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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: ABIC Ltd.

File: B-286460

Date: January 12, 2001

Kurt M. Rylander, Esq., for the protester.
Lafayette N. Johnson, Esq., and Paul D. Metrey, Esq., Federal Emergency Management Agency, for the agency.
Paul E. Jordan, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of exclusion of protester's proposal from the competitive range is denied where the evaluation was conducted in accordance with the evaluation criteria announced in the solicitation, and the record supports the evaluators' conclusions and provides no evidence of bias.

DECISION

ABIC, Ltd., doing business as femaINSPECTOR.com, protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. EMW-2000-RP-0018, issued by the Federal Emergency Management Agency (FEMA) for inspection services in disaster areas. ABIC contends that its proposal was improperly eliminated based on an unreasonable, biased evaluation.

We deny the protest.

BACKGROUND

Pursuant to the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5221 et seq. (1994), FEMA is authorized to provide assistance to applicants for grants in presidentially declared disasters and emergencies. Once a disaster is declared, affected persons are instructed to apply for assistance. Their applications are then forwarded to contractor inspectors who collect information on disaster-related expenses, which will enable the agency to determine the type and amount of disaster assistance to which applicants are entitled. The RFP contemplated the award of two or more indefinite-quantity, fixed-price contracts, for a 1-year base period, with 4 option years. Offerors were required to submit a "limited written technical

proposal,” and to make an oral presentation (required in lieu of a detailed written technical proposal), which were to be based on two scenarios, one mandatory and one optional.¹

Award was to be made to the offerors whose proposals were considered most advantageous to the government based upon technical and price factors, with technical factors significantly more important than price. RFP § M.2.

The following technical factors and subfactors were specified (with weights, on a scale of 100 possible points): (1) technical approach and understanding, 40 points (including phase-in (5 points), operations (20 points), and quality control (15 points)); (2) corporate experience (5 points) and past performance (20 points); (3) staffing and key personnel, 15 points; (4) cultural diversity and customer service, 15 points; and (5) small, disadvantaged business participation, 5 points). RFP § M.4.

Eight offerors, including ABIC, submitted written proposals and subsequently made oral presentations. The source evaluation board (SEB) evaluated the initial written proposals and the oral presentations for scenario No. 1 as follows:

Offeror	Technical Score	Adjectival Rating
Offeror 1	92	Superior
Offeror 2	88	Superior
Offeror 3	85	Superior
Offeror 4	77	Acceptable
Offeror 5	75	Acceptable
Offeror 6	72	Unacceptable but susceptible
Offeror 7	59	Unacceptable but susceptible
ABIC	27	Unacceptable

Contracting Officer’s Statement at H. Based on the initial evaluation and recommendation of the SEB, the proposals of Offeror 7 and ABIC were excluded

¹ The mandatory scenario (No. 1) was based on hurricane damage requiring 450,000 inspections to be performed as follows: “While maintaining an average turn around time of 72 hours, the Contractor shall produce 5,000 inspections per day within the first 7 calendar days after the date of the [task order] Briefing, and 7,500 inspections per day by the 14th calendar day following the Briefing and continue at 7,500 inspections per day, on average, until the required number of inspections falls below the required level.” RFP § J, attach. 14. The optional scenario (No. 2) assumed a hurricane resulting in the need for an estimated 800,000 inspections, which were to be performed at a minimum rate of 10,000 per day. Id.

from the competitive range.² After receiving a written debriefing, ABIC filed this protest with our Office.

ABIC asserts that the competitive range determination was flawed because it was based on an erroneous and biased technical evaluation. ABIC specifically challenges each of the evaluated weaknesses in its proposal.

The determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. Dismas Charities, Inc., B-284754, May 22, 2000, 2000 CPD ¶ 84 at 3. Federal Acquisition Regulation (FAR) § 15.306(c) allows an agency to establish a competitive range consisting of only the most highly-rated proposals. Our Office will review an agency's evaluation of proposals and determination to exclude a proposal from the competitive range for reasonableness and consistency with the criteria and language of the solicitation. FAR § 15.305(a); Novavax, Inc., B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 13; SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4.

Based on our review, we find that the evaluation and the resulting decision to exclude ABIC's proposal from the competitive range were reasonable. The agency has provided detailed responses to the protester's allegations which support the assessment of the contracting officer that "even with extensive revision, [ABIC's] proposal would not have a reasonable opportunity for selection." Agency Report (AR), Tab 21. We address the most significant areas of the evaluation below.³

OPERATIONS SUBFACTOR

ABIC challenges its score of 4 (of 20 possible) points under the operations subfactor of the technical approach and understanding factor (under which its proposal received an overall 9 (of 40 possible) points. In this regard, the agency viewed as weaknesses ABIC's proposal to have FEMA make inspection appointments at the time applicants applied for assistance and ABIC's proposed process for handling priority and remote inspections. In ABIC's view, these evaluations were unwarranted because it proposed FEMA's involvement in making appointments only as a "goal," and only with FEMA's agreement, and it clearly explained its priority and remote inspection process.

