

R. White



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MGM Land Company; Tony Western

File: B-241169; B-241169.2

Date: January 17, 1991

R.W. McKamy for MGM Land Company, and Tony Western, J. Blaine Anderson, Jr., Esq., and Catherine S. Sands, Esq., for Tony Western, the protesters.

Bob Chaplin for Lyons & Chaplin (LMC Group), an interested party.

Alton E. Woods, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging agency's exclusion of proposals from the competitive range are denied where protesters' proposals were evaluated in accordance with the stated evaluation criteria and without bias, and the agency reasonably concluded that the proposals were significantly inferior relative to the proposals included in the competitive range and would require major revisions to become eligible for award.
2. Composition of evaluation panel is within the discretion of the agency, and where protesters have not shown fraud, bad faith, conflict of interest, or actual bias, there is no basis to question the composition of the panel.
3. Allegations that evaluation panel is biased are denied where the record shows that the evaluations were reasonable and in accordance with the stated evaluation criteria.
4. Protests that the awardee will not perform as required under contract for feral pig eradication services, because the awardee lacks incentive to eradicate pigs while also operating a commercial hunting business involving the same pigs, involves a matter of contract administration not for review under the General Accounting Office bid protest forum.

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5. Allegation that the National Park Service is abdicating its stewardship of a national park to commercial operations is beyond the bid protest jurisdiction of the General Accounting Office.

6. Challenge to the solicitation's evaluation criteria and proposal due date raised for the first time in protester's comments on agency report is untimely since such challenges must be raised prior to the closing date for submission of proposals.

DECISION

MGM Land Company and Tony Western protest the exclusion of their proposals from the competitive range under request for proposals (RFP) No. 8000-90-23, issued by the National Park Service (NPS), Department of the Interior, for the eradication of feral pigs from Santa Rosa Island in Channel Islands National Park, California. Both offerors contend that the agency decision to exclude their proposals from the competitive range was arbitrary and improper. In addition, both offerors argue that the agency's evaluation panel lacked sufficient knowledge and experience to judge proposals for these services.

We deny the protests in part and dismiss them in part.

BACKGROUND

On July 20, 1990, the NPS issued a solicitation seeking professional hunters to eradicate the feral--i.e., wild--pig population on Santa Rosa Island in Channel Islands National Park. The feral pigs living on Santa Rosa Island are a mixture of formerly domestic swine and European wild boar, and have proven to be a menace to the island's ecosystem. Because these animals are not native to the island and are endangering native plant and animal species, the NPS decided to procure hunting services to remove them from the island.

The RFP sought offers for all personnel, equipment, materials, supplies, facilities, and services to eradicate the island's feral pigs in accordance with the terms of the Statement of Work (SOW). The RFP advises that award will be made to the offeror whose proposal is most advantageous to the government, and states that technical quality is more important than price. Section M of the RFP explains that proposals will be scored by a technical evaluation panel against seven specified

evaluation criteria worth a total of 100 points. These seven criteria, paraphrased, include:

Experience and past performance	25 points
Island-wide eradication ability, including skills and tools	20 points
Merits of technical proposal, including thoroughness, understanding and planning	20 points
Approach to eradication of remnant pigs	15 points
Personnel qualifications	10 points
Knowledge of California terrain, habitats and conditions	5 points
Island-wide logistic experience	5 points

The SOW anticipates that the most highly-rated technical proposal will likely combine reliance on traps, hunting teams, trained pig-hunting dogs, and aerial hunting--shooting from a helicopter--to kill all the pigs. According to the SOW, approximately 2,000 pigs populate the island.

Thirteen offerors responded to the NPS solicitation by the August 20 due date for proposals. The proposals were scored by the technical evaluation panel according to the stated criteria and point ranges specified in the RFP. The scores given the 13 offerors are as follows:

Multiple Use Managers, Inc.	97.7
Company A	64.7
Company B	59.44
Company C	55
Company D	54.5
Company E	36.8
Tony Western	32.66
MGM	26.66
Company F	23
Company G	22
Company H	21.5
Company I	20.83
Company J	17.33

Based on these scores, the contracting officer determined that the five highest-rated offerors were technically acceptable and within the competitive range because they proposed the best blend of experience, performance, schedule and cost. The next six offerors, including MGM and Western, were determined technically acceptable, but were excluded from the competitive range because their proposals contained deficiencies that would have required major revisions. The two lowest-rated offerors were excluded from the competitive range because their proposals were found technically unacceptable.

