

Spangenberg



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

(Corrected Copy)

Matter of: J.M. Cashman, Inc.

File: B-233773

Date: April 14, 1989

DIGEST

1. An offeror on a request for proposals (RFP) for a contract for the rehabilitation of a movable bridge has not been reasonably evaluated where it receives a perfect score for the "mechanical machinery" subcriterion of the "experience and qualifications" criterion of the RFP, notwithstanding that its last known experience is 12 years old and the offeror does not show compliance with the specific criteria that the contractor and its supervisory personnel have certain minimum experience in the repair or rehabilitation of movable bridge mechanical machinery, and where the protester, who has identified several recent movable bridge projects, receives a significantly lower score because of a stricter application of these criteria.

2. An agency may not give undue weight to the fact that an offeror will perform work with its own forces, rather than subcontract for some of the work, when the evaluation criteria of a request for proposals do not indicate such a preference.

DECISION

J.M. Cashman, Inc., protests the award of a contract to Karl Koch Erecting Co., Inc., under request for proposals (RFP) No. DACW33-88-R-0002, issued by the United States Army Corps of Engineers, Boston, Massachusetts, for the rehabilitation of a vertical lift movable railroad bridge over the Cape Cod Canal, Bourne, Massachusetts.

We sustain the protest. We find the Corps misevaluated proposals, such that there is no reasonable basis for the award selection.

Three offers were submitted in response to the RFP from Cashman, Koch and another firm by the May 6, 1988, closing date for receipt of proposals. In its proposal, Cashman

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proposed two major subcontractors, The Shaughnessy Companies for much of the mechanical and structural work, and General Electric Company for the electrical work. Proposals were to be evaluated against the following evaluation criteria listed in the RFP, which also specified what documentation was required to be submitted:

"a. Experience and Qualifications.

[50 points]^{1/}. The offeror must have demonstrated experience of similar work for movable bridges More specifically, this experience must include as a minimum the following:

(1) Mechanical Machinery [25 points].

(2) Electrical System Changeover [15 points].

(3) Management Plan [10 points].

b. Performance Time. [30 points].

c. Price. [20 points]."

On May 9, 1988, the contracting officer informed Koch that it had not submitted, among other things, a list of the experience of its machinery and electrical suppliers, a management plan and a CPM (construction path method) analysis, and that this information was required to be submitted by May 16, 1988. At the same time, Cashman was advised of a minor discrepancy in its pricing which it promptly corrected. On May 13, Koch advised the Corps that it had solicited three machinery suppliers and three electrical suppliers, with which it was still negotiating, and that it would send information regarding the selected subcontractors' experience when Koch determined who the suppliers would be. Koch also declined to supply CPM schedules and did not mention the management plan.

A four-person Technical Review Board was established to conduct the technical evaluation. The Board scheduled and conducted separate oral discussions with Cashman and the third offeror on June 9, 1988, since they were found to have submitted sufficient information for evaluation. On June 14, Koch submitted a CPM, a "management plan for project with crew requirement," and resumes of senior Koch personnel. Oral discussions were then scheduled and conducted with Koch on June 28.

^{1/} Actual point values were not identified in the RFP.

On July 6, 1988, the Board awarded the following consensus point scores:

	Cashman	Koch
a. Experience and Qualifications		
(1) Mechanical Machinery	18	25
(2) Electrical System Changeover	12	5
(3) Management Plan	5	10
b. Performance Time	20	25
Total Technical Score	55	65

The third offeror's proposal was rated significantly lower.

Since the initial proposed prices were in excess of the government estimate, certain changes, not relevant to the protest, were made to the RFP and best and final offers (BAFOs) were requested; offerors were requested to "reaffirm that the mechanical machinery and electrical experience and qualifications submitted with your original proposal remain in effect." The BAFOs submitted on November 1, 1988, contained no technical changes. Cashman's low BAFO price was \$8,300,245 while Koch's price was \$8,950,058.

On November 8, the Board reaffirmed the previous point scores, since no technical revisions were made in the BAFOs. Cashman was awarded 20 points for its low price and Koch 18 points.^{2/} Consequently, Koch had the high total score of 83 points while Cashman received 75 points. The Board recommended Koch for award because:

- (1) Koch possesses "superior bridge work experience and has demonstrated a multitude of successfully completed projects";

^{2/} Cashman's price divided by Koch's price times 20 = approximately 18.

(2) Koch will perform various major mechanical and structural tasks with "his own personnel and will be under his direct control This total control of the mechanical/structural portion of the project is of critical importance to delivery of the project within the time frame allotted as the work by its nature will require a vanguard coordinated mechanical/structural effort to complete on schedule"; and

(3) Koch has "demonstrated the ability to complete difficult bridge/mechanical projects on time and within budget."

The recommendation was adopted by the Corps Division Engineer, who was the contracting officer, and award was made to Koch on November 23. Cashman protested this award to our Office on December 5, 1988. No notice to proceed has been issued.

Cashman protests that the evaluation was unreasonable and inconsistent with the RFP evaluation criteria, and that meaningful discussions were not conducted. Cashman supplemented its protest several times, as additional documents concerning this procurement were released by the Corps, questioning all aspects of the evaluation and contending that its evaluated deficiencies were not pointed out during the "unequal" discussions. The Corps also submitted several affidavits, executed by all four members of the Board, which provided further details of, and justifications for, the evaluations and discussions which were conducted.

A fact-finding conference was conducted pursuant to section 21.5(b) of our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1988), because of a dispute concerning the content of the oral discussions between the Corps and Cashman. This dispute arose out of an affidavit executed by the four members of the Board, which described the conduct of discussions and the evaluated strengths and weaknesses of the Cashman and Koch proposals. One of the items in this affidavit was a list of seven questions that the members of the Board specifically state were "put to each offeror" during the oral discussions. In response to this affidavit, Cashman's project manager, who represented Cashman in the oral discussions, submitted an affidavit expressly denying that three of these questions were asked during oral

discussions.^{3/} Cashman states that if these questions were asked of Koch, then Koch was given an unfair opportunity to address the Corps' concerns to the prejudice of Cashman, since the "performance time" and "management plan" criteria, on both of which Cashman was rated lower than Koch and to which these questions relate, were significant evaluation items.

At the fact-finding conference, the Chairman of the Board (hereinafter Chairman) and the Cashman project manager gave sworn testimony and were subject to cross-examination. Under cross-examination, the Chairman admitted these specific questions were not asked of Cashman during the oral discussions.^{4/} Conference Transcript (Tr.) 30-36. The Chairman's testimony is inconsistent with the affidavit, even though the Chairman testified that he read this affidavit before he signed it. Tr. 29. However, the testimony of the Chairman and the Cashman project manager indicates that information relating to the subject matter of each of these three questions was mentioned by Cashman during the oral discussions.^{5/}

^{3/} The three questions, which the four members of the Board stated in an affidavit were put to each offeror, are: (1) how would the field office be staffed during the critical 90-day period; (2) what would be the number of hours per day and the number of hours per week to be worked, and the number of mechanics to be employed, during the 90-day period; and (3) what was the offeror's method for monitoring the job schedule?

^{4/} The Cashman project manager confirmed these questions were not asked. Tr. 73-76.

^{5/} General information was obtained from Cashman about how it would staff the job, but no questions were asked in this regard about the critical 90-day period. Tr. 30, 73, 92-93. No specific information was obtained during discussions about how Cashman would monitor the job schedule; the Board was advised that the Cashman project manager would be on-site and the Chairman inferred that he would personally monitor the work. Tr. 33-36, 76. Cashman has some specific methods of monitoring job performance that it says it would have detailed if it had been asked. Tr. 76-78. Some information about the hours and days to be worked during the 90-day period may have been volunteered by the project manager for Shaughnessy, Cashman's mechanical subcontractor, (continued...)

Although Cashman contends that the Corps' failure to ask it these three questions was prejudicial to it, we find the record inconclusive on this point. On the one hand, while Koch may well have been asked these questions, it is clear that, despite the statements in the Corps' affidavit, these questions were not asked of Cashman. On the other hand, it does appear that Cashman had an opportunity to, and in fact did, elaborate on these areas during oral discussions. Whether Cashman would have responded any differently than it did had it been asked those specific questions is, we think, speculative. Moreover, the RFP specifically indicated that the subjects of the questions should be addressed in the proposals, so that Cashman should have known of the need to address these areas effectively.

Nonetheless, we sustain this protest because we find the Corps' evaluation of competing proposals was unreasonable, inconsistent, and not in accordance with the RFP evaluation criteria.

For example, one significant evaluated difference between Koch's and Cashman's proposals was Koch's perfect 25 out of 25 point score for the "mechanical machinery" subcriterion of the "experience and qualifications" criterion, as opposed to Cashman's 18 points. This criterion states in pertinent part:

"(a) The Offeror shall submit a list of projects which the Offeror has performed in the installation and rehabilitation of movable bridge operating machinery. The list of projects shall contain a detailed description of the performance requirement for such installation and rehabilitation of movable bridge operating machinery. The list shall also contain the name of persons in those organizations for whom the project was performed who are familiar with the details of the Offeror's performance.

