quality Assurance	2.7	2.44	2.34
Corporate Experience	2.7	2.31	2.27
Equipment & Facilities	1.3	1.18	1.11
TOTAL	10	8.82	8.81

The offerors proposed scheduled and non-scheduled cost factors from which the agency generated a total evaluated cost factor. The agency reports that Phoenix Marine's normalized cost is [DELETED] percent lower than Oceaneering's normalized cost. The protester states that the differential is only [DELETED] percent. In any event, the record confirms that the awardee's cost is significantly lower than the protester's cost. Because the total technical scores of the two offerors were virtually identical and Phoenix Marine offered the lower price, the Navy determined that Phoenix Marine offered the best value to the government and awarded the contract on September 9.

⁵(...continued)

"good" was described as follows:

The offeror's proposal is adequately sufficient with no major weaknesses [A]ny weaknesses noted are of a minor nature A rating within GOOD is used when there are no indications of exceptional features that could prove beneficial, or contrarily, weaknesses which may diminish the quality of the Offeror's performance

An "acceptable" rating was described as:

The offeror's proposal is minimally sufficient [T]here are many areas for improvement [I]ndicated weaknesses would diminish the quality of the Offeror's performance

Oceaneering challenges the evaluation of each offeror's past performance, the evaluation of Oceaneering's proposed project manager, and the evaluation of Phoenix Marine's facilities and equipment. Oceaneering also protests that one member of the TERP failed to follow the evaluation scheme outlined in the RFP and argues that Phoenix Marine did not comply with an alleged definitive responsibility criterion.⁶

TECHNICAL EVALUATION

Past Performance

The RFP instructs offerors to identify all public and private contracts that they have performed within the past 3 years that are similar in nature to this solicitation. The criteria for evaluating past performance set forth in the RFP include the offeror's record of conforming to contract requirements and to standards of good workmanship; the offeror's record of forecasting and controlling costs; the offeror's adherence to contract schedules; the offeror's history of reasonable and cooperative behavior and commitment to customer satisfaction; and, generally, the offeror's concern for the interest of the customer.

In evaluating Oceaneering's past performance, the Navy reviewed Oceaneering's proposal and examined Oceaneering's award fee scores as the incumbent,⁷ after determining that the award fee criteria used by the Navy under the past contract were essentially equivalent to this solicitation's criteria for assessing past performance. The TERP concluded that Oceaneering's performance under the prior contract was neither exceptional nor deficient, and that its performance demonstrated neither strengths nor weaknesses. As noted above, the rating scheme employed by the agency prescribed a rating of "good" to reflect a proposal that was "adequately sufficient" with "no indications of exceptional features . . . or contrarily, weaknesses." Thus, under the Navy's rating plan, Oceaneering's past performance

⁶In its initial protest, Oceaneering also challenged the evaluation of other personnel and the agency's cost analysis. The Navy fully responded to these issues in its report, but the protester failed to rebut the agency's response in its comments. Therefore, we consider these issues to have been abandoned by the protester and we will not consider them. Analex Space Sys., Inc., PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 8-9.

⁷While Oceaneering submitted information on a number of past contracts, both the Navy and Oceaneering considered Oceaneering's performance as the incumbent to be its most relevant experience.

was given a score of 8.4, which was the highest possible score under a "good" rating.⁸

On the other hand, Phoenix Marine, a new corporation, had no corporate experience. The Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 405(j) (2) (1994), states: "In the case of an offeror with respect to which there is no information on past contract performance . . . the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance." Similarly, the Federal Acquisition Regulations (FAR) § 15.608(a)(2)(iii) (June 1997) provides that firms "lacking relevant past performance history shall receive a neutral evaluation for past performance." Based on the narrative descriptions defining the adjectival ratings, the Navy assigned Phoenix Marine a score of 8, which was the midpoint score for an adjectival rating of "good." The Navy explains that the description supporting a "good" rating--that is one that was "adequately sufficient" with neither strengths or weaknesses--most closely conformed to a neutral rating.

Oceaneering argues that both of these past performance evaluations are improper. First, as to its own proposal evaluation, Oceaneering argues that its past performance merited a higher adjectival rating than that of a company with no past performance. Oceaneering also argues that the award fee criteria under the prior contract differ from the past performance evaluation criteria described in the solicitation, and that the formula for calculating the award fee makes the translation of the award fee factor to the RFP evaluation's scheme impossible.

As for Phoenix Marine's past performance evaluation, Oceaneering asserts that the Navy's evaluation lacks a rational basis. Oceaneering acknowledges that, because Phoenix Marine has no corporate history, it was entitled to a "neutral" score; however, Oceaneering questions the Navy's determination that a neutral score equates to a "good" rating, arguing that such an evaluation "flies in the face of the ordinary meanings of the terms 'good' and 'neutral.'"

The evaluation of technical proposals is a matter within the discretion of the contracting agency since that agency is responsible for defining its needs and the best method of accommodating them. Mesa, Inc., B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62 at 5. In reviewing an agency's technical evaluation, we will not reevaluate the proposals; rather, we will examine the record to ensure that the evaluation was reasonable and consistent with the RFP evaluation criteria. Id. A protester's disagreement with the agency's judgment, standing alone, is not sufficient to

⁸In assessing a score of 8.4, the Navy also considered Oceaneering's award fee scores for delivery orders completed by Oceaneering during the prior 3 years. Oceaneering's average award fee score for the past 3 years was 8.4.

establish that the agency acted unreasonably. Ionsep Corp., Inc., B-255122, Feb. 10, 1994, 94-1 CPD ¶ 97 at 3.

Here, we find no merit in Oceaneering's contention that the evaluation of its past performance was improper. Oceaneering has not shown that the agency unreasonably determined that its past performance demonstrated neither strengths nor weaknesses. Regarding the criteria on which the Navy relied, our review of the record shows that the RFP's past performance criteria and the award fee criteria under the prior contract are basically identical. As the Navy points out, quality of performance under the award fee criteria encompasses the offeror's record of conforming to contract requirements and the standards of good workmanship; cost performance under the award fee equates to the offeror's record of controlling costs; and, timeliness equates to adherence to contract schedules. The past performance criterion of reasonable and cooperative behavior and customer satisfaction and concern for the customer are not, as the protester suggests, isolated criteria, but can be reasonably viewed as being part of all the other criteria concerning performance and quality.

As to the use of the award fee scores, we note that award fee determinations are one indicator of successful performance and, thus, it was reasonable for the agency to consider award fee determinations in its evaluation of past performance.⁹ In any event, as noted above, the agency evaluators reviewed the protester's past performance information and independently determined that Oceaneering's past performance reflected neither strengths nor weaknesses. Under these circumstances, we see nothing unreasonable in the agency's evaluation of Oceaneering's past performance.

We also see no basis to question the agency's evaluation of Phoenix Marine's proposal with regard to past performance. As discussed above, the agency concluded that the narrative description of a "good" rating--that is, "adequately sufficient" with no strengths or weaknesses--most accurately reflected the regulatory requirement for a "neutral" rating. We find that the agency reasonably equated a lack of past performance history with a past performance history that was neutral, in the sense that it was neither positive nor negative. It is reasonable for an agency, as the Navy did here, to treat an offeror without past performance information as equivalent to one with past performance that was marked neither by strengths nor by weaknesses.¹⁰ In concluding that this is what the Navy did here,

⁹Oceaneering, in its proposal, used its final award fee score to support its past performance.

¹⁰It would seem preferable to advise offerors in the solicitation, in more detail than was done here, regarding the way in which the agency would implement the mandate for a neutral rating for offerors lacking past performance information.

we rely on the underlying substantive definition of the ratings, rather than the connotation of the label attached to the definition (since the underlying definition is, we agree, at odds with the "good" label). In sum, we find that the Navy reasonably evaluated Phoenix Marine's past performance.

Project Manager

Oceaneering next complains that the agency improperly evaluated the skills and experience of its proposed project manager and alleges that the evaluation was biased. We have reviewed the evaluation record and Oceaneering's proposal, including the resume submitted by Oceaneering's proposed project manager, and we conclude that the evaluation was reasonable and consistent with the RFP.

The solicitation listed two desired qualifications for the project manager: (1) undergraduate degree in science, engineering, or business and (2) 8 years of experience with responsibility for the management of marine-related operations.

Oceaneering alleges that the agency improperly treated desired qualifications in education and experiences as if they were mandatory and therefore downgraded its proposed project manager for failing to meet them. Oceaneering also notes that the experience at issue was to be in "the management of marine-related operations," complaining that the agency interpreted this management more narrowly to mean only "project manager" experience. The protester claims that its proposed project manager served as the project manager for Oceaneering's current contract since July 1995 and as project manager for a Department of Transportation and Coast Guard contract in 1994 and 1995. Additionally, Oceaneering asserts that its proposed project manager managed two 12-person inspection teams from 1991 through 1993 and directed diving crews for another firm from 1988 to 1991. The protester contends that this experience totals more than the desired 8 years of "management of marine-related operations."

Because its proposed manager was rated "marginal," Oceaneering also argues that the evaluation was biased. Oceaneering maintains that one of the evaluators retaliated against the firm in his evaluation of Oceaneering's proposed project manager because the evaluator was allegedly removed from working on Oceaneering's prior contract at the request of the proposed manager.

As noted above, the RFP listed desired qualifications without stating that these qualifications were mandatory; thus, the RFP clearly advised offerors of the specific skills and experience the Navy sought. While a candidate who did not possess the desired qualifications was acceptable, offerors were clearly on notice that such a candidate could be scored lower than a candidate with the desired credentials.

Here, the agency did not reject Oceaneering's proposed project manager as "unacceptable," but rather rated him "marginal," primarily because he did not

demonstrate that he had 8 years experience in the management of marine-related operations. Specifically, based on the resume submitted, the agency found that Oceaneering's proposed program manager had 2 years management experience on Oceaneering's current contract. However, rather than the claimed 2 years of management experience for work with the Department of Transportation and the Coast Guard, the proposed project manager's resume, in fact, indicated that his work was sporadic and amounted to only 9 months of actual management experience. Similarly, the proposed program manager's management of 12-person inspection teams reflected a 7-month effort, rather than the 2 years claimed by the protester. As to Oceaneering's assertion that its proposed manager "directed diving crews" for another firm from 1988 to 1991, the proposed project manager's resume stated that he was an "Ocean Engineer/Diver" providing "engineering and program management support." In sum, the Navy determined that Oceaneering's proposed project manager had a maximum of 6 years and 8 months of management experience. Based on our review of the record, we see no basis to question the Navy's determinations.

Regarding the allegation of bias, the protester must provide credible evidence showing bias and demonstrate that agency bias unfairly affected the protester's competitive position. ASI Personnel Serv., Inc., B-258537.7, June 14, 1995, 95-2 CPD ¶ 44 at 7. Our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Id. Here, as noted above, the agency reasonably downgraded the proposed project manager for lack of the desired experience. Accordingly, Oceaneering's allegation of bias is without merit.

Equipment and Facilities

Oceaneering next argues that the evaluation of Phoenix Marine's equipment and facilities was flawed. Because Phoenix Marine does not own as much of its own equipment and facilities as does Oceaneering, the protester argues that Phoenix Marine should not have been as highly rated under this factor as Oceaneering.

The RFP required that the contractor provide (1) the equipment and facilities to perform the qualification welding required under the solicitation; (2) 1,000 square feet of enclosed warehouse controlled access storage for government-furnished equipment; (3) an open tank for conducting wet welding trials in seawater; and, (4) a hyperbaric chamber suitable for conducting dry-chamber welds. Additionally, Schedule D of the RFP listed minimum requirements for diving equipment.

In its proposal, Phoenix Marine stated that it would purchase or subcontract for the required equipment and provide facilities through leasing arrangements. Specifically, Phoenix Marine proposed to meet the open tank requirement by either constructing a tank [DELETED] or subcontracting [DELETED]. Phoenix Marine also provided that it would subcontract for [DELETED], lease facilities [DELETED], and purchase much of the diving equipment listed on Schedule D. With its proposal

Phoenix Marine provided letters of commitment to subcontract for existing equipment. Accordingly, the TERP determined that Phoenix Marine's proposal had no weaknesses and assigned the proposal an "excellent" rating.

The agency acknowledged in Oceaneering's debriefing that current ownership of the equipment and facilities by the prime contractor was beneficial to the agency and, noted that it had awarded Oceaneering higher numerical scores than Phoenix Marine because the protester owns the required equipment and facilities. However, the RFP did not require ownership of the equipment and facilities, and Phoenix Marine's proposal to purchase, lease, or subcontract for the required equipment and facilities was permissible. The protester points to nothing but general disagreement with the agency's assessment to support its position. On this record, we have no basis to question the agency's determination.

Failure to Follow Evaluation Scheme

Oceaneering also alleges that one of the three members of the TERP failed to follow the evaluation scheme outlined in the RFP. The protester bases this allegation on a memo written by this evaluator, and the fact that this evaluator's scores were generally lower than the scores of the other evaluators. The memo, which was part of the member's evaluation sheets, states, in relevant part, that the rating adjectives "are weighted far too heavily on the 'good' side" since a subfactor which merely meets the criterion but does not exceed the criteria must be rated as "good" and, even if weaknesses are apparent, must be rated as "acceptable."

The protester argues that this evaluator "clearly scored according to his own evaluation scheme." We disagree. Individual evaluators may not agree on all aspects of an evaluation, and an expression of disagreement with some aspects of an evaluation does not mean that the evaluator failed to follow the evaluation scheme outlined in the solicitation. Roy F. Weston, Inc., B-274945 et al., Jan. 15, 1997, 97-1 CPD ¶ 92 at 4 n.7; Stat-a-Matrix, Inc. et al., B-234141 et al., May 17, 1989, 89-1 CPD ¶ 472 at 6.

Here, while the memo on which the protester relies suggests that the evaluator believed the adjectival ratings were overly generous, the memo does not support the protester's contention that the evaluator refused to follow the RFP evaluation scheme. Rather, the memo outlines how the evaluator evaluated the proposals within the parameters of the RFP's evaluation criteria. Specifically, the first paragraph of the memo explains that the evaluator evaluated "the specific qualifications of the individual person or item being reviewed and compares the qualifications against the requirements put forth in the RFP." We have reviewed the

scores and do not find them unreasonable. More importantly, it is clear that the evaluator applied the same standards to both Oceaneering's and Phoenix Marine's proposals. On this record, we find no merit in this portion of the protest.

Definitive Responsibility Criteria

Finally, Oceaneering protests that Phoenix Marine is ineligible for award because it failed to meet what Oceaneering asserts was a definitive responsibility criterion. In this regard, section L of the solicitation provides as follows:

The offeror will need the financial capability to simultaneously conduct two or more underwater operations. It is estimated that a single operation can cost as little as \$20,000 or as much as \$2,000,000. The offeror will need the financial resources or credit line to absorb these costs for a reasonable period after initiation of the operation. Accordingly, upon written notice from the Contracting Officer, the Offeror shall furnish all information necessary for the Contracting Officer to determine the financial responsibility of the Offeror.

Oceaneering alleges that this RFP provision required offerors to demonstrate current funds or a credit line totaling \$2,000,000, and that Phoenix Marine provided documentation showing only an approved line of credit of [DELETED] and commitments for funds by two Phoenix Marine officers totaling [DELETED]. Oceaneering argues that, because Phoenix Marine did not demonstrate an ability to produce \$2,000,000, it should have been eliminated from award consideration.

A definitive responsibility criterion is a specific and objective standard established by an agency for use in a particular procurement to measure a offeror's ability to perform the contract. See M&M Welding & Fabricators, Inc.--Recon., B-271750.2, Mar. 26, 1997, 97-1 CPD ¶ 124 at 2. These special standards of responsibility limit the class of offerors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Id. Here, the requirement that offerors have the financial capability to fund operations for a limited time period does not set out a specific, objective standard measuring the offeror's ability to perform; rather, the provision expresses in general terms a factor which is encompassed by the contracting officer's subjective responsibility

determination. Our Bid Protest Regulations preclude us from reviewing a contracting officer's affirmative responsibility determination absent a showing of possible bad faith on the part of government officials or that a definitive responsibility criterion was not met. 4 C.F.R. § 21.5(c) (1997). Since these circumstances are not present here, we will not consider Oceaneering's allegations.¹¹

The protest is denied.

Comptroller General
of the United States

¹¹In any event, the protester misreads the requirement. The RFP does not require, as Oceaneering alleges, that an offeror must be able to obtain \$2,000,000. While the RFP does state that an operation may cost as much as \$2,000,000, the solicitation specifically states that an offeror needs only the financial resources to absorb the cost of two or more operations for a reasonable period after initiation of the operation. According to the agency, a reasonable period that an offeror would be required to finance would be approximately two months, not the entire period of the largest single operation.