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

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Decision

Matter of: BST Systems, Inc.

File: B-298761; B-298761.2

Date: December 1, 2006

Brian A. Darst, Esq., for the protester.
Jonathan D. Shaffer, Esq., Smith Pachter McWhorter, for Yardney Technical Products, the intervenor.
Emilia Muche Thompson, Esq., Department of the Navy, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging evaluation of protester's past performance in procurement for battery cells is denied where record establishes that evaluation was reasonable and in accord with stated evaluation criteria; reports of electrolyte leaking from protester's battery cells furnished under prior contracts for the cells being procured warranted assigning protester less favorable rating than awardee, for which there were no reports of leakage.

DECISION

BST Systems, Inc. protests the award of a contract to Yardney Technical Products under Naval Undersea Warfare Center, Division Newport, Request for Proposals (RFP) No. N66604-06-R-0016, for silver-zinc battery cells for the MK30 Mod 1 Anti-Submarine Warfare (ASW) target. BST challenges the evaluation of past performance.

We deny the protest.

The solicitation contemplated the award of a fixed-price contract to furnish a basic quantity of 4,600 to 4,800 silver-zinc battery cells to be shipped dry and electrolyte fill kits to activate the batteries, with 12 options for various quantities (with a maximum of 8,000 production cells and fill kits per year) over 4 years. The MK30 Mod 1 target is a torpedo-shaped vehicle, 20 feet long and weighing 2,700 pounds, which simulates a threat from a submarine in acoustic and magnetic characteristics and dynamic maneuvers. Energy for the propulsion and payload systems of the target is furnished by 168 individual silver-zinc battery cells arranged in eight trays and installed in the

battery hull section of the target. The standard wet-life of a cell/battery system is 15 months from the time the cell is activated with electrolyte. Consequently, the MK30 Mod 1 Program needs to maintain and replenish a replacement inventory of battery cells at each operational site. (The battery cell used in the MK30 Mod 1 target is only used in that vehicle, and not in the MK30 Mod 2 target, which is replacing the MK30 Mod 1 target and uses a different battery cell built to a different specification.) Historically, Yardney and BST have been the only two producers of MK30 Mod 1 battery cells. The current solicitation, issued January 24, 2006, essentially is a follow-on to Yardney's contract for the same cells, contract No. N66604-01-C-2305 (contract-2305).

The RFP provided for award to be made to the responsible offeror whose proposal represented "the best overall value to the Government" based on two equally weighted evaluation factors, total evaluated price and past performance. RFP § M32X(a). Offerors were required to furnish information regarding past performance, including "a list of the last ten (most recent) contracts and subcontracts completed during the last three years and all contracts and subcontracts currently in process." RFP § L34X(a). The solicitation provided that past performance

will be evaluated as an indicator of the offeror's expected future performance. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance are representative of the types of data that may be considered. The Government may contact points of contact listed in the offeror's proposal for the purpose of obtaining additional past performance information. The number of contacts, if any, will be determined by the Government at its discretion. Selection of contacts may be random.

RFP § M32X(b). In addition, the RFP provided that the government "may consider information concerning the offeror's past performance that is not contained in the proposal." Id.

Yardney and BST submitted proposals. After conducting discussions with the offerors—including discussions with BST regarding deficiencies in its performance of its prior contract—contract No. N66604-95-C-B111 (contract-B111)—for MK30 Mod 1 cells—the agency requested final revised proposals.

The agency's final evaluation of Yardney's past performance was based on 3 of the 10 contracts Yardney cited in its proposal: (1) contract-2305, NUWC's prior contract for MK30 Mod 1 silver-zinc cells; (2) contract No. N00104-05-C-LA17 (contract-LA17), awarded by the Naval Inventory Control Point (NICP), Mechanicsburg, Pennsylvania, for silver-zinc battery cells for the Navy SEALs' Seal Delivery Vehicle (SDV); and (3) contract No. N61331-05-P-1788 (contract-1788), awarded by the Naval Surface

Warfare Center (NSWC) for silver-zinc battery cells for the Navy's Autonomous Underwater Vehicle (AUV). The agency assigned Yardney the following detailed ratings for these contracts:

Yardney	Contract-2305 (MK30 Mod 1)	Contract-LA17 (SDV)	Contract-1788 (AUV)	Overall Rating
Quality of Product	Exceptional	Very Good	Exceptional	Exceptional
Timeliness	Exceptional	Very Good	Very Good	Very Good
Cost Control	Exceptional	Very Good	Very Good	Very Good
Business Relations	Exceptional	Very Good	Very Good	Very Good
Customer Satisfaction	Exceptional	Very Good	Very Good	Very Good

In particular, the agency noted that, under Yardney's most relevant contract, its predecessor contract-2305 for 19,965 of the same MK30 Mod 1 silver-zinc battery cells being procured here, Yardney's performance had been exceptional in all categories, with no spillages of electrolyte when the cells were removed and charged. In addition, the agency noted that the silver-zinc battery cells furnished by Yardney under contract-1788 for use in the Navy AUV were superior in quality to those previously furnished by BST for that program, with better wet-life and chargeability. Based on these considerations, the agency rated Yardney as low risk for past performance.

BST's final past performance evaluation was based on 3 of the 10 completed and 7 in-process contracts cited by BST in its proposal: (1) purchase order No. [DELETED] (contract-[DELETED]), issued by [DELETED] for silver-zinc battery cells for the [DELETED]; (2) purchase order No. [DELETED] (contract-[DELETED]), issued by [DELETED] for batteries for the [DELETED]; and (3) contract No. N00164-02-C-6906 (contract-6906), issued by the NSWC for silver-zinc battery cells for use in the Advanced SEAL Delivery System Vehicle (ASDV). In addition, the agency evaluated BST's performance under its prior contract for MK30 Mod 1 cells, contract-B111, even though BST did not cite that contract in its proposal for past performance purposes.¹ The agency assigned BST the following detailed ratings for these contracts:

BST	Contract-B111 (MK30 Mod 1)	[DELETED]	[DELETED]	Contract-6906 (ASDV)	Overall Rating
Quality of Product	Marginal	Satisfactory	Very Good	Very Good	Satisfactory
Timeliness	Marginal	Very Good	Very Good	Very Good	Very Good
Cost Control	Satisfactory	Very Good	Very Good	Very Good	Very Good
Business Relations	Marginal	Very Good	Very Good	Very Good	Very Good
Customer Satisfaction	Marginal	Very Good	Very Good	Very Good	Very Good

In particular, the agency noted that BST's performance under contract-B111, which the agency viewed as BST's most relevant contract, had been marked by spillages of

¹ BST did cite its performance of contract-B111 in requesting a waiver of the First Article Test requirements.

electrolyte and failures to meet dimensional requirements of the specifications; according to the agency, BST's performance problems included problems that were unrelated to the government changes in the specifications or inspections to the wrong standard which BST had cited in explaining the performance deficiencies brought to its attention during discussions. Concluding that BST's "overall work record is good or fair," with performance problems encountered that "might have been substantial but were not severe," the agency assigned BST a moderate risk rating for past performance. Final Evaluation of BST Systems at 2.

The agency determined that Yardney's superior past performance warranted payment of its higher evaluated price--\$[DELETED] versus \$[DELETED] for BST. In reaching this conclusion, the agency contrasted Yardney's problem-free performance of contract-2305 for MK30 Mod 1 battery cells, with the problems BST had encountered in performing contract-B111 for MK30 Mod 1 cells. The agency specifically noted in its best value analysis, with reference to the spillages of electrolyte by BST's MK30 Mod 1 battery cells, that the need to clean spilled electrolyte in the internal areas of the Mod 1 target vehicles and retest vehicle electrical parameters would delay return of targets to operational use and would add to the program's expense; that electrolyte is a hazardous, very caustic material that poses a risk to operational site personnel; and that spillage of electrolyte during operational use can cause premature shutdown of the target vehicle during fleet operations and previously caused the loss of one of the \$2.5 million target vehicles. The agency also noted that, because it is in the process of replacing the Mod 1 targets with the Mod 2 targets, inventories of the Mod 1 cells will be kept to a minimum in order to avoid having unused cells at the end of the MK30 Mod 1 program; thus, any slippage in production would affect availability of the Mod 1 targets for fleet training events. The agency therefore made award to Yardney. Following a debriefing, BST filed this protest with our Office.

BST primarily challenges both the manner in which the agency selected contracts for review in the past performance evaluation and the evaluation of its performance under the selected contracts.

Determining the relative merits of offerors' past performance information is primarily a matter within the contracting agency's discretion; we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10; Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4. In this regard, it is reasonable for an agency to give different evaluation weights to prior contracts based on their similarity or relevance to the required effort. See Chenega Tech. Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 6; SWR, Inc.-Protest and Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94 at 6.

The evaluation of Yardney's and BST's past performance was both reasonable and consistent with the RFP's evaluation terms. We discuss BST's principal arguments below.

YARDNEY'S CONTRACTS

BST asserts that Yardney improperly failed to list a contract that it was required to list under the solicitation instructions, thereby precluding the agency from evaluating Yardney's performance shortfalls under that contract. In this regard, in addition to the three contracts evaluated by the agency--contracts-2305, -LA17, and -1788--Yardney listed 7 other contracts in its past performance proposal, including a contract completed in April 2004. Yardney did not list contract No. N00104-98-C-LA13 (contract-LA13), the 1998 predecessor contract to the 2005 contract (contract-LA17) for low rate, 360 amp silver-zinc battery cells for the SDV. BST asserts that, since contract-LA13 was not completed until 2005, within the 3-year period for which offerors were to submit past performance information, Yardney was required to list the contract in its past performance proposal.

At the hearing our Office conducted in this matter, the Yardney manager responsible for preparing its proposal testified that, in selecting the contracts to be included in the past performance section, he selected the most current contract for a particular relevant battery cell type, e.g., a low rate 190 amp cell, for a particular application. For example, the manager explained that he listed both contract-2305, the prior contract for low rate, 190 amp MK30 Mod 1 silver-zinc cells, and contract-1788, a contract for low rate, 190 amp silver-zinc battery cells used in the AUV, because they were for different vehicles, and thus for different applications. Hearing Transcript (Tr.) at II/41-II/48, II/80-II/81. The manager further explained that he did not list contract-LA13, the predecessor contract for low rate, 360 amp battery cells for the SDV, because he had listed the more recent 2005 Contract-LA17 for SDV battery cells. Tr. at II/59. In this regard, we note that Yarney's interpretation of the solicitation past performance listing requirement appears similar to that of the contracting officer (who was also the source selection authority). Specifically, the contracting officer testified that, while he was unaware of contract-LA13 at the time of the evaluation, he would not have expected that contract to be listed, since the more current contract-LA17, which was listed, was "the most relevant and current" contract regarding Yardney's performance on the SDV program. Tr. at I/73-I/76.

As noted by BST, Yardney's approach to listing prior contracts was inconsistent with the RFP, which instructed offerors to furnish "a list of the last ten (most recent) contracts and subcontracts completed during the last three years and all contracts and subcontracts currently in process." RFP § L34X(a). Nothing in this provision permitted offerors to include only one of several contracts for the same battery cell where the contracts otherwise qualified as the most recent contracts that had been completed during the last 3 years or were currently in process.

Nevertheless, BST's assertion does not furnish a basis for sustaining the protest. In this regard, the record indicates that, as acknowledged in its proposal, BST also furnished only a "partial listing" of contracts. BST Past Performance Proposal at 5. BST's program manager for these batteries testified that she selected the contracts to list not only for relevance, but also with an eye toward avoiding listing similar contracts. Tr. at II/242-43. Thus, BST also interpreted the RFP as permitting offerors to select which of the contracts within the 3-year period to list, and to omit contracts where it had already listed a similar contract. This being the case, BST cannot now argue that Yardney's proposal should be rejected for following the same approach as BST; the integrity of the protest process does not permit a protester to espouse one interpretation of a solicitation during the procurement, and then argue during a protest that the interpretation is unreasonable. AAI Eng'g Support, Inc., B-257857, Nov. 16, 1994, 95-1 CPD ¶ 2 at 3-4; see Sabreliner Corp., B-290515, Aug. 21, 2002, 2003 CPD ¶ 4 at 6; Picker Int'l, Inc., B-249699.3, Mar. 30, 1993, 93-1 CPD ¶ 275 at 7.

In any case, there is no basis on this record for concluding that consideration of Yardney's performance on Contract-LA13 would have altered its low risk past performance rating. The record indicates that, while the first article tests (FAT) and lot acceptance tests (LAT) for Lots 1 to 3 under contract-LA13 indicated a failure of some of the tested cells to meet some specification requirements, resulting in a delay in contract performance, Lots 1, 2 and 3 ultimately were accepted by the agency, and the subsequent LATs for Lots 4 to 10 indicated no critical failures. Test Reports for FAT and LAT Lots 1-10, contract-LA-13; Tr. at II/97.² In this regard, the Navy Technical Lead for contracts -LA13 and -LA17 testified that Yardney's cells in Lots 4 to 10 of contracts -LA13 and -LA17 satisfied all of the "performance requirements," and that there were no reports of problems attributable to the cells. Tr. at I/116-18, I/132-48. Furthermore, as discussed above, the agency had determined that Yardney's contract-2305, the prior contract for the MK30 Mod 1 cells being procured here, was the most relevant indicator of Yardney's expected performance under the contemplated contract. In this regard, neither the technical point of contact for contract-2305, who was also the chairman of the technical evaluation panel (TEP) here, nor the MK30 program manager at the Atlantic Undersea Test and Evaluation Center (AUTECE), the operational site using the greatest number of MK30 Mod 1 target vehicles, was aware of any problems (including any electrolyte leakage) with Yardney's MK30 cells. Tr. at I/253-54, II/332; Final Technical Evaluation Report, July 14, 2006, at 3. We conclude that there is no basis for questioning the agency's evaluation of Yardney's past performance as low risk.

² While it appears that the agency revised the testing procedures, apparently in response, in part, to Yardney's claim that the testing procedures initially used were improper, the Navy Technical Lead for contract-LA13 and contract-LA17 testified that the revisions in testing procedures did not diminish the value of the cells to the Fleet. Tr. at I/110, I/123-24, I/148, I/156.

BST'S PAST PERFORMANCE

BST challenges the agency's rating of its past performance as moderate risk, asserting that its performance under contract-B111, its most recent contract for battery cells for the MK30 Mod 1 target vehicles, awarded on or about August 29, 1995, did not fall within the RFP's 3-year timeframe for listing prior contracts. RFP § L34X(a). BST asserts that the contract was completed no later than October 1, 2001, when the last battery cells produced and shipped under the contract were inspected and accepted by the government, and that the contract therefore should not have been considered in the past performance evaluation. The agency determined that contract-B111 fell within the 3-year period because the government-furnished molds used by BST in performing the contract were not shipped back to the agency until June 28, 2004, that is, within 3 years before the February 28, 2006 closing date for receipt of proposals here. Tr. at I/29-41.

We need not resolve whether contract-B111 was completed within the last 3 years, because the solicitation did not limit the past performance information that the agency could consider. In this regard, although RFP § L34X(a) required offerors to list contracts within a 3-year timeframe, section M stated that “[p]ast performance will be evaluated as an indicator of the offeror’s expected future performance,” with consideration to be given to the “currency and relevance of the information, source of the information, context of the data, and general trends in contractor’s performance,” and specifically provided that the government may “consider information concerning the offeror’s past performance that is not contained in the proposal.” RFP § M32X(b). There is nothing in sections L or M, or elsewhere in the solicitation, that precluded the agency from evaluating relevant past performance information, whether or not it was listed in the proposal or concerned a contract completed within the past 3 years.

BST also complains that contract B-111 was given too much weight in the evaluation. This argument, too, is without merit. Although, as noted by BST, it also had two other MK30 Mod 1 battery cell contracts besides contract-B111, including contract No. N66604-95-C-A978 (contract-A978) and contract No. N66604-97-C-3077 (contract-3077), the final deliveries of cells under those contracts—September 27, 2001 and January 31, 2000, respectively—were no more recent than those under contract-B111 (which were accepted October 1, 2001). More importantly, the quantities of cells delivered under contract-A978 (approximately 6,500) and contract-3077 (7,000-8,000) were significantly smaller than the quantity under contract-B111 (approximately 13,429). BST Comments, Oct. 23, 2006, at 14, citing exh. 2 (Material Inspection and Receiving Reports, Contract-B111, Contract-A978, Contract-3077); BST Protest, Sept. 5, 2005, at 11, 15; see also Tr. at II/165-67; BST Comments, Nov. 28, 2006, at 10. In any case, as discussed below, the record

indicates that the performance problems with respect to BST's MK30 Mod 1 battery cells extended beyond contract-B111.³

BST also questions the agency's view of its Mod 1 battery cell performance problems as extensive. We find no basis to question the agency's judgement in this regard.⁴ The record indicates that there were spewages or leakages of electrolyte from BST battery cells on 3 or 4 of the lots under contract-B111 in 1997 and 1998. In addition, BST requested a waiver in connection with leakage experienced under contract-3077. Although BST attributes the leakages during that period to a government-directed change in the concentration of electrolyte from 42 to 45 percent, the record indicates that leakages continued even after BST had been authorized to return to using a 42 percent concentration. Modifications (with associated Requests for Deviations/Waivers) to contract-B111, Nos. P00004, P00005, P00010, P00016; LAT Lot 7 Test Results, July 15, 1998; BST Letter to Navy, July 22, 1998; BST Response to Discussions Question, June 27, 2006, at 2-3; Tr. II/177-81, II/186-92, II/205. Likewise, there was at least one instance of leakage in 1999, under contract-3077, as a result of defective workmanship. Modification (with associated Request for Deviation/Waiver) to contract-3077, No. P00016; Tr. at II/219-29. The record also includes a Product Quality Deficiency Report, dated June 22, 1999, and prepared by AUTECH, which reports leakage during the third cycle of charging and discharging the cells (as well as over 50 cells failing to retain the proper voltage after

³ BST asserts that the agency also should have considered its performance under contract Nos. N66604-03-C-0240 (contract-0240) and N666604-06-C-1381 (contract-1381), for battery cells for the MK30 Mod 2 target, which were listed in its past performance proposal. However, since the Mod 1 and Mod 2 cells are not interchangeable, we find nothing unreasonable in the agency's focusing on contract-B111, for the same Mod 1 cells under the RFP, as the best indication of expected future performance. BST itself recognized this principle in basing its request for a waiver of FAT on its performance of contracts -B111, -A978 and -3077, all for Mod 1 cells. In any case, not only was the quantity under contract-0240 fewer than 1,500 cells (as compared to approximately 13,429 under contract-B111), but because there are only a few MK30 Mod 2 vehicles, which are still under development, BST's Mod 2 cells have not been tested in the vehicles. As for contract-1381, which was listed as "in process" in BST's proposal, the record indicates that BST has only furnished a part of the cell, not the entire cell, under that contract. Tr. at I/225-30, I/325.

⁴ We note that, in addition to the electrolyte spewages or leakages on which the agency's past performance evaluation focused, the record indicates that there were other problems with BST cells. For example, a 1999 modification to contract-B111 waived dimensional requirements for one lot in order to permit acceptance of the lot. Modification No. P00022 (with associated Request for Deviation/Waiver) to contract-B111.

4 cycles). Further, 33 cells were returned by AUTECH to BST in 2000 after cracks were discovered as a result of leaking electrolyte. Letter from DCMA Hartford to BST, July 11, 2000; Tr. at I/285-86, I/296, II/211-12. Finally, as noted in the agency's past performance evaluation, the chairman of the TEP was advised by AUTECH in connection with the procurement of 8 instances during 2004 and 2005, involving from 1 to 18 BST Mod 1 cells in each instance, in which the cells experienced leakages or spillages. Best Value Analysis, Table 1.

BST speculates that the reported leakages were caused by government mishandling of the cells (e.g., overcharging or dropping the cells, or not restraining the cells properly after a charged cell had been removed from the battery). However, the president of BST conceded (when testifying concerning the reported leakages in 2004 and 2005) that the only way to determine whether a leakage was the result of a BST-caused problem or a government-caused problem would be to perform a detailed, thorough failure analysis on the cell, which was not done for most of the reported instances of leakage. Tr. at II/319, II/324. In other instances, the record indicates that BST likely was at fault, e.g., the continued leakages even after authorization to return to using a 42 percent concentration of electrolyte or the leakage in 1999 as a result of defective workmanship. In any case, while it is possible that government mishandling or use of a cell beyond its expected life may have contributed to leakages by some cells, BST has not furnished convincing evidence of a pattern of government mishandling of its cells causing leakages of electrolyte. Meanwhile, neither the chairman of the TEP, who was the technical point of contact for contracts-B111, -A978 and -3077, nor the MK30 program manager at AUTECH, was aware of any government mishandling of BST's cells that caused leakage of electrolyte. Tr. at I/183-84, I/201-05, I/284-85, II/326-30. Further, any pattern of mishandling would be expected to extend to all cells, including Yardney's; however, as discussed above, no leakages of Yardney MK30 Mod 1 battery cells have been reported. We conclude that the agency reasonably found that the repeated instances of BST's MK30 Mod 1 cells leaking electrolyte, contrasted with the absence

of leakages from Yardney's MK30 Mod 1 cells, warranted assigning BST a less favorable performance risk rating (moderate) than Yardney (low).⁵

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ BST asserts that, because the agency's discussion question to BST—citing “problems with batteries including delivery, voltage, spillage, weight and dimensional problems,” Discussion Question for BST, June 21, 2006—did not refer to reports from AUTECH citing cracked cases as the apparent cause for some leakages, the agency failed to satisfy the requirement under FAR § 15.306(b)(1)(i) to raise in discussions “adverse past performance information to which an offeror has not had a prior opportunity to respond.” However, as discussed above, and as confirmed by both the contemporaneous evaluation documentation and the testimony of contracting officials, the agency's concern with BST's past performance focused on the fact that leakages had been reported, not on the particular cause of any leakage. Best Value Analysis, Table 1; Tr. at I/85, I/174, I/193. The agency's discussion questions clearly put the protester on notice of the leakages.