The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Liberty Associates, Inc.

File: B-232650

Date: January 11, 1989

DIGEST

1. Protest that firm competing for architect-engineering services contract was unable to demonstrate extent of its qualifications during discussions with agency because it did not have access to certain information is dismissed as untimely where protest was not filed within 10 working days after protester learned that agency would not provide the information.

2. Protest that firm selected for negotiation of an architect-engineering contract will be unable to perform because it cannot obtain access to required inspection report form which is alleged to be proprietary to the protester is denied where statement of work did not require use of protester's form.

3. Where record indicates that agency judged firm selected for negotiation of an architect-engineering (A-E) contract to be technically superior, its selection was proper despite the fact that it had received prior A-E awards while the protester had received none.

DECISION

Liberty Associates, Inc., protests the Naval Facilities Engineering Command's (NAVFAC) selection of Applied Management Engineering, PC (AME) as the firm with which to negotiate an architect-engineering (A-E) contract for performance of a facilities condition inspection and related services at the Marine Corps Base at Came Lejeune, North Carolina, and at the Marine Corps Air Station in New River, North Carolina, under solicitation No. N62470-88-B-5833. Liberty contends (1) that AME had access to information not provided to other interested firms; (2) that AME cannot comply with one of the conditions specified in the statement of work; and (3) that certain actions taken by the agency in selecting AME gave the appearance of partiality and

044325/137692

impropriety. Liberty also argues that AME should not have been selected because it has already received a number of A-E awards from the Department of Defense (DOD) during the past 24 months.

We deny the protest in part and dismiss it in part.

Generally, under the selection procedures set forth in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which govern the procurement of A-E services, and in the implementing regulations in Federal Acquisition Regulations (FAR) §§ 36.00-36.09, 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 must then 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, with the advice of appropriate technical and staff representatives, then lists, in order of preference, 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 the firm as to a fair and reasonable price, negotiations are terminated and the second ranked firm is invited to submit its proposed fee. See generally FAR subpart 36.6.

NAVFAC announced its requirement in the Commerce Business Daily (CBD) on February 23, 1988. The CBD synopsis indicated that the following evaluation factors, listed in relative order of importance, would be considered in selecting a contractor:

1. Recent experience of the firm and its consultants (if proposed) in facilities condition inspections;

2. Familiarity and past experience of the firm with DOD Real Property Facilities Maintenance Management;

3. Professional qualifications of the proposed engineering/technical staff who will perform the work;

4. Quality of performance of DOD work, especially past performance in projects with this command;
5. Exhibited capability to fulfill established contract completion dates;

6. Geographic proximity to the project sites;

7. Volume of work previously awarded to the firm by the Atlantic Division (LANTDIV), NAVFAC and other DOD agencies with the objective of effecting equitable distribution of contracts among qualified A-E firms including disadvantaged business firms and firms that have had no prior LANTDIV or other DOD contracts.

Fifteen firms responded to the CBD announcement. The evaluation board recommended that 5 of the 15, including Liberty and AME, be further considered. A statement of work, describing in greater detail the tasks to be accomplished, was issued to each of the five firms, and interviews were conducted with each on June 1. Upon completion of the interviews, the selection board ranked the three firms that it considered most qualified in order of preference. The evaluation record shows that the board ranked AME as the most highly qualified firm based primarily on the firm's experience in facilities condition inspection work, the experience of its senior personnel in DOD real property facilities maintenance management, and on AME's status as a full service firm. The selection official approved the board's recommendation. Liberty first protested the selection to the agency. After its protest was denied by letter dated September 1, it filed the current protest with our Office.

Liberty argues first that AME had access to government information not furnished to the other firms. That information, according to the protester, provided AME with an unfair advantage at the interviews. Specifically, the protester claims that only 2 of the 13 attachments that were supposed to be provided with the statement of work were in fact provided to the firms. (The missing attachments included facility and equipment lists, checklists, and sample forms.) Liberty contends that AME, by virtue of the fact that it was performing similar work in another area of Camp Lejeune, already had access to this information. Liberty claims that if it had been provided the various lists and forms, it would have been able to discuss during the interviews how they were deficient and how they could be improved, thereby demonstrating its superior knowledge.

