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## Decision

**Matter of:** Chemonics International, Inc.

**File:** B-282555

**Date:** July 23, 1999

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Robert A. Mangrum, Esq., and Jason I. Hewitt, Esq., Winston & Strawn, for the protester.

Kenneth A. Martin, Esq., and Jennifer C. Adams, Esq., Martin & Rylander, for Planning and Development Collaborative International, Inc., an intervenor.

Gary Winter, Esq., and A. Lindsey Crawford, Esq., Agency for International Development, for the agency.

Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Where protester and awardee initially proposed comparable levels of effort for a particular category of key personnel and, during discussions, the agency provided awardee, but not protester, with detailed advice regarding the importance of increasing the proposed levels of effort for those personnel, and also provided only the awardee the opportunity to submit multiple iterations of its proposal and to receive detailed agency feedback on each iteration, the agency's conduct improperly favored one offeror over another.

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### DECISION

Chemonics International, Inc. protests the U.S. Agency for International Development's (USAID) award of a contract to Planning and Development Collaborative International, Inc. (PADCO) under request for proposals (RFP) No. 263-98-P-011 to assist recently formed water/wastewater utilities in providing water and wastewater services in Egypt. Chemonics asserts that the agency conducted discussions in a manner which unreasonably favored PADCO, applied unstated evaluation criteria, and awarded the contract on the basis of PADCO's proposal which failed to comply with material RFP requirements.

We sustain the protest.

## BACKGROUND

The objective of the protested procurement is to increase access to sustainable water and wastewater services for the 7.5 million people in the Egyptian governorates of Fayoum, Beni Suef and Minia, through technical assistance aimed at strengthening the institutional capabilities of the recently-formed water/wastewater organizations in those areas. Specifically, performance of the contract is intended to: increase revenues to recover operation and management costs; enhance autonomy in managing utility assets; and expand capacity to deliver services. RFP at 2, 11.

The RFP, issued on March 15, 1998, contemplated the award of a cost-plus-award-fee contract for a 60-month period. As amended, the RFP established a May 17 closing date for the submission of initial proposals.

The solicitation identified three phases of contract performance, listed specific tasks to be performed, and requested that each offeror describe its proposed technical approach.<sup>1</sup> With regard to personnel, the RFP stated:

USAID will not dictate in the RFP the number and composition of specialists to be fielded, but will be interested in soliciting creative proposals for carrying out the scope of work, including proposals regarding the appropriate mix of specialists, schedule for deploying different members of the team, and strategy for establishing field offices.

RFP at 38.

Although the RFP did not establish required personnel levels, the RFP did establish certain minimum requirements applicable to various categories of personnel that the agency anticipated offerors would propose. Under the heading “Key Expatriate Positions,” the RFP required that the person proposed to serve as “Chief of Party”<sup>2</sup>

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<sup>1</sup> The RFP’s required tasks included: development of water metering programs, strengthening of operations and maintenance capabilities, development of capabilities to reduce water losses and waste, and strengthening of finance and revenue capabilities.

<sup>2</sup> The RFP described the functions of this position as that of a project manager, requiring that the Chief of Party “shall be the senior and official representative of the Contractor in communicating with USAID/Cairo and the three authorities . . . [and] shall be responsible for conceptualizing the overall technical approach and implementation strategy.” RFP at 38.

must have “extensive overseas management experience,” more specifically stating that “10 years experience in utility management and/or operations, with 5 years in a supervisory capacity . . . is required.” Id. Regarding other key expatriate personnel proposed, the RFP provided, among other things, that “[a] minimum of BSc. [Bachelor of Science] level degrees are required.” Id.

Section M of the RFP provided that evaluation of an offeror’s “Chief of Party” and “Other Expatriate Staff” would account for 30 of a possible 100 technical points.<sup>3</sup> RFP at 133-34. Offerors were advised that “technical proposal merits are considered significantly more important than cost,” but cost was not assigned a numerical weighting. RFP at 132.

Four proposals, including those of Chemonics and PADCO, were submitted by the May 17, 1998, closing date. These proposals were evaluated by a technical evaluation committee (TEC) which assigned the following scores:

<u>Offeror</u>	<u>Technical Score</u>
Chemonics	[deleted]
PADCO	[deleted]
Offeror A	[deleted]
Offeror B	[deleted]

TEC Memorandum, July 8, 1998, at 1.

Chemonics’ initial proposed cost was [deleted]; PADCO’s initial proposal proposed cost was [deleted]. The agency’s independent cost estimate was approximately [deleted].

Based on the evaluation of initial proposals, the contracting officer determined that Chemonics’ and PADCO’s proposals were the most highly rated and established a competitive range consisting of only those two proposals. By letters to each offeror dated July 9, the contracting officer advised Chemonics and PADCO of their inclusion in the competitive range, requested that each plan to participate in oral

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<sup>3</sup> The RFP stated that evaluation of all proposed personnel, including Egyptian staff, would account for 40 points; evaluation of the proposed technical approach would account for another 40 points; evaluation of firm capabilities and management would account for 10 points; and evaluation of past performance would account for the final 10 points. RFP at 133-34.

discussions with agency personnel in mid-August, and identified certain concerns regarding their technical proposals.<sup>4</sup>

By letters to the agency dated July 23 and July 29, respectively, Chemonics and PADCO each responded by advising the agency that it was preparing for the mid-August oral discussions. With their responses, each offeror also provided written responses to the questions and concerns the agency had raised.

Thereafter, the agency conducted oral discussions with Chemonics on August 23 and with PADCO on August 26. However, prior to these discussions, the agency sent PADCO another letter, dated August 18, advising PADCO that the agency was “having difficulty determining [deleted].” Letter from Contracting Specialist to PADCO (Aug. 18, 1998). That letter specifically requested that PADCO “construct two new [cost] tables,” and gave explicit instructions as to how each table should be composed and what information each table should contain.”<sup>5</sup> No similar letter was sent to Chemonics, and the agency’s written questions concerning cost issues were not presented to Chemonics until after oral discussions, at which time additional cost questions were also presented to PADCO.

Following oral discussions, the TEC summarized its evaluation of the offerors’ proposals in a memorandum dated August 30. In this memorandum, the TEC recommended that the agency “proceed with cost negotiations only with Chemonics,” noting general approval of Chemonics’ proposal.<sup>6</sup> In contrast, the TEC was highly critical of PADCO’s proposal—specifically regarding the level of effort PADCO proposed for key expatriate personnel—stating:

PADCO’s [deleted] indicated to us that we do not share a common understanding of the best approach to prepare these utilities for USAID’s proposed [deleted] construction program. [Deleted.] We found their answers to questions regarding their [deleted] unconvincing and unclear, suggesting that they did not have a well-defined technical basis for their cost proposal.

Memorandum from TEC to Contracting Officer at 1 (Aug. 30, 1998).

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<sup>4</sup>Each offeror was asked to confirm the availability of, and provide references for, certain personnel it had proposed. Additionally, PADCO was advised of the agency’s concern with PADCO’s [deleted] and PADCO’s [deleted]. Letter from Contracting Officer to PADCO at 1-2 (July 9, 1998).

<sup>5</sup>The letter stated: [deleted].

<sup>6</sup>The TEC did suggest that Chemonics could make minor cost reductions in connection with certain specified subcontracts.

The contracting officer rejected the TEC's recommendation to proceed with cost negotiations only with Chemonics, determining instead to conduct further discussions with both offerors. In a letter to PADCO dated October 14, the contracting officer provided PADCO with a detailed summary of the agency's concerns, specifically focusing on the [deleted] PADCO had proposed for its [deleted]. The October 14 letter explicitly set forth the agency's concerns that PADCO had proposed its [deleted] stating:

It is strongly suggested that PADCO have an expatriate Chief of Party (COP) for the full duration of the contract as COP presence is needed for the full range of contract phase-down and close-out activities. [Deleted.] The Deputy Chief of Party may be proposed for a shorter period of time than 60 [person months] but 3 years is not acceptable. Note that 60 [person months] is preferred by the TEC. Again, this person should be an expatriate or an individual fully authorized to represent PADCO's interests in all aspects of contractor performance.

The TEC feels that the O&M [Operations and Maintenance] Advisor and the Metering Advisor are the backbone of the program and that the contractor should propose expats for the full term of the contract. This is an institutional building program and full time expat advisors are highly desired by the TEC.

. . . . .

PADCO is requested to fully respond to the above in writing within 7 working days of receipt of this letter.

Letter from Contracting Officer to PADCO at 1 (Oct. 14, 1998).

