



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Loschky, Marquardt & Nesholm
File: B-222606
Date: September 23, 1986

DIGEST

1. Allegation that agency improperly reopened selection process after protester was selected as the highest qualified architect-engineer firm and negotiations for contract award were completed is denied since agency discovered during contract clearance procedures that the published weights for two major evaluation criteria had been reversed by the evaluation board and the record shows that the protester would not have been included in the top five ranked firms which were interviewed and should not have been provided the opportunity to continue in the selection process. Agency's error had a direct and substantial impact on the outcome of the competition and agency's action in reopening the process is reasonable in view of broad discretion of contracting officials to take corrective action.
2. Allegation that agency evaluation was not consistent with the published selection criteria because agency utilized some subfactors in its evaluation which were not explicitly stated is denied since agency may consider subfactors not specifically identified where such subfactors are reasonably related or encompassed by specified evaluation criteria.
3. Protest that agency did not comply with its regulations concerning the award of architect-engineer contract because agency failed to advise its evaluation board to consider certain factors is denied where record shows that evaluation board nonetheless considered these factors in ranking the firms.

DECISION

Loschky, Marquardt and Nesholm (LMN) protests the General Services Administration's (GSA) selection of Elaine Day LaTourelle and Associates (EDL&A) as the firm with which to negotiate an architect-engineer (A-E) contract for the design

036796

of a new border inspection facility at the United States-Canada Border near Sumas, Washington. LMN argues that GSA improperly reopened the selection process after initially evaluating LMN as the highest qualified firm. Also, LMN contends that GSA's reevaluation was not consistent with the published selection criteria and that the agency's actions denied LMN a fair and equitable opportunity to compete.

We deny the protest.

Generally, under the selection procedures set forth in the Brooks Act, 40 U.S.C. §§ 541-54 (1982) and in the implementing regulations in the Federal Acquisition Regulation (FAR), 48 C.F.R. part 36 (1985), the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project. The board then must conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR, § 36.602-3(c). Thereafter, the board recommends to the selection official in order of preference no less than three firms deemed most highly qualified.

The selection official then must make the final selection in order of preference of the firms most qualified to perform the required work. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second ranked firm is invited to submit its proposed fee.

GSA published an announcement for this project in the Commerce Business Daily (CBD) on December 10, 1984. Responses were due no later than January 7, 1985, and the CBD notice stated that the following selection criteria would be utilized:

"1. Project Team (20%): Key personnel qualification and Time Commitment, Team experience on other projects and involvement of Firm principals.

"2. Project Management (25%): Team Organization, Project Management Plan, Project Scope and Cost Control, Schedule

Maintenance, Project Priority within Team Firms, production facilities, capabilities and techniques.

"3. Design Ability (35%): Project Design Philosophy as related to Design opportunities, existing site and historical significance, Design Programs, max. quality within value analysis and max. net to gross utilization, knowledge of local construction market.

"4. Demonstrated Design Experience (20%): Performance on similar projects, past performance on other projects (including reference checks), experience in fire safety, historical preservation, handicap accessibility, value management and energy conservation."

Responses were received from 27 firms and a selection board was convened on January 11, 14 and 15 to review the submissions. Based on the initial review, EDL&A was ranked first and LMN was ranked fifth. Interviews were then conducted with the top five rated A-E firms and after these discussions, LMN improved its ranking from fifth to first, with EDL&A second. By letter dated July 2, 1985, GSA advised LMN that it had been selected to perform the necessary services and that price negotiations would be initiated.

GSA successfully completed negotiations with LMN on October 18, 1985 and by letter dated November 15, LMN was advised of GSA's final contract clearance procedures and that approval for award could be expected shortly. However, during the contract clearance review, GSA discovered that the selection board had improperly transposed the published weights for two of the four major evaluation criteria. The CBD notice indicated that Design Ability would be weighted 35 percent and Demonstrated Design Experience 20 percent, but in the actual ranking of the firms, the weights for these two criteria were reversed. The entire selection process was reevaluated and GSA found that if the correct weights had been utilized, LMN would have ranked seventh after the selection board's initial review and would not have been one of the top five rated firms selected for an interview. In addition, one firm was excluded from discussions that should have been interviewed. Because of this error, GSA decided to reopen the selection process.

By telegram dated February 5, 1986, GSA informed all firms that responded to the initial CBD announcement that the selection process would be restarted and requested those firms still interested in the project to contact GSA by February 12. Subsequently, GSA issued a letter on February 12 which specifically advised the firms of the error which occurred and that because of this error one firm was improperly excluded from the interview process, while one firm was interviewed that should not have been. Interested firms were given an opportunity to update their performance data and statement of qualifications already on file with GSA and GSA appointed a new screening and evaluation board to review the submissions. After the initial review, the top five ranked firms selected for interviews were the same firms that were selected previously. LMN was included in this group and was ranked first. EDL&A was ranked second, while the firm that GSA improperly excluded because of its weighting error was not selected. Thereafter, interviews were conducted with these five firms and based on the scoring, EDL&A was ranked first and LMN second. By letter dated March 4, 1986, EDL&A was notified of its selection.

LMN filed a protest and claim for costs with GSA on April 15, 1986. LMN alleged that it was arbitrarily denied the initial award and that because of GSA's actions during the negotiation process, LMN was entitled to be reimbursed for costs that were incurred by the firm. In addition, LMN argued that the evaluation criteria utilized by GSA during the second selection process deviated from the announced criteria in the original CBD notice. GSA denied the protest and claim on May 16 and LMN filed its protest with our Office on May 27, 1986.

REOPENING THE SELECTION PROCESS

LMN argues that GSA's action in reopening the selection process was not reasonable since GSA's weighting error had no impact on the final outcome. LMN indicates that it was the highest rated firm under both Design Ability and Demonstrated Design Experience and, therefore, its overall position would not have changed regardless of the percentage weights which were applied to these two factors. Also, LMN contends that GSA found the error prejudicial only because one firm was improperly excluded from the final interviews and because that firm apparently did not participate in the restarted process, there was no reason for GSA to begin all over again.

In addition, LMN alleges that GSA committed waste by inducing an additional expenditure of funds without attempting to settle any potential protest informally and ascertaining whether the firm which was improperly excluded objected. LMN

contends that the Brooks Act does not require rigid adherence to the published criteria at the initial screening phase and as a result, the excluded firm would have had no basis to set aside the initial selection results. LMN argues that the additional costs incurred due to the reopening of the process were substantial and that, under the circumstances, GSA's action in doing so was unreasonable.

GSA contends that reopening the selection process was appropriate despite the fact that the negotiations had been completed with LMN.^{1/} GSA points out that, in addition to excluding a firm that should have been interviewed, the weighting error also resulted in LMN being selected for an interview when it should not have been. GSA argues that the error could not have been ignored and that it acted properly in reopening the selection process.

We have recognized in negotiated procurements that contracting officials have broad discretion to take corrective action, where it is determined that such action is necessary to ensure a fair and impartial competition. Pharmaceutical Sys., Inc., B-221847, May 19, 1986, 86-1 CPD ¶ 469, Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153. In this regard, we have held that an agency may convene a new selection board and conduct a new evaluation where the decision is made in good faith and where the record shows that it was not made with the specific intent of changing a particular offeror's technical ranking or avoiding an award to that offeror. Pharmaceutical Sys., Inc., B-221847, supra. While we have recognized that Brooks Act procedures are fundamentally different from traditional procurement procedures, we believe that under these procedures agencies should be afforded the same discretion to take corrective action as in other types of procurements. Cf. Parkey & Partners Assocs., B-217319, Mar. 22, 1985, 85-1 CPD ¶ 336. Thus, we will review GSA's action in accordance with the standard set forth above.

^{1/} GSA also argues that LMN's protest in this regard is untimely. We agree with GSA that LMN was clearly advised by GSA's February 12 letter that the process would be restarted and did not protest this action within 10 working days of this notification. However, LMN's arguments concerning the reasonableness of GSA's actions rest in large part on the fact that the firm excluded during the initial selection process was not subsequently considered and, since it appears that LMN did not discover this information until a later date, the merits of the allegation will be considered.

Here, we find the record substantiates GSA's decision to reopen the selection process. LMN's assertion that GSA considered the error prejudicial solely because one firm was excluded from the interview process is not supported by the record. GSA's February 12 letter clearly stated that the error resulted in one firm being interviewed that should not have been. Furthermore, LMN was the firm that should not have been ranked in the top five and we therefore disagree with LMN that the impact of the error was harmless and should have been ignored by GSA. While LMN was the highest ranked firm after the interviews and was scored higher in both Design Ability and Demonstrated Design Experience, this was not the case at the initial screening phase. Under GSA's procedures, only the top five rated firms would be interviewed and applying the proper weights to LMN's initial scores shows that LMN should not have been provided the opportunity to continue in the selection process. Consequently, the error had a direct and substantial impact on the outcome of the competition and under these circumstances, we find GSA's decision to reopen the selection process reasonable.

EVALUATION CRITERIA

LMN argues that GSA failed to adhere to the published evaluation criteria during the second selection process. LMN contends that GSA not only corrected the percentage weights for Design Ability and Demonstrated Design Experience, but also substantially modified the subfactors under these criteria without advising offerors of the changes. For example, although the CBD announcement indicated that a firm's "Design Program" would be considered, LMN indicates that a firm's design programming was also evaluated under the second selection process. LMN asserts that this is a different concept from a mere program formulated for a particular project. In addition, LMN argues that GSA added other subfactors which were not specifically identified in the CBD announcement. In this respect, LMN argues that under Demonstrated Design Experience, GSA evaluated a firm's experience in "value analysis," "life-cycle cost analysis" and experience with environmental design standards and that none of these subfactors were included in the original CBD announcement. LMN complains that GSA's rationale for reopening the selection process was based on the fact that the published criteria were not followed, yet the second selection process was deficient for this reason as well. LMN argues that GSA advised offerors that it would strictly adhere to the published criteria, that GSA was required to apply the CBD criteria to the letter and that the changes made by GSA denied LMN a fair opportunity to compete.

