



Comptroller General  
of the United States

Washington, D.C. 20549

## Decision

**Matter of:** Aqua-Chem, Inc.; Gismo, Inc.

**File:** B-249516.2; B-249516.3

**Date:** May 18, 1993

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for Aqua-Chem, Inc., and Linda L. Shapiro, Esq., Coburn & Croft, for Gismo, Inc., protesters.  
Del S. Dameron, Esq., and Jeffrey S. Merrifield, Esq., McKenna & Cuneo, for Keco Industries, Inc., and Denise C. Shafer, for Brunswick Corporation, interested parties.  
William R. Medsger, Esq., and Tony K. Vollers, Esq., Department of the Army, for the agency.  
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Allegation that evaluation of awardee's and protester's proposals was flawed, such that awardee's evaluation was too high and protester's was too low, is dismissed as academic; even if protester received highest possible evaluation and awardee's rating were lowered, intervening offeror with highest evaluation rating and lower price than protester would be in line for award.
2. Selection of prior relevant contracts for evaluation of past performance was proper where agency's selection criteria were logically related to overall objective of conducting past performance evaluation (to evaluate offerors' capability to perform contract comparable in engineering and manufacturing complexity to the solicited requirement), and contracts were selected for review based on those criteria.
3. Protest that agency lacked adequate information for determining whether prior contracts were relevant for past performance evaluation is denied where solicitation required offerors to provide all available information, the information provided related to relevancy, and protester points to no specific relevancy determination that was affected by alleged lack of adequate information.

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## DECISION

Aqua-Chem, Inc. and Gismo, Inc. protest the award of a contract to Keco Industries, Inc. under request for proposals (RFP) No. DAAK01-92-R-0086, issued by the Department of the Army to acquire a quantity of 3,000-gallon-per-hour reverse osmosis water purification units (ROWPU). Both protesters principally challenge the evaluation of past performance under the RFP.

We dismiss Aqua-Chem's protest in part and deny it in part. We deny Gismo's protest.

The solicitation contemplated the award of a requirements contract for up to 184 ROWPUs to be ordered during five 1-year delivery periods, and provided quantity estimates for each year. Offerors were required to submit firm, fixed unit prices, and award was to be made to the firm whose proposal represented the best overall value to the government. Technical considerations were deemed more important than cost unless the agency found that two or more technical proposals were substantially equal, in which case low cost would become the determinative award consideration.

For technical evaluation purposes, the RFP provided that past performance on other government contracts would be the agency's sole area of consideration, and eight past performance evaluation factors were specified (e.g., contractor's adherence to delivery schedules and contractor's dedication to overall quality and the submission of quality products, as reflected in the quantity, significance and resolution of quality deficiencies).

Offerors were instructed to submit their proposals in two volumes, one for cost and one for past performance. In the past performance volume, offerors were required to furnish detailed information relating to all government contracts valued at more than \$500,000 that had been performed during the preceding 3 years. The information was to include a narrative describing the work involved in each contract, its similarity to the solicited work, and any significant successes or failures during performance. Offerors were also required to describe their performance on each contract in terms of the eight past performance evaluation factors. Offerors were advised that the government would evaluate past performance based on the information submitted, as well as information obtained from outside sources such as the contracting officers responsible for the earlier contracts.

The Army received 12 initial proposals, which it forwarded to a Performance Risk Analysis Group (PRAG) for initial evaluation purposes. In evaluating past performance, the PRAG first determined whether a contract was relevant. A contract was considered relevant if it met at least one critical relevancy factor and at least three other relevancy factors, which were as follows: 1) end item built to contract specifications; 2) welding required in the manufacturing process (critical); 3) item contained electronic circuitry (critical); 4) item size comparable to the ROWPU; 5) item handles fluids; 6) electric wiring required in the manufacturing process (critical); and 7) item assembled in a production plant.

For relevant contracts, the PRAG considered the proposal information and solicited additional information from outside sources through the use of detailed questionnaires. Based on this information, the PRAG first assigned initial numeric scores and adjectival past performance risk ratings to each firm's proposal. The agency then engaged in discussions, providing firms an opportunity to explain significant past performance weaknesses. After receiving responses to the discussion questions, the PRAG assigned final numeric scores to the proposals, and then converted the numeric scores to past performance risk ratings which took into account not only the numeric scores but also certain extrinsic considerations. These extrinsic considerations included the relative numeric scores of the various offerors, the number of contracts evaluated for a given offeror, the relevancy (beyond the relevancy factors already discussed) of the contracts considered, and outside information relating to significant performance problems which carried too little weight to affect the numeric score.

Aqua-Chem submitted information relating to 20 prior or current government contracts, including a predecessor production contract for a quantity of ROWPUs. Of these 20 contracts, the PRAG determined that 19 were relevant. Because 17 of the 19 contracts were subcontracts for government prime contractors, however, the PRAG was unable to collect outside data for a number of them; as a consequence, only 9 of the 19 contracts were deemed to be supported by sufficient information to be evaluated. After performing an initial evaluation and conducting discussions with Aqua-Chem, the Army assigned the firm an overall final past performance risk rating of "medium-low."

GISMO did not submit any prior government contract information with its proposal, stating that because it had been incorporated in December 1991 it had not performed any government contracts valued at over \$ 500,000. After reviewing its proposal and searching government contract data bases, the Army wrote to GISMO stating that it had a

record of one qualifying government contract, and requested information relating to that contract. GISMO responded by stating that the contract in question had been performed by a predecessor firm (hereinafter, old GISMO) whose assets had been purchased as part of its formation. GISMO went on to state that it had not acquired any rights relating to the contract when acquiring the assets of old GISMO, that delivery on the contract was complete, and that the Army had apparently used an incorrect contractor and government entity (CAGE) code in performing its data base search. Thereafter, the Army engaged in discussions with GISMO, during which it acknowledged GISMO's previous letter and requested any additional corporate information which the government might use in evaluating the firm. GISMO responded stating that, although it was a new firm not associated with old GISMO, it did lease old GISMO's facility and employed a number of old GISMO's employees.

Based on this information and additional outside information regarding the one old GISMO contract, the Army performed its evaluation. The PRAG assigned an initial past performance risk rating of "low" based on its review of the information relating to the old GISMO contract. This rating was changed to a final risk rating of "medium" based on application of the extrinsic factors. The PRAG downgraded GISMO because only one contract had been evaluated, the end item produced under that contract was significantly less complex than the ROWPUs being acquired, and GISMO was not the same entity as the firm performing the contract.

Keco submitted information on 17 government contracts, 8 of which were determined to be relevant. Of these 8 contracts, outside data could be obtained for only 5; these 5 contracts were evaluated for risk, discussions were conducted with Keco, and the PRAG assigned Keco a final past performance risk rating of "medium-low" based on its review. A third firm, Brunswick, received a final past performance risk rating of "low" based on the Army's evaluation. The Army then made award to Keco, concluding that its proposal represented the best overall value to the government. The source selection document states that Keco was selected over GISMO, despite GISMO's lower price, because of the lower risk associated with the Keco proposal. The source selection document also states that award was made to Keco rather than Brunswick, despite Brunswick's slightly better past performance risk rating, because Keco's price was significantly lower than Brunswick's. Aqua-Chem, although ranked fifth for risk, was not included in the final list of firms receiving award consideration because of its significantly higher price; Aqua-Chem's price was higher than all but one of the offerors submitting proposals and was \$14.7 million higher than Keco's.

## AQUA-CHEM'S PROTEST

Aqua-Chem focuses largely on alleged flaws in the evaluation of its and Keco's past performance. This argument is based on its view that the Army made errors in the selection of the contracts that would be considered in the evaluation, and failed to conduct adequate discussions with Aqua-Chem. According to Aqua-Chem, but for the resulting evaluation errors relating to the two firms' proposals, it would have been rated higher and Keco lower, possibly resulting in an award to Aqua-Chem.

Aqua-Chem's protest in this regard is academic. Even if Keco had been eliminated from award consideration altogether based on a less favorable risk rating and Aqua-Chem had received a "low" risk rating (the best possible), Aqua-Chem would not be in line for award. This is because Brunswick clearly would have received the award under this scenario; Brunswick already had a "low" risk rating and offered a price lower than Aqua-Chem's. Thus, the changes in the evaluation results advocated by Aqua-Chem would not result in an award to Aqua-Chem even if we agreed with its arguments. We will not consider such academic arguments. Watkins Security Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108.<sup>1</sup>

While we will not consider Aqua-Chem's argument that alleged evaluation errors skewed its and Keco's risk ratings, Aqua-Chem also asserts that the alleged contract selection errors bring into question the overall results of the Army's evaluation such that a resolicitation and/or reevaluation should be performed. We will consider these additional arguments since, if correct, they would bring into question the validity of all of the evaluation results, including Brunswick's. However, we find nothing improper in the evaluation process.

### Prior Contract Selection Issues

Aqua-Chem argues that the seven relevancy factors (not disclosed in the RFP) did not embody the Army's principal objective in performing a past performance evaluation, namely, to select a firm with experience in performing contracts involving a comparable level of engineering and

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<sup>1</sup>Aqua-Chem argues that the Army improperly failed to consider an alternate offer it submitted. This argument also is academic since Brunswick's price is \$4,512,893 lower than Aqua-Chem's alternate price. Aqua-Chem thus would not be in line for award based on the terms of its alternate offer.

manufacturing complexity. As a result, Aqua-Chem concludes, the evaluation did not fairly indicate the relative quality of the offerors' past performance.

This argument is without merit. We think the relevancy factors were a logical means of determining whether firms had manufacturing or engineering experience that would be predictive of their ability to perform the current contract. Each of the factors embodied some critical manufacturing or engineering consideration that also is involved in producing the ROWPU. For example, the Army was obviously concerned with the offerors' ability to manufacture a device capable of handling fluids, since this is an essential aspect of the ROWPU. This concern is reflected in one of the relevancy factors and, we think, reasonably could be considered to bear on an offeror's ability to accomplish this aspect of the contract's requirements. The other relevancy factors similarly appear to be reasonably related to the current contract requirements, and thus are unobjectionable. We note that Aqua-Chem has not specifically objected to any particular factor.

Aqua-Chem also maintains that the Army's selection of relevant contracts, even under the seven relevancy factors, was irrational and inconsistent. Aqua-Chem points in this regard to the Army's selection of seven prior Keco air conditioner contracts as relevant while ignoring seven other air conditioner contracts, and the selection of a prior Aqua-Chem oil cooler contract as relevant, despite its failure to satisfy the relevancy test precisely.

Even if Aqua-Chem were correct that the selection of contracts in the above two instances was inconsistent with the relevancy factor test the agency was following, there is no indication or reason to believe that these alleged flaws in the selection process represented systemic problems that undermine the evaluation results. The protester has pointed only to these two specific instances and has not explained why these flaws should be viewed as showing that the agency systematically disregarded or misapplied the relevancy factors. Indeed, Aqua-Chem has not even suggested a consistent theme or pattern of erroneous contract selection which would indicate the existence of a systemic error in the agency's selection process. Absent such a showing, there is no basis for concluding that any error in the contract selection process affected the entire evaluation, rather than only the proposals involved.

Aqua-Chem argues that the agency should not have evaluated prior contracts which were performed at its Tennessee facility. According to the protester, since it intended to perform the ROWPU contract at its Wisconsin facility (where it presently manufactures ROWPUs), contracts performed at

its Tennessee facility are not indicative of its capability to perform at its Wisconsin facility, and are therefore irrelevant. However, the RFP required offerors to provide information regarding all government contracts valued at over \$500,000, and advised that the Army's past performance evaluation could take into consideration this information, as well as information provided by outside sources. The RFP nowhere stated that only contracts performed at the facility proposed for the current contract would be deemed relevant. Aqua-Chem thus was on notice that the evaluation could take into consideration information relating to contracts performed at any facility, not just the facility where it intended to perform the current contract.

#### Informational Deficiencies

Aqua-Chem contends that there was not sufficient information in the offerors' proposals to apply the relevancy factors to the prior contracts. However, under the terms of the solicitation offerors were required to provide a narrative explanation of the prior contract's statement of work and a statement regarding the similarity of the prior work to the work called for under the RFP. Offerors also were to provide statements regarding what end item was being manufactured, and regarding strong or weak points of the firm's technical performance during the life of the contract. This information all appears to be related to the seven relevancy factors, and while the amount of information provided may have varied for different contracts, Aqua-Chem has not directed our attention to any particular instance--in its or any other offeror's proposal--where the agency's relevancy determination was unsupported because of a lack of proposal information.<sup>2</sup>

Aqua-Chem maintains that the evaluation results were unreliable because the questionnaires sent to other agencies

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<sup>2</sup>Aqua-Chem also maintains that the PRAG relied solely on the questionnaire responses in arriving at its past performance risk ratings and failed to consider information contained in the proposals, as required by the RFP. As noted above, the record shows that the proposals were reviewed in detail during the PRAG's relevancy determinations. In addition, information obtained from the offerors during discussions was used during the PRAG's final evaluation, in some instances resulting in a change to a firm's rating. Finally, the PRAG changed some offerors' final ratings notwithstanding the results indicated by the questionnaire responses, where information in the proposals indicated that the questionnaire rating was inappropriate. The record thus does not support this allegation.

for information on offerors' prior contracts failed to distinguish between past and present contract performance. Aqua-Chem contends that this was prejudicial to it insofar as the evaluation of its current ROWPU contract was concerned, since it believes the questionnaire results fail to reflect its currently satisfactory performance on the ROWPU contract.

This argument is unsupported in the record. The PRAG questionnaires did not limit the respondents to reporting only past performance information, and the substantive answers relating to the ROWPU contract describe not only the firm's past performance problems but its current performance as well. For example, one respondent, in describing initial subcontractor control problems experienced by Aqua-Chem, stated that "[t]he problems resulted in the submittal of unnecessary waivers and engineering changes. As a result, Aqua-Chem replaced the quality assurance supervisor. [This] change . . . proved successful. Aqua-Chem currently grades all of their subcontractors. . . ." Other questionnaire responses provide detailed descriptions of the firm's past and present performance as it relates to delivery, various past and present modifications which had been effected during contract performance, and other aspects of the firm's performance both initially and currently.

Aqua-Chem further argues that, despite the source selection plan's instruction to use only one questionnaire for each contract, the PRAG reviewed eight questionnaires for the ROWPU contract. The protester also maintains that the PRAG gave no consideration to the qualifications of the respondents or their degree of involvement in the prior ROWPU contract. Aqua-Chem implies that these alleged errors bring into question the reliability of the evaluation results for all offerors.

Initially, we fail to see how the agency's alleged improper reliance on additional questionnaires for one of Aqua-Chem's prior contracts even arguably could evidence a systemic defect that could undermine the entire evaluation. In any case, we see nothing inherently prejudicial in the agency's reliance on more than one questionnaire for Aqua-Chem's ROWPU contract. Indeed, since this was a contract for the same item being procured, we see no reason why the agency could not accord that contract significant weight in the evaluation; there was nothing in the RFP that precluded the agency from doing so. As for Aqua-Chem's second concern, a review of the answers in the ROWPU contract questionnaires shows that, where the respondent was unqualified or had not participated in some aspect of the contract for which information was being solicited, the individual in question did not provide a substantive answer, stating instead that he or she had not been involved or was not qualified to




answer. There thus is no basis to question the Army's reliance on the questionnaires.

#### GISMO'S PROTEST

Gismo argues that the Army improperly failed to give adequate consideration to its past performance. In particular, Gismo argues that the agency failed to give adequate consideration to the experience of old Gismo, its predecessor firm, and also failed to adequately consider the qualifications of its current vice president for government contracting.

We have no basis to object to the Army's evaluation of Gismo's past performance. The solicitation clearly advised offerors that they were responsible for furnishing past performance information to demonstrate experience with manufacturing contracts of comparable complexity, and informed firms that they ran the risk of rejection if they failed to provide such information. Gismo failed to furnish any past performance information relating to its prior contracts or contracts performed by old Gismo with its initial proposal. As discussed, the Army did discover one old Gismo contract in its data base search, but Gismo advised the Army not to rely on that contract. Subsequently, the Army afforded Gismo another opportunity to furnish any additional corporate information which could be used by the agency to evaluate Gismo's past performance. In responding to this opportunity, Gismo did not present information concerning prior contracts of old Gismo or any other information relating to its contracting personnel. Rather, Gismo affirmed its earlier position that it was not associated with old Gismo and went on to state only that it leased old Gismo's facility and had retained a number of old Gismo's employees. This did not meet the RFP's requirement for Gismo to furnish all information relating to its prior experience. The information Gismo now maintains was never considered by the agency is information never furnished with its proposal, introduced for the first time by Gismo in its protest filings.

The protests are denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel