



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: GTS Duratek, Inc.

File: B-280511.2; B-280511.3

Date: October 19, 1998

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DIGEST

1. Protest that contracting agency improperly determined that awardee's proposal met the solicitation's minimum technical requirements is sustained where the proposal is ambiguous, at best, with respect to whether it met certain requirements and where the contemporaneous evaluation documentation shows serious concerns regarding the awardee's technical acceptability that were not resolved.
 2. Protest that contracting agency improperly evaluated offerors' past performance is sustained where the record shows that, with respect to both offerors, the agency ignored relevant information that was personally known to one of the agency evaluators, and where the agency failed to comply with the solicitation's evaluation criteria with respect to the past performance evaluation.
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DECISION

GTS Duratek, Inc. (GTSD)¹ protests the award of a contract to Allied Technology Group, Inc. (ATG) under request for proposals (RFP) No. N00604-97-R-1001, issued by the Department of the Navy for the comprehensive reduction and disposal of radioactive waste generated by the Pearl Harbor Naval Shipyard (PHNS) in Pearl Harbor, Hawaii. GTSD challenges as improper the Navy's conclusion that ATG's proposal met the solicitation's minimum technical requirements; the Navy's

¹The entity initially involved in the procurement, Scientific Ecology Group, Inc., was purchased by GTSD prior to the submission of second best and final offers (BAFO). GTSD's Seventh Revised Proposal at 1.

evaluation of offerors' past performance; and the Navy's failure to reconcile the pricing assumptions on which offerors based their pricing.

We sustain the protests.

BACKGROUND

The solicitation, issued January 24, 1997, requests the services of a firm to pick up PHNS's radioactive waste from designated locations on the West Coast; transport the waste to a licensed processing facility; process and/or volume-reduce the waste via designated methods; and provide further transportation of the material to a licensed disposal facility, as required. RFP § C1.1B. The RFP's statement of work (SOW) set forth detailed requirements for each designated processing and/or volume-reduction method, including supercompaction, incineration/vitrification, metal melting, and the resin, sluicing/dewatering process. RFP § C1.3.

The successful offeror was to be awarded a fixed-price requirements contract to perform these services over 1 base year and 1 option year. RFP §§ A.1, B.1. Firms wishing to be considered for award were required to submit proposals consisting of technical, past performance, and price volumes. Each is at issue here.

Offerors' technical volumes were to describe and define their understanding of and compliance with all requirements contained in the RFP/SOW. Among other things, offerors were asked to explain how they complied with the RFP's requirements concerning special licenses and permits, various methods of radioactive material processing, radiological concerns, transportation, and emergency response plans. RFP § L.101.C.2.

Offerors' past performance volumes were to include all data and information demonstrating the overall quality of past performance on same or similar requirements with approximately the same per year dollar value. RFP § L.101.C.1. The overall quality of each offeror's past performance was to be "highly influential" in determining the relative merits of the overall proposal and in selecting the offeror whose proposal was considered most advantageous to the government. RFP § L.101.C.3.B.

Offerors' price volumes were to include section B of the RFP with a price proposed for each line item. RFP § L.101.C.4. The sum of all line items was to result in the estimated total amount for both contract periods. RFP § B.1.

Award was to be made to the offeror whose proposal met the minimum technical requirements and offered the best past performance to the government; past performance was more important than price. RFP § M.100.b. Section M.100.a. identified the following evaluation factors:

1. Technical (Minimum Requirements) which are of equal importance:
 - a. Special Licenses
 - b. Radioactive Material Processing
 - c. Radiological Concerns
 - d. Transportation
 - e. Emergency Response Plan
2. Past Performance
 - a. Quality of Service
 - b. Timeliness of Performance
 - c. Cost Control
 - d. Customer Satisfaction
3. Price

The degree of importance of price was to increase with the degree of equality of the proposals in relation to the other factors on which selection was to be based, or when price was so significantly high as to diminish the value of the technical and past performance factors to the government. RFP § M.100.d. The government might make award to other than the lowest-priced offeror or to the offeror with the best past performance rating if the contracting officer determined that doing so would result in the greatest value to the government. RFP § M.100.e.

Three firms submitted proposals by the March 21, 1997 extended closing date. The contracting officer established a competitive range of two--ATG and GTSD--based upon the initial findings of the technical evaluation board (TEB). Between May 2 and June 25, the Navy issued amendment Nos. 0005 through 0010. During this same period the Navy also conducted six rounds of written discussions, each of which generated revised proposals. The TEB also conducted its past performance evaluation, rating ATG's proposal "excellent" to GTSD's "good." Both firms submitted BAFOs on June 27, 1997.