MGM protests that it was unreasonably excluded from the competitive range despite its submission of an acceptable proposal, and that NPS has abdicated its responsibility to operate Santa Rosa Island as a national park, instead operating the island as a private hunting club. Also, MGM claims that the NPS has a conflict of interest with the highest-scored offeror, Multiple Use Managers, Inc. (MUM), and that the evaluators on the technical evaluation panel lacked the expertise to judge proposals for this procurement.

Mr. Western protests that his proposal was unreasonably excluded from the competitive range because NPS failed to consider his prior professional hunting experience in New Zealand; refused to permit him to amend his proposal to include the identity and experience of his hunting team and a diagram of his pig traps; and failed to give his proposal adequate credit for innovations and suggestions. Mr. Western also argues that the evaluation panel lacked the expertise to judge these proposals; that the solicitation's evaluation criteria were defective; and that the proposal due date was unreasonable. In short, according to Mr. Western, nearly every facet of this procurement is improper and impermissibly biased in favor of the highest-scored offeror, MUM.

COMPETITIVE RANGE DECISION

Both protesters challenge the NPS decision to exclude their proposals from the competitive range and to hold discussions only with the five highest-scored offerors. MGM protests this decision on a general basis, while Mr. Western argues that it was unreasonable to exclude his proposal without considering his prior professional hunting experience in New Zealand, permitting him to supplement his initial proposal with additional information, or crediting his proposal for its unique innovations and suggestions.

In a negotiated procurement, an agency may determine a competitive range for the purpose of selecting those offerors with which the contracting agency will hold oral or written discussions. Federal Acquisition Regulation (FAR) § 15.609; Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. In making this determination, agencies must establish their competitive range "on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award." FAR § 15.609(a). Proposals have a "reasonable chance" of being selected for award when they are technically acceptable as submitted, or are reasonably susceptible of being made acceptable through discussions. Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114.

Since agencies are responsible for defining their needs and for deciding the best method of accommodating them, the evaluation of proposals and the resulting determination of whether an offer is in the competitive range are matters within the discretion of the contracting agency. Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203. In reviewing protests concerning competitive range determinations, our function is not to reevaluate the proposal and make our own determination of its merits; rather, we examine the agency's evaluation as a whole to ensure that it has a reasonable basis. American Contract Health, Inc., B-236544.2, Jan. 17, 1990, 90-1 CPD ¶ 59.

After each of the 13 proposals submitted was evaluated and scored in accordance with the stated evaluation criteria, the contracting officer established the competitive range by reviewing the scores awarded by the evaluation panel. Based on these scores, she concluded that only the five highest-rated proposals would be included in the competitive range. In the contracting officer's statement, she explains that these proposals offered "the best composite blend of experience, performance, schedules and cost." The proposals rated sixth through eleventh, including the proposals submitted by Tony Western and MGM, were determined to be acceptable, but were excluded from the competitive range because they would require major revision to be successful. As discussed above, the two lowest-rated proposals were found to be technically unacceptable.

With respect to the decision to exclude the proposals from the competitive range, we look first to the agency's evaluation of the proposals to determine whether it had a reasonable basis. Based on our review of the record, we find that the evaluation of the proposals was reasonable.

Evaluation of Tony Western

Our review indicates that the greatest weakness of the Tony Western proposal is its failure--based upon an apparent misunderstanding of the RFP--to list key employees for evaluation by the agency.^{1/} Unlike the other offerors, Mr. Western lists only himself, and his experience, in his proposal. Thus, when scored on the technical subfactors set forth in the RFP--valuing, as discussed above, experience with feral pigs, experience with island logistics issues, past performance, knowledge of California terrain, and personnel qualifications--only Mr. Western's experience was considered. Mr. Western's proposal received none of the benefits of naming key employees who also might have contributed to higher ratings for these subfactors.

The evaluation panel raised several other criticisms of Mr. Western's proposal. Specifically, the panel disagreed with Mr. Western's negative view of the use of pig-hunting dogs; questioned whether Mr. Western would follow the zone approach to eradicating the island of pigs as required by the SOW; and expressed concerns about the failure rate of his proposed pig traps and whether they would snare unintended animals.

With respect to Mr. Western's assertions that the evaluators failed to consider his prior professional hunting experience in New Zealand, and failed to consider unique innovations and suggestions in his proposal, these arguments are refuted by the evaluation materials. As mentioned above, since Mr. Western named only himself in his proposal, it was only his experience--all of which is in New Zealand--that was considered. Further, one evaluator explicitly noted Mr. Western's prior experience as good. In addition, the fact that more than one evaluator questioned the applicability of

^{1/} Mr. Western apparently misinterpreted section H.3(a) of the RFP--requiring the assignment of key personnel to the contract at the time of award and barring substitution of the persons named there for reasons other than specified--to mean that offerors need not identify key personnel until time of award. Mr. Western's reading of this clause ignores, and renders meaningless, the clauses found in the RFP at sections L.9(a)(1)(iii), requiring identification of key personnel in the technical proposal for evaluation purposes, and M.3(b)(7), establishing personnel qualifications as a technical subfactor worth 10 points.

Mr. Western's prior experience in New Zealand indicates that such experience was not overlooked by the evaluators. The record is also clear that certain innovative suggestions in the Tony Western proposal were not overlooked. One evaluator expressly termed Mr. Western's approach to eradicating remnant pigs--phase III of the operation--as innovative and unique, while other evaluators praised the proposal's choice of helicopters. Mr. Western's disagreement with the weight accorded these provisions of his proposal does not mean that they were improperly evaluated or overlooked. See ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

With respect to Mr. Western's contention that the agency unreasonably refused to permit him to amend his proposal, only those offerors in the competitive range are entitled to an opportunity to amend their initial proposals; offerors who are reasonably excluded from the competitive range are not entitled to such an opportunity. Given that, as discussed below, Tony Western's proposal was reasonably excluded from the competitive range, NPS had no obligation to permit Mr. Western to revise his proposal. See Madison Servs., Inc., B-236776, Nov. 17, 1989, 89-2 CPD ¶ 475.

Evaluation of MGM

With respect to the proposal submitted by MGM, our review indicates that this proposal received its low score because it did not present evidence of past experience in feral pig eradication projects. Specifically, the evaluation panel noted that none of the members of the hunting team proposed by MGM had organized or executed a feral animal eradication program; that the two members of the team who had any prior experience with feral pigs were not committed on a full-time basis; and that the proposal merely parrots the SOW, providing little evidence of critical evaluation of eradication strategies. Also, the evaluation record, as well as our review of MGM's proposal, indicates that the proposal lacks detail.

In its response to the agency report on this protest, MGM challenges none of the specific conclusions of the evaluation of its proposal, nor does it challenge any of the findings in the detailed written debriefing provided to the protester as part of this protest. Rather, MGM questions the competence of the evaluators and the composition of the evaluation panel-- matters discussed below--and charges generally that the evaluators' comments indicate that they did not read the proposal carefully. These general arguments about the evaluators' comments do not rebut the specific findings of the evaluation panel and provide us with no evidence to conclude

that the evaluation here was unreasonable. See Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, aff'd, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180.

Determination of Competitive Range

Using the evaluation panel's scores and comments, the contracting officer determined that the proposal submitted by Mr. Western should be excluded from the competitive range. While Mr. Western's proposal was termed "acceptable," it was clearly viewed to be significantly inferior to the proposals included in the competitive range.^{2/} The evaluation panel gave Mr. Western's proposal a score of 32.66, on a 100 point scale; in comparison, the 5 offerors included in the competitive range each received scores above 54, and the highest-rated offeror, MUM, received a score of 97.7. In addition, Mr. Western's seventh-ranked proposal offered a minimum price^{3/} of \$385,780, higher than the price of 4 of the 5 offerors included in the competitive range, and more than \$75,000 higher than the MUM proposal.

Given the solicitation's emphasis on technical expertise; the disparity between Tony Western's technical score and the scores of the higher-rated offerors; and Western's high price relative to four of the five offerors in the competitive range, including MUM, we find that Mr. Western's proposal lacked a reasonable chance of being selected for award. Accordingly, the contracting officer reasonably excluded the proposal from further consideration. See Hummer Assocs., B-236702, supra.

In deciding to exclude MGM from the competitive range, the contracting officer, as in the case of Tony Western, examined

^{2/} For comparison purposes, the two proposals deemed "technically unacceptable" failed to address many of the requirements of the RFP and failed to provide sufficient information to even evaluate the proposals. Thus, although the proposals excluded from the competitive range were acceptable relative to the two lowest-rated proposals, they were not acceptable as offered.

^{3/} Mr. Western's proposal included two prices based on his concern about the spread of pseudorabies among endangered animal species on the island if contractors improperly disposed of pig carcasses. The SOW provided that the pig carcasses could not be disposed of on the mainland to avoid the spread of this disease to domestic swine, but did not address the disposal of such carcasses on the island. Mr. Western's lowest price, cited above, did not include burial of pig carcasses on Santa Rosa Island.

the point scores and comments regarding the MGM proposal and again decided that this proposal had little or no likelihood of being selected for award. MGM's proposal was scored even lower than the proposal of Tony Western, 26.66 on a 100 point scale. Again, the comparison of this score to the scores awarded the five highest-rated offerors, in a procurement where technical ability was more important than cost, formed the basis for this decision. In effect, MGM's offer was not considered technically acceptable, despite the contracting officer's description to the contrary. The technical evaluation supports this conclusion, stating in summary that "[t]he proposal failed to meet the minimum requirements of the RFP in most respects." In light of MGM's significantly lower technical rating in relation to the other offerors in the competitive range, the decision to exclude MGM's proposal from the competitive range was reasonable.^{4/}

EVALUATION PANEL COMPOSITION AND AGENCY BIAS

Both offerors challenge the composition and expertise of the evaluation panel, and allege that NPS was biased in favor of MUM. With respect to the challenge to the evaluation panel, both MGM and Mr. Western argue that the panel's lack of a wildlife biologist is a critical deficiency--NPS used a marine biologist and a botanist, and did not use a staff member with feral animal experience. Both protesters also argue that the panel's comments about their respective proposals indicate either a lack of expertise or bias.

4/ Although MGM's price was lower than that of any of the five proposals in the competitive range, there is no detailed discussion of its price other than the contracting officer's general statement that the determination of the competitive range included a consideration of the blend of technical expertise and cost offered by the proposals. Even without a more detailed analysis of the prices offered, the decision to exclude the proposal from the competitive range is not inconsistent with our prior decisions, which hold that agencies may not exclude a technically acceptable offer from the competitive range without consideration of price, see Howard Finley Corp., 66 Comp. Gen. 545 (1987), 87-2 CPD ¶ 4; Federal Serv., Inc., B-231372, Sept. 6, 1988, 88-2 CPD ¶ 215, given our conclusion that MGM's proposal in effect was found to be technically unacceptable.

The composition of an agency evaluation panel is within the discretion of the contracting agency. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588. Unless a protester shows evaluation panel fraud, bad faith, conflict of interest, or actual bias--none of which is evident here--we will not question the composition of such panels. Id. Nonetheless, in response to these arguments, NPS provided resumes for each of the three evaluation panel members establishing extensive experience in areas related to this project. This experience includes: participating in prior feral animal eradication projects; chairing workshops in feral pig removal strategies; serving on the Channel Islands Feral Animal Committee; publishing articles in the fields of biology, botany, and resource management; and serving on technical evaluation panels for prior procurements. In our view, the evaluation panel here appears amply qualified to evaluate proposals for these services.

With respect to the allegation by both protesters that the agency was impermissibly biased in favor of the proposal submitted by MUM, the protesters focus essentially on the arrangement between NPS and a private cattle ranch operating on Santa Rosa Island. This ranch not only raises cattle, but conducts commercial sport hunting of deer, elk, and feral pigs, and apparently provides accommodations for guest hunters.^{5/} The principal supervisor for MUM has operated the hunting program associated with this ranch for the last 12 years. In addition, all of the hunters and trappers proposed by MUM have experience with the hunting operation on Santa Rosa Island.

The fact that the highest-scored proposal is submitted by individuals who are associated with the ranching operation on the island, standing alone, does not establish that the agency, or its evaluators, acted with bias or bad faith. The record here contains no evidence of wrongdoing or of bad faith, and bald assertions of bad faith by a disappointed offeror do not establish agency bias. Metrolina Medical Peer Review Found., B-233007, Jan. 31, 1989, 89-1 CPD ¶ 97.

To the extent that the protesters are arguing that the agency improperly evaluated the MUM proposal, we have reviewed the proposal and the evaluation documents and conclude that the agency's evaluation was reasonable and was not the result of

^{5/} Santa Rosa Island offers no other private lodging, and MUM's technical proposal explains that "there will be incidental shooting [of feral pigs] by ranch personnel and their guests."

bias. The evaluation was in accordance with the stated evaluation scheme, which greatly values prior experience in this area of work, and in this geographic location.^{6/} Notwithstanding NPS' familiarity with MUM, the record shows that the MUM proposal received the highest initial technical rating because its proposal best demonstrated its capabilities and its understanding of the solicitation's requirements. Our own review indicates that the MUM proposal is detailed and specific about following the solicitation's approach to eradicating the pigs by geographic zones and in phases. Also, the prior experience of the individuals, including the hunting team, properly contributed to the high technical scores received by MUM's proposal. As explained above, every individual associated with the MUM proposal has experience with the hunting operation on Santa Rosa Island.

To the extent that the protesters are arguing that their own proposals were unfairly evaluated because of evaluator or agency bias, as discussed above, our review of the evaluation records related to the proposals submitted by both MGM and Tony Western indicates that the evaluation of these proposals had a reasonable basis with no indication of bias on the part of the agency or its evaluators. The fact that the protesters disagree with the conclusions and opinions of the evaluators does not establish agency or evaluator bias. See D-K Assocs., Inc., B-213417, Apr. 8, 1984, 84-1 CPD ¶ 396.

OTHER ISSUES

MGM's and Tony Western's remaining shared argument is an alleged conflict of interest between MUM and NPS. As mentioned above, every member of the MUM hunting team is, or has been, involved in the commercial hunting of feral pigs on Santa Rosa Island, and the MUM proposal, on its face, anticipates incidental shooting of pigs by ranch employees or guests. The protesters argue that this arrangement, if permitted by NPS, presents a potential conflict between permitting MUM to derive income from the hunting of animals,

^{6/} For example, four of the seven evaluation subfactors specified in section M of the solicitation relate to experience. These include: demonstrated experience and recent satisfactory past performance for this type of work, worth 25 points; demonstrated knowledge of California terrain, habitats, and physical conditions, worth 5 points; experience with the logistics of supporting an island operation, worth 5 points; and qualifications of personnel assigned, worth 10 points. The three remaining subfactors, although not as clearly linked to prior experience as the subfactors listed above, also are driven by prior experience with Santa Rosa Island and its wildlife.

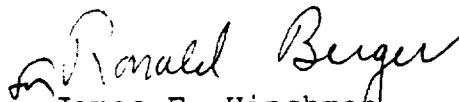
and at the same time, paying MUM for the eradication of the same animals. The protesters argue that MUM will lack incentive to perform thoroughly and completely.

Initially, we note that MUM has not yet been awarded this contract. However, if NPS determines that MUM's proposal is most advantageous to the government, NPS will bear the responsibility for oversight of the contract. Whether MUM successfully eradicates the pigs, or fails to succeed after a good faith effort, is a matter of contract administration within NPS' responsibility, and thus is not a matter for consideration by our Office. See 4 C.F.R. § 21.3(m)(1) (1990). Accordingly, we dismiss the protests in this regard.

We also dismiss MGM's contention that NPS has abdicated its responsibility to operate Santa Rosa Island as a national park, and is instead operating the island as a private hunting club. This claim is beyond the jurisdiction of our bid protest forum, since NPS' decisions to permit a cattle ranch to operate on Santa Rosa Island, and to permit commercial hunting operations there, are unrelated to the award of a federal government contract. The jurisdiction of our Office, as established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551 et seq. (1988), is to ensure that statutory requirements for full and open competition are met in awarding such federal contracts. Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299. The stewardship of the Channel Islands National Park by NPS is not a matter for our resolution.

Finally, we dismiss as untimely the challenges by Tony Western to the provisions of the solicitation and amendments, including the technical evaluation criteria, and the proposal due date. These challenges involve alleged solicitation improprieties that must be raised prior to the initial closing date for submission of proposals. See 4 C.F.R. § 21.2(a)(1); Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Since these arguments were not raised until Mr. Western submitted his comments on the agency report--3 months after the August 20 due date for proposal submission--they are untimely.

The protests are denied in part and dismissed in part.


James F. Hinchman
General Counsel