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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218489, B-218489.2, B-218489.3 **DATE:** August 16, 1985

MATTER OF: Mounts Engineering; Department of the Interior--Request for Advance Decision

DIGEST:

1. Although Standard Form (SF) 254, "Architect-Engineer and Related Services Questionnaire," by which architect-engineer (A-E) firms can document their general professional qualifications, need only be updated on an annual basis, SF 255, "Architect-Engineer and Related Services Questionnaire for Specific Project," by which A-E firms can supplement their SF 254 with specific information on the firm's qualifications for a particular A-E project, should contain information which is "current and factual."

2. Contracting agency, which found the two top-ranked architect-engineer (A-E) firms to be "equally preferred," acted improperly when it thereupon requested the firms to submit cost proposals prior to selecting for negotiations the most highly qualified firm. Under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which governs the procurement of A-E services, contracting officials may not consider the proposed fees in ranking the professional qualifications of A-E firms.

3. Where contracting agency (1) failed to hold discussions with three architect-engineer (A-E) firms as to anticipated concepts and the relative utility of alternative methods of approach, as required under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), (2) may have ranked the firms in order of preference based upon out-of-date or misleading information, and (3) improperly requested firms to submit cost proposals prior to selecting for negotiations the most highly qualified firm, agency's post-award decision to conduct discussions with the three A-E

firms initially evaluated as most highly qualified and to reevaluate their qualifications based upon updated information is not objectionable.

4. The details of the contracting agency's proposed corrective action are matters for the sound discretion and judgment of the agency. The inability to achieve total competitive equality in a recompetition or speculation as to the agency's likely bad faith in evaluating the recompetition does not preclude otherwise appropriate corrective action.

5. Where the contracting agency, although receiving notice of a protest within 10 days of contract award, nevertheless allows contract performance to continue on the basis that directing the contractor to cease performance would not be in the best interests of the United States, then GAO, in the event that it determines that the award did not comply with statute or regulation, must recommend corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract.

Mounts Engineering (Mounts) protests the Department of the Interior (Interior), Bureau of Mines' award of architect-engineer (A-E) contract No. S0156015 to Potomac Engineering and Surveying (Potomac). Mounts challenges the agency's determination that Potomac was the firm most highly qualified to perform the required services, the collection of mine subsidence data, and alleges that the agency failed to comply with the requirements set forth in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which governs the procurement of A-E services.

Although Interior contests most of Mount's allegations, it concedes that contracting officials failed to conduct discussions with at least three A-E firms as required under 40 U.S.C. § 543. Accordingly, the agency proposes to reevaluate the qualifications of three of the A-E firms which originally offered to satisfy the agency's requirement, this time conducting the required discussions with the firms. Interior requests an advance decision from our Office, under 31 U.S.C. § 3529 (1982), as to the propriety of its proposed corrective action.

We sustain Mounts' protests and make no objection to Interior's proposed corrective action.

Generally, under the selection procedures set forth in the Brooks Act and in the implementing regulations in the Federal Acquisition Regulation (FAR), subpart 36.6, 48 C.F.R. §§ 36.600-36.609 (1984), the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project. The board then must conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR, § 36.602-3(c). Thereafter, the board recommends to the selection official in order of preference no less than three firms deemed most highly qualified.

The selection official then must make the final selection in order of preference of the firms most qualified to perform the required work. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

By notice published in the Commerce Business Daily (CBD) of September 11, 1984, Interior announced a requirement for the collection of mine subsidence data, i.e., data on ground surface movements caused by underground mining, at Kitt No. 1 Mine in Barbour County, West Virginia. The agency requested interested firms to submit Standard Forms (SF's) 254, "Architect-Engineer and Related Services Questionnaire," by which A-E firms can document their general professional qualifications, and 255, "Architect-Engineer and Related Services Questionnaire for Specific Project," by which A-E firms can supplement their SF 254 with specific information on the firm's qualifications for a particular project. Potomac, Mounts and nine other firms responded to the announcement.

As indicated above, Interior then evaluated qualifications without holding the required discussions with three A-E firms.

In the agency's initial evaluation of qualifications, Potomac received the highest point score, 890 points, while Mounts received the second highest score, 880 points. The next highest point score was only 770 points.