The Navy's review of ATG's BAFO led to the conclusion that the firm had an excellent past performance rating and that it was the lowest-priced, technically acceptable offeror. However, since ATG's BAFO disclosed a recent termination for default on an Army contract, and since ATG was a small business, the Navy requested a preaward survey to ensure that ATG was financially and technically capable of performing the contract. Addendum to Pre-Negotiation Memorandum, Oct. 30, 1997, at 1. In an unrelated matter, the Navy decided to reopen discussions to address concerns regarding the government's liability associated with contractors' speculative accumulation of radioactive metal for future recycling applications. Id.

Between October 31, 1997, and January 9, 1998, the Navy issued amendment Nos. 0011 through 0016. During this same period the Navy also conducted four rounds of written discussions, each of which generated revised proposals. Both firms submitted second BAFOs on January 29.

The Navy later determined that it had incorrectly considered most of the findings raised by ATG's preaward survey to be issues of responsibility when they were, instead, unresolved technical issues. Addendum to Pre-Negotiation Memorandum, Feb. 25, 1998. The contracting officer decided to reopen discussions to allow ATG an opportunity to review and address these technical findings. Id.

The Navy issued ATG its preaward survey discussion questions on February 27,² and requested clarifications to ATG's response. ATG provided these clarifications on May 7. Both offerors subsequently submitted their third and final BAFOs.

The apparent basis for the source selection decision is the following paragraph from the Post-Negotiation Business Clearance Memorandum, at 56:

The offer from [ATG] is the best value to the government since it has been determined to be technically acceptable; [ATG] received an overall past performance rating of excellent in comparison to [GTSD's] rating of good and was determined responsible . . . ; in addition ATG is the low offeror vice [GTSD's] prices and ATG's proposed prices are fair and reasonable based on a price analysis and competition.

Award was made to ATG on June 18. GTSD filed its initial protest after its debriefing, and has filed two supplemental protests during the course of this proceeding. GTSD primarily contends that the Navy improperly concluded that ATG's proposal met the Navy's minimum technical requirements with respect to metal melting; the Navy improperly conducted a mechanistic evaluation of the offerors' past performance which failed to consider the nature of the underlying contracts and failed to consider negative past performance information regarding ATG; and the Navy improperly failed to reconcile the pricing assumptions on which offerors based their pricing.³

EVALUATION OF ATG'S TECHNICAL PROPOSAL

GTSD argues that the Navy improperly concluded that ATG's proposal met the solicitation's minimum requirements--in other words, was technically acceptable--with respect to metal melting. GTSD first alleges that ATG improperly proposed to decontaminate most of the metals and release them to a commercial foundry for uncontrolled reuse, in contravention of the RFP's requirement that all metals be processed through a radioactive foundry and recycled to qualified users

²The Navy advised GTSD that discussions had been reopened but that it needed no clarifications or revisions regarding its proposal. Navy's Eleventh Request for GTSD's Revised Proposal.

³Our review of GTSD's remaining allegations shows them to be without basis.

only. GTSD also alleges that ATG's proposal failed to designate the next user of the recycled metal melt products, in contravention of the RFP's requirement to do so.

Background

The solicitation requires the contractor to be able to process radioactive waste using an array of methods, but the Navy estimates that 75 percent of the work will involve metal melting.⁴ Post-Negotiation Business Clearance Memorandum at 39. Section C1.3.C. of the solicitation sets forth the metal melting specifications.

The contractor is required to provide metal melt recycling services for radioactively contaminated ferrous and non-ferrous metal scrap, parts, subassemblies, tools, machines, tanks, demineralizers, and components. RFP § C1.3.C.(1), (2), and (3). At the time initial proposals were submitted, the RFP permitted the contractor to mix metals originating from PHNS with those originating from other sources as long as the resulting ingot was recycled and transferred to a facility holding a current radioactive materials license for possession of by-product materials or was an authorized Department of Energy (DOE) facility. RFP § C1.3.C.(5).

In its initial proposal ATG stated that it would provide metal melt and recycling services according to section C1.3.C. of the solicitation. That is, ATG planned to receive the material at its facility; disassemble and/or size-reduce the metals; place the metals in containers; and ship these containers to its metal-melting subcontractor. The subcontractor would melt the metal and return the resulting ingots to ATG for recycling. ATG Initial Proposal at 6-7. ATG stated that it "may use these [ingots] for internal shielding or other recycling applications." *Id.* at 7.

In its Fourth/Fifth Revised Proposal, at 4, ATG advised the Navy that its pricing structure assumed that:

DELETED. . . . This is consistent with paragraph C1.13⁵. . . . DELETED
Accordingly, our technical and pricing approach to this bid takes a
literal approach to C1.13

⁴The Navy estimates that the contractor will melt just over 1.6 million pounds of metal during the course of the contract. RFP § B.1.

⁵Section C1.13 of the RFP, "Material Release as Industrial Scrap," sanctioned the "[f]ree release [of] any uncontaminated materials for [disposal] as 'clean' industrial waste; i.e. external wood shoring/dunnage, tie-downs, lead, aluminum or any other materials that would reduce unnecessary radioactive waste."

The Navy's Request for ATG's Sixth Revised Proposal, at 1-2, asked ATG to clarify this statement. The Navy instructed:

It is the intent of the prospective contract that all ferrous and non-ferrous metal items shipped, undergo the metal melt process by foundry melting to the maximum extent practicable. The free release clause (C1.13) . . . is intended for support material that is normally used in shipment of metal items, e.g. wood, dunnage, tie downs and plastic wrap. Request you review your prices in light of this clarification and confirm if this procedure will be met.

In its Sixth Revised Proposal, at 3, ATG reiterated that it planned to follow the approach explained in its Fourth/Fifth Revised Proposal—i.e., DELETED. ATG advised that if its interpretation was not correct, and it was so directed by the Navy, it would process the materials through a radioactive foundry regardless of the level and the nature of the present contamination. If so directed, it would adjust its prices accordingly in its BAFO. Id.

The next Navy communication with ATG, its first BAFO request at 1, instructed ATG as follows: "All ferrous and non-ferrous metals are to be processed through a radioactive foundry regardless of level and the nature of the contamination." ATG's BAFO was silent on the issue of its metal melting approach, and the Navy apparently assumed that the issue was resolved in accordance with its instruction. See Agency Report, Sept. 8, 1998, at 2, 10.

In an unrelated matter, the Navy reopened discussions to address a Naval Sea Systems Command (NAVSEA) concern that the provisions used by some activities in contracts for radioactive metal melting and recycling services might be inadequate to prevent a contractor from speculatively accumulating radioactive metal for uncertain future recycling applications. If such speculative accumulation occurred and the contractor was unable to recycle or dispose of the metal, the government could still retain liability for radioactive metals of government origin. Letter from NAVSEA to Shipyard Commands 1 (Sept. 11, 1997). NAVSEA proposed the addition of a contract provision which was added to section C1.3.C. of this solicitation by amendment No. 0011. That amendment deleted the prior grant of permission to mix metals and replaced it with the following language:⁶

(5) Metals originating at [PHNS] shall not be mixed or co-mingled with other generators' waste materials.

⁶Amendment No. 0011 also rephrased the clause at C1.13, "Material Release as Industrial Scrap," to clarify its meaning consistent with the Navy's previous instruction to ATG.

- (6) The contractor shall not speculatively accumulate metals of [PHNS] origin for uncertain future recycling applications. Metals of [PHNS] origin shall be processed into recycled product and in the possession of the next user within 12 months of the date such metals are received by the contractor . . . The next user of the recycled product shall be a facility holding a current radioactive material license or a [DOE] facility. The contractor agrees that if the [PHNS] metal cannot be sold as a recycled product within 12 months, the contractor shall dispose of such metal at the US Ecology burial site (the licensed disposal site for radioactive waste of [PHNS] origin) at no additional expense to the government.

The Navy's Request for ATG's Eleventh Revised Proposal raised the findings of the preaward survey team. At pages 2-3 of the request, the Navy references the requirement to provide ferrous and non-ferrous metal melt recycling services for radioactively contaminated metal, as well as the prohibition against speculative accumulation of PHNS metals for uncertain future recycling applications, and sets forth the following findings:

ATG has no current plans for the disposition of the metal melted ingots. They do not have a contract in place for delivering a product made of recycled radioactive ferrous metal to a facility holding a current radioactive material license or a [DOE] facility. Therefore, ATG cannot execute the recycling of radioactive ferrous metal in a timely manner as required by the solicitation.

In addition to the lack of plan or capability to recycle radioactive ferrous metals, . . . ATG has no plans to specifically address the elemental constituents of . . . nonferrous metals. The lead content of such metals is sufficient to result in such metals being regulated as hazardous waste . . . in the event the metals become a waste material. . . . Without specific disposition plans for recycled radioactive brass and bronze materials, ATG cannot recycle radioactive non-ferrous metals in a timely manner as required by the solicitation, and the failure to do so would result in an accumulation of radioactive hazardous waste.

The Navy cautioned ATG that its response to each finding must be in sufficient detail to convey a complete understanding of that finding, and must provide a viable solution showing its complete compliance throughout the term of the contract. Failure to provide sufficient information for the Navy to determine that its proposal was "completely technically acceptable" might result in a determination that the proposal was technically unacceptable. Id. at 6.

In its Eleventh Revised Proposal, at 2-3, ATG complained it had not known that the lead levels of non-ferrous metals would be sufficiently hazardous to render any blended metal melt product a mixed waste if not recycled. ATG submitted that the best solution for the government might be to "follow the approach identified below which is consistent with ATG's initial bid approach for this procurement and which falls within the RFP wording[:]"

DELETED

ATG further stated, "Given that the RFP wording would allow this approach (the RFP did not specify that a radioactive foundry must be used but simply that metal melting must be used), this approach falls squarely within the four corners of the procurement as well as within ATG's bid approach. . . . if the Government follows the prudent course identified above, a new BAFO is not required. ATG will provide the approach identified in 1-3 above at the prices set forth in the second BAFO." Id. at 4.

ATG also stated that it had given the Navy its "self-recycling option" for melted metals, and now identified two "potential" DOE recycling options by name. Hence, ATG contended, it had committed to recycle the materials both through self-recycle needs as a licensed user of radioactive materials and via DOE for its internal requirements for shielding. The firm argued that GTSD did not have an exclusive contract with DOE for metal melt recycle, and that some DOE contractors will no longer accept shielding from GTSD due to quality issues. ATG asserted that its proposed recycling approach was no more speculative than GTSD's, as "DOE is willing to accept shielding from either of us if DOE has a current need." Id. at 4-6.

The Navy's Request for ATG's Twelfth Revised Proposal, at 1, states that ATG's Eleventh Revised Proposal "has been reviewed" and requests some specific clarifications. Two of these requests are at issue here.

First, the Navy acknowledged that ATG's response offered a totally different approach to processing metals--DELETED. However, the Navy does not repeat its explicit prohibition against this approach or make any comment on it. Instead, the Navy narrowly focuses on what it believes to be ATG's misunderstanding regarding the lead levels of the non-ferrous metals to be provided under the contract and, with this focus as the backdrop, asks ATG to explain the process it intends to use to provide recycling services for PHNS's non-ferrous materials. Id. at 1-2. ATG's Twelfth Revised Proposal, at 2, answers the Navy's narrow question in a fashion that does not clarify whether it intends to use the approach that had previously been prohibited.

Second, the Navy disclosed its serious concerns regarding ATG's plans for the disposition of melted metal products:

Availability of a known recycling outlet for radioactive metal is a key aspect of determining the technical acceptability of your offer. If ATG has assurance from DOE that DOE will accept radioactive recycled metal from ATG, or if ATG has written information from DOE that DOE will accept radioactive recycled metal from any provider of such recycled metal that meets DOE's technical acceptance requirements, please provide PHNS with such information in your response. The Navy also has serious concerns regarding the technical acceptability of self-use by ATG as an outlet for Navy origin metal. Retention of radioactive metal for self-use could be considered by a regulatory agency to be speculative accumulation or a sham recycling, particularly since we saw no evidence of previous use of such material at your facility. Further, we believe that continued possession of Navy-origin material at a facility under contract with the Navy for processing radioactive material could result in continuing Navy liability for the eventual disposition of such material.

Navy's Request for ATG's Twelfth Revised Proposal at 2.

In its Twelfth Revised Proposal, at 3, ATG insisted that its internal uses for the materials are legitimate recycle uses by a licensed user of radioactive materials and that it has significant needs for shielding materials. ATG also conceded there are no firm requirements for its potential DOE recipients--one indicated a willingness to accept material from ATG's metal melt subcontractor and ATG had spoken to the other regarding its willingness to accept material from either contractor if funding was available. However, ATG again argued that it had at least equal ability to recycle to DOE as did GTSD, and discounted the Navy's concerns regarding its potential liability for internal use materials.

The only evidence that ATG's Twelfth Revised Proposal was reviewed is a one-page document which states, without further comment, "In reviewing [ATG's Twelfth Revised Proposal] it has been determined that ATG is able to perform the requirements and specifications of [the solicitation] and is technically acceptable." TEB Review of ATG Revised Proposal, May 11, 1998. The letter is signed by an individual who was not a member of the TEB. Id.; see Pre-Negotiation Business Clearance Memorandum at 6.

Discussion

Where, as here, an RFP requires the submission of information showing technical acceptability, each offeror must include sufficient information in its proposal to establish compliance with the solicitation's technical requirements. Pacific Consol. Indus., B-260650.2, Oct. 25, 1995, 95-2 CPD ¶ 247 at 3. The procuring agency is responsible for evaluating the data submitted by an offeror and ascertaining if they provide sufficient information to determine the acceptability of the offeror's

services; we will disturb this technical determination only if it is shown to be unreasonable. Inframetrics, Inc., B-257400, Sept. 30, 1994, 94-2 CPD ¶ 138 at 3. While we do not make an independent determination of the merits of a technical proposal, the agency's judgment must have a rational basis and be consistent with the stated evaluation criteria. Pacific Consol. Indus., *supra*. Consistent with this requirement, an agency must document its technical determinations in sufficient detail to show they are not arbitrary. *Id.* Where there is inadequate supporting rationale in the record for the agency's determination of technical acceptability, we cannot conclude that the agency had a reasonable basis for its determination. See Northwest EnviroService, Inc., B-247380.2, July 22, 1992, 92-2 CPD ¶ 38 at 5. Here, we cannot conclude that the Navy's determination that ATG's proposal was technically acceptable had a reasonable basis.

GTSD and the Navy agree that the RFP required that "all metals, ferrous or nonferrous, must be processed through a radioactive foundry." Agency Report, Sept. 8, 1998, at 10. At various points in this procurement ATG has insisted that "the RFP did not specify that a radioactive foundry must be used but simply that metal melting must be used." ATG's Eleventh Revised Proposal at 4. ATG's interpretation apparently is based upon the introductory language in RFP § C1.1.: "The contractor shall process radioactive waste by . . . recycling radioactively contaminated metals by foundry melting . . . "

To be reasonable, an interpretation of a solicitation must be consistent with the solicitation when read as a whole and in a manner giving effect to all of its provisions. Herman Miller, Inc., B-241582, B-241582.2, Feb. 19, 1991, 91-1 CPD ¶ 184 at 4. The solicitation plainly states that the contractor will be provided radioactively contaminated metal that must be recycled by foundry melting. Even if ATG had any basis to think that its interpretation was consistent with the RFP, the Navy clearly notified it to the contrary in its first BAFO request by saying: "All ferrous and non-ferrous metals are to be processed through a radioactive foundry regardless of level and the nature of the contamination." Navy's First BAFO Request of ATG at 1. This communication itself was sufficient to place ATG on notice of the actual requirement. Environmental Techs. Group, Inc., B-237325, Jan. 24, 1990, 90-1 CPD ¶ 101 at 3-4.

With the RFP's requirement in mind, we turn to ATG's proposal and briefly recap the relevant exchanges between the Navy and ATG. In its Sixth Revised Proposal, ATG stated that it planned to DELETED and processing through a commercial, that is, non-radioactive, foundry when possible. In its next communication with ATG, the Navy clearly told ATG that all metals must be processed through a radioactive foundry regardless of the level and nature of the contamination. ATG's first BAFO was silent on this issue, and in a subsequent revision (its Eleventh Revised Proposal)--and the last time ATG explicitly addressed this issue--ATG suggested, yet again, that it planned to DELETED in contravention of the RFP's requirements.

Given the statements by ATG on this issue in the various versions of its proposal, the proposal was, at a minimum, ambiguous as to whether ATG would comply with a material requirement of the solicitation--the requirement to process all metals through a radioactive foundry. In the absence of any evidence in the record to show that the ambiguity was resolved, it was unreasonable for the Navy to conclude that ATG's proposal was acceptable, and we sustain the protest on this ground.⁷ Pacific Consol. Indus., *supra*, at 3-4.

We turn now to GTSD's contention that ATG failed to meet the RFP's minimum technical requirements regarding the recycling of metal melt products because it did not designate the next user of the recycled products.

The metals had to be processed into recycled product and "in the possession of the next user" within 12 months of receipt, and "[t]he next user of the recycled product shall be a facility holding a current radioactive material license or a [DOE] facility." RFP § C1.3.C.6. There is no explicit requirement to "designate" the next user of the recycled products, and the only indication of the Navy's interpretation of the requirement is found in its discussion questions put to ATG.

ATG's primary plan for the disposition of the recycled metal melt products was its "self-use option." As discussed in detail above, the Navy had "serious concerns regarding the technical acceptability of self-use by ATG as an outlet for Navy origin metal," particularly since it had seen no evidence of such use during the preaward survey. The Navy cited the potential for speculative accumulation or a sham recycling, and expressed concern regarding continuing Navy liability for the eventual disposition of such material. Navy's Request for ATG's Twelfth Revised Proposal at 2. Neither ATG's Twelfth Revised Proposal nor its Third BAFO retreated from its "self-use option."

ATG also had "potential" DOE sources for the recycled material. As discussed in detail above, the Navy believed that availability of a "known" recycling outlet for radioactive metal was a key aspect of determining the technical acceptability of ATG's proposal. The Navy specifically requested some concrete evidence of DOE's willingness to accept the material at issue. *Id.* ATG did not provide any such concrete information in its Twelfth Revised Proposal or in its Third BAFO. It

⁷ATG's comments suggest that it does plan to use the DELETED approach. Comments, Sept. 14, 1998, at 2-4.

merely reiterated its contention that neither offeror could guarantee a DOE user.⁸ ATG's Twelfth Revised Proposal at 3.

The record shows, then, that the Navy's "serious concerns" regarding ATG's plans to recycle the melted metal products had a bearing on the technical acceptability of the firm's proposal, and that ATG's plans did not change after it was apprised of these concerns. What the record does not show is why, in the face of these "serious concerns," ATG's proposal was found to be technically acceptable. In the absence of any rationale for this decision, we cannot conclude that the Navy's assessment of ATG's proposal as technically acceptable was reasonable, and we sustain the protest on this basis. Pacific Consol. Indus., supra.

PAST PERFORMANCE

Background

The Navy planned to evaluate each offeror's performance under existing and prior contracts for services that were the "same or similar in scope, magnitude, and complexity to this requirement," and to focus on information that demonstrated "quality of performance relative to the size and complexity of the requirement under consideration." RFP § L.101.C.3.E. The RFP set forth past performance subfactors and provided a narrative explanation of the areas under consideration. Past performance information was to be collected using Contractor Past Performance Data Sheets, but the government might contact references other than those identified as well. Id.

GTSD's past performance volume discussed its performance of various Navy contracts for services such as those required here, including a PHNS contract for radioactive metal melting and recycling services. GTSD also submitted five Contractor Past Performance Data Sheets, none of which referenced the PHNS contract. The Navy sent surveys to each reference identified on GTSD's Contractor Past Performance Data Sheets and received responses from three of these. Using these surveys, the Navy evaluated GTSD's past performance by reviewing the adjectival responses given to each question, as well as any comments, and by noting which of the services required here were performed under the surveyed contracts. The TEB evaluated GTSD's past performance as "good" and concluded that the services evaluated were the "same for [GTSD] in the areas of metal melt and resin processing." Post-Negotiation Business Clearance Memorandum at 20. The contracting officer concurred. Id. at 21.

⁸While the Navy and ATG contend that GTSD had no guaranteed DOE outlets for its recycled product, the record shows that GTSD's plans in this regard are more concrete than those of ATG. GTSD's Initial Proposal, Introduction at 1; Volume I at 3.

The Navy's Request for GTSD's Third Revised Proposal included a copy of each past performance survey and asked for GTSD's review and comment. GTSD replied that it had no comment on the past performance information provided by PHNS.⁹ GTSD's Third Revised Proposal. The issue of GTSD's past performance was not revisited until after these protests were filed.

ATG's past performance volume included five Contractor Past Performance Data Sheets, three for its own contracts and one for each of its two subcontractors' contracts. The Navy sent surveys to each reference and received responses from four--all of ATG's references and one from ATG's metal melt subcontractor. Using these surveys, the Navy evaluated ATG's past performance in the same fashion as it evaluated GTSD's past performance. The TEB evaluated ATG's past performance as "excellent" and concluded that the services evaluated were "similar" for ATG. Post-Negotiation Business Clearance Memorandum at 20. The contracting officer concurred. Id. at 21.

The Navy's Request for ATG's Third Revised Proposal included a copy of each past performance survey and asked for ATG's review and comment. ATG provided comments in its Third Revised Proposal; there is no evidence that these had any effect on ATG's rating. The Navy telephoned ATG's past performance references twice before award to confirm the prior ratings, but ATG's rating did not change.

The only evidence in the record that the offerors' respective past performance ratings were compared in making the source selection decision is the following statement: "[ATG] received an overall past performance rating of excellent in comparison to [GTSD's] rating of good." Post-Negotiation Business Clearance Memorandum at 56.

Discussion

In its first supplemental protest GTSD argued that the Navy improperly failed to consider its "most relevant" contract, the PHNS contract for radioactive metal melt and recycling services. The Navy replied that since GTSD had not submitted a Contractor Past Performance Data Sheet for the PHNS contract, it had not sent out a survey for that contract. The Navy stated, however, that after the protest was filed it obtained a past performance survey from the contracting officer's representative (COR) on the PHNS contract, as well as another survey. The Navy stated that it had reevaluated GTSD's past performance inclusive of these two

⁹GTSD was given an opportunity to comment on this past performance information in accordance with Federal Acquisition Regulation (FAR) § 15.610(c)(6) (June 1997) (competitive range offerors must be provided with "an opportunity to discuss past performance information obtained from references on which the offeror has not had a previous opportunity to comment").

surveys and that the results had not changed. GTSD was still evaluated as "good," but the surveys contain several negative comments about GTSD's performance. Addendum #1 to Post-Negotiation Memorandum at 2; Addendum #2 to Post-Negotiation Memorandum at 1; Reevaluation of GTSD's Past Performance.