The contracting officer also prepared a discussion letter to Chemonics dated October 15. Although the TEC's August 30 memorandum indicated general approval of Chemonics' proposal, the record shows that Chemonics' proposed levels of effort for its key expatriate personnel were comparable to PADCO's. Specifically, Chemonics proposed a Deputy Chief of Party for [deleted], and that Chemonics proposed only [deleted] to perform the O&M advisor and metering advisor functions (compared to PADCO's [deleted]). In this regard, the agency would subsequently state that [deleted]. Memorandum from TEC to Contracting Officer (Jan. 10, 1999). Nonetheless, the agency never advised Chemonics—as it had PADCO—that the agency “preferred” that the Deputy Chief of Party be proposed for the full 60-month period, or that proposing a Deputy Chief of Party for some reduced period was “not acceptable.” Similarly, the agency's discussions with Chemonics provided no hint that the agency considered Chemonics' proposed levels of effort for the O&M advisor and the metering advisor positions to be “well below USAID's estimate,” nor that the agency considered these functions to be “the backbone of the program” or that offerors “should propose expats [to fill these positions] for the full term of the

contract.” On the contrary, the October 15 letter, consisting of a single page, advised Chemonics generally that “[your] cost proposal is above the [government] estimate.” The only specific questions presented to Chemonics in the October 15 letter dealt with three subcontracts, involving local and/or short term staffing, which the agency viewed as reflecting excessive proposed effort.<sup>7</sup>

Finally, in contrast to the contracting officer’s direction that PADCO “respond . . . in writing within 7 working days,” the contracting officer’s October 15 letter to Chemonics stated that it “may address these comments in a new submission or respond to them in their BAFO.”

On October 25, PADCO responded to the contracting officer’s October 14 letter with a submission [deleted],<sup>8</sup> which included a revised [deleted], several revised [deleted], various supplements to the [deleted], and a revised [deleted]. The contracting officer’s October 15 letter to Chemonics did not state that Chemonics should “respond . . . within 7 days”—as his letter to PADCO did—and Chemonics did not submit a response to the agency at that time.

The contracting officer forwarded PADCO’s submission to the TEC, requesting evaluation and feedback. In a memorandum dated November 1, the TEC provided its assessment of PADCO’s proposal, as supplemented by the October 25 submission, stating that, while PADCO had responded to the agency’s specific requests, “PADCO’s [deleted] makes us uncertain that their revised strategy is based on considered understanding of the required effort.” Memorandum from TEC to Contracting Officer at 1 (Nov. 1, 1998). The TEC also noted “some discrepancies” between the levels of effort indicated in PADCO’s staffing tables and those reflected in its revised budget. *Id.* at 6.

Thereafter, the contracting officer sent yet another discussion letter to PADCO, dated November 25. That letter outlined the TEC’s concerns regarding PADCO’s [deleted], PADCO’s [deleted], the [deleted], and PADCO’s [deleted]. For each area of concern, the contracting officer identified specific examples of portions of the

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<sup>7</sup>The contracting officer expressly acknowledged in his negotiation memorandum justifying the subsequent selection of PADCO that the October 15 written discussions with Chemonics “only dealt with the costs of their subcontracts.” Contracting Officer’s Memorandum of Negotiations at 7.

<sup>8</sup>As initially issued, section L.14 of the RFP provided that: “The Technical Proposal in response to this solicitation should not exceed forty (40) pages (exclusive of C.V.s and Annexes). C.V.s are limited to three (3) pages per C.V. Annexes should not exceed thirty pages (30).” RFP at 127. RFP Amendment No. 1 deleted the 30-page limitation on annexes.

proposal that needed to be corrected or revised, including PADCO's "fail[ure] to [deleted], failure to [deleted], and discrepancies [deleted]. Again, the contracting officer established a deadline for PADCO's response, advising it to "address the above in a written submission no later than December 10, 1998." Letter from Contracting Officer to PADCO (Nov. 25, 1998).

On December 10, PADCO responded with a submission [deleted], providing additional responses to the agency's questions and criticisms. With its submission, PADCO noted: "We have benefited immensely from the TEC's very thoughtful observations throughout the discussion phase of this procurement." Letter from PADCO to Contracting Officer (Dec. 10, 1998). The contracting officer again provided this submission to the TEC for evaluation and feedback.

By a December 14 e-mail transmission, the TEC advised the contracting officer that, "PADCO's response to our previous concerns is acceptable, and we can go ahead with the BAFO now."

By letters to PADCO and Chemonics dated December 15, the agency requested the submission of final revised proposals by December 22. The letter to Chemonics provided no information regarding the content of its final proposal, other than the advice to "please review previous USAID comments, specifically the letter dated October 15, 1998 concerning your cost proposal." The letter to PADCO similarly advised that it should review previous USAID comments, and also advised that PADCO's [deleted]—as altered by its submissions following oral discussions—[deleted], and specifically suggested that PADCO "please review [deleted]."

PADCO's final revised proposal reflected the multiple rounds of feedback it had received in response to the various iterations of its proposal requested by the agency. For example, PADCO's final proposal offered to provide [deleted]. In contrast, Chemonics appears to have responded to the agency's advice that its proposal [deleted], in that its final revised proposal included a reduction in [deleted].

By memorandum dated January 10, 1999, the TEC summarized its evaluation of the final revised proposals, stating:

In general, PADCO submitted a much stronger proposal than before, while Chemonics has made more cuts [deleted] than we regard as appropriate. It is evident that PADCO has benefited from the several opportunities afforded to them to respond to our concerns . . . . Since Chemonics has not been given the same opportunity to refine their proposal as PADCO . . . we request that you [the contracting officer] allow them to respond to this assessment of new weaknesses in their proposal.

Rejecting the TEC's recommendation, the contracting officer labeled Chemonics' proposal as "technically deficient" and "unacceptable," Memorandum of Negotiations at 12, and selected PADCO's proposal for award.

PADCO proposed a final cost of [deleted]; Chemonics proposed a final cost [lower than PADCO's final cost]. Based on the contracting officer's determination that Chemonics' proposal was unacceptable, no actual cost/technical tradeoff was performed. The contract with PADCO was awarded on March 4. This protest followed.

## DISCUSSION

Chemonics first protests that the agency conducted discussions in a manner that unreasonably favored PADCO. We agree.

Federal Acquisition Regulation (FAR) § 15.306(d)(3) provides that contracting officers shall conduct discussions with each competitive range offeror regarding aspects of its proposal that could, in the opinion of the contracting officer, be altered or explained to materially enhance the proposal's potential for award, but expressly makes this requirement subject to the limitations contained in FAR § 15.306(e), which provides that discussions may not be conducted in a manner which "[f]avors one offeror over another."

Here, as discussed above, the record shows that Chemonics and PADCO initially proposed substantially equivalent levels of effort for key expatriate personnel—specifically, [deleted]. Nonetheless, while advising PADCO that a specific level of effort proposed for the Deputy Chief of Party was "not acceptable," that the expatriate metering advisor and O&M advisor were considered to be "the backbone of the program," and that PADCO "should propose expats [to fill these positions] for the full term of the contract," the agency provided no similar information to Chemonics. Although the agency has expressly acknowledged that it believed "Chemonics' original estimate of needed long-term expatriate engineering staff [was] well below USAID's estimate," the only discussions conducted with Chemonics concerning cost issues were directed at reducing Chemonics' proposed levels of effort, not increasing them.

Finally, following submission of initial proposals and oral discussions, the agency twice requested revisions from PADCO, effectively requiring that PADCO submit completely revised proposals, each time providing PADCO with detailed evaluations of those submissions, including specific suggestions and examples of discrete portions of PADCO's proposal that needed to be corrected or revised. No similar agency input was provided to Chemonics.

The agency has offered no reasonable explanation regarding the basis for the facially unequal and misleading discussions that it conducted with Chemonics.<sup>9</sup> On the record here, as discussed above, we find that the agency conducted discussions in a manner that unreasonably favored PADCO over Chemonics and, thus, the agency failed to comply with FAR § 15.306(e).<sup>10</sup> The agency's actions in this regard were particularly prejudicial in light of the contracting officer's ultimate determination that Chemonics' proposal was technically unacceptable due, in large part, to evaluation of the specific portions of Chemonics' proposal that would likely have been affected, if the agency had conducted discussions with that firm that were comparable to those conducted with PADCO.

The protest is sustained.

#### RECOMMENDATION

We recommend that the agency reopen negotiations, conduct meaningful discussions with both offerors, request final revised proposals, and evaluate those proposals consistent with the stated solicitation requirements. In the event the RFP does not reflect the agency's actual requirements or the evaluation factors on which the agency intends to rely, the solicitation should be appropriately modified prior to these recommended actions. If, as a result of this reevaluation, Chemonics' proposal is selected for award, the agency should terminate PADCO's contract for the convenience of the government and make award to Chemonics. We also recommend that Chemonics be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should

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<sup>9</sup>Chemonics complains that the agency was improperly motivated by unstated evaluation criteria, noting that agency's documentation of its initial evaluation of proposals listed the following "weakness" attributed to Chemonics' proposal:

Chemonics is already implementing two long-term contracts for USAID/Cairo's Water/Wastewater Division . . . . Lack of competition could raise costs and limit USAID's management flexibility.

Memorandum from TEC to Contracting Officer at 2 (July 8, 1998).

In light of our determination that the agency's discussions were conducted in a manner contrary to the FAR requirements, we need not reach any conclusion as to whether the agency's concerns about Chemonics' other contracts were improperly considered in the source selection decision.

<sup>10</sup>The record also shows that the agency waived the RFP requirement that proposed key expatriate personnel possess, at a minimum, a degree at the "BSc. level." Prior to reopening negotiations, the agency should determine whether this requirement is consistent with its minimum needs and, if not, amend the RFP.

**submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.**

**Comptroller General  
of the United States**