Given the closeness of the evaluation of the two firms, contracting officials determined that Potomac and Mounts were "equally preferred" and therefore requested them to submit cost proposals. When Mounts objected that it was improper to consider cost before the selection of the most highly qualified firm, the contracting officer warned that Mounts might be considered "non-responsive if . . . [it] doesn't submit costs." Mounts thereupon submitted a cost proposal in which it offered to provide the required services at unit prices ranging from 26.7 percent to 100 percent above those offered by Potomac.

Shortly thereafter, the evaluation board was requested to reevaluate the qualifications of Potomac and Mounts in order to select the most preferred firm. Upon reevaluation, the board gave Potomac's qualifications a score of 930 points and Mounts' qualifications a score of 915 points. We note that the contracting officer claims that "[a]t no time did the evaluation board have knowledge of or access to the cost proposals submitted by Mounts or Potomac."

Interior subsequently informed Mounts that it was negotiating with Potomac as the most preferred firm. Mounts thereupon protested to the agency. When the contracting officer denied that protest and instead made award to Potomac, Mounts protested to our Office. Mounts later supplemented its initial protest to our Office with another protest against award to Potomac.

Mounts' Allegations

Mounts questions both the procedures used in evaluating qualifications and the ultimate determination that Potomac was the most highly qualified firm. Mounts argues that the procedures used to select Potomac were improper, alleging that (1) the evaluation board was appointed in bad faith and lacked the expertise required in order to properly evaluate the qualifications for this type of work, (2) that the board failed to conduct discussions with at least three of the most highly qualified firms regarding anticipated concepts and the relative utility of alternative methods of approach, and (3) that the agency should not have requested cost proposals before selecting the most preferred firm. Mounts

also questions the determination that Potomac was the most highly qualified firm, alleging (1) that there was no indication that Potomac could meet the requirement set forth in the CBD announcement for "registered surveyor(s)," since the SF's 254 and 255 initially submitted by Potomac, although indicating that the firm employed "Surveyors," did not indicate that its surveyors were "registered," (2) that the persons listed in Potomac's SF 255 as key personnel for this project either lacked surveying experience or were not employed by the firm, (3) that Potomac lacked experience in subsidence monitoring, (4) that Potomac's "capacity" to perform was less than that of Mounts, (5) that the board gave Potomac credit in the category of past performance on government contracts for current subsidence monitoring work at another site performed at Potomac's own risk and in anticipation of the award of a contract for that site, (6) that the board failed to give Mounts credit for having a local office near the work site and for its allegedly superior knowledge of the locality of the project, (8) and that the reevaluation of qualifications was inevitably influenced by Interior's knowledge of Potomac's lower prices. Finally, Mounts contends that Interior acted improperly in permitting Potomac to amend its SF 255 after award in order to include the resume of a registered surveyor with the resumes of other key personnel.

Interior's Response And Proposed Corrective Action

While Interior contests most of Mounts' allegations, it admits that the board failed to conduct the required discussions with at least three of the most highly qualified firms. The agency also agrees that the SF's 254 and 255 submitted by Potomac were "not up-to-date," although it maintains that it is not unusual for the SF's 254 and 255 submitted by A-E firms to be "out-of-date" and that the Brooks Act and FAR only require that firms be encouraged to submit them on an annual basis.

In view of the failure to conduct the required discussions, Interior proposes to undertake certain corrective measures. In particular, the agency proposes (1) to obtain updated SF's 254 and 255 from the three firms previously rated most highly qualified, (2) to appoint a new evaluation board, comprised of qualified personnel from outside the Bureau of Mines, to conduct discussions with and reevaluate the qualifications of the three firms, and (3) to determine, based upon the results of the above, whether to continue the

contract with Potomac or to terminate it and make award to another firm.

Interior, however, requests that we render an advance decision as to the propriety of its proposed actions.

Deficiencies in the Evaluation Process

The bill which became the Brooks Act was amended specifically to require contracting officials to conduct discussions, regarding anticipated concepts and alternative methods of approach, prior to recommending the firm with which the agency should commence negotiations so as to assure "as extensive an evaluation of alternative approaches and design concepts as is possible without requiring actual design work to be performed." H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 8 (1972). The importance with which this "mandatory" requirement was viewed was apparent from the expectation that the selection authority:

> "through discussions with an appropriate number of the firms interested in the project, will obtain sufficient knowledge as to the varying architectural and engineering techniques that, together with the information on file with the agency, will make it possible for him to make a meaningful ranking."

H.R. Rep. No. 92-1188, pp. 8, 10; Sen. Rep. No. 1165, 92d Cong., 2d Sess. 8 (1972).

As indicated above, Potomac and Mounts were found to be "equally preferred" in the initial evaluation, while the reevaluation resulted in a mere 15 point or 1.6 percent difference between their scores, 930 and 915 points,respectively. Given the closeness of the evaluations, we think that the failure to conduct discussions could have prevented a meaningful ranking and could have deprived Mounts of the opportunity for award.

Furthermore, the evaluations may be open to question on other grounds as well.

Interior concedes that Potomac's SF's 254 and 255 were "not up-to-date." Thus, for example, although Potomac indicated in the SF 255 that it submitted in response to the September 11 CBD announcement of the project that its proposed project manager was currently associated with Potomac, Interior has determined that the individual "has not worked for Potomac since he was hired by the Bureau [of Mines] in July, 1984."

Interior maintains that it "is not unusual for the SF 254 and 255 submitted by A&E firms to be out-of-date" and that A-E firms need only be "encouraged to submit them on an annual basis."

It appears to us, however, that at least SF 255 must be current as of the time of the particular project, since, under the regulations, SF 255 is a means by which a SF 254 already on file can be supplemented with specific information, information which is both "CURRENT AND FACTUAL," as to a firm's qualifications for a particular project. FAR, §§ 36.702(b)(2) and 53.301-255. The policy in favor of encouraging annual statements of qualifications, 40 U.S.C. § 543, is implemented through submission and annual updating of SF 254, not SF 255. FAR, §§ 36.603(d) and 53.301-254.

Moreover, in setting forth the criteria which evaluation boards could use in ranking A-E firms, neither the Act nor the implementing regulations include cost as a consideration. 40 U.S.C. § 543; FAR, §§ 36.602-1 and 36.602-3. On the contrary, the Act provides for the consideration of cost during negotiations, i.e., after the final ranking of firms, 40 U.S.C. § 544, while the regulations prohibit the consideration of fees during discussions, FAR, § 36.602-3(c). Therefore, we question the propriety of requesting cost proposals from A-E firms prior to selecting the most highly qualified A-E firm.

This reflects the congressional intent to continue the traditional method of procuring A-E services by first ranking the firms in order of their qualifications and only then negotiating fees. Congress was convinced that any consideration of the proposed fees as a factor in ranking A-E firms would result in undue pressure on the firms to lower their proposed fees, which in turn would adversely affect the quality of the design by favoring the selection of "the less skilled, and those willing to provide a lower

level of effort." H.R. Rep. No. 92-1188, pp. 2-4; S. Rep. No. 1165, pp. 2-4. Accordingly, it believed that:

> "[i]n no circumstances should the criteria developed by any agency head relating to the ranking of architects and engineers on the basis of their professional qualifications include or relate to the fee to be paid the firm, either directly or indirectly."

H.R. Rep. No. 92-1188, p. 10; Sen. Rep. No. 1165, p. 8.

We recognize that we have previously held that where a source selection official, after taking into account all the evaluation factors, including both price and technical factors, is unable to choose between offerors, then he may properly consider "other factors which are rationally related to a selection decision for the particular procurement," even though as a general rule awards must be based upon evaluation criteria set forth in the solicitation. Group Hospital Service, Inc., (Blue Cross of Texas), 58 Comp. Gen. 263 (1979), 79-1 C.P.D. ¶ 245. Nevertheless, given the legislative mandate to rank A-E firms without reference to compensation, we believe that the fee proposed by a firm is not a factor rationally related to deciding which A-E firm is most highly qualified to provide the required services.

Accordingly, we see no reason to question Interior's basic decision to conduct discussions with the three firms ranked highest in the initial evaluations and to reevaluate their qualifications. The protest is sustained.

Mounts' Objections to Interior's Proposed Corrective Action

Mounts also objects to some portions of Interior's proposal for corrective action. Mounts questions Interior's intention to consider updated SF's 254 and 255, believing that this would give Potomac a competitive advantage as a result of the experience gained and the employees hired in performing the current contract. Mounts also questions whether contracting officials can be trusted to undertake an unbiased evaluation. In any case, it argues that the proposed corrective action does not address all of the allegations that it made.

