



Decision

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Matter of: Vane Line Bunkering, Inc.

File: B-417859; B-417859.2

Date: November 22, 2019

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Joshua R. Gillerman, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's proposal under the technical factor is sustained in part where the record does not show that the agency considered significant countervailing evidence in the awardee's proposal that cast doubt on the awardee's assertions of compliance with the solicitation's vessel capacity requirements.
 2. Protest that agency improperly evaluated the awardee's past performance is sustained where the record does not confirm that the awardee was the contractor on submitted past performance references and does not support the reasonableness of crediting the awardee with the past performance of its subsidiaries.
 3. Protest that the agency improperly found the awardee responsible is denied where the record shows that the agency reasonably considered the available information concerning the awardee's financial status.
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DECISION

Vane Line Bunkering, Inc., of Baltimore, Maryland, protests the award of a contract to Harley Marine Services, Inc., of Seattle, Washington, under request for proposals (RFP) No. HTC711-19-R-W003, issued by United States Transportation Command for fuel transportation services. Vane challenges the agency's evaluation of proposals and source selection decision.

We sustain the protest in part and deny the protest in part.

BACKGROUND

The RFP was issued on April 12, 2019, and contemplated the award of a fixed-price contract for a 1-year base period and four 1-year option periods, to provide transportation services for Department of Defense-owned bulk jet, marine diesel, and commercial fuel.¹ Agency Report (AR), Tab 5, RFP, at 3; AR, Tab 1, Contracting Officer's Statement of Facts (COS) at 2. The requirement entailed delivering fuel by tug and barge between ports on the Atlantic and Gulf Coasts. RFP, at 4.

Award was to be made on a best-value, tradeoff basis, considering four factors: business proposal, technical proposal, past performance, and price. RFP at 37-38. The business proposal factor was divided into two subfactors: proposal compliance and use of United States Shipyards. Id. at 38. The technical proposal factor also included two subfactors: equipment and management operations. Id. at 39-40. The agency was to evaluate the business and technical proposals at the subfactor level on an acceptable/unacceptable basis. A proposal found to be unacceptable under any of the subfactors would not be considered for award. Id. at 39.

Under the past performance factor, the RFP required offerors to submit past performance questionnaires (PPQs) detailing recent and relevant contracts.² Id. at 41. To make award, the agency would then perform a tradeoff between the equally weighted past performance and price factors. Id. at 38.

Harley³ and Vane submitted proposals in response to the RFP. COS at 9. The Source Selection Evaluation Board (SSEB) performed an initial evaluation of proposals and found both unacceptable under each technical subfactor. AR, Tab 40, SSEB Report at 3-5. For the past performance factor, the agency assigned Harley's proposal a satisfactory confidence rating, while assigning Vane's proposal a substantial confidence rating. Id.

The contracting officer and the Source Selection Authority (SSA) then established a competitive range, consisting only of Vane and Harley. AR, Tab 26, Competitive Range

¹ The agency subsequently amended the solicitation three times. All citations are to the RFP, as amended.

² For this factor, the agency would assign proposals one of the following confidence ratings: no confidence, limited confidence, neutral confidence, satisfactory confidence, or substantial confidence. RFP at 41.

³ This decision refers to the firm Harley Marine Services, LLC--the awardee--as "Harley." To avoid ambiguity, when discussing Harley's subsidiaries, this decision will use the full name of the subsidiary.

Determination at 2. The agency entered into discussions with both firms and sent evaluation notices which addressed the deficiencies contained in their respective proposals. COS at 10. At the conclusion of discussions, the agency issued a request for final proposal revisions to Vane and Harley. Id. at 11. Both offerors advised that they were not submitting final proposal revisions. Id.

The agency evaluated proposals as follows:

		Vane	Harley
Business Proposal	Proposal Compliance	Acceptable	Acceptable
	Use of US Shipyards	Acceptable	Acceptable
Technical Proposal	Equipment	Acceptable	Acceptable
	Management of Operations	Acceptable	Acceptable
Past Performance		Substantial Confidence	Satisfactory Confidence
Price		\$115,787,208	\$86,492,542

AR, Tab 40, SSEB at 10.

The SSA reviewed the SSEB's report and performed an integrated assessment of proposals against the solicitation's evaluation criteria. AR, Tab 42, Source Selection Decision Document, at 2. The SSA noted that both firms received equivalent ratings under the business proposal and technical proposal factors. Id. The SSA then performed a past performance/price tradeoff, concluding that Harley's proposal represented the best value to the agency. Id. While Vane's proposal had received a superior past performance confidence rating, the SSA concluded that Vane's superior past performance did not justify the \$29.3 million price premium associated with its proposal. Id. at 3. The SSA explained that Harley's satisfactory confidence rating meant that the agency had a reasonable expectation that Harley would successfully perform the requirement. Id. The agency made award to Harley on August 5. COS at 13. After requesting and receiving a debriefing, Vane filed this protest. Id.

DISCUSSION

Vane raises several challenges to the agency's evaluation of proposals and award decision. Based on our review of the record, we sustain the protest because we find that the agency unreasonably evaluated Harley's proposal under the technical proposal and past performance factors. We deny or dismiss Vane's remaining allegations.⁴

⁴ Although we do not discuss all of the protester's arguments here, we have considered them and find that none, other than those identified, provide a basis to sustain the

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Technical Proposal Evaluation

Vane challenges the agency's evaluation of Harley's technical proposal. Vane contends that the agency unreasonably found that Harley provided the required documentation to support its ownership or control for its proposed vessels. Comments and Supp. Protest at 8-12. Vane also contends that one of Harley's proposed barges did not comply with the RFP's vessel capacity requirements. Id. at 3-5. We deny Vane's allegations that Harley did not provide the required documentation to demonstrate ownership or control of its proposed vessels. We sustain, however, Vane's challenge to the agency's evaluation of Harley's proposed barges' compliance with the RFP's capacity requirements because we find that the agency unreasonably ignored information which called into question whether one of Harley's barges complied with the RFP's requirements.⁵

Documentation Requirement

As noted above, the technical factor was comprised of two subfactors: equipment and management of operations. RFP at 39-40. For the equipment subfactor, offerors were required to propose several barges and tugs that met various requirements detailed in the Performance Work Statement.⁶ Id. at 39. Offerors also had to prove ownership or control of their proposed vessels. Id. For their barges, offerors had to provide a United

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protest. For example, Vane alleged that the agency's source selection decision abandoned the RFP's tradeoff approach. Comments and Supp. Protest at 24-25. Because a new best-value tradeoff determination is necessary to implement our recommendation below, we need not address this allegation. See Crowley Logistics, Inc., B-412628.2 et al., Apr. 19, 2016, 2016 CPD ¶ 20 at 10.

⁵ In its comments on the agency report, Vane contends, for the first time, that Harley's proposed barges are not equipped with the RFP's required cargo tank and water stripping systems. Comments and Supp. Protest at 5-6. Vane bases this allegation on publicly available information contained on Harley's website. Id. Since Vane learned that Harley was rated as technically acceptable under the equipment subfactor at its debriefing, to be timely, Vane was required to raise this issue in its initial protest. Thus, it is untimely when it is first raised more than 10 days after it knew or should have known of the basis of protest. 4 C.F.R. 21.2(a)(2); see also Advanced Construction Techniques, Inc., B-404847.6, Jan. 25, 2012, 2012 CPD ¶ 54 at 5 n.6 (dismissing as untimely protester's allegation raised for the first time in comments where it was based on publicly available information on the awardee's website and the protester knew the awardee's ratings at the post-award debriefing). As a result, this allegation is dismissed.

⁶ Offerors had to propose five barges, five tugs, three on-call tow barges, and three on-call tow tugs. RFP at 39.

States Coast Guard (USCG) Certificate of Inspection (COI) for each vessel.⁷ Id. Offerors were asked to provide the USCG COI for their proposed tugs, but could also provide other forms of documentation.⁸ AR, Tab 14, RFP amend. 002, at 5.

The RFP explained that if the barge or tug was owned by a subsidiary company, the offeror must provide a signed letter stating the relationship between the subsidiary company and the offeror “to show proof of ownership or control of the barges and tugs being offered.” RFP at 36. If the offeror currently did not own or have control of the vessel, they were required to provide supporting documentation to demonstrate the ability to obtain the vessel during performance, defined as a “commitment or explicit arrangement that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, or other resources.” Id.

Harley’s technical narrative identified its proposed vessels. AR, Tab 19, Harley’s Technical Proposal at 3. Harley provided a COD for all of its proposed vessels and, as specifically required, provided a COI for each of its proposed barges. AR, Tab 20, Ownership Documentation, at 4-46. Because Harley’s subsidiaries were the identified owners of barges and tugs on its documentation, the firm included a letter, titled Bridge Letter of Ownership, identifying Harley as the registered owner of 12 different subsidiary companies. Id. at 1. Harley also provided a charter agreement for the tug, the HMS Justice, because the documented owner of the vessel is Ally Bank. The letter indicated that Ally Bank was leasing the tug to Harley Marine New York until December 1, 2027. AR, Tab 30, at Harley Evaluation Notices, at 17.

The agency found that Harley’s proposal complied with the RFP’s requirement to provide documentation demonstrating ownership or control over its proposed barges and tugs. AR, Tab 33, Harley Final Technical Evaluation, at 2. Since the proposed barges and tugs (with the exception of the HMS Justice) were owned by firms identified as Harley’s subsidiaries in the Bridge Letter, the agency found that Harley had complied with the RFP’s documentation requirements. Id. According to the agency, the Bridge Letter provided sufficient documentation of the relationship between Harley and its subsidiaries and showed that Harley either owned or had control of the barges and tugs being offered. Id. The agency also found that, while Ally Bank was the owner of the HMS Justice, the charter agreement was sufficient to demonstrate that Harley could obtain the vessel for performance of the contract. Id.

⁷ USCG COI’s list both the owner and operator of the vessel. AR, Tab 13, RFP amend. 002, at 1.

⁸ After learning that the USCG currently does not require that all tugs have a COI, the agency amended the RFP to permit offerors to provide alternative documentation, such as a USCG Certificate of Documentation (COD), to verify ownership or control of proposed tugs. AR, Tab 13, RFP amend. 002, at 1.

Vane argues that Harley's ownership documentation failed to satisfy the RFP's requirement for Harley to "show proof of ownership or control" for certain vessels. Comments and Supp. Protest at 9. Vane notes that Harley's eight barges are owned by Harley's subsidiaries⁹--not Harley--and contends that "nothing in the [Bridge] letter even suggests that Harley's ownership of the operating companies results in Harley having ownership or control of the vessels" Comments and Supp. Protest at 10. Vane also notes Harley's technical narrative proposal states that "[a]ll equipment proposed for this contract is owned by [Harley] through two companies--Harley Marine Special Leasing LLC and Harley Marine Financing LLC," contradicting some of the identified subsidiaries on the COI's submitted. *Id.* at 9 (citing AR, Tab 19, Harley's Technical Proposal, at 5. Vane further argues that the charter agreement provided for the HMS Justice does not show that Harley had the ability to obtain the vessel during performance. Comments and Supp. Protest at 12. The firm contends that the charter only shows that Harley's subsidiary--Harley Marine NY-- has the vessel under lease and that there was nothing to lead the agency to conclude that Harley would have the ability to utilize the vessel during performance. Protester's Supp. Comments at 10.

In reviewing protests of an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Management Sys. Int'l, Inc., B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 5. Rather, we will review the record to determine if the evaluation was reasonable, consistent with the stated evaluation criteria, and with applicable procurement statutes and regulations. Computer World Servs. Corp., B-410513, B-410513.2, Dec. 31, 2014, 2015 CPD ¶ 21 at 6.

We deny this aspect of Vane's protest. As noted above, if an offeror's proposed barges and tugs were owned by the offeror's subsidiary, the RFP required that they provide "a signed letter stating the relationship between the subsidiary company and the offeror to show proof of ownership or control of the barges and tugs being offered." RFP at 36. Harley satisfied this requirement by providing the Bridge Letter, which identified Harley's subsidiaries, thereby connecting each of Harley's proposed barges to a company owned by Harley.¹⁰ AR, Tab 20, Harley Ownership Documentation, at 1. Similarly,

⁹ The documentation states that the barges are owned by Pacific Coast Maritime, Inc., Harley Marine Special Leasing, LLC, and Harco Marine, LLC. AR, Tab 20, at 20-46.

¹⁰ Vane also collaterally attacks the reasonableness of the agency's reliance on the Bridge Letter to connect Harley to its subsidiaries, asserting that the letter relates only to the operation of the vessels for safety purposes and that the letter is "outdated" because it was drafted before the solicitation was released. Comments and Supp. Protest at 9. Even if the letter was not drafted for the purpose addressing this solicitation's requirements, and was drafted prior to the RFP's issuance, neither of these assertions shows that the Bridge Letter failed to accurately detail Harley's relationship with its subsidiaries. Thus, we find that the agency reasonably relied on this letter in assessing Harley's compliance with the RFP's documentation requirements.

Harley satisfied the RFP's requirements for the HMS Justice--which it did not own--by providing a charter agreement showing that the vessel is chartered to Harley Marine New York, a subsidiary of Harley.¹¹ We find that the agency reasonably found this documentation, which shows that Harley owns each of the vessel's owners, sufficient to demonstrate that Harley would have control of the vessel for performance.¹² While Vane has argued that Harley does not automatically control the assets of its subsidiaries, Comments and Supp. Protest at 8, Vane has not demonstrated that it was unreasonable for the agency to find that Harley would have control of the vessels for performance of this requirement based on its documented ownership of its subsidiaries.

Capacity Requirements

Vane next contends that one of Harley's proposed barges, the HMS 2607, failed to meet a material solicitation requirement related to barge capacity limitations. Comments and Supp. Protest at 3. For the reasons that follow, we sustain this aspect of Vane's protest.

The solicitation delineated capacity requirements for the tugs and barges. Relevant to this challenge, offerors were required to propose a "tank-barge" with a capacity of not less than 10,000 barrels, but not more than 20,000 barrels. RFP at 63-64. Offerors also had to propose an "on-call" barge that satisfied the same capacity requirements. Id. at 64.

¹¹ Vane argues that our decision from an earlier protest of the same procurement stands for the broad proposition that offerors are required to provide a charter agreement with the offeror being a named party to the charter in order to show that the offeror could obtain the equipment. Protester's Supp. Comments at 9-10 (citing Vane Line Bunkering, Inc.--Costs, B-416033.2, July 5, 2018, 2018 CPD ¶ 299 at 6). Vane misunderstands the findings of our decision. In that decision, our Office found that the agency had unreasonably concluded that Harley had provided the required documentation to demonstrate ownership of a particular vessel because the record failed to connect the identified owner of the vessel to Harley. The identified owner of the vessel in question was a firm named Willamette Champion and we stated that "[w]hile Harley's proposal explains that it is the registered owner of several operating companies, Willamette Champion is not listed as one of Harley's subsidiary companies." Vane Line Bunkering, Inc.--Costs, supra at 6 n.5. Here, in contrast, Harley has provided the Bridge Letter showing that Harley Marine NY is a subsidiary of Harley, thus providing a nexus between the owner of the vessel and Harley. AR, Tab 20, Harley Vessel Documentation, at 1.

¹² While there is an inconsistency between the identified owners of Harley's proposed barges, and its narrative assertion that all vessels utilized will be the equipment of either Harley Marine Special Leasing LLC or Harley Marine Financing, this minor contradiction, by itself, does not mean that Harley failed to demonstrate ownership or control of the vessels as required by the RFP. AR, Tab 19, Harley's Technical Proposal, at 5.

Harley proposed a vessel named the Investigator as its primary tank barge, and identified the HMS 2607 as its “on-call” barge. AR, Tab 19, Harley’s Technical Proposal at 3. Harley’s technical narrative proposal states that the Investigator has a capacity of 18,550 barrels and the HMS 2607 has a capacity of 19,465 barrels. The USCG COI provided by Harley to prove ownership or control of the Investigator states that its capacity is 18,550 barrels. AR, Tab 20, Harley Ownership Documents, at 24. However, the COI provided to prove ownership of the HMS 2607 states that the barge has a capacity of 22,600 barrels, which is more than the maximum permitted capacity of 20,000 barrels. *Id.* at 42. Despite this discrepancy, the agency found that all of Harley’s vessels, including the HMS 2067, complied with the RFP’s capacity requirements. AR, Tab 33, Harley Final Technical Evaluation, at 1.

The agency counters that it reasonably found the HMS 2607 compliant with the RFP’s capacity requirements, arguing that the solicitation only requested the COI’s to show proof of ownership or control of the vessels and not to establish capacity. Supp. Memorandum of Law (MOL) at 4 (citing AR, Tab 18, RFP amend. 003 at 5).¹³ According to the agency, “it is clear from the [s]olicitation that the COIs were requested for one reason only—to show proof of ownership or control.” *Id.* In this regard, the agency contends it would have been improper under this solicitation to evaluate capacity numbers identified in this COI.

As an initial matter, we disagree with the agency’s assertion that considering information contained in the COIs to confirm vessel capacity would have deviated from the terms of the solicitation. Supp. MOL at 6. The solicitation required offerors to provide the COI “to verify ownership or control for the barges to be utilized during the contract period of performance.” AR, Tab 18, RFP amend. 003 at 5. While this language supports the agency’s view that COIs were requested to establish ownership or control, nothing in this language barred the agency from considering the information contained in the COI, particularly where, as here, the information contained in the HMS 2607’s COI directly contradicted Harley’s assertion of compliance with the RFP’s requirements.

In evaluating proposals an agency may reasonably rely upon the accuracy of information provided by an offeror in its proposal. Able Bus. Techs., Inc., B–299383, Apr. 19, 2007, 2007 CPD ¶ 75 at 5. An agency however may not accept representations in a proposal at face value where there is significant countervailing evidence reasonably known to the agency evaluators that should or did create doubt as to whether the representations are accurate. Highmark Medicare Servs., Inc. et al.,

¹³ The agency also argues that six of Vane’s vessels similarly had discrepancies between its self-reported barrel capacity and the capacity as listed on the COI provided to demonstrate ownership. Supp. MOL at 4. Based on the capacities listed in their COIs, though, all of Vane’s vessels comply with the RFP’s capacity requirements.

B-401062.5 *et al.*, Oct. 29, 2010, 2010 CPD ¶ 285 at 1; Carson Helicopter Services, Inc., B-299720, B-299720.2, July 30, 2007, 2007 CPD ¶ 142 at 8 (agency unreasonably concluded that awardee's proposed helicopter complied with solicitation requirement where there was significant countervailing evidence known to the agency's evaluators that would cast doubt on the firm's assertions of compliance).

The record here shows that the agency had direct evidence--on the face of Harley's proposal--that one of Harley's vessels exceeded the capacity limitations delineated in the RFP. The contemporaneous record is silent about how the agency viewed the conflict between Harley's proposal narrative and the capacity limitations in the USCG documentation. The COIs were a required component of Harley's technical proposal. A reasonable review of the documentation should have created doubt about whether Harley's proposed vessel the HMS 2607 would comply with the above-stated capacity requirement. In addition, the agency has not proffered an explanation as to why the capacity information contained in the USCG COI would be inaccurate, or otherwise unreliable, for the purposes of addressing the discrepancy in this vessel's stated capacity.¹⁴ Under the circumstances here, we find that the agency unreasonably evaluated Harley's proposals by failing to recognize information on the face of Harley's proposal that contradicted its proposal's assertions of compliance. See SeaBeam Instruments, Inc., B-253129, Aug. 19, 1993, 93-2 CPD ¶ 106 at 6-8; Carson Helicopter Services, Inc., *supra*. Thus, we sustain this aspect of Vane's protest.¹⁵

¹⁴ In responding to Harley's supplemental protests, the agency provided a declaration from Harley's CEO (as an exhibit to the supplemental AR) stating that COIs are not a reliable indicator of a vessel's capacity and that the HMS 2607 underwent subsequent modifications which lowered its barrel capacity within the RFP's specified range. AR, Tab 69, Harley CEO Declaration, at 2. This post-protest statement--which is neither corroborated nor expounded upon by the agency--fails to adequately fill in the gaps left by the contemporaneous record, principally, whether the agency, during evaluation, recognized the discrepancy between the HMS 2607's capacity as listed in Harley's proposal narrative and the capacity delineated in the vessel's COI.

¹⁵ Vane also alleges that Harley misrepresented its intention to provide its offered equipment because certain vessels that it proposed are currently being utilized to perform for commercial customers, making them unavailable to perform for this requirement. Comments and Supp. Protest at 13-14. Vane asserts that several of Harley's vessels are currently on the West Coast of the United States, and transporting them across the country to perform would be burdensome and costly. Id. (citing Protest, Exhibit A; Declaration of Vane CEO at ¶ 8); Protester's Supp. Comments at 11. Beyond speculating that Harley has no intention of actually providing certain vessels, due to potential logistical challenges and obligations on other contracts, Vane has failed to furnish a basis to question the veracity of Harley's proposal's representations that its vessels will be available for this requirement. Thus, we find that these assertions fail to demonstrate that Harley knowingly or negligently proposed vessels that it did not have a reasonable basis to expect to furnish during contract performance. See DKW Commc'ns, Inc., B-414476, B-414476.2, June 23, 2017, 2017 CPD ¶ 206 at 9; cf.

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Past Performance Evaluation

Vane argues that the agency unreasonably evaluated Harley under the past performance factor by improperly crediting Harley with the past performance of its subsidiary companies. Comments and Supp.at 14. Vane notes that Harley's past performance submission was comprised of PPQs that identified Harley as the contractor that performed the fuel delivery services, but its research shows that the contracts were actually performed by Harley's subsidiaries. Id. at 15-16. Vane argues that it was unreasonable for the agency to credit Harley with the past performance of these subsidiaries where Harley's proposal does not evidence that they would be involved in performing this contract. Comments and Supp. Protest at 18; Protester's Supp. Comments at 12-16 (citing Health Net Federal Services, LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 15).

The purpose of the past performance evaluation was to allow the agency to assess the offeror's ability to perform the required fuel delivery efforts based on the offeror's demonstrated past performance. RFP at 40. To that end, offerors were required to identify at least three, but no more than four, contracts similar in scope, size, and complexity as the present requirement. Id. Offerors would complete section 1 of a PPQ for each contract and then have the references complete the remainder of the PPQ. Id. at 37. The agency would evaluate referenced contracts first for recency, and then assign a confidence ratings based on an assessment of the relevancy and quality of the contracts submitted. Id. at 40-41.

Harley submitted PPQs from three commercial customers. AR, Tab 34, Past Performance Evaluation, at 1-3. Relevant here, Harley identified the name of the contractor that performed on the referenced contracts simply as "Harley Marine Services" in section 1 of the PPQs. Id. at 7, 10, 13. The agency found each reference to be recent as defined by the RFP. Id. Each reference was also found relevant as they involved fuel delivery efforts of similar scope, magnitude, and complexity. Id. For quality, the agency noted that the references rated Harley's performance as exclusively "[v]ery [g]ood" or "[e]xceptional" for each category listed on the PPQ. Id. at 3, 6. Based on these findings, the agency assigned Harley's proposal a satisfactory confidence rating. Id. at 3.¹⁶

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Patricio Enterprises Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 10 (finding that awardee materially misrepresented its ability to provide proposed personnel where it submitted contingent offers for personnel that it had never contacted).

¹⁶ A satisfactory confidence rating was defined as, "[b]ased on the offeror's recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort." RFP at 41.

The agency asserts that each of the PPQs submitted list Harley as the contractor that performed the fuel delivery services, and the customers exclusively refer to Harley, and not its subsidiaries, as having provided the services. Supp. MOL at 17. Thus, the agency argues that there “was no reason to verify the past performance contracting relationships.” Id. The agency also notes that, even if Harley’s subsidiaries performed the efforts listed on the PPQ, this wouldn’t make the evaluation unreasonable, as the RFP did not preclude consideration of affiliate performance under this factor, nor is such consideration of affiliate performance inherently unreasonable. Id. (citing Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4).

The evaluation of an offeror’s past performance is generally within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. Computer Scis. Corp. et al., B-408694.7 et al., Nov. 3, 2014, 2014 CPD ¶ 331 at 12. We will question an agency’s evaluation conclusions, however, when they are unreasonable or undocumented. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the agency conducted the evaluation fairly, reasonably, and in accordance with the solicitation’s evaluation scheme. Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int’l, Inc., B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 5.

The record confirms the agency’s assertions that Harley identified itself as the contractor that performed each of the contracts identified in its PPQs. AR, Tab 34, Harley Past Performance Evaluation, at 7, 10, 13. As Vane has highlighted, though, all of Harley’s proposed vessels are owned and operated by personnel from Harley’s subsidiaries, not Harley, the parent company. AR, Tab 20, Ownership Documentation, at 1-46. While Harley’s technical proposal states that all vessels to be utilized are owned by either Harley Marine Special Leasing, LLC, or Harley Marine Financing, LLC, the ownership documentation provided by Harley shows that it also proposed to utilize vessels owned, or controlled, by its other subsidiaries as well, such as Pacific Coast Maritime, Inc., Harco Marine, LLC, and Harley Marine NY. AR, Tab 19, Harley’s Technical Proposal at 5; AR, Tab 20, Ownership Documentation, at 4-46; AR, Tab 30, at Harley Evaluation Notices, at 17. Thus, as a holding company, Harley’s proposal evidences that the firm will rely exclusively on the assets of its subsidiaries for the performance of the contract. Moreover, the protester points out that the firms actually performing the contracts referenced in the PPQs would have been Harley’s subsidiaries, not Harley.¹⁷ Comments and Supp. Protest at 14-15.

An agency properly may attribute the experience or past performance of a parent, subsidiary, or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the affiliate will affect the performance of the offeror. See GM-Bulltrack, JV, B-414591.6, B-414591.7, Oct. 30, 2018, 2018 CPD ¶ 378 at 4. The relevant consideration is whether the resources of the parent or subsidiary company—its

¹⁷ Harley confirms, in a post-protest submission, that Harley’s subsidiaries performed the contracts referenced in the PPQs. AR, Tab 69, Harley CEO Declaration, at 1-2.

workforce, management, facilities or other resources--will be provided or relied upon for contract performance such that the parent or affiliate will have meaningful involvement in contract performance. See GM-Bulltrack, JV, supra. While it is appropriate to consider a subsidiary's performance record where the affiliate will be involved in the contract effort, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror and where there is no evidence that the affiliate will meaningfully contribute to performance. See National City Bank of Indiana, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190 at 10; Health Net Federal Services, LLC, supra.

As noted above, the record shows that Harley will be relying on multiple subsidiaries to perform this effort, which include not only use of vessels but also all the services associated with the provision of bulk fuel transportation. Harley's past performance proposal, however, does not explain the roles--if any--that the subsidiaries had on the contracts detailed in its PPQs. In this regard, Harley's proposal failed to connect the performance described in its PPQs with the subsidiaries it was proposing to rely on for performance here. Absent a clearer indication of which subsidiaries contributed to the referenced efforts, the agency could not explain how the performance described in the PPQs bore on the likelihood of success here. While Harley's proposal did explain that these are wholly-owned subsidiaries, our Office has stated that the fact of ownership of an affiliated company is not sufficient to show that the past performance of one can be contributed to the other. See IAP World Servs., Inc., EMCOR Gov't Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171 at 9 (explaining that mere presence of common management and general claims of access to resources of subsidiaries were insufficient to attribute offeror's past performance); Language Select LLP, dba United Language Group, B-415097, B-415097.2, Nov. 14, 2017, 2017 CPD ¶ 359 at 10.

In sum, because the record shows that the only nexus between Harley's PPQs, and performance on this requirement, is Harley's corporate ownership of its subsidiaries (which we have found to be insufficient for the attribution of past performance) we conclude here that the agency unreasonably evaluated Harley's past performance. See IAP World Servs., Inc., EMCOR Gov't Servs., supra; Health Net Federal Services, LLC, supra.

Responsibility Determination

Finally, Vane contends that the agency unreasonably found Harley to be a responsible offeror. Protest at 12-17; Comments and Supp. Protest at 19-23. Vane asserts that the agency failed to meaningfully consider two pieces of information bearing on Harley's responsibility: whether Harley had adequate financial resources to perform the contract and the risk of performance associated with Harley's low price. Comments and Supp. Protest at 19-23. In particular, Vane contends that the agency ignored information relating to Harley's sale of its vessels, in an effort to reduce financial obligations and remain fiscally solvent. Id. at 20-23.

The Federal Acquisition Regulation (FAR) provides that a purchase or award may not be made unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set forth in FAR § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8.

As a threshold matter, we note that Vane's allegations have not raised serious concerns of a type that our Office will generally consider in connection with an agency's affirmative determination of responsibility. Cf. FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8 (reviewing an allegation that the agency failed to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement); Southwestern Bell Tel. Co., supra. In any event, the record shows that the agency engaged in a thorough review of Harley's responsibility. To assess Harley's financial status, the agency reviewed Harley's Dun & Bradstreet (D&B) report's various financial metrics, including Harley's viability score¹⁸ and financial stress score.¹⁹ AR, Tab 41, Harley Responsibility Determination at 1-2. While the metrics reviewed indicated some level of risk, the agency concluded that this risk was "acceptable," and the information contained therein indicated that Harley had, or had the ability to obtain, adequate financial resources to perform the contract. Id. In addition, prompted by a letter from Vane casting doubt on Harley's responsibility, the agency contacted Harley and confirmed from Harley's Chief Financial Officer that Harley was financially solvent, had adequate resources to perform the contract, and had not sold any vessels on the East Coast to pay outstanding debts. AR, Tab 41, Responsibility Determination at 47.

¹⁸ The D&B viability score assesses the probability that a company will no longer be in business in the next 12 months. AR, Tab 41, Harley Responsibility Determination, at 2. Harley received a score of six on a scale ranging from one through nine, with one being low risk and nine being high risk. Id. Harley's score indicated "moderate" risk and a 14 percent chance of becoming no longer viable. Id. at 2, 5.

¹⁹ The D&B financial stress score predicts the likelihood that a business will experience financial stress in the next 12 months. Id. Harley received a score of four on a scale of one through five, with one being low risk and five being high risk. Id. The agency notes that this score, though, indicates only a 0.84 percent failure rate for firms in its business class. Id. at 2, 5.

On this record, we have no basis to object to the agency's determination that Harley was responsible. The agency undertook a thorough review of Harley's financial status and even performed additional investigatory steps when prompted by allegations from Vane. It is also evident from the record that the agency, in finding Harley responsible, was not concerned that Harley's proposed price posed an inherent risk of unsuccessful performance. Thus, we find that the agency performed a reasonable investigation and, in its reasoned business judgment, found that Harley was responsible. See SaxmanOne, LLC, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 7.

RECOMMENDATION

We recommend that the agency reevaluate proposals, document its evaluation in a manner consistent with this decision and the solicitation, and make a new source selection decision. If, after performing the reevaluation, the agency determines that a firm other than Harley represents the best value to the government, we further recommend that the agency terminate the contract for the convenience of the government and make award to the firm selected, if otherwise proper. Finally, we recommend that Vane be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Vane should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Thomas H. Armstrong
General Counsel