Gilhooly

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harding Lawson Associates, Inc.

File: B-230219

Date: May 20, 1988

DIGEST

Allegation that agency improperly revised its initial ranking of protester as the highest qualified architect-engineer firm is denied where protester does not demonstrate that agency's evaluation was unreasonable based on capacity of protester to perform contract following award of another contract.

DECISION

Harding Lawson Associates, Inc. (HLA), protests the Department of the Navy's selection of Hunter Environmental Services, Inc. (HES), as the firm with which to negotiate an architect-engineer (A-E) contract for design and engineering services for underground storage tanks for Naval and Marine Corps installations in Hawaii. HLA contends that the Navy had no reasonable basis to revise its initial ranking of HLA as the most qualified firm, and violated the Brooks Act, 40 U.S.C. §§ 541-544 (1982), and the Federal Acquisition Regulation (FAR) by selecting HES, which was initially ranked third.

We deny the protest.

Generally, under the selection procedures set forth in the Brooks Act, which governs the procurement of A-E services, and in the implementing regulations in FAR §§ 36.00-36.09, 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.

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The board must then conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service." 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, with the advice of appropriate technical and staff representatives, then lists, in the order of preference, 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. See generally FAR subpart 36.6.

On August 24, 1987, the Navy announced the requirement in a Commerce Business Daily (CBD) synopsis which listed the following criteria for evaluation of A-E firms: (1) professional qualifications of firm and staff proposed for performance of required services; (2) specialized recent experience and technical competence of particular staff members in design and operation of underground storage tanks and associated piping, testing of underground tanks, investigation of subsurface contamination from leaking underground tanks, corrective measures for leaking tanks, and design of corrective measures; (3) knowledge of current environmental and safety laws and regulations (federal, state and county) for underground storage tanks and pollution control; (4) capacity to accomplish the work in the required time; (5) past performance on contracts with government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules; (6) A-E firm's design quality control practices/techniques; (7) location in the general geographic area of the project and knowledge of the locality of the projects, provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; (8) the volume of work previously awarded to the firm by the Department of Defense (DOD) shall also be considered, with the object of effecting an equitable distribution of DOD A-E contracts among qualified A-E firms, including small and small disadvantaged business firms, and firms that have not had DOD contracts.

The CBD notice invited all qualified firms to submit updated standard forms (SFs) 254 and 255 outlining their qualifications for the project. The Navy's preselection board reviewed the forms for the 45 firms which responded to the

announcement. Five firms, including HLA, were recommended by the board for further consideration. One of the firms requested that it be withdrawn from consideration. The selection board then interviewed the remaining four firms, ranked the top three of the four, and recommended in its report that award be made to the first ranked firm, HLA. The Navy official responsible for review and approval of the report, the Commander of the Pacific Division, Naval Facilities Engineering Command, returned the report to the board for reconsideration when he learned that HLA had been selected for another Navy contract to perform environmental investigations and surveys of the Pacific area. The selection board then rated HLA third. The final selecting authority, for reasons unrelated to this protest, returned the report for further consideration. The selection board then issued a new report ranking HES first and HLA second. The final selecting authority approved the report, and HES was notified of its selection by letter dated January 29, 1988.

HLA initially protested that the Navy improperly based its selection of HES upon equitable workload considerations rather than which firm was the most highly qualified, in violation of the evaluation factors, the Brooks Act and the FAR. According to HLA, the selection authority rejected HLA because it had more work for DOD than the other two firms under consideration.

The Navy responds that HLA's initial ranking was not changed based on an application of the policy of equitable distribution of work expressed in selection criterion (8) of the CBD synopsis, but rather because of concern over HLA's capacity to perform the work in the required time, selection criterion (4) of the CBD synopsis. The Navy notes that FAR § 36.602-1(a)(3) requires that agencies shall evaluate each potential contractor in terms of its "capacity to accomplish the work in the required time." According to the Navy, the Commander applied this criterion when he learned that HLA had been selected for another A-E solicitation issued by his command. His consideration of HLA's capacity encompassed the adequacy of its personnel to perform the two A-E contracts, in light of its other current federal contracts and extensive private sector obligations. He considered that the SF 255 listing of key personnel for the protested solicitation included 11 individuals also listed as key personnel in the SF 255 for the other A-E solicitation for which HLA had been selected. The Commander returned the board's recommendation of HLA for reevaluation of HLA's capacity to perform in light of its selection under another solicitation.

HLA comments that there was no discussion with HLA about its capacity to perform both solicitations, that the overlapping key personnel were not required full time on either project, and that there was sufficient surge capacity within HLA to handle any unanticipated peaks in workload. HLA notes that although the same individual was listed on the SF 255's as project manager for both solicitations, HLA told the evaluation board at its interview that another individual was available for the position of project manager. HLA argues that there was no serious effort to assess its capacity to perform both solicitations, and asserts that if there was a legitimate issue of capacity, it should have been selected to perform the protested solicitation, which was for a significantly larger project. HLA concludes that the Navy's decision to rerank HLA because of a pending award under another solicitation was a distribution of work based upon workload and not merit or qualifications.

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Arix Corp., B-195503, Nov. 6, 1979, 79-2 CPD ¶ 331. In this regard, the protester bears the burden of affirmatively proving its case. Engineering Sciences, Inc., B-226871, July 29, 1987, 87-2 CPD ¶ 109.

Further, it is not the function of our Office to make our own determination of the relative merits of the submissions of A-E firms. The procuring officials enjoy a reasonable degree of discretion in evaluating such submissions and we will not substitute our judgment for that of the procuring agency by conducting an independent examination. Y.T. Huang & Associates, Inc., B-217122; B-217126, Feb. 21, 1985, 85-1 CPD ¶ 220.

We find the Navy's decision to rerank the firms reasonable and consistent with the evaluation criteria. It is not improper for an agency to reevaluate a firm's eligibility for selection when it receives new information relevant to the selection process. See Paul F. Pugh and Associated Professional Engineers, B-198851, Sept. 3, 1980, 80-2 CPD ¶ 171. Here the Commander returned to the selection board its rating of HLA when he learned about HLA's selection for work on another solicitation which HLA planned to perform with some of the same key personnel listed for the protested solicitation. That information had not been available to the board when it originally rated HLA, and was clearly related to an evaluation factor, the capacity to accomplish the work in the required time.

Though HLA argues that the change in ranking was due to the equitable distribution criterion, our review of the statement of the selection official supports the Navy's position that it was the capacity of HLA to perform both contracts which led to the reranking. Also, while HLA argues that it had the capacity to perform both contracts, we find the evaluation board's reranking to have been reasonable and to have been adequately based since aside from the project manager, 10 other HLA key personnel were listed for both contracts.

Finally, while HLA contends the question of its capacity and utilization of key personnel could have been cleared up with a telephone call, we know of no requirement for such discussion and HLA has cited none. Evaluations for A-E contracts are based essentially on the SF 254's and 255's submitted by interested firms, and firms that submit their forms with data that could lead an agency to rank them lower than their competitors run the risk that that will in fact occur. HLA, to protect itself, should have indicated on its forms how it would perform each of the two contracts in which it was interested if it was awarded the other one; the ultimate rankings simply were a consequence of HLA's failure to do so.

The protest is denied.

James F. Hinchman
General Counsel