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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Marine Hydraulics International, Inc.

File: B-403386.3

Date: May 5, 2011

Terence Murphy, Esq., Patrick H. O'Donnell, Esq., and J. Bradley Reaves, Esq., Kaufman & Canoles, for the protester.

Robert M. Tata, Esq., and Carl D. Gray, Esq., Hunton & Williams, for Earl Industries, LLC, an intervenor.

Janice M. Passo, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision not to consider awardee's performance under certain contracts is untimely where Government Accountability Office (GAO), in sustaining protest against initial source selection on other grounds, had previously found the agency's approach in this regard to be reasonable, and protester did not timely request reconsideration of GAO's earlier conclusion.
 2. Protest of source selection decision is denied where record shows that agency's award was rational and consistent with the solicitation's evaluation scheme.
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DECISION

Marine Hydraulics International, Inc. (MH), of Norfolk, Virginia, protests the award of a contract to Earl Industries, LLC, of Portsmouth, Virginia, under request for proposals (RFP) No. N00024-08-R-4405, issued by the Department of the Navy, Naval Sea Systems Command, for executing, planning, maintenance, repair and alteration to LPD 17 Class ships home-ported in, or visiting the Norfolk, Virginia area. MH challenges the evaluation of Earl's proposal and resulting award decision.¹

¹ In its initial protest, MH challenged the agency's evaluation of its cost proposal. In its comments responding to the agency report, MH withdrew these allegations. Protester's Comments, Mar. 10, 2011, at 1.

We deny the protest.

The RFP contemplated the award of a cost-plus-award-fee/incentive-fee contract for a base year, with four 1-year options, for a number of ship “availabilities.” (Each availability is an interval of time during which a ship is made available to the contractor for performance of required work.) Because the precise work to be performed during each availability is unknown in advance, the RFP included a notional work package to which offerors were to respond with technical proposals and proposed cost/fee estimates. RFP § L, at 162-66; Initial Agency Report (IAR), exh. 2b.² Award was to be made to the offeror submitting the proposal representing the “best value” considering evaluated cost and several non-cost factors. While the solicitation provided that technical considerations were more important than cost, it also indicated that the importance of cost would increase as differences in technical merit decreased. RFP at 179.

The agency received and evaluated four proposals, including those of the awardee and protester. After evaluating the initial proposals, the agency engaged in discussions and twice requested final proposal revisions (FPR). The second FPRs were evaluated as follows:

	Earl	MH
Overall Proposal Rating	Very Good	Very Good
Management Approach	Exceptional	Very Good
Technical Approach	Very Good	Satisfactory
Resource Capabilities	Very Good	Very Good
Past Performance	Exceptional	Very Good
Evaluated Cost	\$84,402,522	\$87,098,331

IAR, exh. 25, at 2. On the basis of these evaluation results, the agency made award to Earl, finding that its proposal represented the best value to the government.

After learning of the initial award to Earl, MH filed a protest with our Office, maintaining that the agency had misevaluated both technical and cost proposals and had made an unreasonable source selection decision. After reviewing all of MH’s assertions, we sustained its protest, but only in connection with certain issues relating to the agency’s evaluation of MH’s cost proposal; the record showed that, absent certain errors in the agency’s cost evaluation, MH, rather than Earl, appeared to have submitted the low-cost proposal. We summarily denied MH’s remaining arguments relating to the agency’s evaluation of proposals. Marine Hydraulics Int’l,

² We refer to the agency report filed in the prior protest that we sustained as the initial agency report or IAR; references to the agency report filed in connection with this protest are to the agency report or AR.

____, B-403386, B-403386.2, Nov. 3, 2010, 2010 CPD ¶ 255 at 2. We recommended that the agency reevaluate proposals in a manner consistent with our decision and make a new source selection decision based on the results of that reevaluation.

In response to our decision, the agency reevaluated cost proposals. Based on the results of its revised cost evaluation, along with the original technical evaluation findings, the agency made a new source selection decision. While the revised evaluated cost of Earl's proposal (\$73,063,668) was higher than MH's (\$69,494,049), the agency nonetheless determined that Earl's proposal represented the overall best value to the government because of its superiority under the more important non-cost considerations. Source Selection Memorandum (SSM), Jan. 7, 2011, at 4; Source Selection Memorandum Correction, (SSMC), Jan. 14, 2011, at 1.³

In its protest of the new source selection determination, MH asserts that the agency performed a defective evaluation of Earl's proposal because it failed to consider Earl's ongoing performance on two contracts for work on the USS San Antonio, an LPD 17 class ship. According to the protester, Earl has experienced cost overruns on the USS San Antonio contracts that the agency should have taken into consideration in evaluating Earl's past performance, as well as in its evaluation of Earl's cost proposal. MH maintains that this information was "too close at hand" for the agency to have ignored it.

This aspect of MH's protest is a restatement of an identical assertion raised in its earlier protest. Although we did not discuss the issue in our earlier decision, we concluded that it lacked merit. Marine Hydraulics Int'l, Inc., *supra*, at 2. Briefly, the basis for our conclusion was that the record showed that the RFP did not contemplate consideration of past cost performance information in connection with the agency's cost evaluation. As for the past performance evaluation, we found that the agency reasonably did not consider Earl's performance under the USS San Antonio contracts in determining Earl's past performance rating. In particular, the record showed that the San Antonio work was ongoing work for which there was not yet a past performance rating under the Navy's contractor performance assessment reporting system. Additionally, the San Antonio work involved principally diesel engine repair and was not particularly relevant to the extensive work contemplated under the notional work packages under the current requirement. Finally, the record showed that Earl had other, more relevant, experience working on LPD 17 Class ships other than the USS San Antonio. See generally, Supplemental Agency Report, Sept. 17, 2010, at 18-23.

³ The agency executed its original SSM on January 7, 2011 but then discovered that it had made an additional error in evaluating the MH cost proposal; the agency corrected the error and executed a supplemental source selection memorandum dated January 14 noting the error and confirming its award determination.

As a result of our conclusion that this aspect of MH's initial protest lacked merit, we confined the analysis in our earlier decision to issues relating solely to the agency's evaluation of MH's cost proposal. Correspondingly, the recommendation in our earlier decision was confined to reevaluation in a manner consistent with the discussion in our decision, that is, reevaluation of the MH cost proposal, giving due regard to the errors noted with the agency's original evaluation. Marine Hydraulics Int'l, Inc., *supra*, at 7-8. To the extent MH thought its prior challenge to the evaluation of Earl's past performance and cost proposal had merit—notwithstanding our denial of the issue—it was required to request reconsideration within 10 days of receiving our first decision. 4 C.F.R. § 21.14 (b) (2010). Under the circumstances, we have no basis to consider the issue further here.

MH asserts that the agency's source selection decision was inconsistent with the RFP's evaluation scheme. In this regard, MH notes that, while the solicitation stated that non-cost considerations were more important than cost, the RFP further specified that the importance of cost would increase as differences in overall technical merit decreased. According to the protester, the assignment of identical overall adjectival ratings of very good to the two proposals shows that there was only a minimal difference between the proposals from a technical standpoint. MH concludes that, accordingly, its cost advantage should have been assigned greater importance in the agency's source selection decision.

We find no merit to this aspect of MH's protest. Where, as here, a solicitation contemplates award on a best value basis and provides that the non-price considerations are more important than price/cost, agencies have discretion to make award to a concern that has submitted a higher-priced/cost, technically superior offer; the agency's decision is governed only by the test of rationality and consistency with the solicitation's stated evaluation scheme. Tessada and Assocs., Inc., B-293942, July 15, 2004, 2004 CPD ¶ 170 at 8.

Here, the record shows that, although the proposals were assigned the same overall adjectival rating, the agency, in fact, determined Earl's proposal to be technically superior. Earl's proposal received higher adjectival ratings under three of the four non-cost evaluation factors. SSM at 6. In addition, the source selection decision identified a number of relative advantages offered by Earl's proposal that rendered it superior to MH's; these advantages formed the underlying basis for the agency's cost/technical tradeoff. Specifically, the agency found the technical approach outlined in Earl's proposal to be superior to that in MH's proposal because of its discussion of [deleted]. *Id.* The agency also found Earl's proposed management approach to be superior because it included [deleted]. *Id.* Finally, the agency determined that, not only did Earl possess specific experience working with LPD 17 class vessels (while MH had no similar experience), Earl also had highly relevant experience working on amphibious ships generally, whereas the majority of MH's experience was on surface combatant ships. *Id.*

In sum, the record shows that, notwithstanding the identical overall adjectival ratings of very good, in fact, the agency found Earl's proposal to be superior under the non-cost considerations. Further, apart from its untimely challenge to the agency's decision not to consider Earl's performance of the USS San Antonio contracts, MH has challenged neither the above adjectival ratings nor the specific substantive evaluation findings. In these circumstances, we find that MH's protest furnishes no basis to object to the agency's determination, consistent with the terms of the solicitation, that award to Earl based on its technically superior, higher cost proposal, offered the best overall value to the government.

The protest is denied.

Lynn H. Gibson
General Counsel