GSA indicates that the evaluation factors were modified in two respects for the second selection process. First, GSA states that it corrected the weights assigned to Design Ability and Demonstrated Design Experience to conform to the weights specified in the CBD announcement. In addition, GSA indicates that it also revised the subfactors to more closely track the evaluation criteria published in the CBD announcement. GSA states that because of the changed weighting of the two major factors, the weights assigned to some subfactors were also changed and the consideration of some other subfactors, such as energy conservation, was shifted from Design Ability to Demonstrated Design Experience. Furthermore, although some new subfactors were added, GSA argues that the CBD notice adequately apprised offerors of the basis for selection and GSA contends that there was nothing inconsistent between the published criteria and those utilized in the actual evaluation. While GSA acknowledges that there were some differences between the first and second evaluations, GSA argues that all firms, including LMN, competed on an equal basis.

It is well established that award may not be based on factors that prospective offerors were not advised would be considered. North American Automated Sys. Co., Inc., B-216561, Feb. 15, 1985, 85-1 CPD ¶ 203. However, our Office will not object to an agency's consideration of subfactors not specifically identified where such subfactors are reasonably related to or encompassed by the specified evaluation criteria. Oceanprobe, Inc., B-221222, Feb. 26, 1986, 86-1 CPD ¶ 227; Rolen-Rolen-Roberts Int'l, et. al., B-218424 et al., Aug. 1, 1985, 85-2 CPD ¶ 113. Consequently, the mere fact that GSA considered other subfactors not expressly set forth in the CBD announcement does not render the evaluation improper. See Oceanprobe, Inc., B-221222, supra.

Furthermore, we find that the evaluation conducted by GSA was consistent with the criteria published in the CBD announcement. Although LMN contends that firms were not advised that GSA would consider design programming, LMN has not asserted that this factor is not reasonably related to an evaluation of a firm's design ability. Also, we note that under Demonstrated Design Experience, firms were advised that their past performance on other projects would be considered as well as their experience in value management and energy conservation, among other areas. GSA's evaluation of each firm's experience in performing value analysis and life-cycle cost analysis as subfactors under this criterion is not objectionable since we find these factors to be relevant considerations in assessing a firm's general design experience. Concerning LMN's complaint regarding GSA's evaluation of a

firm's experience with environmental design standards, the CBD notice expressly stated that experience in energy conservation would be considered. In our view, experience with environmental design standards is logically related to experience in energy conservation and we see no basis to object to GSA's consideration of this factor as well as a firm's general design experience in energy conservation.

Overall, our review of the scoring sheets utilized by GSA for the second selection process shows that the evaluators considered only the specified criteria contained in the CBD announcement and subfactors that were either specifically stated or otherwise encompassed by the stated criteria. Based on this evaluation, GSA's evaluation board unanimously concluded that EDL&A would best satisfy GSA's requirements for this project. LMN has not challenged the evaluators judgments concerning the relative qualifications of the two firms for this project and since we find that GSA's evaluation was consistent with the stated evaluation criteria, GSA's selection of EDL&A was proper.

Finally, we note that LMN has also asserted that GSA failed to comply with its own regulations since the evaluation board was not informed of the need to consider "capacity to accomplish the work in the required time" nor was the board advised to hold discussions "regarding concepts and the relative utility of alternative methods of furnishing the required services." FAR 48 C.F.R. § 36.602.1(a)(3), 36.602.3(c). LMN argues that these factors are required to be considered in selecting an A-E contractor and there is no evidence that the evaluation board complied with these requirements.

We find this allegation without merit. We note that demonstrated design experience was one of the major evaluation factors, and under this criteria GSA clearly considered each firm's demonstrated capability to accomplish the work. Furthermore, alternative methods of furnishing the required services were also evaluated. In this respect, each firm's organization, management and design philosophy, as well as its design program and programming, were evaluated. Although LMN argues that GSA did not advise the evaluation board of these requirements, we believe the record supports a finding that these factors were in fact considered by the board in formulating its judgment regarding the relative qualifications of the firms. Therefore, since GSA's evaluation took into consideration these factors, we find no basis to conclude that the evaluation was not consistent with these FAR requirements.

The protest is denied.

In view of our finding that GSA acted reasonably in reopening the selection process and that GSA's second evaluation was consistent with the evaluation criteria specified in the CBD announcement, LMN's claim for proposal preparation expenses and costs of filing and pursuing its protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel