



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dynamic Isolation Systems, Inc.

File: B-247047

Date: April 28, 1992

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DIGEST

1. A requirement that a company be "regularly engaged" in the manufacture of seismic isolation bearings may be met by a company that has installed bearings in only one building, where there are only a limited number of buildings worldwide in which the bearings have been installed and the company was identified in the solicitation as an acceptable manufacturer of the bearings.

2. Where solicitation requires offeror to have at least 3 years of experience, agency may reasonably consider both the limited 3-year experience of an offeror as well as the offeror's more recent applicable experience.

3. Where solicitation imposes a 3-year experience requirement but imposes no particular education requirement, individual with considerable practical experience in the field may reasonably be found to meet requirements.

4. Although the procuring agency waived a mandatory solicitation requirement for the awardee's proposal with regard to the experience of the awardee's proposed material supplier and improperly overrated the proposal under the related evaluation subfactor, the protest of this waiver is not sustained because the procuring agency determined that the supplier was acceptable and there is no evidence that the protester or any other potential offeror was prejudiced by the agency's action, given the substantial price advantage of the awardee, whose proposal was rated approximately technically equal to the protester's, and the lack of any indication that the protester would materially lower its price or change its technical approach in response to the waiver of this requirement.

DECISION

Dynamic Isolation Systems, Inc. (DIS) protests the award of a contract to Earthquake Protection Systems, Inc. (EPS)/VSL Corporation (VSL), a joint venture, under request for proposals (RFP) No. GS-09P-91-KTC-0076, issued by the General Services Administration (GSA). The RFP was to obtain the services of a "highly qualified" base isolator supplier to provide, on a fixed-priced basis, technical/engineering support to the project architect engineer responsible for designing the base isolation system for the seismic retrofit of the Ninth Circuit Court of Appeals Building in San Francisco, California. The RFP included various fixed-priced options to purchase the supplier's seismic isolation bearings for installation in the court building with associated technical services. DIS contends that the award to EPS/VSL was improper, since certain mandatory solicitation requirements, relating to the experience of the offeror and its key employees and subcontractors, were allegedly not met by EPS/VSL.

We deny the protest.

Base or seismic isolation is a process that isolates a building at its foundation so that an earthquake's effects on the structure are minimized. The process depends upon seismic isolation bearings¹ employed at various connection points between the building structure and its foundation. The system is designed to absorb the lateral motion of the ground in an earthquake to encourage the building structure to return to the identical position on the foundation.

The court building has been unoccupied since the 1989 Loma Linda earthquake. Based upon a feasibility study pertaining to the seismic upgrade of the court building,² the RFP contained separate specifications and pricing tables for three types of seismic isolation bearings that the study determined to be acceptable products.³ Each product was

¹A seismic isolation bearing is a structural component with high vertical stiffness and low horizontal stiffness.

²Prior to issuance of the RFP, GSA commissioned Forell/Elsesser Engineers, Inc. to provide a seismic evaluation of the court building. The study contained seismic upgrade recommendations based upon modern seismic isolation standards.

³The study found that each of the three systems had undergone substantial earthquake simulator testing, and each was capable of being installed underneath the court building.

listed in the RFP in various quantities, which required offerors to propose unit prices for the various quantities for the particular bearing proposed because the precise size or quantity of bearings would not be determined until after the design of the system. The three types of bearings listed in the RFP were high-damping rubber seismic isolation bearings, lead-rubber seismic isolation bearings, and friction pendulum seismic isolation bearings. There were detailed specifications for each of the three types of bearings and the acceptable manufacturers of each type bearing were identified. EPS is the only manufacturer of the friction pendulum system, while DIS is the only manufacturer of the lead-rubber system. Both of these systems are dependent upon patented bearings of the respective manufacturers.

The RFP contained certain mandatory requirements, which offerors' proposals were required to meet. Specifically, the RFP under "Minimum Experience Qualifications" stated that:

"Qualified firms are those which have been regularly engaged in the manufacture of seismic isolation bearings for the protection of buildings and other structures, whose isolation bearings have been in satisfactory use in buildings or other structures for not less than 3 years."

Also, section H, "Special Contract Requirements," contained certain minimum qualifications for the material technologist to be employed on the project as follows:

"Material (rubber or PTFE (Polytetrafluoroethylene⁴)) Technologist . . . is to be a firm or individual regularly engaged in the design and testing of the applicable materials for use in seismic isolation bearings for not less than 3 years."

Further, section H stated that with regard to the supplier of the material to be used in the bearings:

"Material (rubber or PTFE) Supplier . . . is to be a firm regularly engaged in the compounding of the applicable material for use in . . . seismic protection of buildings or other structures, whose rubber compounds have been in satisfactory use in similar service for not less than 3 years."