Liberty's protest is in essence that it was not able to perform as well as it would have liked at the interviews because it did not have access to the attachments. Liberty was aware of this ground of protest at the latest on June 1, when during its interview with the selection panel its final request for the information was denied. To be timely, Liberty's protest should have been filed within 10 days after the date of the interview. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988). Instead, the protester waited over a month before it protested to the agency. This basis of protest is therefore untimely.

In any event, to the extent Liberty is arguing that AME had an unfair advantage over other interested firms due to its familiarity with the forms and lists that it had acquired through its performance of similar work,1/ we have consistently recognized that a firm may gain an advantage over other firms by virtue of its prior experience, and that such an advantage, so long as it is not the result of preferential treatment or other unfair action by the government, need not be discounted or equalized. Thermex Energy Corp., B-227034.2, Aug. 17, 1987, 87-2 CPD ¶ 164. Here, the agency maintains that these attachments were not provided to any of the competing firms. According to the agency, the statement of work was, at the time the interviews were conducted, in preliminary form and the attachments were just not available. The agency further reports that AME's work at Camp Lejeune did not concern the same facilities as are the subject of this procurement and that the forms it used are not the same as those referenced in the statement of work. While it may indeed be true that AME's other work provided it with useful experience and information, we do not think that the unavailability of the material in the attachments--which was not directly related to AME's other work--constituted unfair action by the government which resulted in an unfair advantage for AME.

Liberty further argues that AME cannot obtain one of the inspection report forms required by the statement of work because the form was developed from Liberty's proprietary software and Liberty will not grant AME a license to use it.

NAVFAC responds that the statement of work did not require the use of Liberty's form. Rather, it provided for the use of a government form. (Liberty had apparently developed a

---

1/ The protester states that it was not informed that AME was performing other services at Camp Lejeune until June 28. Since the agency-level protest was filed on July 12, this protest ground is timely.

slightly different version of this form as part of its software system, and it is this form to which it refers.) The agency also points out that the statement of work permits the contractor to use its own form, subject to approval by the agency. We have reviewed the statement of work and we can find no evidence--and Liberty has provided none--that the form specified is proprietary to the protester. In any event, it is clear from the statement of work that the contractor may substitute its own form. Hence, we can find no basis for the protester's contention that AME will not be able to meet the contract requirement for an inspection report.

Liberty also complains that AME was selected despite the fact that the firm had already received a number of awards for similar A-E work from DOD during the past 24 months. Liberty argues that the selection of AME, which had already received a number of significant awards, over other qualified firms, such as itself, which had not received any awards, was contrary to the final evaluation criterion, which stated that the volume of work previously awarded to a firm would be considered with the objective of effecting an equitable distribution of contracts among qualified A-E firms.

The Navy responded to Liberty's agency-level protest on this issue by stating that when firms are evaluated equally with regard to their demonstrated experience and qualifications, it is the agency's policy to exclude firms having DOD awards of $500,000 or more in the current fiscal year in order that contracts are equitably distributed. The agency continued by saying that in, this case, the slated firms were not considered equally qualified "in the areas of experience and past performance on projects with this Command."

In its protest to our Office, Liberty takes issue with the agency's statement that it was not considered to be equally qualified in terms of its experience on projects "with this Command." Liberty argues that its experience with other branches of the Navy should not have been considered any less valuable.

Our review of the rationale set forth by the selection panel for their choice of AME as the high-ranked firm indicates that the basis for the selection was not merely AME's past performance on projects with the LANTDIV, NAVFAC, or for that matter just NAVFAC projects. The selection panel referred to the facilities conditions inspections that the firm had performed for the Marine Corps at 29 Palms, California, and for two other NAVFAC commands. The evaluation record also referred to the experience of AME's

staff in real property facilities maintenance management as former Navy employees. Further, the record shows that Liberty was also credited with its experience in projects for other DOD activities such as the Philadelphia Naval Shipyard and the Marine Corps. Thus, although the agency's response to Liberty's agency-level protest implies that only experience concerning LANTDIV projects was considered, this was not in fact the case. Both firms' broader experience was evaluated. Moreover, even if the agency had used the more narrow standard, the protester does not state how it was prejudiced. It does not specify what "non-Command" experience was improperly ignored during the evaluation.

Further, to the extent that Liberty argues that it was improper for the Navy to have selected AME because it has been previously awarded Navy and DOD A-E work, we think that the agency's view that it would exclude a firm because of prior work only if it is rated essentially equal technically to another firm is consistent with the announced evaluation criteria. The evaluation criteria listed the volume of prior work as seventh in importance out of the seven listed factors. Experience and qualification factors made up the four highest rated criteria. Since the evaluation record shows that AME was rated higher because of its experience, its staff, which has worked together previously, and its full service capacity, we think it was reasonable and consistent with the evaluation criteria for NAVFAC to have selected AME despite the fact that it had received prior A-E awards and Liberty had not. Dhillon Engineers, Inc., B-209687, Mar. 16, 1983, 83-1 CPD ¶ 268. If Liberty thought that prior awards should have had a greater impact on the selection, it should have objected to that factor's relatively low weighting in the evaluation scheme prior to the receipt of offerors. 4 C.F.R. § 21.2(a)(1).

The protester also contends that several actions taken by the agency in selecting AME give the appearance of impropriety and partiality. In particular, Liberty objects to the attachment to the statement of work of a sample facility condition report prepared by AME. Liberty argues that the inclusion of a sample prepared by AME favors that firm because it presupposes that AME's previous work is the acceptable standard for performance.

The Navy responds that the document in question was prepared by AME under another contract and was included in the statement of work as an example of an acceptable format. We agree with the agency that the use of a form prepared by AME under a different contract does not support a charge of agency partiality for that firm.

Liberty argues next that AME's president had confided to its president approximately 6 months prior to publication of the CBD synopsis that his firm had an "inside track" for the contract. The protester contends that it can be inferred from this statement that agency personnel had already informed AME that it would be selected.

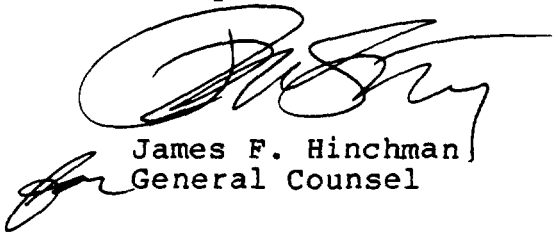
We do not think that it can be inferred from the above statement that the agency had informed AME that it would be selected. Moreover, we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Petro-Engineering, Inc., B-218255.2, June 12, 1985, 85-1 CPD ¶ 677.

Liberty also says that the selection panel exhibited bias against it during its interview by failing to follow up on several critical issues raised by the protester during the discussions. Liberty complains that the selection panel appeared indifferent to its specialized knowledge and to its capability to preclude serious deficiencies from occurring in the Camp Lejeune project.

We think that this ground of protest, like Liberty's first ground, is untimely. To the extent that Liberty objected to its interview, it should have protested within 10 days after the interview was conducted, rather than waiting over a month. 4 C.F.R. § 21.2(a)(2). This ground of protest is dismissed.

Finally, the protester has requested that we investigate the NAVFAC Atlantic Division's A-E selection procedure in general and has raised a series of additional issues and demanded the production of several documents related to these issues. It is not our practice to conduct investigations pursuant to our bid protest function. Aguirre Architects, Inc.--Request for Reconsideration, B-230256.2, May 19, 1988, 88-1 CPD ¶ 478. Furthermore, we have reviewed the protester's additional arguments and document requests and will not consider them in our decision because we do not believe they are relevant protest issues which are appropriate for our consideration.

The protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel