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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Gulf Copper Ship Repair, Inc.

File: B-292431

Date: August 27, 2003

William L. Mercer for the protester.

John R. Tolle, Esq., and William T. Welch, Esq., Barton, Baker, McMahon & Tolle, for the intervenor.

John B. Dale, Esq., and Susan S. Grooms, Esq., Naval Sea Systems Command, for the agency.

Sharon L. Larkin, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,

Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's selection of proposal that failed to conform to a minimum water depth specification is an unobjectionable waiver of the solicitation requirement, where deviation is negligible and does not result in prejudice to the protester.
 2. Under a solicitation with two evaluation factors, past performance and price, that contemplates a "best value" award, agency reasonably selected lower priced proposal from firm whose past performance was reasonably rated neutral instead of higher priced proposal of protester whose past performance was rated very good.
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DECISION

Gulf Copper Ship Repair, Inc. protests the award to Anteon Corp. by the Department of the Navy under request for proposals (RFP) No. N62678-03-R-0049 for ship maintenance and repair. Gulf challenges the acceptability of Anteon's proposal, the agency's methodology in evaluating past performance, and the source selection decision.

We deny the protest.

The RFP provides for award of a fixed-price contract for the "phased maintenance" of the USS Heron. RFP at B-1. Award was to be made on a "best value" basis, considering past performance and price, with past performance being "approximately equal to . . . [, but] more important than" price. RFP at M-2, 3. The

solicitation specified that the past performance data considered by the agency would include Contractor Performance Assessment Reporting System (CPARS) reports and “other relevant past performance information” from other sources. RFP at L-6. Offerors were instructed that the agency might select other than the lowest priced offer, or other than the offer with the highest evaluation rating. RFP at M-3.

Among other requirements, offerors were to submit berthing plans and sketches to show that the proposed navigation route from the navigation channel to the berthing position satisfied certain minimum water depth requirements. Specifically, a water depth of 2 feet more than the minimum vessel clearance at the mean low water (MLW)¹ was required by the specifications. RFP at L-9; Agency Report (AR), Tab 14, Standard Item 009-101, at 1; Tab 15, Drawing 845-668699, at 4. Vessel clearance was stated to be 10 feet, 1 inch, which thus required a minimum water depth of 12 feet, 1 inch at MLW throughout the navigation route. AR at 11.

Offers were received from Gulf and Anteon in response to the RFP. The Past Performance Evaluation Team (PPET) evaluated Gulf’s past performance as very good and Anteon’s as marginal, based upon the PPET’s review of the CPARS reports where available, past performance questionnaires, and other data. Gulf’s very good rating was based upon the CPARS reports from nine contracts, which the PPET determined to be “very relevant” to the procurement.² The PPET found that Anteon’s four referenced contracts were not relevant, and thus rated Anteon marginal “based solely on a lack of relevance and not significant weaknesses or deficiencies in the contractor’s past performance record.” AR, Tab 4, PPET Memorandum at 2-3, 6-8.

The Best Value Advisory Committee (BVAC) reviewed the findings of the PPET and, although it agreed with the PPET’s rating for Gulf, it disagreed with the rating for Anteon. The BVAC determined that the PPET’s findings concerning Anteon were inconsistent with the definition of “marginal” past performance set forth in the source selection plan.³ A marginal rating, the BVAC noted, was warranted where

¹ The MLW is the average of all low tides over a particular period of time. Canaveral Maritime, Inc., B-231857.4, B-231857.5, May 22, 1989, 89-1 CPD ¶ 484 at 7.

² The PPET determined that three other contracts for ship repair were not “as significantly relevant” and therefore the past performance information from these contracts did not affect Gulf’s ratings. AR, Tab 4, PPET Memorandum, at 3.

³ A marginal rating is defined as:

The offeror’s performance of previously awarded relevant contract(s) that are similar in respect to the subject availability did not meet some contractual requirements. The prior performance being assessed reflected some serious problems, for which the contractor either failed to identify or implement corrective actions in a timely manner, or for

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“serious [performance] problems” or “quality” issues arose in connection with the performance of “relevant contract(s) that are similar to the subject availability,” which was not the case here. Rather, the PPET’s findings were based solely on the lack of relevant past performance, which the BVAC found warranted only a neutral rating. Accordingly, the BVAC adopted a neutral rating for Anteon.

The BVAC also considered the firms’ proposed prices, noting that Anteon’s price was lower than Gulf’s. The BVAC recommended award to Anteon, stating that, in light of Anteon’s neutral past performance rating, the BVAC

[did] not consider the risk of performance if award goes to Anteon to justify paying the additional [cost] for this availability. In the absence of any information to indicate that Anteon is a bad performer, the BVAC considers Anteon to be the better value.

AR, Tab 5, BVAC Memorandum, at 2-4.

The source selection authority (SSA) concurred with the BVAC’s findings and recommended award to Anteon. Specifically, the SSA stated

I agree with the BVAC that Anteon’s past performance history does not warrant a marginal rating. The information available does not indicate significant weaknesses, deficiencies, or consistently mediocre work on the part of Anteon. While the few jobs performed by Anteon in Ingleside, [Texas] have consisted of low contract values, minimal complexity, and have been performed outside of the contractor’s plant,

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which the corrective actions implemented or proposed to be implemented were, or are expected to be, only partially effective. Performance over completed contracts was consistently of mediocre quality or exhibited a trend of becoming so. The offeror’s past performance record leads to an expectation that the successful performance might be difficult to achieve or that it can occur only with increased levels of [agency] management and oversight.

A neutral rating is defined as:

The offeror lacks a record of relevant or available past performance history. There is no expectation of either successful or unsuccessful performance based on the offeror’s past performance.

AR, Tab 3, Source Selection Plan, at 9.

the contractor has successfully completed these jobs without significant weaknesses or deficiencies. Further, the work performed by Anteon in the Norfolk, [Virginia] area, while still representing minimal complexity and performed outside the contractor's plant, has been performed successfully. I do not have any information available to me that indicates Anteon would not be capable of successful performance if awarded the subject availability. My independent risk analysis agrees with the BVAC and does not justify paying the price differential necessary to award to Gulf Copper. . . . Based on the above, award is directed to Anteon.

AR, Tab 6, Source Selection Assessment, at 1. Award was made to Anteon and this protest followed.

Gulf complains that Anteon's proposal does not conform to the RFP's water depth requirements, which mandate a minimum water depth of 12 feet, 1 inch at MLW for the navigable route. Indeed, Anteon's berthing plan and sketches submitted with its proposal show that, while the water depth in the berthing area is 16 feet at MLW, the water depth in two places in the navigation channel leading to the berthing area is only 12 feet at MLW, which is less than the 12 feet, 1 inch required by the RFP. AR at 11. The Navy, however, considered the 1-inch shortfall to be "negligible" and thus concluded that the water depth at Anteon's facility was "satisfactory." AR at 11 n.5; Tab 17, Navy Discussions Re: Water Depth, at 3.

It is true that Anteon's proposal did not satisfy the minimum water depth requirement so that the agency essentially waived the requirement when it concluded that the 1-inch shortfall was acceptable. Nevertheless, we find no prejudice to the protester in the agency's actions, as the water depth shortfall was reasonably determined to be "negligible" and the protester has not shown how it would have altered its proposal to improve its competitive standing had it been given an opportunity to respond to the relaxed requirements. Absent prejudice to the protester, we deny this ground of protest. See 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 10-11; see also Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4 at 3-4 (agency permitted to waive deviation from specification which was minor and did not result in prejudice).

Gulf objects to the agency's use of past performance questionnaires as opposed to the CPARS reports to evaluate Anteon's past performance. Gulf argues that Anteon should not have been selected for award because it lacked relevant past performance.

Because the evaluation of proposals is a matter within the discretion of the contracting agency, we will not reevaluate proposals, but will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's

stated evaluation criteria and in accordance with applicable procurement laws and regulations. Hughes Georgia, Inc., B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151 at 4.

As noted above, the RFP contemplates that the agency would consider sources of past performance data other than the CPARS reports, RFP at L-6, and these sources, in our view, reasonably include the use of past performance questionnaires. In any event, given that the use of questionnaires resulted only in a neutral rating for Anteon and had no effect on the evaluation of Gulf's past performance, we fail to see, and Gulf has not shown, how Gulf was prejudiced as a result of the agency's methodology in evaluating past performance.

We also find reasonable the Navy's decision to award the contract to Anteon despite the lack of relevant past performance, which the agency reasonably determined warranted a neutral rating.⁴ The RFP specifically provided that a neutral rating for past performance "will be evaluated neither favorably nor unfavorably," RFP at M-02, see also FAR § 15.305(a)(2)(iv), and also cautioned that award could be made to other than the highest technically rated offeror. Since the RFP provided that the Navy could select an offeror for award whose proposal was not the highest technically rated, but was nevertheless deemed to provide the best value to the government, the SSA was required to determine whether Gulf's past performance rating was worth the higher price associated with its proposal. Hughes Georgia, Inc., supra, at 8. Here, the SSA determined that Anteon's referenced contracts, while not relevant, did not indicate performance deficiencies or cause the Navy to doubt Anteon's capability to successfully perform this contract, and thus concluded that Gulf's very good past performance rating did not justify paying the higher cost. This determination was within the sound discretion of the SSA, id., and apart from

⁴ Gulf challenges the qualifications of the PPET members to perform the past performance evaluation. The selection of individuals to serve as proposal evaluators is a matter within the discretion of the agency; we will not appraise the qualifications of such individuals absent a showing of possible fraud, conflict of interest, or actual bias on the part of the evaluators, which has not been alleged here. Emmert Int'l, B-280478, B-280478.2, Oct. 7, 1998, 98-2 CPD ¶ 112 at 8. In any event, Gulf does not challenge the PPET's ratings of its own past performance, and the PPET's ratings of Anteon were rejected by both the BVAC and SSA, so the qualifications of the PPET appear to be irrelevant. Although Gulf does not challenge the findings of the BVAC or SSA, we find that the SSA's determination to reject the PPET's rating of marginal for Anteon and assess a rating of neutral to be reasonable and consistent with the rating definitions set forth in the source selection plan, and within the SSA's discretion. See SAM El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 17-18.

disagreeing with the SSA's decision, Gulf has provided us with no basis to find that the determination was unreasonable.

The protest is denied.

Anthony H. Gamboa
General Counsel