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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Pemco Aeroplex, Inc.

File: B-310372

Date: December 27, 2007

David R. Hazelton, Esq., Roger S. Goldman, Esq., Kyle R. Jefcoat, Esq., Benjamin Wei, Esq., Brent W. Johnson, Esq., and Jennifer S. Crone, Esq., Latham & Watkins LLP, for the protester.

Rand L. Allen, Esq., Paul F. Khoury, Esq., Scott M. McCaleb, Esq., Kara M. Sacilotto, Esq., and Nicole P. Wishart, Esq., Wiley Rein, LLP, for The Boeing Company, an intervenor.

Brent G. Curtis, Esq., Kenneth C. Kitzmiller, Esq., and Gerald L. Trepkowski, Esq., Department of the Air Force, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's past performance evaluation is denied where agency considered all reasonably available relevant past performance information and, based on consideration of that information, made confidence assessments that were not unreasonable.
2. Protest that agency was required to assign a "Blue/Exceptional" rating for any mission capability subfactor in which protester's proposal contained an evaluated strength is denied where solicitation stated that proposals containing one or more evaluated strengths could properly receive either "Blue/Exceptional" or "Green/Acceptable" ratings.
3. Where solicitation required that agency perform a price realism analysis and risk assessment, and identified the particular data that would be considered, including [deleted], protest is sustained given the absence of any agency documentation reflecting the required analysis of the awardee's final proposal revisions, which reflected [deleted] that appear to conflict with the agency's internal [deleted] projections.

4. Protest based on alleged conflicts of interest and an alleged violation of procurement integrity provisions is denied where record does not support the protester's allegations.

DECISION

Pemco Aeroplex, Inc. protests the Department of the Air Force's award of a contract to Boeing Aerospace Operations, Inc. pursuant to request for proposals (RFP) No. FA8105-05-R-0014 to provide programmed depot maintenance (PDM) for KC-135 aircraft. Pemco maintains that the agency's evaluation of proposals was flawed with regard to past performance, mission capability, and cost/price, and that the agency failed to properly consider alleged organizational conflicts of interest (OCI) and an alleged violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (2000).

As discussed below, we sustain the protest with regard to the agency's evaluation of cost/price, but we deny the challenges to the agency's evaluation of past performance and mission capability, as well as to alleged OCIs and the alleged violation of procurement integrity provisions.¹

¹ Pemco's protest submissions also suggested potential bias on the part of Charles Riechers, who was appointed as the source selection authority (SSA) in May 2007, a few months prior to Boeing's selection for award. As the parties have been advised, our decision here does not express any opinion regarding this matter. By way of background, Pemco's protest was filed on September 19, 2007. On October 1, the *Washington Post* reported that, immediately prior to his employment with the Air Force, Mr. Riechers held what was described by the newspaper as a "no-work contract" with Commonwealth Research Institute, a subsidiary of Concurrent Technologies Corporation (CTC). Letter from Pemco to GAO (Oct. 11, 2007), attach. 1. On October 11, Pemco filed a protest submission with our Office that referenced the October 1 article, noted that CTC's Internet website listed a Boeing company as a CTC client, and suggested that, due to Mr. Riechers' recent arrangement with CTC's subsidiary, he may have been biased in favor of Boeing, a CTC client.

On October 14, Mr. Riechers was found dead, an apparent suicide. It was subsequently reported that Air Force officials believed Mr. Riechers' apparent suicide was linked in some manner to the October 1 *Washington Post* article and Pemco's October 11 protest submission. Letter from Pemco to GAO (Oct. 24, 2007), attach. 2. On October 24, Pemco filed another protest submission, complaining that the Air Force was improperly "pressing forward with its defense of the Boeing award without first conducting a full and proper inquiry" into the circumstances leading to Mr. Riechers' death. On November 1, our Office requested that the Air Force advise us as to ongoing inquiries/investigations that would address the factors or motivations leading to Mr. Riechers' death, and requested production of documents

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BACKGROUND

The solicitation was originally issued in August 2005, and proposals were first submitted in October of that year. At that time, Boeing and Pemco were jointly performing the maintenance for KC-135 aircraft in a prime contractor/subcontractor relationship pursuant to a predecessor contract with the Air Force. In October 2005, Boeing and Pemco submitted a joint proposal responding to the solicitation, proposing to maintain their relationship.

In May 2006, the agency substantially reduced the quantities of KC-135 aircraft for which maintenance was being sought under the solicitation.² Following that quantity reduction, Boeing terminated the prime contractor/subcontractor relationship between itself and Pemco.³ In July 2006, the agency amended the solicitation to reflect its revised requirements, and allow Pemco and Boeing to submit separate proposals competing for those requirements.

The solicitation provided for award on a “best value” basis, stating that the agency intended to award to the offeror “who gives the Air Force the greatest confidence it

(...continued)

relevant to that issue for GAO’s in camera review. On November 6, the Air Force advised our Office that the Loudon County Sheriff’s Office (LCSO), in conjunction with federal government investigative authorities, was conducting an ongoing investigation to determine the “root cause” of Mr. Riechers’ death, and further provided an LCSO statement expressing the view that release of any evidence relating to that ongoing investigation was inappropriate.

On November 7, we advised the parties that, in light of the ongoing investigation being conducted by both local and federal authorities, and consistent with our Office’s past practice, see, e.g., JWK Int’l Corp., B-296969.3, Jan. 5, 2006, 2006 CPD ¶ 17 at 3 n.4; Oceaneering Int’l, Inc., B-278126, Dec. 31, 1997, 98-1 CPD ¶ 133 at 1 n.1; Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 6 n.4, our bid protest decision would not address the allegation of bias on Mr. Riechers’ part.

² The agency states that “[p]ending KC-135E retirements and decisions made by the Air Force to increase the number of KC-135 aircraft to be input into the organic PDM facility at Tinker Air Force Base . . . resulted in a reduction to the BEQ [best estimated quantity] from 44 to 24 and a reduction in the maximum quantity from 60 to 48.” Agency Report, Tab 6, Proposal Analysis Report (PAR) at 2.

³ In a subsequent letter to the Air Force, Boeing stated: “Boeing has severed our relationship with Pemco Aeroplex. The parties have determined that the program is no longer viable with two sources of repair.” Boeing Letter to the Air Force (Sept. 8, 2006).

will best meet our requirements affordably,” and established the following evaluation factors: mission capability, proposal risk, past performance and cost/price.⁴ RFP at 78-79. Under the mission capability evaluation factor, the solicitation established five subfactors: depot maintenance, supply chain management, transition, program management, and small business.⁵ Id. at 79. With regard to evaluation of mission capability, the solicitation provided that color ratings would be assigned at the subfactor level.⁶ With regard to evaluation of proposal risk, the solicitation provided that risk assessments of “low,” “moderate,” or “high” would be made for each of the mission capability subfactors, and stated:

The Proposal Risk assessment focuses on the risks and weaknesses associated with an Offeror’s proposed approach and includes an assessment of the potential for disruption of schedule, increased cost, degradation of performance, and the need for increased Government oversight, as well as the likelihood of unsuccessful contract performance.

Id. at 82-83.

With regard to evaluation of past performance, the solicitation provided that the agency would make “confidence assessments” regarding whether an offeror is likely to successfully perform the required effort.⁷ Id. at 84.

Finally, with regard to cost/price, the solicitation contemplated award of a fixed-price contract. Nonetheless, the solicitation provided that the agency would perform a price realism analysis, required offerors to submit data regarding “labor, fringe benefits, overhead and G&A rates by year for all labor categories anticipated for use

⁴ Offerors were advised that mission capability, proposal risk, and past performance were of equal importance and that, when combined, these factors were “significantly more important” than cost/price. RFP at 79.

⁵ The solicitation provided that depot maintenance, supply chain management, and transition were of equal importance and, individually, were more important than either program management or small business, and that small business was the least important subfactor. Id.

⁶ The solicitation provided for ratings of “Blue/Exceptional,” “Green/Acceptable,” “Yellow/Marginal,” and “Red/Unacceptable.” Id. at 80.

⁷ The solicitation provided for assessments of “high confidence,” “significant confidence,” “satisfactory confidence,” “little confidence,” and “no confidence” based on the offeror’s past performance record. Id. at 84. The solicitation also provided for an “unknown confidence” rating where an offeror did not have a past performance record. Id.

in the performance of this effort,” and provided that “evaluation of [the required data] will be used to determine reasonableness and realism of the prices.” Id. at 86.

In September 2006, Pemco and Boeing submitted independent proposals competing for the revised solicitation requirements.⁸ Thereafter, discussions were conducted and final proposal revisions (FPR) were requested; in February 2007, Pemco and Boeing each submitted an FPR. The FPRs were subsequently evaluated by the various teams within the source selection evaluation team (SSET),⁹ and briefings were provided to the source selection advisory council (SSAC) and the SSA.

In April 2007, as the agency was completing its final evaluation of the FPRs, [deleted]^{10, 11} The SSAC was briefed [deleted], and this information was thereafter provided to the agency’s performance confidence assessment group (PCAG) for consideration in its evaluation of past performance. Proposal Analysis Report (PAR) at 2; Contracting Officer’s Statement at 10. Because the agency considered [deleted] to be adverse past performance information, the agency reopened discussions on May 10 to provide Boeing an opportunity to respond, thereafter sending various evaluation notices (ENs) to the offerors, including ENs to Boeing regarding [deleted]. PAR at 2.

On May 17, 2007, the Air Force [deleted].¹²

Thereafter, the offerors responded to the various ENs. Boeing provided [deleted] responses to the agency’s ENs.

On June 18, the offerors submitted second FPRs, which were evaluated by the agency and resulted in the following final ratings.

⁸ A third proposal was submitted by another offeror; the agency’s evaluation of that proposal is not relevant to this protest, and is not further discussed.

⁹ The SSET included the technical team, the cost/price team, and the performance confidence assessment group (PCAG). Agency Report (AR), Tab 6, Proposal Analysis Report (PAR), at 4.

¹⁰ [deleted]

¹¹ [deleted]

¹² [deleted]

	Boeing	Pemco
Mission Capability Subfactors		
Depot Maintenance Proposal Risk	Blue/Exceptional Low Risk	[deleted]
Supply Chain Management Proposal Risk	Blue/Exceptional Low Risk	[deleted]
Transition Proposal Risk	Blue/Exceptional Low Risk	[deleted]
Program Management Proposal Risk	Green/Acceptable Low Risk	[deleted]
Small Business Proposal Risk	Green/Acceptable Low Risk	[deleted]
Past Performance	Satisfactory	Satisfactory
Total Evaluated Price	\$1,165,138,187	[deleted]

PAR at 78, 166; Contracting Officer’s Statement at 4.

The SSA subsequently concluded that: Boeing’s proposal was superior with regard to mission capability; Pemco’s proposal was superior with regard to past performance; proposal risk was not a significant discriminator; and Boeing offered the lowest total evaluated price (TEP). Agency Report (AR), Tab 5, Source Selection Decision Document (SSDD), at 22. In light of these assessments, the SSA concluded: “Pemco’s better record of past performance is not sufficient to outweigh the benefits of Boeing’s superior Mission Capability proposal and [deleted] lower TEP.” Id. Thereafter, a contract was awarded to Boeing. This protest followed.

DISCUSSION

Past Performance Evaluation

Pemco first challenges the agency’s assignment of “satisfactory” confidence ratings to both Pemco’s and Boeing’s proposals under the past performance factor. In this regard, Pemco complains that the agency “unreasonably failed to rate Pemco higher than Boeing,” and that the agency “was unreasonable in rating both Boeing and Pemco equally.” Protest at 15, 17.

As our Office has frequently stated, adjectival ratings are only guides to assist agencies in evaluating proposals; information regarding particular strengths and weaknesses of proposals is the type of information that source selection officials should consider, in addition to ratings and point scores, to enable them to determine whether and to what extent meaningful differences exist between proposals. See, e.g., TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, CPD ¶ 104 at 17. In this regard, proposals with the same adjectival ratings are not necessarily of equal

quality, and an agency may properly consider specific advantages that make one proposal higher quality than another. See Pueblo Envtl. Solution, LLC, B-291487, B-291487.2, Dec. 16, 2002, 2003 CPD ¶ 14 at 10; Oceaneering Int'l, Inc., B-287325, June 5, 2001, 2001 CPD ¶ 95 at 13.

Here, the record clearly establishes that the agency did not evaluate Boeing's and Pemco's proposals as being equal with regard to past performance; rather, Pemco's proposal was found superior to Boeing's. Specifically, although both proposals received overall ratings of "satisfactory" confidence, the agency's contemporaneous evaluation documents show that, after considering multiple strengths and weaknesses in both offerors' past performance record, Pemco's overall past performance rating was considered to be at "the high end of satisfactory" and Boeing's overall rating was considered to be [deleted]. PAR at 159; Email from SSA (Riechers) to SSAC Advisors, Aug. 5, 2007. Similarly, the SSA unambiguously stated in his source selection decision: "I consider Pemco to have a better past performance record than Boeing." SSDD at 22. Accordingly, there is no merit to Pemco's protest that the two proposals were evaluated "equally" with regard to past performance; to the contrary, the agency considered this aspect of Pemco's proposal to be better than Boeing's.

Pemco also complains that, rather than a past performance rating of "satisfactory" confidence, Boeing's proposal should have received a rating of either "little" confidence or "no" confidence. Specifically, Pemco protests that the agency failed to consider negative past performance information associated with Boeing's performance related to [deleted]. More specifically, Pemco's protest refers to various sources and authorities that have criticized Boeing's contract performance in connection with these programs, including: a Department of Defense Inspector General (DODIG) report issued in May 2006;¹³ [deleted]; and the agency's decision not to exercise contract options under the predecessor KC-135 PDM contract. Pemco's protest further identifies particular matters contained or reflected in each of these various sources of negative information, and maintains that, in assessing Boeing's past performance, the agency failed to consider these particular matters.

Where a protest challenges an agency's past performance evaluation, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. Although an agency is not required to identify and consider each and every existing piece of past performance information, it must consider information that is reasonably available and relevant as contemplated by the terms of the solicitation. Johnson Controls Sec. Sys., LLC, B-296490.3 et al., Mar. 23, 2007, 2007 CPD ¶ 100 at 3-5; Dismas Charities, B-298390, Aug. 21, 2006, 2006 CPD ¶ 131 at 5. Where an

¹³ *Adjusting the Price and Restructuring the KC-135 Depot Maintenance Contract*, DODIG Report No. D-2006-088 (May 18, 2006).

agency has considered reasonably available and relevant past performance information, its judgments regarding the relative merits of competing offerors' past performance are primarily matters within the contracting agency's discretion, and a protester's mere disagreement with such judgments does not establish a basis for our Office to sustain a protest. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10; Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, based on our review of the agency's extensive past performance evaluation record, along with testimony obtained during the hearing,¹⁴ we conclude that the agency considered all relevant and reasonably available past performance information in its evaluation. See AR, Tab 33, Boeing Past Performance Worksheets, at 1-71; PAR exh. A, Boeing Past Performance Data, at 1-55. Specifically, with regard to Boeing's prior contract performance supporting the particular programs on which Pemco's protest relies, the record establishes that the PCAG considered the DODIG report in its entirety,¹⁵ along with [deleted], and Boeing's responses to the agency's various requests for information. Hearing Transcript (Tr.) at 266-67, 279-81, 287, 304, 341, 352-53. Additionally, the contracting officer and the PCAG interviewed the contracting officers for the [deleted], seeking their separate feedback regarding Boeing's prior contract performance. Tr. at 101-02.

Although Pemco disagrees with the agency's assessments and conclusions drawn from its consideration of Boeing's past performance information, Pemco has not identified any significant, relevant, and reasonably available information that the agency did not consider. Accordingly, Pemco's protest that the agency failed to consider Boeing's negative past performance information is denied.

With regard to the reasonableness of the agency's ultimate determination to assign a "satisfactory" confidence rating to Boeing's proposals under the past performance factor,¹⁶ we have reviewed the extensive record on which the agency relied, and take note of the fact that this record contains substantial amounts of both positive and negative information regarding Boeing's past performance. Based on our review, we cannot conclude that the agency's judgments and its overall assessment of Boeing's

¹⁴ This Office conducted a protest hearing on November 8 and 9, 2007, during which testimony was provided by the agency's contracting officer, the PCAG chair, and a cost/price analyst.

¹⁵ Although Pemco disagrees with the agency's judgments as to whether certain aspects of the report reflect negative past performance attributable to Boeing, there can be no dispute that the agency considered the entire report in performing its past performance evaluation.

¹⁶ As noted above, the SSA considered Boeing's rating to be [deleted].

past performance were unreasonable--although we recognize that other assessments of that performance might also have been reasonable. Accordingly, Pemco's protest challenging the reasonableness of the agency's assessment of a "satisfactory" confidence rating for Boeing's proposal is denied.

Pemco also protests that it was unreasonable for the agency to have assigned a "satisfactory" confidence rating to Pemco's proposal,¹⁷ arguing that nothing less than a "significant" confidence rating could have been reasonably assigned. We have similarly reviewed the agency record regarding Pemco's past performance, again noting that this record contains substantial amounts of both positive and negative information regarding Pemco's past performance. Based on our review, we cannot conclude that the agency's judgments and its overall assessment of Pemco's past performance were unreasonable. Pemco's protest challenging the agency's past performance evaluation is denied.

Mission Capability

Pemco next challenges the agency's rating of Pemco's proposal under the mission capability evaluation factor, asserting that the agency's evaluation "violated the RFP's express terms and [the agency's] own findings." Protest at 22. In this regard, Pemco asserts that the agency was required to rate Pemco's proposal "Blue/Exceptional," rather than "Green/Acceptable," under [deleted], because Pemco's proposal was evaluated as having "strengths" in those areas. Pemco notes that, in defining the requirements for a "Blue/Exceptional" rating, the solicitation stated:

Exceeds specified minimum performance or capability requirements, in a way beneficial to the government; proposal must have one or more strengths and no deficiencies to receive a blue.

RFP at 80.

Pemco maintains that because its evaluated "strengths" exceeded the solicitation's minimum requirements in a way beneficial to the government, Pemco was "clearly entitled" to "Blue/Exceptional" ratings for those subfactors. Protest at 23. Pemco is mistaken.

In reviewing a protest challenging an agency's evaluation of technical factors, our Office will not reevaluate proposals, but will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See, e.g.,

¹⁷ As noted above, Pemco's rating was considered to be at "the high end" of a "satisfactory" confidence rating.

Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 4. As with an agency's evaluation of past performance discussed above, the evaluation of technical proposals, including determinations regarding the magnitude and significance of evaluated strengths and weaknesses, is a matter largely within the agency's discretion, and a protester's mere disagreement with the agency's judgment does not establish a basis for our Office to sustain a protest. C. Lawrence Const. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

Here, although Pemco points to the solicitation's definition regarding the requirements for a "Blue/Exceptional" rating, it overlooks the similar definition regarding the requirements for a "Green/Acceptable" rating. In this regard, the solicitation stated: "A proposal rated green[/acceptable] must have no deficiencies, but may have one or more strengths." RFP at 80. Accordingly, the solicitation clearly provided that in situations where a proposal received one or more "strengths," either a "Blue/Exceptional" or "Green/Acceptable" rating could properly be assigned. On this record, there is no merit to Pemco's assertion that the agency's failure to assign a "Blue/Exceptional" rating under any subfactor for which Pemco's proposal contained evaluated strengths "violated the RFP's express terms."

To the extent Pemco's protest otherwise challenges the reasonableness of the agency's subjective judgments in assigning Pemco "Green/Acceptable" ratings under those subfactors, we have reviewed the record, and find that Pemco's complaints constitute mere disagreement with those judgments; as such, they provide no basis for sustaining the protest.

Cost/Price Evaluation

Pemco next protests that the agency failed to reasonably evaluate the realism of changes Boeing made in its final proposal revisions with regard to [deleted].¹⁸ Here, the solicitation specifically provided that the agency would assess the realism of [deleted]; yet, the agency's procurement record fails to reflect a reasonable analysis of [deleted] in Boeing's final proposal revisions.

As discussed above, although the solicitation contemplated award of a fixed-price contract, offerors were required to provide certain cost data regarding "labor, fringe benefits, overhead and G&A rates by year for all labor categories anticipated for use in the performance of this effort." Further, the solicitation specifically provided that

¹⁸ The solicitation requirements are divided into three types of work: basic PDM work (work that is performed on all aircraft), intermittent tasks (IT) (tasks that are recurring, but not performed on all aircraft), and "over and above" (O&A) work (unanticipated repairs that exceed 200 labor hours or \$20,000 in material costs). Tr. at 10; Performance Work Statement (PWS) at 17. There is no dispute that basic PDM work constitutes a significant majority of the contract requirements.

“evaluation of [this required data] will be used to determine reasonableness and realism of the prices.” Id. at 86.

In the September 2006 proposal Boeing submitted after severing its partnership with Pemco, Boeing stated that its proposal reflected implementation of [deleted].¹⁹ AR, Tab 22, at V3-49.²⁰ Boeing’s September 2006 proposal contained a relatively detailed explanation of this [deleted] and its application to performance of the solicitation requirements. Id. at V3-45 through V3-57. Based on [deleted], Boeing’s September 2006 proposal reflected [deleted],²¹ and also reflected [deleted]. Id. at V3-57.

During discussions with Boeing, following submission of the September 2006 proposal, the agency asked Boeing to further explain the basis for [deleted].²² Boeing responded, stating:

[deleted].

AR, Tab 23, EN No. B4-AMD-8, at 6.

Nonetheless, in its subsequently-submitted FPR (February 2007) and second FPR (June 2007), Boeing [deleted]. Boeing’s proposed price in those revisions reflected [deleted]. AR, Tab 27, FPR, at V3-57; Tab 30, SFPR, at V3-56. There is no dispute that the effect of this change reduced Boeing’s proposed price by more than the [deleted] difference between Boeing’s and Pemco’s final total evaluated prices, on which the source selection decision was based.²³

¹⁹ Boeing’s proposal described [deleted].

²⁰ Boeing’s October 2005 proposal, submitted jointly with Pemco, also reflected the [deleted].

²¹ Boeing [deleted].

²² The agency asked: [deleted]. AR, Tab 23, EN No. B-4-AMD-8, at 6.

²³ Counsel for the parties and their various consultants disagree on the cost/price impact of Boeing’s [deleted]. Boeing’s representatives state that the impact is [deleted] or “approximately [deleted]”; Pemco’s representatives assert that the impact is at least [deleted]. Email from Boeing Counsel to GAO (Dec. 13, 2007); Email from Pemco Counsel to GAO (Dec. 13, 2007). For purposes of this decision, we need not determine the precise cost/price impact, since the parties agree that the amount is greater than the [deleted] difference between the two offerors’ total evaluated prices.

Notwithstanding this [deleted] change in [deleted], Boeing's final proposal revisions reflected no explanation supporting that change, other than the following two sentences.

[deleted].

Id.

That is, Boeing's final proposal revisions did not reflect changes to its technical approach or [deleted]. Indeed, in responding to Pemco's protest regarding this matter, Boeing expressly acknowledges that the [deleted] were not connected in any way to a technical change in its proposed approach to contract performance, stating: "Boeing decided for business reasons to assume the risk [associated with [deleted]]." Boeing Post-Hearing Comments at 40-41.

Despite Boeing's own acknowledgment that its final proposal revisions created risk, and that this risk was created "for business reasons," the record contains no documentation of any agency evaluation that considers whether Boeing's revised [deleted] are realistic. The absence of agency documentation addressing this matter is striking in light of the fact that Boeing's revised assumptions not only depart, without explanation, from its initial approach—but they appear directly contrary to the agency's own view regarding [deleted] for the [deleted] KC-135 aircraft fleet.

Specifically, the record contains a document titled "Talking Paper on C/KC-135 PDM Recompensation Source Selection," which was prepared in June 2006 by the agency's SSET chair and the KC-135 System Program Director.²⁴ This "Talking Paper" states that the agency expects [deleted]. AR, Tab 46, "Final Version" of Talking Paper on C/KC 135 PDM Recompensation Source Selection, at 1. Moreover, this document states that such [deleted].²⁵ Id. Finally, this document states: [deleted]. Id.

Thus, in contrast to the agency's projection of [deleted], Boeing's proposal assumes [deleted]. For example, although the agency has projected that [deleted], Boeing's final proposal revisions assume that [deleted]. AR, Tab 30, at V3-57.

As noted above, the solicitation expressly provided that the agency would evaluate the realism of the offerors' proposed prices, and that such analysis would include

²⁴ Under the heading "Purpose," this document states: "Ensure Air Force senior leadership is aware of important factors and considerations with respect to the current KC-135 PDM recompensation source selection."

²⁵ The record also contains a slide from the "C/KC-135 Roadmap Conf[erence] Feb 06" which reflects [deleted]. Pemco Comments on Agency Report, Oct. 29, 2007, attach. V.

consideration of an offeror's [deleted]. RFP at 86. Further, the solicitation provided that the agency would also assess proposal risk, including an assessment of whether an offeror's proposed approach has potential for "disruption of schedule, increased cost, degradation of performance, and the need for increased Government oversight, as well as the likelihood of unsuccessful contract performance." *Id.* at 82. It appears beyond reasonable dispute that, even in the context of a fixed-price contract, an offeror's proposed approach that [deleted] could create risks of [deleted].

In order for our Office to meaningfully review an agency's evaluation, the agency must have adequate documentation to support its various judgments. Where an agency fails to create or retain documentation regarding its evaluation assessments, it bears the risk that our Office will be unable to determine whether the agency's judgments were reasonable. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

Here, the agency's evaluation record includes no meaningful documentation addressing the unexplained changes in Boeing's assumptions between submission of its initial proposal and its subsequent proposal revisions. Specifically, the record contains no documentation regarding any agency consideration of the basis for Boeing's changed [deletion], how Boeing's revised [deleted] correspond to the reality of the [deleted], how the revised [deleted] correspond to the agency's own [deleted] projections, or whether Boeing's revised [deleted] are likely to create [deleted]. Accordingly, on the record here, we are unable to determine whether the agency reasonably concluded that Boeing's proposed price is realistic, or whether the agency's assessment of "low risk" for Boeing's proposal, under each of the mission capability subfactors, is reasonable in light of Boeing's revised [deleted]. Since we are unable to determine whether the agency reasonably performed a price realism analysis, or properly considered the potential risk flowing from Boeing's revised [deleted], we sustain the protest on this basis.²⁶

²⁶ Pemco also protests that the agency's cost/price evaluation was unreasonable with regard to the realism of Boeing's [deleted] estimates and that the proposal was unbalanced [deleted]. Our review of the record regarding those issues does not provide a basis to sustain the protest. Nonetheless, in light of our recommendation that the agency evaluate the realism and risk associated with the [deleted] introduced in Boeing's final proposal revisions, the agency may wish to also reconsider the realism of other aspects of Boeing's final proposal revisions, including its [deleted] estimates and the potential risk associated with Boeing's pricing with regard to the [deleted] portions of the solicitation requirements.

Alleged Organizational Conflicts of Interest

Next, Pemco protests that Boeing had a “disqualifying OCI” because “the RFP identified Boeing as a consultant to the Air Force on this procurement.” Protest at 43-46; Pemco Comments on Agency Report, at 69-69. In this regard, section K of the solicitation contained the following provision under the heading “Use of Non-Government Advisors”:

(a) Offerors are advised that technical and cost/price data submitted to the Government in response to this solicitation may be released to non-Government advisors for review and analysis. The non-Government advisor support will be provided by:

.

Boeing Aerospace Operations, Inc.*

.

*NOTE: Boeing will only be used for technical questions which the Source Selection Team may not be able to answer and those individuals at Boeing who are responsible for answering the questions will sign Non-Disclosure Agreements.

RFP at 51-52.

Pemco did not object to the reach of this provision at any time prior to filing its post-award protest with our Office. Accordingly, to the extent its protest challenges the provision itself, the protest is untimely. 4 C.F.R. § 21.2(a)(1) (2007).

In any event, in responding to Pemco’s protest, the agency specifically states that it did not use Boeing as a consultant and that no Boeing employee was ever consulted for technical or other information in connection with the agency’s evaluation of proposals; this information was also provided to Pemco during its debriefing. Contracting Officer’s Statement at 25. Pemco’s protest expressly acknowledged that “the Air Force has indicated that it did not use Boeing as a consultant,” Protest at 45, and Pemco did not challenge that agency representation either during its post-award debriefing, or in its initial protest to our Office.

Despite not having raised an earlier challenge to the agency’s representation, with its comments following receipt of the agency report, Pemco submitted a declaration from one of its employees essentially asserting, based on purported statements of a Boeing employee, that the agency’s representations regarding use of Boeing as a consultant during the procurement are not truthful. Pemco’s assertions in this regard fail to comply with our Office’s timeliness requirements. 4 C.F.R. § 21.2(a)(2). Nonetheless, to ensure that we had a complete record on this matter, we requested a

response from the agency. The agency responded to our request by submitting declarations from the SSAC chair and the KC-135 Program Manager that directly address Pemco's declaration, and categorically deny Pemco's accusations.

Government officials are presumed to act with honesty and in good faith, and a protester's contention that contracting officials have acted dishonestly or in bad faith must be supported by convincing proof; we will not attribute dishonesty or prejudicial motives to procurement officials on the basis of inference or supposition. See, e.g., Worldwide Language Res., Inc., B-297210 et al., Nov. 28, 2005, 2005 CPD ¶ 211 at 4.

Where as here, Pemco offers no evidence supporting its accusations, other than referencing statements purportedly made by Boeing personnel, we will not sustain the protest on the basis of these allegations. Further, we have considered all of Pemco's various other OCI allegations and conclude that they provide no basis for sustaining the protest.²⁷

Alleged Procurement Integrity Violation

Finally, Pemco protests that the agency failed to investigate a matter that Pemco maintains is a potential violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423. In this regard, Pemco asserts that Boeing may have misused Pemco's proprietary information in preparing its proposal, that Pemco advised the agency of such potential misuse, and that the agency was obligated to investigate the matter, but did not.

²⁷ Among other things, Pemco protests that an OCI was created in connection with a solicitation requirement regarding a licensing fee for use of Boeing's technical data. By way of background, Boeing owns technical data rights with regard to data necessary to perform some of the contract requirements. The solicitation provided that offerors, other than Boeing, would be required to pay \$149,000 per aircraft for use of this data. Pemco complains that L-3 Communications, Inc., a Boeing subcontractor, was one of several commercial entities with which the agency consulted in establishing the fee and, therefore, that Boeing should have been disqualified on the basis of an OCI. The record shows that the agency approached several industry representatives, including Goodrich, American Airlines, and Northrop Grumman, along with L-3, and determined that licensing fees for use of the technical data at issue here generally ranged from 3% to 5% of the contract price. Here, the licensing fee represents less than 3% of Pemco's average price per aircraft. Pemco did not object to the solicitation's licensing fee provisions prior to submitting its proposal, nor has it argued that the fee is inconsistent with industry standards. On this record, Pemco's complaints regarding the agency's consideration of input from L-3 do not provide a basis for sustaining the protest.

On September 6, 2007, the day before Boeing was selected for award, Pemco's president wrote a letter to the contracting officer expressing concern about Boeing's "access" to Pemco's proprietary information due to Boeing and Pemco's prior relationship as prime contractor/subcontractor. That letter referenced a June 2005 non-disclosure agreement (NDA) between Boeing and Pemco,²⁸ expressed concern that "Boeing personnel with knowledge of Pemco's proprietary pricing information assisted in the preparation of Boeing's proposal,"²⁹ and that Boeing had not met its obligations under the NDA to adequately "safeguard" Pemco's proprietary information. Letter from Pemco to Contracting Officer (Sept. 6, 2007), at 1-4. The letter also requested that the agency "conduct an inquiry" into Boeing's handling of Pemco information. Id.

On September 7, following a conversation with the contracting officer, Pemco's president retracted the letter, stating in an email that: "Pemco is sorry for any confusion the attached letter may have caused you and hereby, officially retracts it." Email from Pemco to Contracting Officer (Sept. 7, 2007). The parties do not agree as to whether the contracting officer requested that Pemco withdraw the letter during the preceding conversation.

Pemco maintains that, notwithstanding its retraction of the September 6 letter, the contracting officer had an obligation to conduct an investigation, based on the contracting officer's knowledge of the information contained in the letter,³⁰ along

²⁸ The NDA was executed in conjunction with the parties' preparation of a joint proposal to perform the KC-135 PDM requirements pursuant to their prior prime contractor/subcontractor relationship; that joint proposal was submitted in October 2005. The NDA states that the purpose of the agreement is to "set forth the rights and obligations of the parties with respect to the use, handling, protection, and safeguarding of Proprietary Information which is disclosed by and between the parties relating to the KC-135." Pemco Hearing Documents, Tab 45, NDA ¶ 1.

²⁹ Contrary to the implication in the letter, the NDA does not appear to preclude either Pemco or Boeing personnel from assisting in the preparation of their separate proposals. See NDA ¶ 12 ("This restriction will not preclude a party's employees who have had access to the other party's Proprietary Information from participating in the subsequent independent contract, so long as appropriate safeguards are in place.")

³⁰ Section 3.104-7 of the FAR provides: "A contracting officer who receives or obtains information of a violation or potential violation of [procurement integrity provisions] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor."

with what Pemco describes as “the remarkable similarity” of the two proposals.³¹ Protest at 39. For the reasons discussed below, Pemco’s assertions regarding this matter do not provide a basis to sustain the protest.

The procurement integrity provisions of the Office of Federal Procurement Policy Act contain two restrictions related to disclosing or obtaining bid or proposal information.³² 41 U.S.C. § 423(a),(b). First, the Act prohibits a government official from “knowingly disclos[ing] contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 423(a). Second, the Act provides that “a person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 423(b). Under the heading “Savings provisions,” the Act expressly provides: “This section does not . . . restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 423(h).

Here, there was never any suggestion that any government official disclosed Pemco’s proprietary information, nor that Boeing wrongfully obtained it. To the contrary, in pursuing this matter, Pemco specifically discusses agency efforts to assist Pemco in protecting Pemco’s proprietary information during performance, as a Boeing subcontractor, of the predecessor contract. Accordingly, to the extent Boeing obtained Pemco’s proprietary information, it appears clear that Pemco provided it voluntarily, pursuant to its prior relationship with Boeing, and that the facts here fall squarely within the Act’s “Savings provision” which states: “This section does not . . . restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” *Id.* It is also clear that Pemco’s only complaint is that Boeing failed to properly “safeguard” Pemco’s information, as required by the terms of the NDA. To the extent Pemco believes that Boeing failed to comply with the terms of the parties’ NDA, the matter constitutes a private dispute. On the record here, Pemco’s allegations regarding this matter do not provide a basis for sustaining its protest.

CONCLUSION

In summary, we sustain the protest with regard to the agency’s evaluation of cost/price. With the exception of alleged bias, as discussed above, we deny all of

³¹ Our review of the record does not support Pemco’s assertion regarding “the remarkable similarity” of the two proposals. Indeed, other than [deleted], the two proposals differ markedly.

³² The Act also restricts other activities that are not related to disclosing or obtaining bid or proposal information. 41 U.S.C. § 423(c),(d).

Pemco's other protest grounds, including those concerning the agency's evaluation of past performance and mission capability, alleged OCIs, and the alleged procurement integrity violation.

RECOMMENDATION

As discussed above, the agency's procurement record contains no documentation regarding a realism analysis of the [deleted] Boeing incorporated into its final proposal revisions--nor does the record contain any evidence that the agency considered the risk created by Boeing's revised [deleted]. Accordingly, we recommend that, as required by the RFP, the agency perform and document a realism assessment regarding Boeing's [deleted], along with a risk assessment regarding the potential for [deleted]. Following that realism and risk analysis, the agency should make a new source selection decision, and if the agency determines a proposal other than Boeing's represents the best value to the government, the agency should terminate Boeing's contract and make an award to that other offeror. We further recommend that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4. C.F.R. § 21.8(f)(1).

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