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Decision

Matter of: FR Countermeasures, Inc.

File: B-295375

Date: February 10, 2005

Ronald Henry, Esq., and Julie Klusas Gasper, Esq., Kaye Scholer LLP, for the protester.

Lee P. Curtis, Esq., Eric A. Aaserud, Esq., and Richard W. Oehler, Esq., Perkins Coie LLP, for Esterline Armtec Countermeasures Co., and Michael B. Hubbard, Esq., Joseph J. Dyer, Esq., Z. Taylor Shultz, Esq., and Kevin P. Connelly, Esq., Seyfarth Shaw LLP, for Kilgore Flares Co., Inc., intervenors.

Capt. Victor G. Vogel and Bradley J. Crosson, Esq., Department of the Army, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably assigned protester a neutral past performance rating of “unknown” under evaluation subfactor relating to on-time delivery because the agency failed to consider protester’s delivery record between the closing date for receipt of proposals and the time of award is denied since, while the solicitation reserved to the government the right to consider an offeror’s past performance information after the proposal closing date through the time of award, there was no requirement that the agency consider that information.

DECISION

FR Countermeasures, Inc. (FRC) protests the awards to Esterline Armtec Countermeasures Co. (Armtec) and Kilgore Flares Co., Inc. under request for proposals (RFP) W52P1J-04-R-0078, issued by the Department of the Army, for M206 aircraft countermeasure flares and MJU7 infrared countermeasure flares. In challenging the awards, the protester argues that the agency improperly evaluated proposals.

We deny the protest in part and dismiss it in part.

The agency issued the solicitation on June 17, 2004 to procure 1,084,000 M206 aircraft countermeasure flares and 557,760 MJU7 infrared countermeasure flares.

Both the M206 and MJU7 flares are deployed as defense countermeasures against enemy heat-seeking missile attacks on aircraft. The M206 is used for protection of helicopters and other low-altitude Army aircraft and can also be used on several types of low- and high-altitude Air Force aircraft, while the MJU7 is used exclusively for protection of Air Force aircraft. The RFP contemplated the award of a fixed-price contract for 100 percent of the requirement or a split award to two firms—one receiving 55 percent of the requirement and the other receiving 45 percent.¹ The RFP provided that award would be made to the offeror or offerors, in the event of a split award, whose proposals represented the best value to the government based on an evaluation of four factors: (1) technical (including four subfactors, manufacturing plan, quality plan, safety plan, management plan); (2) past performance (including two subfactors, quality and/or quality program problems and on-time delivery); (3) price; and (4) small business utilization.²

As it relates to the protest, section L of the RFP identified the information offerors were required to include in their proposals; specifically regarding the manufacturing plan subfactor, the RFP warned offerors that “[t]he Government will not assume the duty to search for data or information to cure problems it finds in proposals.” RFP § L, amend. 3, at 1. The RFP also instructed that the agency’s past performance evaluation would be based on “recent and relevant” past performance. The RFP defined recent as having occurred within the 3 years prior to the solicitation’s initial closing date; however, the government expressly reserved the right to consider information about an offeror’s past performance up to the date of award.³ RFP § L, amend. 3, at 3.

¹ The RFP informed offerors that the agency favored a split award.

² Under the RFP, the technical evaluation factor was significantly more important than past performance, price, or small business utilization factors. Technical and past performance, when combined, were significantly more important than price and small business utilization individually. Past performance was more important than price and significantly more important than small business utilization. Price was significantly more important than small business utilization, which was the least important factor. Under the technical subfactors, the RFP provided that manufacturing plan was significantly more important than quality plan, safety plan or management plan individually. Quality plan was slightly more important than safety plan, which was slightly more important than the management plan subfactor. Under the past performance subfactors, quality was slightly more important than on-time delivery.

³ With regard to the submission of past performance information, the RFP stated: “Offerors shall submit . . . [a] description of your Government/commercial contracts received or performed during the past three years prior to closing of this solicitation. In addition, the Government has the right to consider information regarding contractor performance up to the date of award.” RFP § L, amend. 3, at 3.

