

Switzer

PLI

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

[Protest of Elimination From Competitive Range] ⁴⁸⁴¹

FILE: B-197245

DATE: September 9, 1980

MATTER OF: Atlanta Construction & Maintenance Corporation ^{D 005191}

DIGEST:

1. GAO does not make determinations as to acceptability or relative merits of technical proposals. Rather, protester has burden of showing procuring agency's evaluation of technical proposal was arbitrary. Based on review of record, GAO cannot conclude that protester has shown procuring agency's evaluation of its proposal to be arbitrary. Therefore, exclusion of protester's proposal from competitive range cannot be questioned.
2. Since protester has not shown evaluation to be arbitrary, qualifications of evaluators cannot be questioned.
3. Allegations of improper conduct based on unfair or prejudicial motives are mere speculation where written record fails to clearly demonstrate alleged unfair treatment. Record reveals no evidence of bias on part of NASA evaluators since protester has not shown that its proposal was arbitrarily evaluated. Further, statement attributed to procuring agency official who did not evaluate protester's proposal may be interpreted as subjective expression of confidence in firms selected for competitive discussions rather than as evidence of bias against protester which is woman-owned concern.

113249

AGC 00 198

017-968

Atlanta Construction & Maintenance Corporation (ACMC) protests its elimination from the competitive range under request for proposal (RFP) No. 8-3-9-AB-30902 issued by the National Aeronautics and Space Administration, George C. Marshall Space Flight Center (NASA). The RFP called for maintenance and support services at the Marshall Space Flight Center. No award has been made.

ACMC raises the following three grounds of protest:

- (1) the company was improperly eliminated from the competitive range under the RFP;
- (2) the NASA Source Evaluation Board (SEB) members were unqualified to evaluate the proposals for the project; and,
- (3) NASA officials were biased against ACMC, a woman-owned company. Based on our review of the record, we deny the protest.

Background

The base maintenance at Marshall Space Flight Center has for several years been obtained through contracting out to firms in the services industry. The present contract at the center is on a "level-of-effort" basis where the Government dictates the skill mix and the total staffing. The protested solicitation, on the other hand, was on a "mission" basis where offerors were requested to submit what they believed to be the optimum skill mix and staffing. As part of their proposal, offerors were required to submit a staffing plan which included their rationale for the skill mix and total personnel for each functional area. The purpose of NASA's change to a mission basis contract was to reduce the amount of Government involvement with the contractor and to provide the greatest possible latitude and opportunity for the contractor to maximize operational efficiency and economy.

Proposals under the RFP were received from several firms. Following the initial evaluation, ACMC was notified in writing that its proposal was no longer in the

competitive range. Following NASA's denial of a request for an immediate debriefing as to the reasons for the exclusion, ACMC filed its protest with this Office.

Competitive Range

Before examining the details of ACMC's arguments, it is appropriate to note several general principles which bear on this controversy. First, it is not the function of our Office to make determinations as to the acceptability or relative merits of technical proposals; that function is the responsibility of the contracting agency which must bear the burden of any difficulties resulting from a defective evaluation. Macmillan Oil Company, B-189725, January 17, 1978, 78-1 CPD 37. In light of this, we have held that procuring officials enjoy a reasonable degree of discretion in evaluating proposals and that this discretion will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Industrial Technological Associates, Inc., B-194398.1, July 23, 1979, 79-2 CPD 47. Additionally, the protester has the burden of affirmatively proving its case. C. L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD 448. These principles also apply to review of competitive range determinations. See, for example, Magnetic Corp. of America, B-187887, June 10, 1977, 77-1 CPD 419. We will now examine the details of this issue.

A. Use of Government Computers

NASA has restricted the disclosure of many of the details supporting the exclusion of the company's proposal. Nevertheless, NASA has informed the company that its proposal contained "several major weaknesses [involving] the overall work and process control system which would use Government computers/facilities, programming, and operations--specifically excluded by the RFP."

On this score, NASA states that Article XVIII (Government Provided Computer Services) of the RFP and its answers to questions 8, 9, 20, and 37 to RFP Amendment No. 3 (preproposal conference questions) were explicit to the effect that the Marshall Space Flight Center computer and allied services were not

available for the contractor's internal operations, such as accounting, financial management reporting, work control data, and payroll. NASA declares that these functions had to be provided by the contractor.

Notwithstanding the clear RFP prohibition against the use of Government computers for work processing, NASA contends that in its proposal ACMC did propose the use of Government computers to accomplish the contract work. In support of this contention, NASA refers to several portions of ACMC's proposal including page II-26 where the company stated:

"Close administrative support through the three tiered organizational structure will reduce administrative effort at the appendix level through the utilization of both MSFC and ACMC computer programs." (Emphasis supplied.)

