



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: George Hyman Construction Company--Advisory Opinion

File: B-265798; B-265798.2

Date: October 13, 1995

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Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for W. M. Schlosser Company, Inc., an interested party.

Lydia R. Hakken, Esq., and Jeffrey M. Hysen, Esq., General Services Administration, for the agency.

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DIGEST

Protest is sustained where the award was made to an offeror, which failed to comply with the go/no-go technical evaluation factor that proposed key personnel have completed a specific type construction project, whose cost exceeded \$20 million, and the record evidences a reasonable possibility of prejudice by the agency's improper relaxation of this requirement.

DECISION

The United States District Court for the District of Columbia requests an advisory opinion from our Office concerning the complaint of George Hyman Construction Company requesting declaratory and injunctive relief with respect to its protest of the award of a contract to W. M. Schlosser Company, Inc. The contract was awarded to Schlosser under request for proposals (RFP) No. GS11P95AQC0002, issued by the General Services Administration (GSA) for constructing penthouse additions, HVAC (heating, ventilation, and air conditioning) upgrades, and sprinkler installation at the Clinical Center Complex, National Institutes of Health (NIH), Bethesda, Maryland.

Hyman alleges that GSA did not evaluate Schlosser's proposal in accordance with the evaluation factors stated in the RFP in that Schlosser's proposal failed to satisfy a go/no-go key personnel experience evaluation criterion. At the time Hyman filed its complaint with the court, it had already protested to our Office on August 18, 1995. In accordance with the court's request on September 13 for expedited consideration and an advisory opinion regarding Hyman's protest, we developed a

record under our Bid Protest Regulations using an expedited schedule.¹ See 4 C.F.R. § 21.9(b) (1995).

We find that Schlosser's proposal did not satisfy the minimum RFP requirement pertaining to key personnel experience, and that this rendered the proposal technically unacceptable under the stated evaluation factors. Since we also find that the record evidences that the RFP overstated the government's actual minimum experience requirements in a material way, we recommend that the project be resolicited based on a solicitation reflecting the government's actual requirements, and that Schlosser's contract be terminated if it is not the successful offeror.

BACKGROUND

The RFP, issued on April 3, 1995, contemplated the award of a firm-fixed-price construction contract. The RFP stated that proposals would be evaluated on a best value basis with technical factors being more important than price. The RFP stated the following evaluation scheme:

“[t]echnical proposals will be evaluated in accordance with the following factors. Factor (a) is Go/No-Go. Subfactor (b)(3) is more important than subfactors (b)(1) and (b)(2), which are of equal importance.

(a) Key Personnel--Minimum Acceptable Past Performance

(b) Capability Information

- (1) The strength of the offeror's experience related to their success in minimizing disruption within an occupied fully operational medical or research facility.
- (2) The strength of the offeror's experience related to HVAC infrastructure modernization within an occupied fully operational medical or research facility.

¹In addition to an agency report, written comments submitted by parties in response to that report, and supplemental written submissions from all parties, our Office conducted a hearing on September 29, 1995, recorded on videotape, at which testimony was obtained from the proposed Schlosser general superintendent, the Source Selection Evaluation Board (SSEB) evaluator responsible for verifying the projects cited by offerors to satisfy the key personnel experience requirements, the NIH Program Director who was responsible for drafting these requirements, and representatives of the Greenville Hospital System whose project was cited by Schlosser's proposal to satisfy the key personnel experience requirement.

- (3) The favorableness of the offeror's reputation for past performance."

The minimum requirements for the go/no-go factor (a) were set forth in the RFP under the "Technical Proposal Guidelines" at section L.14.1, "Key Personnel--Minimum Acceptable Past Performance," which stated in pertinent part:

"[key] personnel shall be those persons who will have major project responsibilities and/or who will provide unusual or unique capabilities. The availability of the individuals is considered critical to the accomplishment of required services.

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"[f]or each of the offeror's proposed key personnel, provide at least one reference for a project which satisfies the following minimum acceptability requirement. If any of the offeror's key personnel have not completed a project in accordance with the following minimum acceptability requirement, the offer will not be given further consideration.

"Minimum Acceptability Requirement--Each of the offeror's proposed key personnel shall have completed at least one multiphased occupied medical or technical research facility renovation project greater than \$20 million where a majority of the cost was for mechanical and electrical infrastructure modernization. . . ."²

On June 28, GSA received four proposals, including Hyman's and Schlosser's. The agency first evaluated the proposals for compliance with the go/no-go key personnel technical evaluation factor. An SSEB evaluator interviewed the references for the projects proffered by the offerors for proposed key personnel compliance with this requirement. One proposal was rejected as technically unacceptable under this factor.³ The other three proposals were found technically acceptable.

²This provision also requested specific identifying information about the project relied upon to satisfy this requirement, and the responsibilities of the proposed personnel on this past project, as well as information about the facility that was renovated, the construction approach (including the type and scope of construction), the cost at the time of award and the final cost (including claim settlements), and references from the past project.

³The past projects proffered for the key personnel proposed under this rejected (continued...)

In the case of Schlosser's proposal, the sole identified project of Schlosser's proposed general superintendent involved renovation and new construction at the Greenville Memorial Hospital (GMH), Greenville, South Carolina. The Greenville Hospital System contracted this work to M. B. Kahn, Inc. Schlosser's proposed general superintendent was employed by Kahn as the GMH project superintendent from November 1992 to January 1995, as was stated in the corresponding resume included in Schlosser's proposal. Schlosser's proposal also stated that the performance period for this project was "1992 - 1995," and that the cost was \$22 million.

On June 29, the SSEB evaluator phoned the reference at the Greenville Hospital System. The evaluator asked if the proposed general superintendent was the superintendent on the GMH project, and the Greenville Hospital System reference confirmed that he was. The evaluator then asked the reference for the final cost of the project, which the reference estimated at \$30 million. The evaluator stated that he had a different cost figure and asked the reference if he could account for that difference. The reference stated that the \$30 million figure was an estimate of the total project cost⁴ and that the estimated cost for construction was \$24 million. The evaluator then stated that he had a figure of \$22 million and requested further explanation. The reference stated that the \$24 million construction cost would include equipment costs and changes.⁵ The evaluator then asked about the status of the project and the reference stated that the project was "nearing completion and winding down."⁶ The evaluator did not ask about the period of performance for Schlosser's proposed general superintendent, nor did he ask about the cost and type of work performed while this person was on the GMH project.

The evaluator testified that he concluded from this conversation that the GMH project was "sufficiently complete" to be an adequate basis for finding this proposed

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proposal did not satisfy either the occupied or renovated facility requirements, and the costs of these projects were less than \$20 million.

⁴Total project costs included all related costs paid by Greenville Hospital System, including architect and engineering fees and equipment.

⁵Although not discussed in this conversation, the equipment was paid for and provided by Greenville and was not part of Kahn's costs.

⁶The remainder of this conversation addressed other information about the GMH project related to elements of the minimum acceptability requirement not at issue here (e.g., whether the facility was occupied, the project involved renovation, a majority of the project was electrical and mechanical construction, etc.).

key personnel technically acceptable. The documented summary of this investigation, which was provided to the SSEB, stated that the “final cost [of the GMH project] was \$24 [million],” and did not state that the contract was not yet completed or that it was considered “sufficiently complete.” It also did not state that the proposed general superintendent had not completed the project.

The SSEB evaluated the three technically acceptable proposals under the capability technical evaluation factor. Schlosser’s proposal received the highest ("very good") technical score, and offered the lowest price of \$32,023,000.⁷ Hyman's proposal received a "good" rating and was priced at \$36,484,901. The third offeror was also rated "good" with a price of \$38,993,600. GSA determined that Schlosser’s proposal offered the best value to the government and awarded the contract to Schlosser on August 11.

ALLEGATION

Hyman alleges that Schlosser’s proposed general superintendent did not complete the GMH project, as required under the go/no-go factor, and that the cost of this project was not greater than \$20 million, as also required in order for a key employee to be deemed acceptable. Hyman concludes that Schlosser did not meet the go/no-go factor, and that its proposal should have been rejected under the terms of the RFP.⁸

The agency and Schlosser respond that Schlosser's proposed general superintendent does comply with the solicitation requirements and, even if it is determined that Schlosser’s proposal did not satisfy the precise requirements stated in the RFP, the experience requirements are definitive responsibility criteria, under which

⁷Schlosser proposed, and award was made at, a price of \$32,023,000. After award, Schlosser alleged a mistake in its price in omitting a material item from its total price and requested correction of its price to \$34,952,806. GSA permitted the requested correction and the contract price was modified. Hyman protests that this correction was improper. Based on our review of the documentation, including bid worksheets supporting the request for correction, we agree that the evidence shows that the agency reasonably found that it should have been aware of a possible mistake, and that Schlosser presented clear and convincing evidence both that Schlosser made the mistake and its intended price. Federal Acquisition Regulation (FAR) §§ 15.1005 and 14.406-4(b) & (c).