While we understand the Navy's rationale for initially not sending out a past performance survey on the PHNS contract, we do not understand the Navy's failure to consider the information in its possession regarding GTSD's performance on that contract. The record shows that this contract was deemed so relevant to the requirements at issue that it served as a basis for the government estimate. Post-Negotiation Business Clearance Memorandum at 54. Moreover, the COR for that contract, the individual who eventually completed the past performance survey, was a member of the TEB for this procurement. PHNS Past Performance Survey; Pre-Negotiation Business Clearance Memorandum at 6. Under the circumstances, the agency could not reasonably ignore personally known information about GTSD's prior experience on the PHNS contract merely because the firm did not submit a Contractor Past Performance Data Sheet for that contract. See Safeguard Maintenance Corp., B-260983.3, Oct. 13, 1995, 96-2 CPD ¶ 116 at 12. While there is no legal requirement that all past performance references be included in a valid review of past performance, some information is simply too close at hand to ignore. See International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

We agree with GTSD that the Navy's post-protest reevaluation of GTSD's past performance does not cure the defective initial evaluation. Under FAR § 15.610(c)(6), competitive range offerors must be provided with "an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment." An agency does not satisfy its obligation to conduct meaningful discussions with competitive range offerors where the agency fails to inform an offeror of adverse past performance information. Biospherics, Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161 at 8. Notwithstanding the Navy's evaluation of GTSD's proposal as "good," the post-protest surveys contain negative past performance information and GTSD was unquestionably entitled to comment on that information. Since it is reasonably possible that GTSD's past performance rating could have improved had it been given meaningful discussions, we sustain the protest on this basis. Id. at 9.

GTSD also contends that the Navy improperly failed to consider negative information concerning ATG's past performance which the Navy learned during ATG's preaward survey and which bears upon the RFP's past performance subfactors. We agree.

The evaluation of past performance was to focus on information pertaining to four equally important areas: quality of service, timeliness of performance, cost control, and customer satisfaction. Section L.101.C.3.B. of the RFP explained:

The offeror's record of conforming to specification and standards of good workmanship, adherence to contract schedules, providing required reports and schedules, the administrative aspects of management, quality control process and the offeror's reputation for reasonable and cooperative behavior will all be considered in the areas listed above.

PHNS's preaward survey of ATG raised numerous concerns, three of which are summarized here. First, there was no evidence of a documented system for determining inspection, test, and measurement requirements, which raised minor concerns regarding quality assurance. Second, there was evidence that ATG had significant backlogs in unprocessed waste which raised concerns regarding the firm's ability to timely process waste. Third, ATG's shipments to PHNS's designated burial site had been suspended on numerous occasions for violating the site's requirements for land burial, and PHNS considered the possibility of suspensions and/or loss of its burial permit to be unacceptable. ATG's Preaward Survey, Quality Assurance, at 3; ATG's Preaward Survey Report, Technical Support Evaluation, at unnumbered pages 5 and 10; Post-Negotiation Business Clearance Memorandum at 45-46.

The Navy skirts GTSD's argument that it improperly failed to consider these matters in the context of the past performance evaluation by relying on the fact that these matters were considered during the technical evaluation. That is not at issue. The Navy did not consider the findings of the preaward survey in the context of the past performance evaluation, and the question here is whether its failure to do so was improper.

At least some of the concerns that came to light during ATG's preaward survey are related to at least some of the RFP's past performance evaluation subfactors--quality of service, timeliness of performance, cost control, and customer satisfaction. Again, an agency may not simply ignore personally known information about an offeror's prior experience simply because it is not listed in the proposal. Safeguard Maintenance Corp., *supra*; *see also* International Bus. Sys., Inc., *supra*. Here, the Navy not only possessed the preaward survey results and considered them in another context, but several PHNS representatives participated in the preaward survey. In our view, it was simply not reasonable for the Navy to set aside this information without at least considering whether it had any impact on ATG's "excellent" past performance rating. *See* Pearl Properties; DNL Properties, Inc., B-253614.6, B-253614.7, May 23, 1994, 94-1 CPD ¶ 357 at 7-8.

Finally, GTSD argues that the Navy improperly failed to consider whether the efforts described in ATG's references were sufficiently similar to the requirements of the instant procurement to warrant an excellent rating without some adjustments to account for the variance between the size, complexity, and type of work performed and that required by PHNS.

Evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for a reasonably based past performance rating. However, we will question such a conclusion where it is not reasonably based or is undocumented. PMT Servs., Inc., B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98 at 6. In addition to the reasons set forth above, the Navy's past performance evaluation was unreasonable because it failed to comply with the stated evaluation criteria.

The Navy's consideration of whether a contract was the "same" or "similar" to the required services was cursory at best. The Navy considered a contract for a few of the services required here, even those services that are marginal to the overall effort, to be "similar" to the requirements at issue. The Navy was apparently satisfied as long as all of the required services were covered, even if only a few services were performed under each contract. Such a consideration does not address the requirement to evaluate performance for services that were the "same or similar in scope, magnitude, and complexity to this requirement," particularly since this requirement includes an array of comprehensive services. The Navy's failure to comply with the evaluation criteria extended to its comparison of proposals for the source selection, a failure which was particularly critical since the overall quality of each offeror's past performance was to be "highly influential" in determining the relative merits of the overall proposal and in selecting the offeror whose proposal was considered most advantageous to the government.
RFP § L.101.C.3.B.

PRICE ANALYSIS

GTSD contends that the Navy improperly failed to reconcile the pricing assumptions on which offerors based their pricing with respect to the resin disposal line items.

Section C1.3.D. of the solicitation set forth the resin disposal specifications. Contractors are required to provide disposal services for resin and resin catch tanks; these services include sluicing, dewatering and proper disposal of resins. Any water obtained in the dewatering process shall be incinerated. Services also include recycling of the metal catch tank using the metal melt process.
RFP § C1.3.D.(1), (2).

The solicitation contained two sub-line items for resin disposal at issue here. Sub-line item 0004AA requests a price for "Resin Disposal (includes weight of Demineralizer)." Sub-line item 0004AB requests a price for "Remove resin, process by vitrification or incineration at the option of the shipyard and metal melt the demineralizers." RFP § B.1.

Amendment No. 0012 contained a series of questions and answers about the procurement. Item No. 4 read as follows:

Q: We assume item 0004AA is for the disposal of both the resins and the demineralizer and that where the resin activities are low enough to meet our vitrification criteria (<200 mR/hr), 0004AB would come into effect.

A: Item 0004AB (incineration/vitrification) apply for resin activities within the limits of your plant equipment. For resin activities greater than plant equipment limitations, Section D (Resin, sluicing/dewatering process) applies.

Note: The resin activity will exceed 200 [millirems/hour] and may be as high as 10 [rems/hour]. . . .

GTSD's pricing proposal advised that it priced sub-line item No. 0004AB using the assumption that all incoming resins would have radiation levels DELETED. GTSD's Tenth Revised Proposal, Section B.1., Note 1; GTSD's Initial Technical Proposal at 5. ATG's pricing proposal advised that it priced sub-line item No. 0004AB using the assumption that all incoming resins would have radiation levels DELETED. ATG's Ninth Revised Proposal, Section B.1. Both offerors provided separate pricing for sub-line item No. 0004AA, and ATG priced resins with DELETED under that sub-line item.

GTSD contends it did not know it could price the disposal of resins with greater radiation levels under sub-line item No. 0004AA, DELETED. According to GTSD, the response to the question in amendment No. 0012 did not inform offerors that resin activities greater than plant equipment limitations could be priced under sub-line item No. 0004AA, but only that such resin activities would utilize section D of the SOW, the resin, sluicing/dewatering process.

We are not persuaded by this argument. While the structure of these CLINs is confusing, and the Navy may wish to make it more clear, we think the response set forth in amendment No. 0012 was sufficiently clear to have put GTSD on notice that it could price the resins with greater levels of radiation under sub-line item No. 0004AA. The response does not specifically say that such resin activities may be priced under sub-line item No. 0004AA, but the reference to the section of the SOW that addresses the resin, sluicing/dewatering process could only refer to that sub-line item.

CONCLUSION AND RECOMMENDATION

We conclude that the Navy improperly determined that ATG's proposal met the solicitation's minimum technical requirements. We also conclude that the Navy improperly conducted its past performance evaluation by ignoring relevant information with respect to both offerors and by failing to comply with the solicitation's evaluation criteria.

We recommend that the Navy reopen discussions, amend the solicitation if necessary, and perform a proper proposal evaluation and source selection decision. If the Navy selects GTSD for award, it should terminate the contract with ATG and make award to GTSD. We also recommend that the protester be reimbursed the costs of filing and pursuing its protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protests are sustained.

Comptroller General
of the United States