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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: East-West Industries, Inc.

File: B-297391.2; B-297391.3

Date: July 19, 2006

Philip M. Dearborn, Esq., Sandeep S. Kathuria, Esq., and Jennifer L. Andrews, Esq., Piliero, Mazza & Pargament, PLLC, for the protester.

Robert A. Brunette, Esq., for Regent Manufacturing, Inc., an intervenor.

Maj. Jeffrey Branstetter, Maj. Paul W. Knoth, James C. Caine, Esq., and

Maj. LaChandra C. Richardson, Department of the Air Force, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evaluation of protester's proposal under past performance evaluation factor was unobjectionable where agency reasonably concluded that only one of four prior contracts was of a magnitude and complexity essentially the same as the solicitation's, and thus met the solicitation's definition of very relevant; two of the remaining contracts were reasonably evaluated as only relevant and semi-relevant due to lesser magnitudes of effort, and the fourth contract was reasonably evaluated as not relevant because it was completely unrelated to the solicitation's work.

2. Evaluation of awardee's past performance and risk was reasonable, notwithstanding protester's identification of alleged quality, safety, and delivery issues, where contracting officials did not have personal knowledge of majority of the issues, and fully considered those of which they were aware in finding no negative impact on awardee's past performance rating.

DECISION

East-West Industries, Inc. protests the award of a contract to Regent Manufacturing, Inc. under request for proposals (RFP) No. FA8518-04-R-70801, issued by the Department of the Air Force for multi-aircraft canopy cranes (MACC). East-West challenges the past performance and risk evaluations of its and Regent's proposals.

We deny the protest.

BACKGROUND

MACCs are used to remove and install various components on numerous types of aircraft, including canopies, ejection seats, wings, stabilizers, rotors, and other components, with sufficient clearance to preclude contact with all primary aircraft structures, such as landing gears, fuel tanks, and maintenance stands.¹

The RFP, a total small business set-aside, contemplated the award of a requirements-type contract with a basic period to include two first articles and related materials, with four options, for a total of 360 production units. Proposals were to be evaluated under four factors—technical, proposal risk, past performance, and price. Technical acceptability was to be determined based on whether the proposed design met the requirements for physical characteristics, system reliability, and system maintainability. Under the proposal risk factor, the agency was to assess the risk associated with the offeror’s proposed approach as it related to disruption of schedule, increased cost, or degradation of performance.² Under the past performance factor, the agency was to consider the relevance of offerors’ prior contracts to the proposed effort, together with the quality of performance of those contracts, in assessing its confidence in the offerors’ ability to successfully accomplish the proposed effort.³ Once a proposal was determined to be technically acceptable, award was to be made on a “best value” basis, with tradeoffs among the remaining factors. Under this procedure, risk and past performance were considered equal to each other and significantly more important than price.

Six offerors, including East-West and Regent, submitted proposals by the original closing time in 2004. Based on the initial evaluation, all proposals were considered technically unacceptable and the agency issued evaluation notices (EN). All six offerors responded, but one was determined not to meet the small business size standard and its proposal was eliminated. After several rounds of final proposal revisions (FPR) and additional ENs, the proposals of East-West, Regent, and a third offeror (not relevant here) were included in the competitive range. The evaluators rated both East-West’s and Regent’s proposals as low risk and very good/significant

¹ Aircraft include the A-10, HH-60 helicopter, F-15, F-16, F-22, F-117, T-38, and Joint Strike Fighters.

² Risk was rated as high (likely to cause significant disruption), moderate (can potentially cause some disruption), and low (little potential to cause disruption).

³ The confidence ratings were: exceptional/high confidence (no doubt of success); very good/ significant confidence (little doubt of success); satisfactory/confidence (some doubt of success); neutral/unknown confidence (no performance record); marginal/little confidence (substantial doubt of success); and unsatisfactory/no confidence (extreme doubt of success).

confidence. Because the contracting officer, as source selection authority (SSA), found no significant difference between the offerors' past performance or risk, she determined that Regent should receive the award based on its low price. In October 2005, after receiving notice of the award and a debriefing, East-West challenged the award in a protest filed in our Office. Prior to responding to the protest in an agency report, the Air Force proposed corrective action. Specifically, the agency would establish a new evaluation team and reevaluate the three proposals in the competitive range; depending upon the reevaluation results, it might reopen discussions and obtain new FPRs before proceeding to make a new award decision. Based on this proposed corrective action, we dismissed the protest as academic (B-297391, Nov. 7, 2005).

