



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Saturn Construction Co., Inc.

File: B-236209

Date: November 16, 1989

DIGEST

1. Where protester's past performance and experience are evaluated in part using information obtained by the agency through contact of protester-furnished references, agency is not required to permit protester to rebut that information since it is historical in nature and protester thus is unlikely to be able to make a significant contribution to its interpretation.

2. Agency reasonably found awardee's proposal to be technically acceptable where alleged shortcomings in initial technical and price proposals and subcontracting plan are unsupported by the record or were corrected in awardee's best and final offer.

3. Where request for proposals provided that, in evaluating proposals, technical quality could be the deciding factor if prices were essentially equal, agency properly awarded on the basis of higher-rated, higher-priced proposal since it reasonably determined that technical advantage associated with the higher-rated proposal was worth the difference in price.

DECISION

Saturn Construction Co., Inc., protests the award of a contract to Jos. L. Muscarelle, Inc., under request for proposals (RFP) No. GS-02P-89-CUC-0008(N), issued by the General Services Administration (GSA) for construction of the Martin Luther King, Jr. Federal Building and United States Courthouse in Newark, New Jersey. Saturn contends that it was denied meaningful discussions and that GSA otherwise improperly awarded the contract to Muscarelle.

We deny the protest.

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According to the RFP, offerors' technical proposals were to be evaluated on the basis of four factors listed in descending order of importance:

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|---|--------|
| "(a) Past Performance on Similar Projects | [35%] |
| (b) Past Experience on Similar Projects | [30%] |
| (c) Management Approach | [20%] |
| (d) Key Personnel | [15%]" |

With regard to the past performance factor, offerors were required to list all comparable projects within the last 5 years which were completed or still underway, along with references who would be contacted to evaluate the offeror's past performance and ability. With regard to the past experience factor, offerors were required to provide certain information on 5 comparable construction projects substantially completed within the past 5 years. Offerors also were advised that they must meet certain minimum requirements on these two factors or be eliminated from the evaluation process. Specifically, at least three of the prior "performance" projects had to be comparable in cost and scope to the solicited project and the majority of the references listed had to describe the offeror's performance as satisfactory and state that they would definitely contract with the offeror again. Similarly, a minimum of three of the "experience" projects had to be at least three stories in height, 250,000 square feet in area, and be (in order of importance) a courthouse; museum, hotel, library, or hospital; or office building.

The RFP also stated that technical quality and price were equally important. Thus, when technical proposals were evaluated as essentially equal, price could be the deciding factor. Likewise, when price proposals were evaluated as essentially equal, technical quality could be the deciding factor.

Four offers were submitted and all were evaluated as being within the competitive range. Discussions were held with all four concerns, but each was advised that no discussions would be held on the matters of past performance and experience. After review of each offeror's best and final offer (BAFO), the source selection evaluation board awarded Muscarelle the highest technical score (816.7) and Saturn the second highest score (660) out of a possible score of 1,000.

1/ Offerors were not advised of the numerical weights applied to each factor.

Although Saturn's evaluated price (base price plus all options) of \$46,380,000 was \$187,600 lower than Muscarelle's evaluated price of \$46,567,600, the evaluation board determined that the difference of only 0.4 percent made the prices essentially equal. Thus, they decided that technical quality would be the determining factor and recommended award to Muscarelle. The source selection authority approved the board's recommendation and award was made to Muscarelle. Saturn then filed its protest with our Office.

Saturn contends that GSA did not conduct meaningful discussions with it in that GSA failed to provide it with an opportunity to rebut negative information obtained from its references.^{2/} GSA maintains, as it advised Saturn during discussions, that the information regarding past performance and experience was historical in nature, not subject to change, and thus not a matter for discussions.

In negotiated procurements, agencies generally must conduct meaningful discussions, that is, discussions that are as specific as practicable, with all responsible offerors within the competitive range, prior to awarding a contract. Employment Perspectives, B-218338, June 24, 1985, 85-1 CPD ¶ 715. The degree of specificity required in conducting discussions is not constant, however, and is primarily a matter for the procuring agency to determine. Id. Our Office will not question an agency's judgment in this area unless it lacks a reasonable basis. Further, we have held that where, as part of the technical evaluation of offers, offerors have been required to furnish references on prior experience and are aware that these references may be contacted, the contracting agency may consider the replies of the references without being required to seek the offeror's comments concerning the information. Id.; Schneider, Inc., B-214746, Oct. 23, 1984, 84-2 CPD ¶ 448.

^{2/} In a related issue, Saturn contends that it was improper for the agency to consider information obtained from its references because the agency should only have considered information submitted with the proposal. We find nothing improper, where, as here, the agency obtains references from offerors as part of the proposal process, especially where the RFP advises offerors of the agency's intention to contact those references as part of the evaluation process. Moreover, Saturn's complaint must be rejected as untimely since it concerns an alleged solicitation impropriety and any such protest must be filed prior to the closing date of the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989).

Under the circumstances of this case, we believe meaningful discussions were conducted. Saturn received lower scores on "past performance" because two of the seven references contacted did not state that they would definitely contract with Saturn again and at least three references noted that Saturn had been behind schedule or slightly late in completing milestones. It received lower scores on "past experience" because two of the five projects listed were not complete and most of the projects listed evidenced experience with office buildings, the lowest-ranked experience listed in the RFP. We agree that these essentially involved matters of historical information, not subject to change, and therefore the agency was not required to discuss such perceived weaknesses with Saturn. See Employment Perspectives, B-218338, supra.

Our conclusion is not changed by the decision in Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984).^{3/} In Delta Data, the contracting agency had lowered an offeror's technical evaluation score, after reviewing and drawing negative inferences from financial information furnished by the offeror, without providing the offeror an opportunity to discuss it. The Court of Appeals held that with regard to new information, an agency is not required to go back to the offeror unless the new information was of "uncertain import, is likely to determine the award, and is of such a nature that the offeror is likely to be able to make a significant contribution to its interpretation." 744 F.2d at 203. Unlike the situation in Delta Data, where the offeror was likely to be able to make a significant contribution to the

^{3/} We also believe this case is distinguishable from Sperry Corp., GSBICA No. 8208-P, 86-1 BCA ¶ 18,574 (January 27, 1986). In Sperry, the procuring agency's technical evaluation team actively sought "candid" information regarding alleged processing problems with the offeror's equipment, and having obtained it, provided no opportunity to refute it. Citing Delta Data, the General Services Administration Board of Contract Appeals found such activity "repugnant" and granted Sperry's protest. Unlike the situation in Sperry, however, here, Saturn provided the references, was aware they would be contacted regarding its prior performance, and in discussions, accepted without objection, the government's statement that information pertaining to the performance and experience factors would not be discussed because they were historical matters not subject to change.

interpretation of its own financial information, Saturn was not likely to be able to make such a contribution. Here, the information concerns whether a reference would again contract with Saturn; whether Saturn had timely met its milestones; and whether projects listed by Saturn were complete and met the comparability criteria set forth in the RFP. Thus, we perceive no error in the agency's failing to discuss these matters with Saturn.

Saturn next argues that GSA was arbitrary and capricious in accepting, and in scoring higher, Muscarelle's proposal because Muscarelle failed to provide adequate scheduling information; failed to submit a proper plan for treatment of certain architectural features; and failed to identify as many key personnel as Saturn.

It is not the function of our Office to evaluate proposals de novo. Rather, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria, since the determination of the relative merits of competing proposals is primarily a matter of administrative discretion. Unisys Corp., B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. Based upon our review of the record, we are not persuaded that GSA's acceptance of Muscarelle's proposal, as supplemented by its BAFO, was unreasonable. The agency found Muscarelle's scheduling, architectural treatments, and identification of key personnel to be satisfactory and Saturn's mere disagreement with the agency's judgment in scoring Muscarelle's and Saturn's proposals does not establish that the evaluation was unreasonable. Id.

Saturn also alleges other deficiencies which should have required rejection of Muscarelle's proposal. First, Saturn claims that Muscarelle's offer did not identify the required references or comparability data on prior experience. However, our review of Muscarelle's complete proposal reveals that all required information was submitted.

Second, Saturn claims that Muscarelle's offer on two of the options appear to have been switched by mistake and that the options are unbalanced. We note, however, that Saturn is not an interested party to raise the issue of such a mistake. See Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275. In any event, Muscarelle's apparent mistake in switching prices for two options was identified during discussions and corrected in Muscarelle's BAFO. Further, although Muscarelle's BAFO prices for the options are greater than Saturn's, we do not find that they are either mathematically or materially unbalanced. See

International Terminal Operating Co., Inc., B-229591;
B-229591.2, Mar. 18, 1988, 88-1 CPD ¶ 287.

Third, Saturn observes that Muscarelle's original subcontracting plan was incomplete and alleges that GSA allowed Muscarelle to complete the plan after receipt of BAFOs. Again, our review of the record reveals that deficiencies in Muscarelle's subcontracting plan were the subject of discussions and were corrected as part of its BAFO. We find no evidence that GSA improperly allowed Muscarelle to supplement its plan after submission of its BAFO. Further, even if GSA had allowed such supplementation, a subcontracting plan is a matter of responsibility which may be submitted at any time prior to award of the contract. See KASDT Corp., B-235889, July 19, 1989, 89-2 CPD ¶ 63.

Saturn also contends that GSA violated its own formal source selection procedures as well as Federal Acquisition Regulation (FAR) § 15.608 (1984) in failing to provide sufficient facts and technical rationale for distinguishing between Muscarelle's and Saturn's proposals with regard to management approach and key personnel. Based upon our review of the record, we conclude that the agency's initial and final evaluation reports meet the applicable requirements. These reports describe in sufficient detail the major strengths and weaknesses of the various offerors and explain the agency's rationale for finding Muscarelle's proposal technically superior to Saturn's proposal. In particular we note that with regard to management approach and key personnel, the agency found the offerors' differences to be negligible and based its award decision on Muscarelle's superior proposal with regard to prior performance and experience.

Based on the absence of any evidence of impropriety in the record, we find GSA's award decision to be reasonable and in accordance with the basis set forth in the RFP. Since Muscarelle's evaluated price was only \$187,600 or 0.4 percent higher than Saturn's, we believe GSA reasonably found the prices essentially equal. Thus, in view of Muscarelle's strong technical advantage, we find the agency was reasonable in awarding the contract on the basis of technical considerations. Moreover, notwithstanding the finding that the prices were essentially equal, it is plain from the record that GSA found that the difference in technical quality between the two proposals outweighed the difference in price. Where, as here, the RFP provides for award based equally on technical merit and price, the agency has the discretion to determine whether the technical advantage associated with a higher-rated, higher priced proposal is

worth the difference in price. Instruments & Controls Serv. Co., B-235197, July 31, 1989, 89-2 CPD ¶ 91.

Accordingly, the protest is denied.

for *James F. Hinchman*
James F. Hinchman
General Counsel