



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FKW Incorporated Systems; ColeJon Mechanical Corporation
File: B-235989; B-235989.2
Date: October 23, 1989

DIGEST

1. Where an agency changes an evaluation criterion in a request for proposals after proposals are received, without notifying the offerors within the competitive range contract award need not be disturbed where the change did not affect the selection decision or otherwise prejudice any offeror.
2. Source selection decision to award to the lowest cost, lowest technically evaluated offeror is not unreasonable where the source selection official determined that higher rated, higher cost proposals were not worth the cost premium.
3. Agency's admitted failure to give preaward notice of the apparent successful offeror so as to permit a timely size protest is not prejudicial to the unsuccessful offerors where the Small Business Administration has not determined the awardee was other than small.

DECISION

FKW Incorporated Systems (FKW) and ColeJon Mechanical Corporation (ColeJon) protest the award of a contract to Facilities Equipment & Maintenance Corporation (FEMCOR) by the Federal Aviation Administration (FAA) under request for proposals (RFP) No. DTFA03-88-R-80037. The RFP was issued as a total small business set-aside for a cost-plus-award-fee contract for Center Operations and Maintenance Support services at the FAA Technical Center, Atlantic City International Airport and its satellite locations.

We deny the protests.

The RFP provided for award of a 5-month base period with 4 option years. Offerors were required to submit separate technical, management and cost proposals with cost and

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pricing information/references included only in the cost proposal. Section M.2 of the RFP listed the evaluation criteria in descending order of importance as follows:

TECHNICAL AND PROGRAM MANAGEMENT AREAS

Area A - TECHNICAL

Comprehension/Adequacy of Proposal
Equipment
Staffing Plan
Experience of Key Personnel

Area B - MANAGEMENT

Management Plan
Related Corporate Experience and Financial Stability
Phase In

Area C - COST

The technical evaluation criteria and subcriteria were weighted more than the program management criteria and its subcriteria. Although not disclosed to the offerors, the technical criteria represented 55 percent of the non-cost evaluation factors, while the management criteria represented 45 percent. Cost was not point-scored and, although said to "be a significant factor," was of lesser weight than either the technical or program management criteria. The RFP stated that award would "be made to that firm offering the best value to the government considering technical merit and price."

Three proposals were received by the October 7 closing date. Following an initial technical/management evaluation, all three offers were determined to be in the competitive range. Discussions were conducted and best and final offers (BAFOs) were requested and received by February 28, 1989.

A technical evaluation team reviewed and evaluated the three technical BAFOs and assigned technical scores of 28.81 to FEMCOR, 29.87 to FKW and 36.14 to ColeJon (out of 55 possible points). The management evaluation team evaluated the three management BAFOs and made no changes to the initial management scores, which ranged from 31.71 (FEMCOR) to 32.95 (FKW) (out of 45 possible points). The management evaluation team concluded that the management proposals of the three offerors were substantially equal. ColeJon's BAFO received a weighted total technical and management score of 68.77; FKW received a total score of 62.82 and FEMCOR a total score of 60.52.

ColeJon submitted the highest proposed cost of \$31,829,682, followed by FKW with a cost proposal of \$30,549,644 and FEMCOR with the lowest proposed cost of \$27,690,731. The evaluated probable costs of ColeJon and FKW were \$31 million each, while FEMCOR's evaluated probable cost was \$28 million.

On June 13, the source selection official (SSO) reviewed the source evaluation board's report and recommendations. The SSO concluded that the higher technical/program management scores of the other offerors did not justify the \$3 million higher cost and that award to FEMCOR would constitute the "best value" to the government. Consequently, award was made to FEMCOR on June 21. The FAA advised FKW and ColeJon of the award by letter dated June 27 and these protests followed.

FKW's and ColeJon's initial protests focus on various allegations that the FAA did not exercise "due diligence" in the selection process since it failed to fully consider FEMCOR's poor and unsatisfactory financial condition. FKW maintains that the firm is financially unstable for the following reasons: (1) FEMCOR was terminated for default by the Army for failure to meet certain bonding requirements; (2) the bonding documents furnished by FEMCOR under that Army contract were fraudulent; (3) FEMCOR is being sued by its subcontractors under that Army contract for nonpayment and that FEMCOR attempted to obtain agreement from the subcontractors to accept 50 percent of their claims; (4) FEMCOR threatened the Army with bankruptcy if not paid under that contract; (5) another firm failed to execute a novation agreement to assume that Army contract after evaluating FEMCOR's financial situation; and (6) FEMCOR is involved in a dispute with a Virginia bank for past due debt.^{1/} In their postconference comments, FKW and ColeJon also protest the agency's previously undisclosed decision not to point-score proposals for financial stability.

The FAA reports, and the record confirms, that it considered each of the problems relating to FEMCOR's financial capability and corporate stability in determining FEMCOR to be a responsible contractor. Indeed, the record shows that FAA was concerned about FEMCOR's financial capabilities and

^{1/} FKW further alleges that FEMCOR is unable to meet the bonding requirements for this FAA contract and cannot therefore meet the phase-in requirements of the RFP. However, the record shows that FEMCOR was able to obtain acceptable bonds.

did not determine FEMCOR responsible until FEMCOR obtained sufficient working capital through third party financing. Our Office will not review an affirmative determination of responsibility absent a showing that such determination may have been made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.4(m)(5) (1989); IMC Magnetics Corp.--Recon., B-232392.2, Dec. 12, 1988, 88-2 CPD ¶ 582. No such showing has been made here.

With regard to the protesters' contention that financial stability was not evaluated, the FAA confirms that only the corporate experience portion of the subcriterion "Related Corporate Experience and Financial Stability" was evaluated and scored. The FAA states that it made this decision because the instructions for preparation of management proposals only requested information on corporate experience and not financial stability, such that none of the offerors furnished any information regarding financial stability in their management proposals. Therefore, when this discrepancy between the evaluation criteria and the instructions for preparation of management proposals was discovered during the evaluation process, the FAA states, a decision was made to allocate all of the points assigned to this subcriterion to corporate experience only.

The FAA states that this change in the evaluation criteria "probably" required issuance of an amendment, but that the failure to issue an amendment is not a defect warranting termination of the contract. In its view, the decision not to score "financial stability" did not materially alter the basis for award nor prejudice any offeror since all proposals were evaluated on the same basis, that is, financial stability was not evaluated in the management proposals of the three offerors and considered only as part of the responsibility determination.

Both protesters argue that the evaluation of proposals was flawed by the FAA's admitted failure to inform offerors of the change in the evaluation criteria. The protesters assert that this failure is violative of applicable procurement regulations. Moreover, the protesters maintain that had financial stability been evaluated, the offerors' management proposals would not have been considered "substantially equal" since FEMCOR's management proposal should have been downgraded under this subcriterion because of its poor financial history. Both FKW and ColeJon state that they would have scored significantly higher than FEMCOR in this management area because each has a strong financial background which would enhance the overall superiority of their proposals to that submitted by FEMCOR.

Where, as here, an agency changes the ground rules or evaluation criteria of an RFP after proposals are received, all offerors within the competitive range should be given the opportunity to revise their proposals based on the new criteria. TMC, Inc., B-230078, B-230079, May 24, 1988, 88-1 CPD ¶ 492. However, we will only sustain a protest on this basis where this change affected the selection decision or otherwise was prejudicial to the protester(s). Air Tractor, Inc., B-228475, Feb. 5, 1988, 88-1 CPD ¶ 115; AT&T Communications, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247.

In the present case, we agree that the proper thing for FAA to have done when it decided not to evaluate financial stability was to notify offerors of the changed evaluation factors. However, it does not appear that this would have affected the selection decision or that the protesters were prejudiced by this change. In this regard, we first point out that financial stability was only to be a minor aspect of the evaluation. Thus, an offeror who was poor in this area and would have received a low score would not have been automatically excluded from consideration for award.

Second, it appears from this record that had financial stability been evaluated and scored, the ultimate selection decision would not have been different. In this respect, in response to the protesters' allegations, FAA rescored this criterion based upon a "worst case scenario." Under this scenario, ColeJon's score would remain essentially the same, FKW's would be raised 1 point and FEMCOR's would be lowered 1.375 points. FAA concludes that given FEMCOR's significant cost advantage, this possible change in scores would not have changed the selection. In light of the cost/technical tradeoff decision that was made, which we discuss further below, we have no basis for disagreeing with FAA's conclusion.

ColeJon's complaint about the technical/cost tradeoff is that it was not explained, much less justified, and was contrary to the RFP criteria that established technical and management considerations as of primary importance. ColeJon alleges that it was prejudiced by the SSO's decision because had it known that cost would be the primary criterion it would have structured its offer differently.

In a negotiated procurement, such as this, even if cost is the least important evaluation criterion, an agency properly may award to a lower-cost, lower-scored offeror if it determines that the cost premium associated with award to a higher-rated, higher-cost offeror is not justified, given the acceptable level of technical competence available at

the acceptable level of technical competence available at the lower cost. NKF Eng'g, Inc.; Stanley Assocs., B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497; Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. Where the selection official has made a technical/cost tradeoff, the question is whether the tradeoff was reasonable in light of the solicitation's evaluation scheme. Dayton T. Brown, Inc., B-229664, supra.

Here, the evaluation and source selection record contain the justification for the technical/cost tradeoff which we find reasonable and consistent with the evaluation scheme. While the SSO did not specifically discuss the relative strengths and weaknesses of proposals, it is clear from both the SEB's evaluation report and the SSO's selection decision that there was a recognition that FKW's and ColeJon's higher technical/management scores was not worth the additional cost. Indeed, the source selection decision document references the SEB's report, the evaluation factors and FEMCOR's lower cost, and concludes that award to FEMCOR represents the best value to the government.

In its final assessment, the SEB, while noting that ColeJon has a very strong phase-in plan, ranked the three offerors' proposals substantially equal in the management area. As indicated above, this relative rating did not significantly change even accounting for a "worst case scenario" rating of financial stability.

With respect to the technical area, all three offerors were found to have no evaluated differences in their proposed equipment and staffing plan. As to the comprehension/adequacy of proposal criterion, ColeJon received the highest weighted score and FEMCOR the second highest; as to key personnel, ColeJon was ranked first and FKW and FEMCOR were ranked second and third, respectively.

FAA found FEMCOR's evaluated costs to be significantly lower (\$3 million) than either protester's costs and that FEMCOR's proposal represented the best value to the government, notwithstanding the higher technical scores for the protesters. Neither the point scores nor the narratives outlining the offeror's technical differences indicate that ColeJon's or FKW's technical proposals were considered "markedly superior" to that of FEMCOR. Cf. DLI Eng'g Corp., B-218335, June 28, 1985, 85-1 CPD ¶ 742, aff'd, B-218335.2 et al., Oct. 28, 1985, 85-2 CPD ¶ 468 (where we held that award was improperly made under a solicitation giving predominant weight to technical factors to technically average low priced offeror instead of to the "nearly perfect" technically, higher priced offeror). Based on our

review, we find the SSO performed a reasonable cost/technical tradeoff and reasonably found that FEMCOR's lower cost offsets the evaluated technical strengths in the protesters' proposals. In this regard, the RFP indicated that cost was a "significant" consideration in determining the "best value" to the government.

FKW and ColeJon also protest the FAA's failure to comply with Federal Acquisition Regulation § 15.1001(b)(2) (FAC 84-13), which requires the contracting officer to inform each unsuccessful offeror in writing, prior to award, of the apparent successful offeror unless the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. The purpose of this preaward notice is to afford unsuccessful offerors an opportunity to challenge the small business status of the proposed awardee. Fidelity Technologies Corp., B-234517, June 15, 1989, 68 Comp. Gen. _____, 89-1 CPD ¶ 565; Hamilton Enters., Inc., B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604.

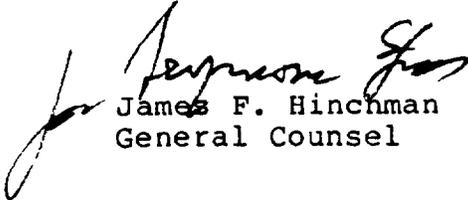
The agency concedes that the contracting officer did not comply with the preaward notice requirement and that he did not, at that time, make a determination of the urgency of the requirement. Nonetheless, the FAA maintains that its failure to do so was not prejudicial to either protester because the urgent and compelling finding which authorized continued performance of the contract notwithstanding the pending protests can now be used to effectively waive the requirement for preaward notice of award.

We will only sustain a protest for failure to comply with this preaward notification requirement if the protesters are prejudiced by this failure. Automation Management Consultants, Inc., B-231540, Aug. 12, 1988, 88-2 CPD ¶ 145. Both protesters argue that the agency's failure to give the preaward notice was prejudicial because they allege that FEMCOR is not eligible as a small business under this solicitation.

However, we think prejudice can only be shown so as to justify sustaining a protest of an agency's failure to give proper notice if the Small Business Administration (SBA) has actually found the awardee other than small. See Fidelity Technologies Corp., B-234517, *supra*; Maximus, Inc., 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467. Here, unlike in Fidelity and Maximus, the protesters elected not to protest FEMCOR's size status to the SBA when they were apprised--albeit after award--of the identity of the awardee. Thus, SBA has made no determination regarding FEMCOR's size. Moreover, our review of the record does not indicate that FEMCOR was other

than small. See Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5. Consequently, we find no evidence that the protesters were prejudiced by FAA's failure to adhere to FAR award notification requirements.

The protests are denied.


James F. Hinchman
General Counsel