² None of the proposals was included in the competitive range for optional scenario No. 2.

³ While ABIC provided separate written proposals and oral presentations for each of the scenarios, there was little substantive difference between the proposals and presentations and the evaluations thereof. Thus, we do not separately address the evaluation of scenario No. 2.

Scheduling

The performance work statement (PWS) provides that the contractor will be responsible for scheduling appointments for damage inspections. RFP § C.8.8.1. ABIC's written proposal and oral presentation nevertheless indicated that [deleted]. ABIC characterizes this as simply an alternative, and asserts that its inspectors otherwise will make the appointments as required. However, nowhere in its written or oral proposals does it state that its inspectors will perform this function if FEMA does not approve of ABIC's proposed plan; the only specific discussion in its proposal with respect to appointments not made by [deleted] places the responsibility on [deleted]. Oral Presentation Transcript (Tr.) at 86, 100. While ABIC asserts that the agency should have assumed that it was willing to comply with the PWS requirement that the contractor schedule appointments, ABIC's failure even to acknowledge the PWS requirement in its proposal reasonably was viewed as calling into question the firm's commitment to comply with the specifications in this regard, and therefore reasonably was rated a weakness.

Priority and Remote Inspections

The PWS required that inspections designated by FEMA as priority be completed and reported within 24 hours of notification and that inspections in remote areas be completed within an average of 72 hours. RFP §§ C.8.7.2, C.8.7.3. ABIC proposed that its [deleted] would be responsible for these inspections. However, as noted by the agency, these [deleted] also were to have a number of additional responsibilities under ABIC's proposal, including [deleted]. Contracting Officer's Statement at 18-19. FEMA concluded that ABIC had proposed insufficient [deleted] and that, given the unrealistic workload assigned each [deleted], it was unclear how priority and remote inspections would be successfully performed. We find nothing unreasonable in FEMA's conclusion that ABIC's approach regarding the [deleted] responsibilities would have a negative impact on priority and remote inspections. Accordingly, the agency's downgrading of ABIC's proposal in this area was unobjectionable.⁴

CORPORATE EXPERIENCE AND PAST PERFORMANCE

The RFP advised offerors that their corporate experience would be evaluated with regard to inspection services of a nature similar to the work described in the RFP, with jobs of similar size, scope, complexity, contract type, and period of performance being of particular interest. Past performance was to be evaluated, in part, using questionnaires from up to four references for projects of a comparable or

⁴ Although ABIC's oral presentation indicated that there would be two [deleted] per team (Oral Presentation Tr. at 46), its written proposal indicated a ratio of one [deleted] to each team (Proposal at 3). FEMA determined that either ratio was inadequate in view of the numerous responsibilities assigned to its [deleted].

related nature and complexity to the RFP. RFP § L.13 at L-11, § M.4 at Factor 2. ABIC's proposal received a score of 9 (of 25 possible) points under the corporate experience and past performance factor based on the agency's finding of limited corporate experience, including a lack of experience with mobilizations of a similar magnitude, and the fact that a predecessor firm was "pulled off" of a task due to performance problems. AR, Tab 19, at 40. ABIC asserts that the evaluation in this regard was unwarranted because no offeror possesses experience with a requirement similar in magnitude to scenario No. 1; its own prior experience in fact is "identical" in nature to that in the RFP, with the only difference being in the replacement of manual data collection methods with electronic methods; and its one instance of poor performance occurred 18 years ago. Protest at 18; Comments at 15-16.

The agency reasonably determined that ABIC's written and oral proposals did not provide evidence of corporate experience and past performance sufficient to warrant a higher score. For its corporate experience, ABIC, which had been organized less than 4 months at the time of proposal submission, cited the experience of predecessor firms apparently controlled by ABIC's principal or in which its principal had been a partner. Although this work was somewhat similar in nature to the work contemplated here, it was not similar in magnitude or scope to the scenario No. 1 requirement (450,000 total inspections at rates of 5,000-7,500 per day). While this weakness was assessed against every proposal, we note that the values of the contracts ABIC cited in its written proposal were only [deleted], amounts insignificant in the context of the requirement here, for which it proposed a price of \$126 million (for scenario No. 1). In any case, ABIC's lack of comparable experience and past performance went beyond the scope and size of the requirements. Specifically, none of the four contracts cited by ABIC in its written proposal was recent; the most recent was completed in 1993, while the other three apparently were completed in 1992, 1982, and 1980. Further, ABIC's experience involved primarily manual, written data collection methods, rather than use of the electronic data collection methods—including the Automated Construction Estimation system and handheld computers—required under the RFP. RFP §§ C.1.4, C.6.2, C.8.8.6. Moreover, ABIC's experience was on contracts where FEMA had directed the contractor to provide a specified number of inspectors and supervisors, within a defined period of time, at specific locations; here, in contrast, the RFP required the contractor to manage the effort and achieve the contract performance requirements with limited FEMA direction. The agency reasonably concluded that these prior contracts were not similar to this procurement.

ABIC's past performance evaluation was based on three past performance questionnaires submitted by ABIC's references, all of which concerned performance by predecessor firms with which ABIC's principal was associated. Based on these references, the contracting officer found that ABIC had "performed overall in an acceptable manner in the past [with] [f]avorable and some less than favorable comments." AR, Tab 18 at 1. While ABIC questions the agency's consideration of the

fact that a predecessor firm had been “pulled off” of a task 18 years ago due to performance problems, we note that ABIC itself considered that contract sufficiently relevant to list it in its proposal, and that ABIC itself disclosed the fact that the predecessor firm was pulled off the task. Proposal at 11. Given ABIC’s reliance on the contract in its proposal, it was reasonable for the agency to consider aspects of poor performance under it. Overall, in view of ABIC’s lack of any corporate experience of its own, the limited nature and remoteness in time of the experience and performance of the predecessor firms with which its principal was associated, and the responses to the past performance questionnaire, we find that the evaluation of ABIC’s proposal under this factor was reasonable.⁵

STAFFING AND KEY PERSONNEL

ABIC challenges the evaluation under the staffing and key personnel factor, under which its proposal received a score of 2 (of 15 possible) points. In this regard, FEMA viewed as weaknesses ABIC’s failure to identify the majority of its proposed staff and key personnel, and the fact that the staff and key personnel who were identified had never been tested under a contract as challenging as this requirement. In ABIC’s view, its proposal should have received higher scores based on the [deleted] résumés it submitted for key staff, and ABIC’s proposal to recruit additional staff from the incumbent contractors.

The evaluation under the staffing and key personnel factor was reasonable. The RFP required offerors to submit a draft staffing plan that included descriptions of the offeror’s management systems and organizational structure; staff qualifications, lines of authority and supervision and staffing procedures; the project director’s corporate position and contract authority; the number, experience, qualifications and skills mix of all proposed staff; résumés and statements of relevant experience with comparable operations for key personnel and others responsible to the project

⁵ ABIC contends that the agency was required by FAR § 15.306(b) to discuss with ABIC its adverse past performance record. This argument is without merit. First, by its terms, FAR § 15.306(b)(1)(i) requires discussions only with offerors “whose past performance information is the determining factor preventing them from being placed in the competitive range.” Here, ABIC’s elimination from the competitive range was due to low evaluation scores under all factors; past performance was not the determinative factor. Second, it is clear that ABIC was not prejudiced by the lack of discussions with respect to its past performance; in this regard, the protester has made no showing in its protest submissions that the agency’s evaluation judgments did not accurately reflect its prior relevant performance. Furthermore, even if ABIC’s proposal received the maximum points for this factor—which appears unlikely given the apparently unalterable nature of the identified weakness—its total score would increase only to 43 points, some 29 points below the score of the lowest-ranked offeror in the competitive range.

manager; and the percentage time commitments of staff. RFP § L.13 at L-12, § M.3 at Factor 3. Instead of providing this level of detail for each proposed position, ABIC's proposal identified an individual for only one of the [deleted] key proposed positions--the [deleted]--and only four individuals (including the [deleted]) of a proposed [deleted] member [deleted] team. As for the [deleted] key staff résumés submitted by ABIC, other than the [deleted] team, there was no indication, in either the written or oral proposal, of the role the individuals were to play in the performance of the contract. In any case, as noted by the agency, even if all [deleted] of these individuals were considered part of the [deleted] team, ABIC failed to identify individuals to fill the majority of the identified team positions. Further, although ABIC stated that it planned to recruit the balance of its key staff from incumbents, its proposal did not identify specific incumbent personnel or explain how it planned to obtain their services.

The experience and capability reflected in the [deleted] résumés were also reasonably found to be inadequate. With the exception of the [deleted], the agency asserts, and our review confirms, that the résumés did not contain any indication that the individual had worked, managed, supervised or provided logistical support with respect to any project close to the magnitude of scenario No. 1. Indeed, only a few proposed staff appeared to possess recent management experience with respect to claims adjustment. Given ABIC's failure to identify the majority of its proposed key personnel, its failure even to indicate what positions [deleted] of the [deleted] staff for whom it submitted résumés were to fill, and the relative inexperience of the proposed staff, there is no basis to question the SEB's downgrading of ABIC's proposal in this area.

BIAS

ABIC attributes its low evaluation scores and elimination from the competitive range to the alleged bias of two individuals it claims were members of the SEB--the FEMA project monitor and the contracting officer for a prior inspection services contract under which [deleted] (one of the predecessor firms for which ABIC's principal was the managing partner) filed a claim against FEMA for additional work performed. ABIC claims that, as a result of the actions and statements of the former project monitor and contracting officer, including memoranda described by ABIC as "smoking gun[s]," [deleted] was able to obtain a favorable settlement of the "hotly contested" matter. Comments at 4-5. ABIC concludes that, as a result of their involvement in this matter, they were biased against ABIC, and this affected their evaluation of ABIC's proposal.

Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. Further, where a protester alleges bias, it not only must provide credible evidence clearly demonstrating a bias against the protester or for the awardee, but

also must demonstrate that this bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17.

ABIC has furnished no evidence to support its allegations; it merely infers bias based on its assumption that the two agency officials resented [deleted] pursuit of its cost claim and improperly skewed the evaluation against ABIC based on that resentment. Contrary to ABIC's allegation, the record indicates that the former contracting officer was not an SEB member and played no part in the evaluation of ABIC's proposal; rather, he simply reviewed a proposed procurement plan and draft RFP for the current procurement.⁶ Although the former project monitor was a member of the SEB, he has denied any bias, improper motive, prejudice, or favoritism for or against any offeror, including ABIC (or its principal). Declaration at ¶ 5. He specifically denies that the litigation was "emotionally charged," or that he was personally embarrassed or suffered any repercussions as a result of his involvement in the litigated matter. Declaration at ¶¶ 10-11. He further denies having any authority or influence over the other SEB members. Declaration at 6-7. Likewise, the other members of the SEB submitted declarations averring that they independently arrived at their own evaluation conclusions prior to the consensus meeting of the SEB, and that the SEB consensus finding that ABIC's proposal was technically unacceptable represented the unanimous agreement of the SEB members. AR, Tab 24. We conclude that ABIC has presented no evidence that the identified individuals were motivated by bias against ABIC.

In any event, even if bias were apparent, as indicated above, the ultimate inquiry is whether any bias translated into action that unfairly affected the protester's competitive position in the procurement. In this regard, the mere fact that evaluators or source selection personnel may have been involved adversarially with competing offerors in past procurements, without more, does not establish that the agency acted out of bias against an offeror. See, e.g., Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75 at 12-13 (evidence that contracting officer did not expeditiously handle protester's claims under incumbent contract and held negative views regarding the protester's past performance, did not indicate bias); TEAM Support Servs., Inc., B-279379.2, June 22, 1998, 98-1 CPD ¶ 167 at 6 (project officer's disagreement with protester over contract administration matters under prior contract did not show that the officer was biased against protester during evaluation in current procurement); Southern California Eng'g Co., Inc., B-232390, Oct. 25, 1988, 88-2 CPD ¶ 391 at 3 (alleged disparate actions in prior

⁶ Indeed, the former contracting officer declined to complete a past performance questionnaire because of the 6-year lapse since he had worked with ABIC's principal. Instead, he simply noted that the principal had filed some claims for "extras," but had "work[ed] hard to get the job done." AR, Tab 18 at 27. While ABIC asserts that these comments were not uniformly positive, we find no evidence of bias in them.

procurements are not evidence that agency failed to act in good faith in protested procurement). Here, any alleged bias notwithstanding, the merits of ABIC's proposal support the agency's conclusion that the proposal was technically unacceptable.⁷

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

⁷ ABIC also claims that it was prejudiced by the agency's "last minute change in the oral presentation procedures" (Comments at 7) when the agency advised ABIC during the oral presentation that any clarification questions would be limited to matters raised in the oral presentation. The RFP clearly provided that the oral presentation was to be "in lieu of detailed written proposals" and that clarification questions would be limited to points addressed in the presentation. RFP § L.13.B.b. To the extent ABIC thought that the RFP was ambiguous and allowed for a presentation that simply supplemented its written proposal and at which it could solicit and answer any of the agency's proposal questions, it was required to protest any alleged solicitation impropriety prior to the closing date. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2000).