In implementing the corrective action, the agency provided the offerors notice of the agency's relevance and confidence ratings, and permitted the firms to submit information that had not been previously considered. East-West and Regent responded to their ENs with additional information purporting to show that certain of their prior contracts should have been assigned higher relevance ratings. Under the new past performance evaluation, the evaluators assigned East-West's four contracts relevance ratings of very relevant, relevant, semi-relevant, and not relevant, resulting in an overall very good/significant confidence rating. The team rated one of Regent's contracts very relevant and three semi-relevant, also resulting in a very good/significant confidence rating. Since both proposals also were evaluated as technically acceptable with low risk, a new contracting officer, as SSA, determined that Regent's proposal represented the best value based on its low price. After receiving notice of the award, East-West filed this protest, supplementing it after receiving a debriefing.

East-West challenges the award decision on numerous grounds. We have considered all of East-West's arguments, and find that none has merit. This decision addresses East-West's most significant arguments.

EVALUATION OF EAST-WEST'S PAST PERFORMANCE

East-West asserts that the agency unreasonably evaluated its past performance record as only very good/significant confidence. In the protester's view, three of its four past performance examples should have been rated at higher relevance levels, which would have resulted in a higher overall confidence rating.

In reviewing a protest of an agency's proposal evaluation, our review is confined to determining whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11.

This aspect of the evaluation was reasonable. Under the RFP, relevance was to reflect the degree to which past performance matched the magnitude of effort and

complexities of the current RFP's requirements, which included a multi-year requirements contract with best estimated quantities of 360 non-powered, air transportable, mobile cranes with a lifting capacity of at least 1,250 pounds. Thus, performance of a prior contract was considered very relevant if it involved essentially the same requirements, relevant if it involved most of the requirements, semi-relevant if it involved some of the requirements, and not relevant if performance did not involve any significant aspects of the current requirements. The agency rated East-West's performance of a contract for delivery of 57, 1,500-pound Master Cranes in 18 months, valued at \$3.9 million, as only relevant, because it involved a lesser magnitude of effort and complexity over a shorter performance period than that called for by the RFP, and was valued at considerably less than the RFP's \$15 million anticipated value. Similarly, while the agency concluded that a contract for delivery of eight 1,500-pound Master Cranes in 14 months, valued at \$559,000, was very relevant technically, it rated the contract only semi-relevant overall since it involved a significantly lesser magnitude of effort.

East-West asserts that these contracts should have been rated very relevant and relevant, respectively, since they concerned the same crane sought by the RFP and the same crane for which the agency rated another contract very relevant. However, the agency's ratings were consistent with the RFP's definition of relevant, and therefore unobjectionable. The agency reasonably concluded that East-West's 57-unit contract involved a lesser magnitude of effort and complexity than the RFP effort due to the lesser quantity, shorter performance period, and lower value, and that its 8-unit contract involved a much lesser magnitude of effort and complexity than the RFP effort based on similar considerations. These ratings also were entirely consistent with the rating assigned the one East-West contract deemed very relevant, which was for an unlimited quantity of cranes over a 5-year period, and was valued at \$8 million.

East-West asserts that the agency's evaluation ignored the information submitted with its EN response. East-West's response noted that under its 57-unit contract it had delivered 56 of the cranes early--in 12 months--which, it asserted, essentially matched the 60-crane-per-year production requirement under the RFP. Its response further noted that this was accomplished at the same time that East-West was producing additional cranes under other contracts, resulting in a total of 130 delivered cranes over several years. The agency considered this information, but reached a different conclusion. The agency found that East-West's matching the RFP's first year production level and producing some 130 cranes in the relevant timeframe did not make the contract sufficiently equivalent to the RFP effort to warrant a very relevant rating.⁴ In this regard, the total best estimated quantity

⁴ The protester asserts that the new evaluation is suspect, citing the fact that the original evaluation team initially evaluated this contract as relevant, but then changed its rating to very relevant based on its having been completed. However, (continued...)

(BEQ) under the RFP (360 cranes) is more than twice the quantity under the protester's combined contractual effort. Further, while East-West's combined contract effort may have matched the RFP's first year production level, only the first and last production years have BEQs of 60 cranes; the second and third years have BEQs of 120 cranes each.⁵ The protester's combined contract effort did not approach this quantity. We conclude that the agency reasonably determined that East-West's 57-unit contract did not warrant a higher relevance rating.

East-West asserts that the agency failed to consider its customers' satisfaction with its performance. Noting that the majority of customer ratings were exceptional and that no significant weaknesses were noted, East-West maintains that its proposal should have received the highest confidence rating of exceptional. This argument is without merit. The agency states that it considered all of the protester's customer ratings before evaluating its proposal as very good/significant confidence. In this regard, as discussed, only three of the four listed contracts were considered relevant, and only two of the customers--for the contracts considered relevant and semi-relevant--rated the firm's performance as exceptional overall; the customer under the third contract--rated very relevant--assessed East-West's performance as only successful and satisfactory. Under the RFP's evaluation scheme, the highest confidence rating was to be assigned where the agency concluded that there was essentially no doubt as to the offeror's successful performance. Since only one contract was rated very relevant and the protester received exceptional performance ratings under only two of its three relevant contracts, we think the agency reasonably concluded that East-West's performance record warranted assigning the

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the mere fact that the new evaluation team arrived at a different rating for the contract than the first team does not establish an impropriety in the evaluation; the protester has provided nothing to indicate that the new evaluation was unreasonable or inconsistent with the RFP's relevance definitions.

⁵ East-West also challenges the agency's rating of one of its contracts--for design and production of 156 attenuating troop seats system (ATSS) retrofit kits, valued at \$2.5 million--as not relevant. The protester asserts that this contract should have been rated semi-relevant based on its demonstration of abilities to perform design and production functions, and argues that this rating is inconsistent with the agency's rating of a Regent contract for jacks as semi-relevant. This argument is without merit. East-West's ATSS contract did not involve the production of a crane or equipment otherwise related to removal/replacement of aircraft components and had a relatively low dollar value. In contrast, the jack Regent furnished under its contract has a lifting capacity comparable to the RFP's crane and is used for removing and replacing aircraft components. We find nothing unreasonable or inconsistent in the agency's ratings of the two contracts.

firm a very good/significant confidence rating based on there being little doubt--rather than no doubt--as to its successful performance.

EVALUATION OF REGENT'S PAST PERFORMANCE

East-West argues that the agency unreasonably evaluated Regent's past performance as very good/significant confidence--the same level as the protester's--asserting that this rating cannot reflect Regent's problems with welded joints, meeting delivery deadlines, and safety under prior contracts. In light of these problems, East-West asserts, the agency should have rated Regent's proposal as no more than satisfactory/confidence, reflecting some doubt, as opposed to little doubt, as to successful performance.

The evaluation of Regent's past performance was reasonable. In reviewing Regent's four contracts, the agency found one--for delivery of 323, 1,500-pound portable floor cranes, valued at \$3.7 million--to be very relevant, and three to be semi-relevant based on their not matching the complexities and magnitude of the RFP's requirement. The evaluators also reviewed Regent's past performance as reflected in customer questionnaires, available quality deficiency reports (QDR), contractor performance assessment reports (CPARS), the past performance information retrieval system (PPIRS), and contract administration services (MOCAS) records. Customers rated Regent's past performance from satisfactory to exceptional, with the majority of ratings being satisfactory and very good. The PPIRS showed an overall on-time delivery rate of 56 percent and an on-time delivery rate of 77 percent for federal supply classification 3950 (winches, hoists, cranes and derricks). Performance Confidence Assessment Group (PCAG) Report at 17. While there was some negative information from the PPIRS concerning past problems with delivery, the agency notes that Regent's proposal acknowledged these problems and explained the corrective action it had taken to change processes to eliminate the delinquencies. Regent Past Performance Proposal, FACTS Sheets, at 3-4. In addition, while MOCAS showed a delinquency rate of 25 percent--based on 1 purchase order out of 4 active contracts--MOCAS also showed only an 11 percent delinquency rate on completed contracts over the past year, with a Defense Contract Management Agency validation of those records noting a 90.24 percent on-time delivery with no quality issues. PCAG Report at 17. Since there was no indication of safety issues from QDRs or customer reports on the firm's cranes, the agency did not further research Air Force safety records. Finally, according to the contracting officer, while there was one incident involving cracked welds, this was found to have resulted from the crane's use in non-specified environments, rather than bad welds. Contracting Officer's Statement (COS) at 13. Although Regent's past performance record was not perfect, the RFP stated that it did not anticipate perfection but, rather, sought evidence of the offeror's ability to isolate the root causes of problems and descriptions of programs or actions taken to eliminate those causes. RFP at 39. In light of the absence of any negative information on Regent's performance or safety

record other than delinquent deliveries, and Regent's acknowledgment of those delivery problems and explanation of the steps taken to correct them, the agency reasonably rated Regent's past performance as very good/significant confidence.

East-West maintains that, even if the agency was unaware of the various alleged problems with Regent's cranes, information regarding these problems was available and was too "close at hand" for the agency to ignore. Protester's Initial Comments at 7 n.6. East-West states that it alerted the agency to the problems with Regent's cranes and that the agency's technical engineer admitted that he knew about alleged weld problems with Regent's wheels. Protester's Final Comments at 6. East-West also has submitted a printout of safety incidents purportedly regarding Regent's cranes, a service bulletin concerning foreign matter in the winch disc brake assembly, and several Air Force personnel e-mails describing cracked welds, dislodged cable issues, a boom collapse, aircraft interface and damage issues, and a tow bar separation.

We have recognized that in certain limited circumstances an agency evaluating an offeror's proposal has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's proposal, where the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider this information." International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14. In those narrow instances where we have applied the "too close at hand" principle, we have required the protester to demonstrate that the outside information bearing on the offeror's proposal was not just known by the agency generally but, rather, was known to the agency employees involved in the source selection process. For example, in GTS Duratek, we held that the agency was required to consider information about the protester's past performance where the protester demonstrated that the contracting officer's technical representative under the protester's contract had personal knowledge of the protester's performance and was a member of the technical evaluation team for the subject solicitation.

The "too close at hand" principle does not apply here. Apart from some knowledge about weld issues (discussed above), there is no evidence that the contracting officials in this procurement possessed first-hand knowledge of the identified issues with Regent's cranes. In this regard, the engineer who initially evaluated the offerors' proposals was unfamiliar with the service bulletin, the issuance of QDRs on any of the issues, and most of the incidents in the e-mails. Supplemental COS at 1.⁶

⁶ While the engineer was aware of an issue concerning setting screws, it was his position that the problem was the result of the user's failing to follow Air Force standards. Similarly, while he was aware of aircraft interface issues, he did not

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Moreover, as observed by the agency, not only was the safety incident printout not before the evaluators, but the printout does not identify the crane manufacturer, the cause of the incident, or the final decision of the investigating officer. COS at 11. Under these circumstances, the agency contracting officials' failure to obtain or consider the information presented by the protester does not provide a basis for questioning the evaluation.

East-West asserts that Regent improperly failed to report these incidents in its proposal. The RFP required offerors to summarize contract issues relative to the number and severity of quality deficiencies, discrepancy reports, and latent defects. RFP at 42. Regent reported its late deliveries and provided an explanation of the steps it took to remedy them, and takes the position that there were no latent defects or quality deficiencies to be reported. We agree with Regent. Regent has provided a detailed explanation of the incidents identified by East-West that supports the agency's position that it reasonably found no impact on Regent's past performance. For example, rather than quality deficiencies or latent defects, Regent explains that the boom collapse was due to improper use leading to unusual stress damage to the mast lock lugs. Regent Engineer's Declaration, ¶ 5. Regent also explains that the tow bar separation was not due to a latent defect in its cranes but, rather, was due to a one-time welding error, which it quickly investigated and repaired. *Id.* East-West has provided no evidence showing that Regent's explanations are inaccurate. Accordingly, there is no basis for concluding that these incidents represented latent defects or quality deficiencies that Regent was required to report or, indeed, that they were indicative of poor performance or lack of technical acceptability.

East-West asserts that there was inherent doubt in Regent's proposal of a crane that [deleted] and that this warranted reducing Regent's confidence rating. However, the agency explains that Regent's winning design [deleted]. The proposed design was found technically acceptable because it satisfied the technical requirement of the purchase description based on its physical characteristics, system reliability, and system maintainability. East-West has not shown that the agency's evaluation in this area was unreasonable; accordingly, this argument provides no basis to question Regent's confidence rating.

RISK EVALUATION OF REGENT'S PROPOSAL

East-West asserts that the agency's risk evaluation for Regent's proposal was flawed. Specifically, East-West asserts that Regent's [deleted] design, and prior delivery and safety/quality problems, indicate a moderate to high risk of increased costs, degradation of performance, and schedule disruption. With regard to Regent's

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consider them latent crane defects, since the crane had passed the necessary compatibility tests. Supplemental COS at 1.

design, delivery, and performance issues, for the same reasons we found the agency's past performance evaluation reasonable despite the alleged problems in these areas (see above), we believe the agency reasonably could conclude that these issues did not warrant downgrading Regent's risk rating.

East-West also asserts--on information and belief--that Regent cannot perform the contract without infringing on the protester's patented crane design, and that it informed the agency of this prior to award. In East-West's view, since it may be entitled to royalties or an injunction against production of Regent's crane, the agency unreasonably failed to consider the potential for patent infringement in its risk evaluation. This argument is without merit. East-West has presented no evidence that Regent's design has been determined to infringe on an East-West patent or that East-West has commenced any patent litigation. Further, the agency explains that the RFP did not direct any specific design and that it has no reason to believe that the RFP can only be satisfied with East-West's design. COS at 13. Under these circumstances, there was no requirement that the agency anticipate a patent infringement and weigh the potential impact on Regent's performance of the contract.

The protest is denied.

Gary L. Kepplinger
General Counsel