

Curtis



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Facilities Engineering & Maintenance Corporation

File: B-233974

Date: March 14, 1989

DIGEST

Protest that contracting agency was biased in favor of the awardee is denied where the agency has reasonably explained the actions allegedly indicating bias in connection with the current procurement and the record contains no evidence that any bias adversely affected the protester's competitive position.

DECISION

Facilities Engineering & Maintenance Corporation (FEMCOR) protests a contract award by the Federal Home Loan Bank Board (Board) to Ogden Allied Services Corporation under request for proposals (RFP) No. C99003.

We deny the protest.

The RFP was issued on August 26, 1988, for consolidated facilities management services for 1 base year and 4 option years. The RFP provided that technical factors and cost would be evaluated with technical factors considered more important. The RFP set out the following technical evaluation factors: (1) organization and management; (2) technical approach; and (3) firm and personnel qualifications and experience. The RFP further provided for an award to the offeror whose offer, conforming to the RFP, is most advantageous to the government, technical evaluation factors, cost or price, and other factors considered, and noted that the government's objective is to obtain the highest technical quality considered to accomplish the requirements at a reasonable price.

On November 21, the closing date for the receipt of proposals, the Board received four proposals. The Board evaluated the proposals, placed all four offerors in the competitive range, sent each offeror written questions, held oral discussions with each offeror and requested best and

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final offers (BAFOs) by December 12. Following the evaluation of BAFOs, Ogden received the highest technical score, 388 out of 450 total points, and proposed to perform for \$16,659,122. FEMCOR was ranked third technically with a score of 294 points and offered to perform for \$14,044,577. Subsequently, the Board awarded the contract to Ogden as the offeror that submitted the highest technically rated proposal at a reasonable price.

Prior to this procurement, the Board's practice was to award separate contracts for its various facilities management needs. For example, the Board awarded separate contracts for janitorial and guard services. Ogden performed some of the services under prior contracts. The current solicitation calls for award of one consolidated contract for all the facilities management services required by the Board. FEMCOR protests that the current award to Ogden is improper because the Board's actions respecting both the current procurement and Ogden's prior contracts demonstrate that the Board was biased in favor of Ogden and intended from the start of this procurement to award the contract to Ogden.

Concerning Ogden's past contracts, FEMCOR asserts that the Board: (1) canceled a procurement for rug installation and modified Ogden's contract to include this requirement even though the requirement was outside the scope of Ogden's contract; (2) did not require Ogden to furnish bonds for construction projects that exceeded \$25,000; (3) failed to consider that Ogden did not include a general and administrative rate for subcontractors; and (4) permitted Ogden to add staff after it was awarded a contract. Respecting the current procurement, FEMCOR complains that the Board: (1) underestimated the anticipated level of work; (2) did not follow the guidelines of Federal Acquisition Regulation (FAR) Part 19 concerning small business participation; (3) did not consider making multiple awards, develop a source selection plan or perform a cost analysis of Ogden's proposal; (4) awarded the contract to Ogden at a price higher than that proposed by two other technically acceptable offerors; and (5) asked all four offerors to respond to the same written questions. In addition, FEMCOR complains that, when asked to extend the closing date for receipt of proposals, the contracting officer represented to FEMCOR that he did not have the authority to do so. FEMCOR asserts that these actions by the Board show that it was biased and never intended to award the contract to a firm other than Ogden.

As a preliminary matter, we note that FEMCOR has raised these complaints to demonstrate that the Board is biased in favor of Ogden, rather than as individual protest bases. We point out, however, that as individual protest issues they are not for our consideration.

First, many of the allegations, such as the Board's failure to consider multiple awards, involve alleged improprieties that were apparent from the face of the solicitation. Since FEMCOR's protest was not submitted until after the closing date for the receipt of proposals these issues are untimely. See 4 C.F.R. § 21.2(a)(1) (1988). In addition, FEMCOR's allegations concerning Ogden's past contracts as well as certain issues concerning the current procurement, such as the Board's failure to hold meaningful discussions, are also untimely because they were raised more than 10 days after FEMCOR knew the protest basis. See 4 C.F.R. § 21.2(a)(2).

To the extent FEMCOR is protesting that the Board was biased in favor of Ogden, FEMCOR bears a heavy burden since we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. The protester must produce credible evidence showing bias, and must also demonstrate that the bias translated into agency action which unfairly affected the protester's competitive position. We will not find an agency action to be biased or arbitrary if the record indicates a reasonable basis for it. Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517.

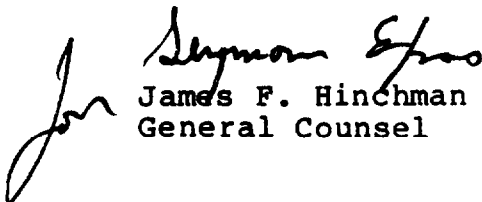
Here, we conclude that FEMCOR has failed to demonstrate that the Board was biased in favor of Ogden. First, the Board has provided a reasonable explanation for its actions in connection with the current procurement which FEMCOR challenges. Thus, for example, the Board explains that each offeror was requested to respond to the same written questions during discussions because the letter containing these questions indicated only general areas of concern and individual deficiencies were pointed out during oral discussions with each offeror. The Board also explains that it decided to consolidate the services under one contract in order to minimize the Board's administrative burden and unify responsibility for all services. In addition, the Board states that the contracting officer did perform a cost analysis, and did not state that he lacked the authority to extend the closing date for proposals, but only that he could not do so without consulting with the end user of the services. FEMCOR failed to respond in any detail to the Board's report on the protest and instead merely requested that the protest be decided on the existing record. Since the record demonstrates that there was a reasonable basis

for the Board's actions, and FEMCOR has not refuted the Board's position, there is no basis to conclude that the Board's actions in connection with the current procurement demonstrate that the selection of Ogden was the result of bias.

Further, while the Board did not directly address the various issues which FEMCOR raised concerning Ogden's prior contracts, there is no indication in the record that they demonstrate bias on the Board's part in connection with the current procurement. Specifically, even assuming that FEMCOR's description of the Board's actions on Ogden's prior contracts were accurate, we would not sustain FEMCOR's protest because there is no indication that any bias on the part of the Board adversely affected FEMCOR's competitive standing in the current solicitation. See Antenna Products Corp., B-228289, Jan. 19, 1988, 88-1 CPD ¶ 43. In this regard, FEMCOR has not questioned the evaluation of either its own or Ogden's proposal, and our review shows that both proposals were evaluated reasonably and in accordance with the stated criteria. Given these factors, we cannot conclude that FEMCOR was improperly denied a contract as the result of bias.

Finally, to the extent that FEMCOR complains that the Board awarded the contract to other than the low cost, technically acceptable offeror, in a negotiated procurement the agency is not required to make award to the firm offering the lowest price unless the RFP provides that price is the determinative factor. Id. Here, the solicitation provided for award to the highest technically rated offeror who would perform at a reasonable price. Thus, once the Board determined that Ogden's proposal was technically superior, the Board properly could award the contract to Ogden even though Ogden's proposed price was higher than that of other offerors.

The protest is denied.


James F. Hinchman
General Counsel