By the RFP's August 3, 2004 closing date, the agency had received proposals from Armtec, Kilgore, and the protester. Based on its evaluation of their proposals, the agency assigned the following adjectival rating under the technical, past performance and small business utilization factors and related subfactors:

	<u>Armtec</u>	<u>Kilgore</u>	<u>FRC</u>
<u>Technical</u>			
Manufacturing Plan	Excellent	Excellent	Good
Quality Plan	Excellent	Good	Good
Safety Plan	Good	Good	Excellent
Management Plan	Excellent	Excellent	Good
<u>Past Performance</u>			
Quality Program	Good	Good	Good
On-time Delivery	Excellent	Excellent	Unknown
<u>Small Business Utilization</u>	Excellent	Excellent	Excellent

With regard to price, the agency considered the offerors' prices for 100 percent of the requirement as well as pricing for 55 percent and 45 percent of the requirement. The evaluated prices were as follows:

	<u>Armtec</u>	<u>Kilgore</u>	<u>FRC</u>
100 Percent	[deleted]	[deleted]	[deleted]
55 Percent	\$127,177,145.06	[deleted]	[deleted]
45 Percent	[deleted]	\$104,949,045.52	[deleted]

Because both Armtec's and Kilgore's proposals were more highly rated and lower in cost than FRC's, the agency concluded that a split award between Armtec and Kilgore, with Armtec receiving 55 percent and Kilgore receiving 45 percent of the agency requirement, was in the best interest of the government and made the awards on October 20. Upon learning of the Army's decision FRC requested a debriefing, which the Army provided on November 2.

At the debriefing, the agency provided the protester with charts containing summaries of the weaknesses and deficiencies that the agency found with its proposal. The agency also provided FRC with the detailed source selection decision document, which included the detailed evaluation of FRC's weaknesses and deficiencies, as well as Armtec's and Kilgore's total evaluated prices and final

ratings, and the agency's rationale for its source selection decision.⁴ FRC, thereafter, filed this protest.

FRC's protest challenged the agency's evaluation of proposals in several respects. With regard to its own ratings, FRC argued that the agency had downgraded it for failing to address various required elements in its technical proposal when FRC had in fact addressed the identified elements in its proposal. FRC also challenged its "Unknown" rating under the on-time delivery subfactor, in two respects. The protester first argued that the rating was improper because the agency failed to consider its perfect record of on-time conforming deliveries, which was available to the agency prior to award. Second, the protester asserted that the agency treated its "Unknown" rating as a deficiency rather than as a "neutral" rating as required by the solicitation.

FRC also challenged the agency's evaluation of the proposals submitted by Armtec and Kilgore. FRC prefaced its challenges in this regard, however, by stating that the agency's debriefing provided "only the most general information regarding the evaluations of Armtec and Kilgore," and that despite the general information provided by the agency with respect to Armtec's and Kilgore's proposals, "certain broad outlines of the defects in those evaluations are apparent and the details will be confirmed when the Agency responds to the document request that is part of this protest." Protest at 3, 6.

With regard to past performance, FRC asserted that it should have received higher ratings than Kilgore because Kilgore had been found nonresponsible under a prior Navy contract, a determination that was affirmed in a decision by our Office, Kilgore Flares Co., B-292944 et al., Dec. 24, 2003, 2004 CPD ¶ 8. With regard to Armtec, the protest concluded that it "also had past performance difficulties that render it clearly inferior to FRC." Protest at 4. FRC, also argued, as a general matter, that "the Agency awarded excessively high scores for Armtec and Kilgore in its defective evaluation of those proposals." Protest at 6. According to the protester, its own facilities and procedures are superior to those of Kilgore and Armtec, and it is well-known in the industry that Kilgore and Armtec are suffering from "severe manufacturing problems, quality control problems, and delivery delays" and that the quality of many rounds they supply are deficient.⁵ Id.

⁴ The Army had redacted proprietary and source selection sensitive information concerning the offerors in the source selection decision document that it provided to FRC.

⁵ FRC also abandoned a number of its protest arguments (e.g., that the agency failed to apply objective standards when rating proposals and that the agency's system for assigning ratings was incoherent and inconsistent). The agency addressed these issues in its agency report and FRC failed to respond in its comments. See Planning Sys., Inc., B-292312, July 29, 2003, 2004 CPD ¶ 83 at 6.

On-Time Delivery

At the time FRC submitted its proposal, it was a relatively new entrant into the flare business. FRC was so new that it had not in fact delivered any production units of flares by the August 3 closing date for receipt of proposals.⁶ As a consequence, the agency assigned FRC a neutral rating of “unknown” for on-time delivery. FRC contends that its “unknown” rating was unjustified because the agency failed to consider deliveries it made after the RFP closing date, but before the date of award. Had these deliveries been considered, FRC argues, the agency would have recognized that it had a perfect record of on-time delivery.

While the solicitation reserved to the government the right to consider past performance information with regard to an offeror up until the time of award, it did not require consideration of that information. Rather, under the terms of the solicitation, the agency was required to consider only an offeror’s performance history for the 3-year period prior to the RFP closing date. Because the protester did not have a history of on-time delivery that was deemed relevant to the subject contract during the 3-year period prior to the RFP closing date, and because the protester does not allege, nor does the record suggest, that the agency treated offerors unequally in limiting its consideration of past performance to the period up through the RFP closing date, the protester’s challenge to its neutral rating for on-time delivery is without merit.

Even if its “unknown” rating for on-time delivery was justified, FRC argues that the agency misapplied this rating by treating it as a deficiency as opposed to a neutral rating as required by the RFP. This argument, however, is premised on FRC’s mistaken understanding of the agency’s evaluation and therefore fails to establish that the agency’s evaluation was inconsistent with the RFP. Specifically, as support for its contention, the protester cites to the agency’s conclusion that FRC’s past performance history was limited and that its ability to achieve full-scale production was unproven. Protest at 5. The Army, however, raised this concern in its evaluation of FRC under the past performance subfactor, “quality and/or quality program problems,” for which FRC received a rating of “Good,” and not with regard to its evaluation of FRC under the on-time delivery subfactor. AR, Tab 9, Source Selection Decision Document, at 8.

⁶ With regard to the evaluation of FRC’s on-time delivery performance, the record reflects that the agency considered one of FRC’s Navy contracts to be relevant. Based on a telephone conversation with the Navy, however, the agency learned that first production of flares under the contract was not due until August 15, 2004; thus the agency concluded that it could not evaluate FRC under the on-time delivery subfactor and assigned FRC a neutral rating of “unknown.” See AR, Tab 5B, Source Selection Evaluator Reports for FRC; AR, Tab 9, Source Selection Decision, at 9.

FRC's Technical Evaluation

FRC also challenges the agency's evaluation of its proposal, asserting that the agency had "farmed out" parts of its technical proposal to different evaluators, and, as a result, the agency identified weaknesses and deficiencies that were "nonexistent and appear to have been alleged simply because the evaluator making the allegation did not have access to all of the relevant parts of the FRC proposal."⁷ Protest at 4. With its protest, FRC included an attachment that purported to cite to the sections of its proposal that addressed the weaknesses and deficiencies identified by the agency during its debriefing. As to the management plan subfactor, however, FRC's attachment in several instances does not cite to information contained in its management plan; rather, FRC cites to information that it included under a different subfactor.

For example, FRC takes exception to the agency's conclusion that FRC's manufacturing plan did not include a list of key personnel specifically in charge of various areas of production, alleging that it had addressed this issue under its management plan. FRC, however, may not rely on information contained in its management plan to challenge the reasonableness of the evaluated weaknesses and deficiencies in its manufacturing plan. The government was not required to search for information regarding FRC's manufacturing plan under one of the other subfactors; rather, the burden was on FRC to submit a clear and logically written proposal. See Sam Facility Mgmt., Inc., B-292237, July 22, 2003, 2003 CPD ¶ 147 at 5. Moreover, the RFP's instructions for the submission of proposals expressly advised offerors, under the manufacturing plan subfactor, that the government would not search for data or information to cure problems in proposals. Thus, FRC's allegations in this regard do not render the agency's evaluation unreasonable.

In addition, FRC's challenge is based on the mistaken premise that the agency simply concluded that FRC had failed to address certain issues in its technical proposal. As noted above, when the agency debriefed the protester, it provided FRC with briefing slides, which included summary bullets identifying the weaknesses and deficiencies found during the agency's evaluation of FRC's proposal, and FRC based its protest on these slides.

⁷ The record reflects that discrete teams of evaluators did in fact separately conduct the evaluations under each of the four technical subfactors and that the teams were provided only with the portion of an offeror's proposal that was relevant to the subfactor under evaluation by the team. Thus, the team evaluating the manufacturing plan subfactor received only the manufacturing plan portion of each offeror's proposal.

The agency, however, also provided FRC with the portion of the agency's source selection decision document regarding its evaluation of FRC's proposal. This document provided FRC with the detailed discussion of the evaluated weaknesses and deficiencies found in FRC's proposal, which were not conveyed by the slide bullet statements. The following examples illustrate that the agency's concerns were not simply based on a perceived omissions as the bullets in the briefing slides might suggest, but rather were substantive in nature as reflected in the agency's source selection decision.

FRC challenged the agency's conclusion, as reflected in the bullet statements that it had failed to address procedures for identification, control, correction, and resolution of deficiencies. According to FRC, it had in fact addressed this issue. While the agency concluded that the protester did in fact provide a general overview of its procedures, it found fault with the general nature of the overview. This analysis was expressly set forth in the agency's source selection decision document, which had been provided to the protester at its debriefing and clearly reflects the fact that the agency's judgment was based on the substantive aspects of FRC's proposal, not a perceived omission as alleged by FRC. AR, Tab 9, Source Selection Decision, at 4.

FRC also challenged one of the comments in the debriefing slides, which stated that FRC had "[l]eft out application step in M206 First Fire process." Protest, exh. 2, at 13. FRC cited to its proposal's manufacturing plan and an appendix to indicate that it had in fact included an application in the M206 First Fire (9311656) process. The agency's complete evaluation finding, however, was that "FRC left out an application step in the M206 First Fire (9311656) process where the First Fire is applied prior to taping and demonstrates that they misread the M206 Extruded Pellet Assembly drawing" AR, Tab 9, Source Selection Decision Document, at 4. Thus, the record reflects the fact that the agency did not fault FRC for omitting the First Fire process; rather, the agency faulted FRC for misreading RFP drawings and placing the First Fire out of order.

While in comments filed during the course of the protest FRC also challenged the substantive nature of the agency's analyses and argued that the agency's conclusions were flawed, FRC's arguments in this regard are untimely since FRC filed these challenges more than 10 days after FRC had received the source selection decision document, which informed FRC of the substantive aspects of the agency's concerns. See 4 C.F.R. § 21.2(a)(2) (2004).

By way of example, FRC cited the agency's debriefing statement that FRC's manufacturing plan did not provide a "list of alternate sources for components/material or associated risk." Protest, exh. 2, at 13. Regarding this point, the source selection evaluation board in its decision document stated that "FRC did not list alternate sources for components/material, and any associated supplier risks or component/material lead times." AR, Tab 9, Source Selection Evaluation

Document, at 4. While FRC initially asserted that it had addressed this weakness in its proposal, FRC ultimately argued in supplemental comments that the RFP did not require offerors to provide alternate sources for each part, or to address supplier risks. This argument, which challenges the substantive nature of the agency's evaluation, is clearly untimely. FRC was informed of the basis for the agency's evaluation when it received the agency's source selection decision document at the debriefing. FRC, however, waited until it had filed supplemental comments to raise this issue, more than 10 days after FRC learned the substantive basis for its evaluation through the source selection decision document provided to FRC at its debriefing.

Evaluation of Armtec's and Kilgore's Proposals

In its initial protest filing FRC specifically challenged the agency's evaluation of Kilgore's past performance, arguing that Kilgore's rating was unjustified because Kilgore had been found nonresponsible for purposes of the award of a Navy contract almost identical to the subject contract, a decision that was affirmed by our Office in Kilgore Flares Co., supra. FRC's reliance on the Navy's prior finding and our decision Kilgore Flares is misplaced. Each federal procurement stands on its own, so that the fact that Kilgore was found nonresponsible for the purposes of award of a similar contract did not render the Army's evaluation of Kilgore improper in this case. Sabreliner Corp., B-275163 et al., Dec. 31, 1996, 96-2 CPD ¶ 244 at 2 n.2. Moreover, the circumstances of the Navy's decision in Kilgore Flares as reflected in our decision do not suggest that the agency's evaluation of Kilgore's past performance in this case was unreasonable.⁸ Here, the agency considered Kilgore's past performance information, its production capability, completed facility renovations and modernization program, and delivery performance, rating Kilgore as "Good" under the quality subfactor and "Excellent" for on-time delivery. FRC's challenge ultimately amounts to little more than disagreement with the agency's ratings, and does not render them unreasonable. The OMO Group Inc., B-294328, Oct. 19, 2004, 2004 CPD ¶ 212 at 7.

⁸ In Kilgore Flares, Kilgore had suffered a serious explosion at its production facilities in 2001 and discontinued production in connection with an extended accident investigation. As a consequence, Kilgore had only just begun re-commencing production at the time it submitted a proposal for a Navy flare procurement in 2003. The Navy found Kilgore nonresponsible based on its determination that Kilgore could not meet both its backlog of existing flare delivery commitments, resulting from the shutdown, as well as the Navy's requirements. While Kilgore challenged the Navy's finding, our Office concluded that the Navy's decision was reasonable. The case did not turn on an evaluation of Kilgore's past performance.

In addition, in comments dated December 22, FRC supplemented its more general arguments concerning the agency's evaluation of Armtec and Kilgore's proposals, with allegations of specific defects in the evaluation record with regard to the various technical and past performance subfactors. As noted above, FRC had prefaced its general arguments in its initial protest filing by stating that only "broad outlines" of the defects in the evaluations of Armtec and Kilgore's proposals were apparent from the agency's debriefing, and explained that the "details" would be "confirmed" when the agency provided the underlying source selection materials pertaining to Armtec and Kilgore, as well as Armtec and Kilgore's proposals, which FRC had requested as part of its protest. On November 24, under a protective order issued by our Office in this protest, FRC's counsel received the Army's entire procurement record as part of an early production of documents (i.e., furnished to the protester prior to the filing of the agency report). These documents formed the basis for FRC's detailed supplementation of the general allegations raised in its protest.

For example, FRC argued in its comments that Armtec's "Excellent" rating for its manufacturing plan was improper because Armtec failed to address the experience and skills of its personnel and failed to explain who was responsible for testing or inspecting sub-contractor provided parts. Regarding the agency's evaluation of Kilgore's manufacturing plan, FRC maintained that the agency gave Kilgore credit for its prior production, a consideration that was not within the selection criteria set forth in the RFP. Similarly, FRC challenged the agency's evaluation of Kilgore's quality plan, arguing that the Army gave Kilgore a rating of "Good" "[d]espite 'extreme deficiencies' in its Technical Quality Plan." Protester's Comments at 11. FRC's arguments, however, are untimely.

Under our Bid Protest Regulations, a protest not based on an apparent solicitation impropriety must be filed within 10 days after the basis of protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where a protester files supplemental protest grounds, each new ground must independently satisfy the timeliness requirements of our Bid Protest Regulations, which do not contemplate the piecemeal presentation or development of protest issues. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13. This is true even if the supplemental protest grounds may be merely "examples" of flaws in the agency's evaluation generally alleged in the initial protest since such staggered presentation of "examples," each of which involves different factual circumstances and requires a separate explanation from the agency, constitutes precisely the piecemeal presentation of issues that our timeliness rules do not permit. Id.

FRC received the documents containing the information upon which it based the above challenges as part of an early production of documents on November 24. Because FRC waited until its December 22 comments to raise these issues, they are untimely and will not be considered. The fact that FRC received the source selection documents as part of an early production of documents did not suspend application

of our timeliness rules. Protests based on documents that the protester receives as part of an early document production must be filed within 10 days after their receipt. See Garco Constr., Inc.; Triton Marine Constr. Corp., B-282231, B-282231.2, June 15, 1999, 99-2 CPD ¶ 8, at 5; Consolidated Eng'g Servs., Inc., B-279565.5, Mar. 19, 1999, 99-1 CPD ¶ 75 at 9 n.4.

The protest is denied in part and dismissed in part.

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