⁸Hyman’s initial protest also alleged that Schlosser’s proposal was technically unacceptable with regard to the experience of a second proposed key personnel position, and that the proposal misrepresented the availability of its proposed key personnel. Hyman subsequently withdrew both of these protest issues.

experience equivalent to the stated requirements, though not satisfying the precise requirements, will be considered compliant with the criteria.

DISCUSSION

Go/No-Go Requirement Not Definitive Criterion

Preliminarily, the requirement in question is not a definitive responsibility criterion. Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform a contract. T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235. While personnel experience requirements often concern determinations of responsibility, and can be set forth as definitive responsibility criteria, ASR Management & Technical Servs., B-244862.3; B-247422, Apr. 23, 1992, 92-1 CPD ¶ 383, see FAR § 9.104-1(e), in negotiated procurements such responsibility-type criteria may be, and often are, incorporated into the evaluation criteria under the terms of the stated evaluation scheme. Robertson Leasing Corp., B-257588, Sept. 21, 1994, 94-2 CPD ¶ 110; ASR Management & Technical Servs., supra. Where this is the case, the requirement must be considered as stated in the evaluation scheme. Id. The key personnel requirement here is set forth as part of the technical proposal instructions, and expressly stated it was a "go/no-go" evaluation factor to determine technical acceptability, and that its satisfaction was a precondition to "further consideration" of a proposal. We conclude that this was a technical requirement rather than a definitive responsibility criterion.⁹

The record also establishes that the requirement was material. The NIH Program Director for the activity that planned and is overseeing restoration of the Clinical Center Complex, testified at the hearing on this matter that the Complex is the premier facility for clinical research, accounting for over half of the research beds in the country. According to the Director, the Complex is unique, and there would be few, if any, construction personnel who would have renovation experience of the precise nature of the project solicited. The Program Director stated that NIH required key personnel experience, particularly with restoring an occupied, multiphased medical or technical research facility, because NIH's prime concern was that the key personnel would be able to manage all of the interacting parties and the type of work that would be involved in such a uniquely complex project, with the end result that the facility would be renovated with minimum disruption to

⁹Even assuming the key personnel requirement in question was considered a definitive responsibility criterion, we think, for the same basic reasons discussed below, that the agency materially and prejudicially relaxed it. See Haughton Elevator Div., Reliance Elec. Co., 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294; Westinghouse Elec. Corp., B-187984, Sept. 2, 1977, 77-2 CPD ¶ 171.

either patient care or ongoing research. He also testified that testing and integration tasks, which are to be performed at the end of project, are key elements of the project.

Completion Requirement

Turning to the merits, the record shows that Schlosser's proposed general superintendent did not meet the go/no-go requirements. First, he did not complete the project cited in the proposal.¹⁰ Although the proposal did not expressly state that the individual had not completed the project, the SSEB evaluator should have become aware of this fact during his investigation when the Greenville Hospital System reference informed him that the project was not yet completed; in fact, the record shows that the project is not even scheduled for completion in this calendar year.¹¹ As indicated on the general superintendent's resume, he left the employ of Kahn in January 1995, almost 6 months prior to the reference check, and thus could not have completed the project.¹² Thus, under this go/no-go technical evaluation

¹⁰The agency and Schlosser suggest that the proposed general superintendent meets the completion requirement by virtue of his involvement on a project at a hospital in New Jersey. However, Schlosser's proposal, and the current record, lack sufficient information, as was requested under the requirement, to determine whether the project in fact would satisfy the requirement.

¹¹The agency initially alleged that the project in question was "substantially complete," a contractual term of art with common application in the construction field. See Matchett v. United States, 202 Ct. Cl. 1118 (1973). The agency's position was that, since "substantially complete" means that the project must be accepted by the parties as a completed project, the same status for the proffered project at issue should satisfy the minimum acceptable requirement for completion. The Greenville Hospital System stated that the GMH was not "substantially complete" at any time to date. The SSEB evaluator who investigated this project initially stated that the Greenville reference told him that the GMH project was "substantially complete." He recanted this statement at the hearing and has further stated that he never considered the GMH project to be "substantially complete." The agency no longer asserts that the project is "substantially complete."

¹²The SSEB evaluator stated that he did not know that this person left the GMH project in January 1995 from reading the proposal; conversely, he stated that when he began his conversation with the Greenville reference on June 29, he assumed that the contract had been completed in January 1995 since the project description and the proposed general superintendent's resume in Schlosser's proposal showed that the GMH project ended in January 1995. In any event, the SSEB evaluator

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factor, Schlosser's proposed general superintendent did not meet the minimum requirement that the proposed general superintendent have "completed" a qualified project.

\$20 Million Requirement

It also is clear that the proposed individual did not meet the \$20 million prong of the go/no-go requirement. While Schlosser's proposal indicated that the cost of the GMH project was \$22 million, the record shows that the contract was awarded to Kahn in the amount of only \$18.9 million. As a result of change orders, the anticipated final contract amounts as of the time the proposed general superintendent left that project, and as of the time of GSA's award to Schlosser, were \$19.7 million and \$19.9 million, respectively. More importantly, the cost of the work performed and accepted as of the time the proposed general superintendent left the GMH project was \$17.7 million. At no time to date has it been established that the cost of the GMH project contracted to Kahn was greater than \$20 million as required under the go/no-go key personnel evaluation factor.¹³

The agency and Schlosser contend that the costs of equipment, separately acquired and paid for by the Greenville Hospital System, which was installed under the Kahn GMH contract when the proposed general superintendent was project superintendent of that contract, should be considered in calculating the project cost. However, even adding the \$1.5 million cost asserted by Schlosser would not increase the contract amount in which the proposed general superintendent was involved (\$17.7 million) above \$20 million.¹⁴

¹²(...continued)

consistently acknowledges reading the resume prior to his investigation, thus he reasonably should have been aware of when the proposed general superintendent left the project.

¹³While the SSEB evaluator reported that, based on his conversation with the Greenville Hospital System, the "final cost" of the project was \$24 million, the record shows that the evaluator knew or should have known this was neither a final cost because the contract was not completed, nor a cost of the project as relevant to the experience of the proposed general superintendent as he had left almost six months earlier.

¹⁴While Schlosser alleges that the cost of the Greenville-provided equipment installed during Schlosser's proposed general superintendent's tenure on the project was \$1,534,536, Schlosser did not provide primary documentation to support this figure. In fact, the documentation upon which Schlosser does rely was only

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The agency and Schlosser also contend that the agency should be permitted to consider another project in conjunction with the GMH project to determine project cost. In this regard, Kahn also had a contract to renovate the Roger C. Peace Rehabilitation Hospital during the same approximate time as the GMH project. The Peace Hospital is part of the Greenville Hospital System and is connected by corridors to GMH on multiple floors. The cost of the Peace Hospital contract was \$2.8 million, and these parties assert that Schlosser's proposed general superintendent was the assistant superintendent on the Peace Hospital contract.

The record does not support this position. Both the Greenville Hospital System, as customer, and Kahn, as contractor, classified these two contracts as separate projects.¹⁵ Furthermore, Schlosser's proposed general superintendent was not the assistant superintendent on the Peace Hospital contract; he did not hold any personnel position under that contract. He testified that he and the Peace Hospital superintendent shared office space and resources while the period of performance of these two projects coincided; that the two superintendents assisted each other on an informal basis; and that assisting the Peace Hospital project supervisor was not part of his employment agreement with Kahn.¹⁶ Under these circumstances, and considering the clear and specific statement of the minimum requirement, we do not think that these two projects reasonably can be considered one \$20 million project performed by Schlosser's proposed general superintendent.

¹⁴(...continued)

provided to our Office after the Greenville Hospital System witnesses were dismissed from the hearing segment conducted by video teleconference between Washington, D.C. and South Carolina. Under these circumstances, we would hesitate to accept this alleged cost figure without further support.

¹⁵Although clearly identified as separate projects, Greenville's designation "Phase IV" appears on documents for both projects. The Greenville Hospital System cautioned that the Phase IV designation should not be considered a project designation. Rather, "Phase IV" is used by the Greenville Hospital System to indicate dedicated funding for a large number of various projects on its campus, some of which are long finished and some not even started.

¹⁶Also, Schlosser's proposal did not identify the Peace Hospital construction as past experience for the proposed general superintendent. Nor does the proposal's description of the GMH project, as confirmed by testimony of the proposed general superintendent, include the work performed on the Peace Hospital. Moreover, the agency was not aware of the Peace Hospital contract, either as part of the key personnel's GMH project experience or as other experience, and did not evaluate the proposed general superintendent's experience prior to award.

We conclude that Schlosser's proposed general superintendent did not meet the minimum requirement for "completing" the requisite project, which in turn could not reasonably have been found to have a value greater than the required \$20 million with regard to the proposed general superintendent's experience. Thus, by accepting the proposed individual and Schlosser's proposal as acceptable, the agency relaxed, or waived, the strict terms of the RFP.

Prejudice

The agency asserts that, even if Schlosser did not meet the requirement precisely, relaxing the requirement was proper because the cited GMH project was "sufficiently complete," and the project cost was close enough to \$20 million, that the experience met the intent of the requirement and met the agency's actual needs,¹⁷ and the relaxation would not result in competitive prejudice. In this latter regard, prejudice is an essential element of every viable protest and our Office will not recommend disturbing an agency procurement decision absent the existence of possible prejudice. Florida Professional Review Organization, Inc.—Advisory Opinion, B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17; see Irvin Indus., Canada Ltd. v. United States Air Force, 924 F.2d 1068 (D.C. Cir. 1990); Saratoga Dev. Corp. v. United States, 777 F. Supp. 29 (D.D.C. 1991), aff'd on other grounds 21 F.3d 445 (D.C. Cir. 1994).

We find a reasonable possibility of prejudice here. The record shows that the key personnel experience requirements were very restrictive. NIH, which drafted the requirements, believed that few personnel had experience in major restoration projects of the specific nature being solicited. A prospective prime contractor, John

¹⁷As GSA's arguments suggest, GSA is unwavering in its position that the proposed general superintendent satisfies NIH's needs for key personnel experience. Testimony from the NIH Program Director, who drafted the text of the minimum requirement and who was called by GSA to testify on NIH's actual minimum needs, suggests that the proffered key personnel experience at issue would meet the agency's actual minimum needs; and that the actual needs are much less restrictive than stated in the requirement in the RFP. He testified that project cost is only a secondary consideration, and that projects with a cost of as little as \$15 million that meet other more important requirements concerning the nature of the facility and the complexity of construction, could provide experience which would satisfy NIH's true needs. Likewise, completion of a project is not necessary to satisfy NIH's actual needs; percentage of a key personnel's time on a project could be as little 70, 60, or even 50 percent in terms of total project cost performed, and completion of the project would not be necessary so long as the experience gained on that project satisfied the more primary concerns.

J. Kirlin, Inc., requested that the stated requirements be amended to be less restrictive than stated, and specifically requested that the minimum acceptable project cost for key personnel experience be reduced.¹⁸ The agency denied this request. Kirlin submitted an affidavit to our Office stating that it believed that the agency required both that the proposed key personnel had completed the project proffered to meet the experience requirement, and that the cost of that project had to be at least \$20 million. Kirlin states that it was unable to meet these requirements; it did not submit a proposal on its own.¹⁹ Moreover, since the current technically acceptable offerors, under resolicitation, would be competing without the expectation of this severe restriction on competition, it is reasonable to expect that there would be increased price competition among these offerors. See Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384. Indeed, Hyman has provided affidavits stating that its proposal was premised on this being a limited competition because of this requirement. We therefore sustain the protest.

RECOMMENDATION

The circumstances of this case show that the government's needs here were significantly overstated, and in such cases we generally recommend resolicitation under a clear statement of the agency's actual minimum needs. Cylink Corp., supra; ManTech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336. Accordingly, we recommend that GSA resolicit, requiring only key personnel experience that is necessary to satisfy the government's actual minimum needs. If Schlosser is not the successful offeror under this competition, its contract should be terminated, as appropriate. Alternatively, if the agency determines that its actual minimum needs are correctly stated in the RFP, the agency should reject Schlosser's proposal as technically unacceptable, terminate the contract, and award to the competitive range offeror whose technically acceptable proposal offers the best value to the government, consistent with the stated evaluation factors. Hyman is also entitled to recover the reasonable costs of pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protester should submit its certified claim for costs directly to the agency within 60 working days of its receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States

¹⁸Kirlin requested a reduction to \$10 million.

¹⁹Kirlin did participate in Hyman's proposal as a subcontractor.