"(b) The supervisory personnel that will be on site for the machinery installation, replacement, and rehabilitation operation shall have a minimum of five years of experience in the installation and repair of movable bridge operating machinery,

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during the oral discussions, although no questions on this point were asked. Tr. 30-33, 74-75.

including the repair of movable bridges. The list of experience of the supervisory personnel shall be submitted in the offer."

The only weaknesses in Cashman's proposal identified by the Corps in response to Cashman's debriefing request were related to this criterion; the Corps advised Cashman that its experience as a:

"prime contractor for similar work (Rehabilitation of Movable Bridges) was limited as your company listed five (5) completed projects of which only two (2) were considered by the [Board] being similar work required by the contract documents. In addition, your mechanical subcontractor, The Shaughnessy Companies listed limited experience in the rehabilitation of movable bridge machinery."

Further, according to the affidavit executed by the Board members, Cashman's proposal was also downgraded under the "mechanical machinery" subcriterion because Cashman's and Shaughnessy's supervisory personnel "for the mechanical machinery work did not possess the requisite five years minimum experience in the installation and repair of movable bridge operating machinery."

Our review indicates that it is true that Cashman's, Shaughnessy's and their supervisory personnel's movable bridge experience was not on vertical lift bridges, and does not extend over a 5-year period. Moreover, it may be that the movable bridges on which they have worked are not of the magnitude of this vertical lift bridge. Consequently, Cashman's mechanical machinery experience could reasonably be downgraded, and we cannot say its score of 18 out of 25 points was unreasonable.

However, the record also shows that the movable bridge experience and qualifications of Koch and its supervisory personnel did not warrant the perfect score that it was awarded. It also is evident that Cashman's proposal was evaluated based on a stricter application of this criterion than was Koch's proposal. Specifically, while the Corps said Koch's "bridge work" experience was superior and that it "has demonstrated a multitude of completed projects," the most recent of the movable bridge rehabilitation projects identified by Koch in its proposals was completed in 1977. That is, although Koch did identify numerous movable bridge projects, all were completed from 1954 to 1977; the only identified vertical lift type movable bridge experience was a bridge Koch built in 1954 and a bridge it rehabilitated in 1961. While Koch's proposal did not set forth detailed

information on these projects (even though the RFP specifically requested this information), the Board was apparently impressed by Koch's description of its experience at the oral discussions; the Chairman considered Koch's experience to be "continuous," see Tr. 26, as opposed to Cashman's "limited" experience. However, upon cross-examination at the fact-finding conference, the Chairman acknowledged "the record" showed Koch's most recent movable bridge experience was in 1977. Tr. 57. Moreover, there is no indication that Koch's supervisory personnel met the minimum requirement for 5 years experience in the installation and repair of movable bridge operating machinery in view of the passage of years since Koch performed a movable bridge project.

We see no reasonable basis for Koch to receive a perfect score for the "mechanical machinery" subcriterion, since its movable bridge experience is more than 12 years old and its proposal does not show compliance with the specific standards identified in the RFP. See Pan Am World Services, Inc., et al., B-231740 et al., Nov. 7, 1988, 88-2 CPD ¶ 446. Moreover, the record does not indicate that Koch's proposal is superior to Cashman's proposal under this subcriterion. It would appear that in order to give Koch its perfect score, the Board and contracting officer could only have considered Koch's more recent experience in other construction and rehabilitation projects that was also listed in Koch's proposal, even though they did not involve movable bridge machinery as contemplated by the RFP evaluation criteria.^{6/} On the other hand, the much more recent movable bridge experience of Cashman and Shaughnessy was downgraded because of the nature of that experience and the supervisory personnel's lack of 5 years of movable bridge experience. Thus, while Cashman was downgraded because of what the evaluators viewed as limited movable bridge experience, Koch, offering no recent experience, was not downgraded at all. In short, the record does not justify Koch's significantly higher rating for this subcriterion. See Programmatic, Inc.; Telesynetics Corp., B-228916.2; B-228916.3, Jan. 14, 1988, 88-1 CPD ¶ 35.

^{6/} We give credence to this probability because in part a close reading of the Board's recommendation does not mention Koch's "movable bridge" experience but only discusses its more generalized bridge/mechanical experience.

We also find unequal treatment of the offerors under the "management plan" subcriterion, where Koch again received a perfect score of 10 out of 10 points while Cashman scored 5 out of 10 points. This criterion states in pertinent part:

"The Offeror will submit a detailed general management plan indicating organization qualification of key personnel, method of tracking job schedule, quality control and include the above for various subcontractors/vendors. Demonstrated past experience detailing the type of project completed with the above personnel and associated subcontractors/vendors shall be furnished."

Neither Cashman nor Koch submitted the management plan as requested by the RFP. The record shows the Corps noted this problem, but, inexplicably, asked Koch for this document but not Cashman. At first Koch did not supply the document; Koch finally supplied a "management plan" only after oral discussions were completed with Cashman. However, this plan only showed the number of crews and job duration for each task.^{7/} Cashman was never requested to supply a management plan.^{8/}

The only reason identified by the Corps for the difference between the "management plan" scores of Koch and Cashman is that Cashman was subcontracting much of the mechanical machinery work while Koch was doing this work with its own forces, thereby exercising direct control over the work.^{9/}

^{7/} The Chairman testified at the fact-finding conference that the "management plan" submitted by Koch "didn't affect the score with respect to his management plan for the project." Tr. 76.

^{8/} Although the Corps claims that Cashman submitted a "management plan" by listing subcontractors and providing information on how the job would be managed during oral discussion, see Tr. 40, 44, this "management plan" does not comport with the RFP requirements.

^{9/} Based on the Chairman's testimony, the Corps argues, for the first time in its comments on the fact-finding conference, that Cashman's "management plan" was downgraded because Cashman's project manager was not sure who would perform the structural part of the work. However, the
(continued...)

It appears that the Corps gave undue weight to this discriminator in evaluating proposals under this criterion.^{10/} Such a strong preference against subcontracting is neither stated nor implied under this subcriterion of the "experience and qualifications" criterion of the RFP. See DBA Systems, Inc., B-224306, Dec. 31, 1986, 86-2 CPD ¶ 722.

Moreover, there appears to be no reasonable basis for Koch's perfect score for this subcriterion. In this regard, in contrast to Cashman's proposal, which specified its successful experience in working with Shaughnessy on movable bridge projects, and its agreement with General Electric, who would be responsible for the electrical work, Koch was still "uncertain" during oral discussions as to what subcontractor would be performing its electrical work. Indeed, the Corps called up Koch after submission of BAFOs to "confirm" Koch's choice. Since it would seem that the electrical subcontractor's work also has to be integrated with the other contract tasks to timely accomplish the work, we fail to see how Koch, who had not decided on what subcontractor to use, could receive a perfect score for this subcriterion. Moreover, Koch never submitted a management plan in compliance with this subcriterion; for example, Koch did not identify its methods of tracking job schedule or quality control. Therefore, it appears the Corps also

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Chairman did not testify that this was the reason Cashman's "management plan" was downgraded, nor is there any documentation that this was an evaluated weakness of Cashman.

^{10/} This same difference was the most important factor in evaluating the "performance time" criterion where Koch received 25 points and Cashman 20 points. However, we do not conclude that the Corps unreasonably evaluated the "performance time" factor, since much of the critical work under the RFP must be done in a 90-day window during which the bridge, which is the sole railroad link to Cape Cod, will be closed to railroad traffic. The Corps advises that if this 90-day window is exceeded, the State of Massachusetts, the railroad operators and Cape Cod communities would suffer serious hardship. In evaluating proposals under this criterion, the Corps could reasonably conclude that Koch's "direct control" could give greater confidence that the work within the critical 90-day period would be timely completed. See DBA Systems, Inc., B-224306, Dec. 31, 1986, 86-2 CPD ¶ 722.

misvaluated the proposals under the "management plan" subcriterion. The record does not indicate that Koch's score for this criterion should be higher than Cashman's score.

As indicated above, we find that the Corps has not established that Koch's rating should be higher than Cashman's for these two criteria. Accordingly, on this record, the selection of Koch for award has not been justified and we sustain the protest.^{11/}

We recommend that the Corps reconsider the award selection in light of this decision. In this connection, it would be appropriate for a new panel to be convened to assure the selection is made objectively. If Koch is not found to be the highest rated offeror under the RFP evaluation criteria, then its contract should be terminated and award made to Cashman. In any case, Cashman is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).



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^{11/} Since we sustain the protest, we need not consider Cashman's numerous other contentions concerning the evaluation and conduct of discussions. Our review does not indicate that Cashman was necessarily entitled to the award, despite its low price.