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United States Government Accountability Office
Washington, DC 20548

# Decision

**Matter of:** Hanley Industries, Inc.

**File:** B-295318

**Date:** February 2, 2005

T. Gaynor Blake for the protester.
Gary Van Osten, Esq., Department of the Navy, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protest of agency's past performance evaluation and price/past performance tradeoff is denied where record shows evaluation and source selection were reasonable and consistent with evaluation criteria; mere disagreement with agency's evaluation and award is insufficient to show they were unreasonable.

**DECISION**

Hanley Industries, Inc. protests the award of a contract to Capco, Inc. under request for proposals (RFP) No. N00104-04-R-K081, issued by the Department of the Navy for impulse cartridges used to release aircraft-mounted detonating projectiles. Hanley, which received a contract under the RFP for a lesser quantity than that awarded to Capco, contends that the agency improperly evaluated its past performance and unreasonably concluded that the performance risk associated with an award to Hanley for the larger quantity of units outweighed the cost advantage associated with such award.

We deny the protest.

The RFP, issued on July 16, 2004, contemplated the award of two fixed-price contracts to different contractors in order to increase the industrial base for the item and enhance competition; one contract was for 16,000 units and the other was for 9,396 units. RFP at 2. The awards were to be made based on the agency's determination of which combination of offers was most advantageous to the agency in terms of two approximately equal evaluation factors, price and past performance; past performance was to be rated under two subfactors, quality and delivery. Id. at 47. All offerors were advised that the past performance evaluations would be based upon the offerors' quality and delivery records reported under the Red/Yellow/Green (RYG) Program.[1] The offerors were also advised that they could submit additional past performance information for consideration, such as explanations of delivery problems and the corrective actions taken by the contractor. Id. at 45.

Four proposals were received by the scheduled closing time. Hanley, which submitted the lowest price for each of the two quantities, submitted no additional past performance information for review by the agency. Consequently, its past performance evaluation was based on its RYG performance ratings. Under the quality subfactor of the past performance factor, all four offerors received low risk ratings for quality. Under the second subfactor, delivery, Hanley received a high risk rating for delivery based upon its RYG red delivery rating; the RYG records for the firm demonstrated a 32-percent delivery delinquency rate for similar items. The other three offerors received low risk ratings for delivery.

Ranking each of the possible combinations of offers for the two awards in terms of total cost to the agency, the evaluators recognized that the lowest-priced combination of offers involved Hanley's lowest proposed price for the 16,000-unit award, and another firm's second lowest-priced offer for the 9,396-unit award. The evaluators expressed concern about an award of such a large number of units to Hanley, however, since the firm had been late in its deliveries of similar units in the past. Consequently, the agency determined that the second lowest-priced combination of offers (involving Capco's second lowest-priced offer for the 16,000 units, and Hanley's lowest-priced offer for the 9,396 units) at a combined price that was only 3.4 percent higher than the lowest-priced combination, offered the best value to the agency. The agency determined that this combination was most advantageous because an award of 16,000 units to Capco would provide the agency with a sufficient number of units to absorb any potential late delivery of the additional 9,396 units from Hanley. The agency did not conduct discussions with the offerors; awards were made to Capco and Hanley on September 30. Following the agency's denial of Hanley's agency-level protest of the agency's consideration of the protester's adverse RYG performance records, the firm filed this protest with our Office.

Hanley challenges the agency's reliance on the negative past performance information included in the firm's RYG records to assign Hanley a high risk rating under the delivery subfactor. Hanley alleges that most of the late deliveries reported

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[1] The RYG Program is a Navy/Air Force automated system that classifies the performance risk associated with a particular contractor by assigning a color rating to the vendor's quality and delivery performance history; a green rating signifies low risk, yellow signifies moderate risk, red signifies high risk, and a neutral rating applies to contractors lacking recent or relevant past performance information.

in the RYG records resulted from a flawed technical data package (TDP) provided by the agency, which, Hanley contends, caused its units' adhesive to fail during first article testing, delaying performance of the contracts.[2] Regarding two other reported late deliveries, Hanley only generally states that one resulted from its need to change certain product numbering, and that the other related to the agency's failure to respond to a clarification request.

The agency asserts it properly relied on the past performance information in Hanley's RYG records, noting that the protester was given ample opportunity to provide additional past performance information for consideration, both in connection with its RYG records and under the current RFP, but that the firm did not avail itself of them. For instance, the agency reports that although Hanley knew of its red (high risk) rating for delivery under the RYG Program, the firm failed to contest the rating in any way during the comment period available under RYG procedures. Hanley also chose not to submit any past performance information with its proposal, as the RFP expressly invited offerors to do, in order to, for example, explain the circumstances of known late deliveries, or to seek credit for any corrective action that may have been taken by the firm. The agency also disputes Hanley's assertion that one late delivery was caused by the agency's failure to respond to a request for clarification; in this regard, the agency reports that the clarification was provided 4 months prior to the scheduled delivery date.

As a preliminary matter, to the extent that the protester contends that it was improper for the agency to consider the adverse past performance information included in its RYG records without providing the protester with a further opportunity prior to award to explain the information, Federal Acquisition Regulation (FAR) § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where award will be made without conducting discussions, "offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors." As the agency points out, and as discussed further below, Hanley has had ample opportunity to comment on the adverse past performance information in its RYG records. Given the permissive language of FAR § 15.306(a)(2), and the fact that Hanley has been given ample opportunity to comment upon the past performance information, the fact that Hanley now wishes to provide further comments on the

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[2] While Hanley suggests that the agency has knowledge of defects in the TDP, the agency disputes that assertion, and further states that the matter is not, as Hanley suggests, currently under consideration. According to the agency, although Hanley filed a request for equitable adjustment in 2003 for what it considered TDP-related delays, the firm, despite notice of the requirement to do so, failed to certify its claim for review.

information in its RYG records does not give rise to a requirement for the agency to provide an opportunity to do so. See TLT Constr. Corp., B-286226, Nov. 7, 2000, 2000 CPD ¶ 179 at 7-8; A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6.

With regard to Hanley's principal challenge--that it was unreasonable for the agency to assign Hanley a high risk rating based on its RYG records--where a solicitation requires the evaluation of offerors' past performance, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria, since determining the relative merits of offerors' past performance information is primarily a matter within the contracting agency's discretion. DGR Assocs., Inc., B-285428, B-285428.2, Aug. 25, 2000, 2000 CPD ¶ 145 at 11. An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. See Quality Fabricators, Inc., B-271431, B-271431.3, June 25, 1996, 96-2 CPD ¶ 22 at 7. Further, where an award is to be based on the best value to the government, a price/technical trade-off may be made in selecting an awardee, subject only to the test of rationality and consistency with the evaluation factors. Demusz Mfg. Co., Inc., B-209575, Aug. 5, 2002, 2002 CPD ¶ 141 at 3. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. Our review of the record leads us to conclude that the agency's evaluation of Hanley's past performance, and the source selection based on the agency's determination that the second lowest combination of offers was most advantageous to the agency, were both reasonable and consistent with the RFP's evaluation terms.

The RFP advised offerors that the past performance evaluations would be limited to the firms' RYG performance records unless they chose to supplement that information with additional past performance information. Here, Hanley knew its RYG report included a red (high risk) rating for delivery, yet the firm did not oppose the adverse rating during the notice and comment period given to the firm at the time the rating was assigned. Further, the firm failed to submit any explanation in its proposal about the late deliveries reflected in the RYG records; the firm also did not explain or otherwise seek credit for any corrective actions taken by the firm. Under the express terms of the RFP, the protester should have known that its negative RYG delivery rating would affect its evaluation for award. Nevertheless, as the record shows, Hanley failed to take advantage of the various opportunities available to it to contest the conclusions and associated high risk rating stemming from the firm's negative RYG performance history.

We recognize that Hanley argues that some of its late deliveries were related to defects in the TDP for the product. As the agency reports, however, the protester's earlier claim on this basis was not properly pursued by the firm and is not currently under review by the agency; accordingly, it provides no basis to question the agency's consideration of the firm's RYG reports. Moreover, our review of the record shows that Hanley has other unexplained late deliveries unrelated to the allegedly defective TDP that reasonably support the agency's concern of substantial performance risk in terms of timely delivery. For instance, Hanley admits responsibility for at least one late delivery due to certain product numbering undertaken by the firm. Additionally, although Hanley suggests that another late delivery was caused by the agency's failure to provide requested clarification of requirements, the agency has reported that the clarification was received by the firm 4 months prior to the missed delivery date; Hanley has not refuted that assertion. In short, the protester has not shown that the agency was unreasonable in assigning high performance risk to the firm's proposal based on the negative RYG performance data obtained for the firm, consistent with the RFP's evaluation terms.

Further, the protester has not shown that the agency's price/past performance tradeoff lacks a reasonable basis. In this regard, Hanley provides no basis to question the reasonableness of the agency's determination that limiting the number of units to be delivered by Hanley will, in turn, limit the overall performance risk to the agency. In sum, given the reasonableness of the agency's determination that the minimal cost premium associated with the selected combination of offers for award is outweighed by the reduction in performance risk to the agency, the record provides no basis for us to question the propriety of the selection decision.

The protest is denied.

Anthony H. Gamboa
General Counsel