ACMC states that it was initially uncertain about the meaning of Article XVIII of the RFP. As a result, at the preproposal conference ACMC asked NASA if Government-furnished computer services included the processing of work control data. Upon receiving the short answer "No" from NASA, ACMC alleges that it instituted efforts to procure its own computer capabilities and made arrangements to purchase a computer from Hewlett-Packard. Further, ACMC asserts that its proposal contained a cost element of \$135,000 to cover the purchase of computer equipment and that it did not propose to use any of NASA's computer programs with the exception of "NASA-furnished Zero Base Data."

In reply to ACMC's argument, NASA points out that the \$135,000 ACMC alleges it included in its proposal for computer equipment was not identified or otherwise related in the proposal to any computer equipment. Instead, the figure appeared under the element "Business Management Office" with no explanation of what it was for.

Analysis

ACMC argues that the excerpt referred to by NASA on page II-26 of its proposal was merely a discussion

of the company's proposed use of the Marshall Space Flight Center Data Output/Input terminals provided as Government-furnished equipment. Nevertheless, we think the clear implication conveyed by the phrase "through utilization of both MSFC and APMC computer programs" was that APMC intended to use Government computer programs to accomplish the contract work. We find no qualifying language that would have shown that this phrase was limited to the discussion of APMC's proposed use of Marshall Space Flight Center Output/Input terminals.

Even assuming APMC never intended to utilize Government computers, programs, and facilities, we believe that the company's intent to use its own computers and computer programs was not made clear in its proposal. An offeror must demonstrate affirmatively the merits of its proposal and it runs the risk of proposal rejection if it fails to do so clearly. Kinton Corporation, B-183105, June 16, 1975, 75-1 CPD 365. Here, APMC's proposal simply did not identify the type or kind of proposed computer equipment or the \$135,000 that it alleges it set aside to purchase a computer from Hewlett-Packard.

Consequently, we cannot take exception to NASA's position that APMC's proposal, as reasonably read, proposes the prohibited use of Government computer equipment and programs.

B. Other Evaluation Deficiencies

NASA also states that "[e]ven assuming * * * APMC had not proposed the use of MSFC computers, operations, and software, APMC would remain significantly below the competitive range threshold." To illustrate, NASA cites APMC proposal deficiencies which NASA considers to be "unrelated to the use of NASA computers" in the areas of management plan, processing and control of work, and in other proposal areas. As stated by NASA:

"APMC's management plan provides for the involvement of the engineering design group in a method to incorporate requirements generated by APMC in Appendices B and D, Maintenance and Minor

Construction respectively, into the management system. This weakness involves organizational elements in unrelated activities and interface.

"ACMC proposes an internal audit function but assigns responsibility to the work area initially responsible for the activity to be audited.

"ACMC's proposed management plan, specifically the reports control system, places responsibility for report preparation for unrelated functional areas in Appendices C (MSFC supply support) and E (Engineering Design). The SEB judged this approach for accomplishing the work as unacceptable.

"ACMC's quality activity, described as a management activity, intermingles contractor and Government responsibilities including establishment of quality control specifications and quality inspections. Further, the quality activity is assigned responsibility which overlaps the functional responsibilities of Appendix C in the inventory management area.

"ACMC's management plan does not adequately incorporate the proposed subcontract arrangement for landscape services in Appendix B.

"ACMC * * * proposes to develop its own preventive maintenance programs for Appendices A and B. This would duplicate existing Government systems and therefore would not be cost effective.

"Several [management] policies and procedures are mentioned but none, other than a detailed explanation of a work breakdown structure, are described or developed.

"Next, under the Criterion, 'Processing and Control of Work,' [NASA] * * * identifies 5 weaknesses. The computer issue is the third in descending order of importance. It is readily apparent from a comparison of * * * [proposal evaluations] that ACMC['s] proposal contained the most significant weaknesses of all proposals submitted. Notwithstanding this fact, awarding all points available under this Criterion would not have brought the ACMC proposal within the competitive range.

"In view of the other significant deficiencies in the [RFP evaluation] Criteria, 'Key Personnel,' 'Staffing Plan,' 'Organization' and 'Total Compensation' * * *, it is beyond doubt that ACMC would be excluded from the competitive range."

As to these evaluation deficiencies, ACMC argues:

- (1) it is being penalized by NASA's refusal to make available the details on its deficiencies in several of these areas;
- (2) its proposal is being penalized for creativeness which was encouraged under the mission approach;
- (3) contrary to NASA's evaluation, ACMC insists that its proposed preventive maintenance is not duplicative of NASA's existing corrective maintenance program; and,
- (4) it did provide details on management policies and procedures.

Analysis

(keyed to above-numbered paragraphs)

- (1) It has been our consistent position to honor agency-imposed restrictions on documents since the documents are those of the originating agency and not

GAO. Nevertheless, we do not consider the honoring of these restrictions as a denial of procedural fairness. Westinghouse Electric Corporation, B-195561, May 5, 1980, 80-1 CPD 322.

(2)(3)(4) Notwithstanding that the RFP encouraged "innovations" in approaches to the services, the RFP also warned offerors that "any innovations must * * * include sufficient rationale to demonstrate the feasibility of the proposer's ideas" and that "proposals not so supported may be deemed unacceptable." Based on our review of the record, we must conclude that ACMC has not met its burden of proving that the NASA evaluations are arbitrary. For example, the dispute between NASA and ACMC over maintenance simply reflects a disagreement on the desirability of preventive maintenance rather than evident arbitrariness on NASA's part. Moreover, although ACMC insists it has supplied certain management plan details, it has not questioned the overall NASA management evaluation other than alleging that the evaluation fails to show appreciation for ACMC's inventiveness which is for NASA, not GAO, to determine under the above principles.

Conclusion

[Overall, the record shows that ACMC had major weaknesses in all areas of proposal evaluation unrelated to the "computer" problem. Nevertheless, ACMC claims that this problem hurt the company in more than one proposal evaluation area.] In support of this claim, ACMC calls our attention to the fact that NASA has indicated that ACMC's computer approach caused it to lose technical points both under the evaluation criterion, "Processing and Control of Work," and the evaluation criterion, "Management Plan." However, even [assuming that ACMC should not have lost technical points in these two areas because of its particular computer approach, we believe it is obvious that the company was given a low technical score because of its weaknesses in other technical areas as well. This is reflected by the fact that ACMC's point score was only approximately one-third as high as the highest ranked offeror and approximately one-half as high as the lowest ranked offeror placed in the competitive range. Therefore, we cannot question the exclusion of the proposal.]

The Source Evaluation Board

ACMC contends that the SEB members were incapable of understanding its proposal, one which the company alleges was keyed to the mission nature of the protested solicitation. Further, in ACMC's opinion, NASA has not demonstrated that the SEB members were qualified to conduct the evaluation of proposals submitted under the RFP.

NASA states that four of the five SEB members have had prior SEB experience in varying capacities which include committee membership, board membership, and participation in the source selection process at the NASA Headquarters level. Further, NASA states that the "Board membership includes experience in the evaluation of mission contract proposals." In addition, the SEB assisted in the preparation of the RFP and gave its final approval before release.

As a [general rule, we will not become involved in appraising the qualifications of contracting agency personnel.] See Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206. Moreover, we have held that the important and responsible positions held by agency evaluators constitute a prima facie showing that they are qualified and with nothing more than a protester's unsubstantiated allegations regarding an evaluator's qualifications, we would have no basis to examine or question the evaluator's qualifications. See CompuScan, Inc., 58 Comp. Gen. 440 (1979), 79-1 CPD 288.

Since ACMC has not shown NASA's evaluation to be arbitrary, we cannot question the capabilities or the qualifications of the SEB members notwithstanding the mission nature of the RFP.

Bias In Evaluation

ACMC alleges that members of the SEB were biased against it because it is a woman-owned concern. In support of its allegation of bias, ACMC offers an affidavit executed by an employee of the Small Business Administration's Office of Women in Business. The

affidavit recounts the employee's discussion with the Deputy Director for Procurement at Marshall Space Flight Center shortly after that employee had learned that ACMC had been eliminated from the competitive range. The employee relates that the Deputy Director for Procurement stated that ACMC was a company which mainly performed small jobs painting buildings and that what made the companies selected for discussions better qualified than ACMC was that they were run by "able men."

In response to ACMC's affidavit, NASA has submitted its own affidavit from the Deputy Director for Procurement at Marshall Space Flight Center. In the affidavit, the Deputy Director categorically denies stating that ACMC was not capable of handling the contract work or that the firms placed in the competitive range were run by able men. Moreover, NASA points out that the Deputy Director was not a member of the SEB and, therefore, did not take part in evaluating and ranking proposals submitted under the RFP.

We believe that ACMC's allegation of bias is not supported by the record. First, ACMC has not shown NASA's evaluation to be arbitrary. Second, even assuming that the Deputy Director for Procurement at Marshall Space Flight Center made the statement that the firms in the competitive range were run by able men, we do not think that such a statement on its face necessarily implies an automatic bias against ACMC as a woman-owned company but rather contained a subjective expression of confidence in the individuals who operate the companies selected for discussions.

The protest is denied.

Larry R. O'Connell
For Comptroller General
of the United States