We have previously held that the details of implementing one of our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. General Electric Information Services Company, B-190632, Sept. 21, 1979, 79-2 C.P.D. ¶ 209. We believe that the agency possesses a similar discretion where, as here, it decides on its own to implement corrective action.

Mounts has not demonstrated that Interior abused this discretion by proposing to consider updated SF's 254 and 255 in the reevaluation of qualifications. Mounts has itself called into question the extent to which Potomac's original SF's 254 and 255 accurately reflected Potomac's qualifications at that time. Moreover, we do not find it to be unreasonable for Interior to seek to assure itself that the firm determined to be most highly qualified upon reevaluation is in fact currently best able to perform under a new contract, since it is a firm's current, as opposed to past, capability which is most relevant to the quality of the work the government can expect to receive. Cf. Beacon Winch Company--Request for Reconsideration, B-204787.2, Aug. 15, 1983, 83-2 C.P.D. ¶ 205 (responsibility, i.e., whether a bidder has the apparent ability and capacity to perform the contract requirements, should be based on the most current information available to the contracting officer); but cf. Richard Sanchez Associates, B-218404.2, B-218474, June 10, 1985, 85-1 C.P.D. ¶ 661 (evaluation of A-E firm's qualifications relative to other offerors differs from a negative responsibility determination).

We recognize that Potomac's competitive position may benefit from the experience gained and from the additional staff employed in performing the current contract. Nevertheless, we do not think it is feasible to preclude Interior in a reevaluation from considering protester's performance under the current contract. Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 C.P.D. ¶ 256.

We also point out that Mounts' contention that the reevaluation will not be conducted in good faith is wholly speculative at this point. Cf. General Electric Information Services Company, B-190632, supra, 79-2 C.P.D. ¶ 209 at 3 (speculation as to proposed corrective action). Interior has proposed selection of a new evaluation board comprised of qualified personnel from outside the Bureau of Mines, and Mounts has failed to demonstrate that the new board will not

fairly evaluate the firm's qualifications. Cf. A.R.E. Manufacturing Co., Inc., B-217515, B-217516, Feb. 7, 1985, 85-1 C.P.D. ¶ 162 (to establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester).

Given Interior's decision to reevaluate qualifications based upon updated SF's 254 and 255, we need not consider Mounts' remaining contentions as to other possible improprieties in the original evaluations, since these are now academic. See Sunbelt Industries, Inc., B-214414, July 20, 1984, 84-2 C.P.D. ¶ 66.

Recommendation

Mounts' initial protest to our Office was filed 8 calendar days after the award to Potomac. Although we notified the agency of the protest on the same day it was filed, Interior permitted Potomac to continue contract performance, finding that it would be "not in the best interest of the Government" to direct Potomac to cease performance.

The bid protest provisions of the Competition in Contracting Act of 1984 § 2741(a), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), require a federal agency to direct a contractor to cease performance where the contracting agency receives notice of a protest within 10 days of the date of contract award unless the head of the responsible procuring activity makes a written finding either that contract performance is in the best interests of the United States or that there are urgent and compelling circumstances significantly affecting the interests of the United States which do not permit waiting for a decision. 31 U.S.C. § 3553(d). Where the agency allows performance to continue without a finding of urgent and compelling circumstances, we must recommend any required corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract. 31 U.S.C. § 3554(b)(2).

By separate letter to Interior, we are therefore recommending that if Interior determines upon reevaluation that a firm other than Potomac is the best qualified firm, the agency should terminate the contract with Potomac and award to that other firm if a mutually satisfactory contract can be negotiated with it pursuant to FAR, § 36.606.

Since qualifications are to be reevaluated with Mounts having a full opportunity to compete, we have not declared Mounts to be entitled to the costs of pursuing its protests, cf. Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 C.P.D. ¶ 508 (recovery of the costs of pursuing a protest inappropriate where protester given an opportunity to compete for award under a corrected solicitation), and of responding to the CBD announcement, 4 C.F.R. § 21.6(e).

Milton J. Socolar

Acting Comptroller General
of the United States