The RFP provided for award to the responsible offeror whose proposal represented the greatest value to the government.

⁴Seismic isolation bearings can be made, in part, from PTFE.

Proposals were evaluated against the following technical evaluation factors:

- A. Experience of the Firm and of Personnel Proposed for the Project
- B. Technical Merit and Advantages of the Product
- C. Capabilities of the Firm/Organization

Factors A and B were of equal importance, with C being of lesser importance. Price, including option prices, was less important than the combined weight of the technical evaluation factors.

Under the RFP's experience of firm evaluation subfactor, under factor A, the following sub-subfactors were listed:

- "a. Length of firm's experience in the manufacture and use of seismic isolation bearings in buildings or other structures for not less than 3 years.
- "b. Amount of experience during the last 3-5 years in the manufacture and installation of seismic isolators in a building project of similar size to this project, and the provision of similar technical services during the design of the project and after installation. Similar size is a project involving a multistory building of 2 stories or more with at least 20,000 gross square feet.
- "c. Familiarity with local construction conditions.
- "d. Quality of, and depth of knowledge gained from past performance."

Under the RFP's experience of personnel proposed for the project subfactor under factor A, the sub-subfactors were:

- "a. Length, depth and relevance of experience of key personnel including consultants. Specific personnel meet the minimum requirements stated in Section H of the solicitation . . . Degree of assurance that proposed personnel will be available for this project.
- "b. Experience of material (rubber or PTFE) technologist. This firm or individual must be regularly engaged in the design

and testing of the applicable materials for use in seismic isolation bearings for not less than 3 years.

- "c. Experience of material (rubber or PTFE) supplier. This firm must be regularly engaged in the compounding of the applicable material for use in seismic isolation bearings for the seismic protection of buildings or other structures, whose rubber compounds have been in satisfactory use in similar service for not less than 3 years."

On September 13, GSA received four proposals, including those of DIS and EPS/VSL,⁵ in response to the RFP. The proposals were evaluated by a three member technical evaluation board (TEB) that evaluated proposals on a 100-point scale in which both factors A and B were worth 40 points each and factor C was worth 20 points. Price was evaluated but not numerically scored. The TEB recommended that three proposals be included in the competitive range, including those of DIS and EPS/VSL. Discussions were held with the competitive range offerors and, on October 25, GSA received best and final offers (BAFO).

EPS/VSL's BAFO received the highest overall technical score of 79 with the lowest price of \$2,816,981. DIS' BAFO received the next highest technical score of 75 and its price was the highest at \$6,827,126. The Source Selection Evaluation Board (SSEB) concluded that EPS/VSL's proposal represented the greatest value to the government because of its high technical score and low price. On December 9, GSA made award to EPS/VSL.

On December 18, DIS filed this protest against the award to EPS/VSL. DIS protests that GSA improperly determined that the EPS/VSL proposal met the RFP's mandatory minimum experience qualifications.

The evaluation of technical proposals is primarily within the discretion of the contracting agency, which is responsible for defining its needs and the best method of accommodating them, and must bear the consequences of a defective evaluation. Mar Inc., B-242465, May 6, 1991, 91-1 CPD ¶ 437. Consequently, we will not engage in an independent

⁵EPS/VSL is a joint venture between EPS and VSL. EPS is the firm that has installed the friction pendulum bearings and VSL is a diversified firm engaged in the manufacturing, supply and installation of specialized structural components and systems.

evaluation of technical proposals, but will examine the agency's evaluation only to ensure that it had a reasonable basis and was consistent with the stated evaluation criteria. The fact that a protester disagrees with the agency's conclusion does not establish that the evaluation was unreasonable. Id.

DIS first contends that EPS/VSL did not meet the minimum qualification requirement that it be "regularly engaged" in the manufacture of isolation bearings that have been installed in "buildings or other structures for not less than [3] years." DIS contends that EPS/VSL's proposal indicates that EPS has manufactured and installed the friction pendulum seismic isolation bearings in only two small projects, and that VSL has no identified experience with seismic isolation bearings. In contrast, DIS asserts that at least 2,000 of its bearings have been installed during the same period on many more buildings and other structures. The only EPS seismic isolation bearing installation projects are a water storage tank completed in 1988 that required only four bearings and a 4-story wood frame apartment building completed in 1991 that required only 31 bearings. DIS asserts that the apartment building was not eligible to be considered in determining whether EPS/VSL is "regularly engaged" because this project was completed in 1991, such that these bearings have not been in use for 3 years. Citing our decision in Townsko Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313, aff'd, 91-1 CPD ¶ 290, DIS contends that the completion of one project, i.e., EPS' water tower, cannot satisfy the "regularly engaged" experience requirement and that EPS/VSL's proposal should have been rejected for not meeting this mandatory minimum experience qualification.

Although in Townsko, which involved a procurement for air-field pavement work, we found that having done one pavement project did not constitute being "regularly engaged," our Townsko decision cannot reasonably be applied here. In our reconsideration affirming that decision, we stated that the term "regularly engaged" must be given meaning within the context of the provision in which it appears. Unlike in Townsko, where the bidder was required to be engaged in work commonly performed throughout the country, the work involved here is far less common--there are very few buildings or other structures in which seismic isolation bearings have been installed.⁶ Moreover, the RFP here was issued with the express intent to procure one of three types of

⁶Only 38 buildings worldwide have had seismic isolation bearings installed; only 8 of these buildings are located in the United States, the first of which had seismic isolation bearings installed in 1986.

predetermined acceptable isolation products, including the EPS friction pendulum bearing. The RFP specifically identified EPS, which is the only manufacturer of the patented friction pendulum bearing, as an acceptable manufacturer. Thus, even though EPS/VSL has only one qualifying project where its bearings have been installed for more than 3 years, we think it is clear under these circumstances that the term "regularly engaged" was intended to include EPS/VSL.⁷ We will not read a provision restrictively where it does not appear from the solicitation that such a restrictive interpretation was intended by the agency.⁸ MAR Inc., supra.

Relying upon the same basic rationale, DIS contends that EPS/VSL had insufficient experience to be considered acceptable under sub-subfactors "a" and "b" (quoted above) under the firm/organization experience evaluation subfactor. DIS asserts that EPS/VSL only had one project, i.e., the water tower, to be rated under each sub-subfactor, a conclusion that DIS arrives at by interpreting sub-subfactor "a" as only allowing the consideration of projects more than 3 years old and sub-subfactor "b" to require only the consideration of "building projects of similar size" completed from 3 to 5 years ago. DIS therefore asserts that EPS' only building project, the apartment house that was completed in 1991, may not be considered in the evaluation, and that EPS/VSL's proposal should have been considered unacceptable under these sub-subfactors.

⁷DIS suggests that none of EPS' experience may be considered in determining compliance with the "regularly engaged" requirement because a different entity, the EPS/VSL joint venture, is the offeror. It is true that the joint venture itself and VSL had no qualifying experience. However, the separate qualifications of each of the joint venture partners can be considered in evaluating the qualifications of the joint venture. Beneco Enters., Inc., B-239543.3, June 7, 1991, 91-1 CPD ¶ 545; Parker-Kirlin, Joint Venture, B-213667, June 12, 1984, 84-1 CPD ¶ 621.

⁸In effect, DIS is effectively objecting to competing against EPS/VSL, when clearly it was on notice that EPS was considered acceptable and potentially might be a competitor under the RFP. Therefore, to the extent that DIS may be questioning GSA's decision that EPS is an acceptable supplier or the merits of the friction pendulum system, we find this aspect of the protest to be untimely. See 4 C.F.R. § 21.2(a)(1) (1992).

We disagree with DIS' restrictive interpretations of the sub-subfactors. We read sub-subfactor "a" as permitting all ~~experience~~ experience to be considered so long as the offeror had some experience in excess of 3 years. Also, given the context, sub-subfactor "b" should reasonably be interpreted as permitting the consideration of projects completed during the last 3 to 5 years (not just projects completed between 3 and 5 years ago as contended by the protester). Thus, EPS' apartment project was properly considered by GSA in evaluating EPS/VSL's proposal.⁹ The evaluation documents reflect that EPS/VSL's limited project experience was given the lowest acceptable rating. Therefore, we find that GSA reasonably evaluated EPS/VSL's proposal under these two sub-subfactors.

DIS next contends that EPS/VSL's material technologist did not meet the minimum RFP requirements. DIS asserts that the EPS/VSL technologist's resume lacks the experience that a material technologist typically would possess. For example, DIS states that the resume cites no degrees in material technology or specialized work in the field, and no research or development with PTFE materials independent of the friction pendulum device. DIS argues that the RFP required that the designated material technologist be regularly engaged in both the design and testing of the applicable materials and that the proposal offers no indication that the technologist has designed or tested PTFE materials or the specific "applicable materials" proposed for use in the EPS/VSL device. Alternatively, DIS argues that GSA overrated EPS/VSL's proposal under the related evaluation sub-subfactor addressing the technologist for the same reasons.

The record of the evaluation indicates that the TEB determined that the technologist had pioneered the testing of high-load bearing materials at earthquake velocities and their use in seismic isolators and possessed considerable experience in testing PTFE materials, particularly relating to the friction pendulum bearing. He had served as the material technologist for EPS for the seismic isolation retrofit of the water tank and apartment building projects, and has tested a variety of formulation of PTFE materials for use in bearings. The technologist is the inventor of the friction pendulum system and the TEB believed that the technologist exhibited more practical experience under this

⁹The apartment building is indisputably a "building project of similar size" as defined under the sub-subfactor "b" criteria, since it has more than 2 stories and 20,000 gross square feet.

criterion than the technologist of any other offeror.¹⁰ The TEB determined that the technologist, although lacking in formal training in the field, demonstrated sufficient technical and practical expertise in the field of PTFE material testing.

Based on our review of the qualifications of the EPS/VSL technologist, as set forth in the proposal, we find that GSA had a reasonable basis for its rating and determination that the technologist was acceptable. See Mar Inc., supra. In this regard, we agree that no specific education requirements were imposed and that the considerable practical experience of the EPS/VSL technologist who invented the friction pendulum system could be considered under the evaluation scheme.

DIS' last contention is that EPS/VSL's material supplier did not meet the mandatory minimum experience requirement and, alternatively, that EPS/VSL's proposal was overrated for the related sub-subfactor for this item. In particular, DIS argues that the information in the proposal did not indicate that the supplier's material had been used in seismic isolation devices that were installed in buildings or structures for not less than 3 years.

GSA argues that the TEB reasonably concluded that ~~the~~ bearing material was used by EPS in the water tower ~~project~~. The EPS/VSL proposal, however, does not specifically identify the proposed material supplier as the same supplier used in the water tower project, and, elsewhere in the proposal, EPS/VSL indicates only that the friction pendulum bearings are developed with materials from domestic sources and local suppliers. An agency must base its technical evaluation solely upon the information furnished in the proposal rather than on presumptions favoring an offeror on the basis of prior performance. Robert Slye Elecs., Inc., B-243272, July 5, 1991, 91-2 CPD ¶ 28. GSA could not reasonably assume EPS/VSL was using the same material supplier that EPS had previously used on the water tower project. Therefore, we find that GSA, in effect, waived for EPS/VSL the mandatory requirement that the material supplier have produced material incorporated into seismic isolation bearings that have been in use for not less than 3 years. Further, since the record of the evaluation indicates that the TEB attributed 4 points to this subfactor and that EPS/VSL's technical proposal received a perfect score, this aspect of the evaluation was unreasonable.

¹⁰EPS/VSL did not receive full credit for this sub-subfactor.

However, we find that the waiver of this requirement and overrating of the related subfactor does not present a basis for sustaining the protest. We will not sustain a protest where the record does not establish prejudice, i.e., that the protester would have had a reasonable possibility of receiving the award. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Where the agency's actual needs will be satisfied and no other actual or potential offerors will be prejudiced by an award that does not enforce qualification requirements, there is no reason to require the agency to go to the time and expense of conducting another procurement, and the agency may in effect waive the overly restrictive requirement. Ktech Corp.; Physical Research Inc., B-241808, B-241808.2, Mar. 11, 1991, 91-1 CPD ¶ 237, aff'd, B-241808.4, June 10, 1991, 91-1 CPD ¶ 552.


As indicated above, EPS/VSL was rated relatively low in the experience of organization and personnel evaluation factor. If the points attributed to EPS/VSL for the sub-subfactor addressing the material supplier were subtracted from the EPS/VSL technical score, the effect would be that EPS/VSL and DIS would have received the same technical score, with EPS/VSL proposing a significantly lower price. The primary reason EPS/VSL remained competitive, despite its low rated experience, was its rating for technical merit and the advantages of its friction pendulum bearings--its novel technical approach, supported by test results and other analysis, was found by the TEB to more effectively enhance the building's survivability in the event of an earthquake. Indeed, EPS/VSL received 39 of the possible 40 points under this evaluation category as compared to DIS' 26 points.¹¹

Further, the SSEB attributed EPS/VSL's low price as compared to the other offerors'--only 40 percent of DIS' price--to the fact that the size of the other two types of seismic isolation bearings that were permitted under the RFP, including DIS' bearings, were significantly larger than the friction pendulum bearings. While DIS argues that it restricted its proposal to include only bearings produced by a material supplier whose material had been in use for not less than 3 years, DIS has not shown, or otherwise argued, that its price would have significantly decreased if it had proposed a different material supplier or that it would have altered its technical approach to its advantage. Moreover, there is no indication that any other source did not propose because of this restriction. Also, the SSEB determined that EPS/VSL's material supplier was acceptable because the supplier had provided the material for 35 years in the

¹¹DIS does not protest this aspect of the evaluation.

aerospace industry and previously had incorporated the material in tested friction pendulum bearings. Under the circumstances, we find that there is no reasonable possibility that DIS or any other potential offeror was prejudiced by GSA's waiver of the supplier experience requirement. Logitek, Inc.--Recon., supra.

The protest is denied.


James F. Hinchman
General Counsel