

Boyle
P.L.T

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

04747

FILE: B-189725

DATE: January 17, 1978

MATTER OF: Macmillan Oil Company

DIGEST:

1. Protester contends that agency acted arbitrarily and unreasonably in considering successful offeror's unaudited financial statement prepared 9 months earlier to determine offeror's financial qualifications. Where solicitation does not require submission of audited financial statement that was prepared within shorter time period, agency's action is not arbitrary or unreasonable.
2. Contentions--that agency ignored successful offeror's (1) past record of late rental payments under another agency concession contract in determining financial capability, (2) known violations of safety requirements, public dissatisfaction, and late rental payments--relate to agency's affirmative determination of responsibility. Agency's position does not provide basis to conclude that agency official's conduct even remotely constituted fraud or bad faith. Accordingly, protest will not be considered on merits and responsibility determination will not be disturbed.
3. Protester argues that successful offeror was given unfair advantage because three of six evaluators were familiar with offeror's operation at another marina and during evaluation, one evaluator told others that offeror's operation, while not without problems, was good. Argument is without merit because such comment added no information to that which was in successful offeror's proposal or obvious in circumstances.

Macmillan Oil Company (Macmillan) protests the award of a lease for the Sayorville Marina concession to Mr. Vernon W. Eden under invitation for proposals No. DACW22-9-77-2066 issued by the Rock Island District, Corps of Engineers, Department of the Army.

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Three proposals were received and evaluated by an Ad Hoc Committee appointed by the contracting officer and composed of six agency employees familiar with design, construction, operation and other aspects of leasing recreation facilities. The solicitation contained the following procedure for awarding the lease and selecting the successful offeror:

"(1) Following the public opening, the Government will analyze the proposals received to determine whether any of the proposals require clarification, and if so, the Government will, by letter, request the specific clarification data required. The Government may require any offeror to furnish additional evidence of his financial condition and, in appropriate cases, of his ability to assume the obligations and responsibilities imposed by the terms and conditions of the lease, and such other information as may be considered desirable by the Government. No offeror will be permitted, in connection with the submission of the above information, to alter any pertinent factors contained in his original proposal. Failure of an offeror to submit any of the above information, within such reasonable time as may be prescribed by the Government, may be the basis for rejection of his proposal.

"(2) The lease will be awarded to the offeror who is determined, by virtue of experience, character and otherwise, to provide the most satisfactory facilities and services determined necessary by the Division Engineer for the proposed site and such additional facilities and services as may become necessary to adequately satisfy the public demand or which may beneficially increase the utilization of the proposed site by the public."

After reviewing and evaluating the proposals, the Ad Hoc Committee recommended that the source selection authority, the District Engineer, make award to Mr. Eden. In support of their recommendation, the Ad Hoc Committee provided this statement:

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"The Ad Hoc Committee selected Vernon Eden as the best offeror by a unanimous decision. Mr. Eden was selected because he has considerable experience with construction and operation of a marina on a lake with fluctuating water levels. The other offerors indicated very limited experience with a marina operation. Mr. Eden's development proposal is not as diversified as the others in that he does not show long range plans for a motel, playground, etc.; however, he does plan very extensive development for mooring, storing, repair and caring for boats and motors which is our primary objective in leasing the marina site. It was questionable that the other offerors had fully considered the extreme lake fluctuation in the dock design, while we know that Mr. Eden is capable of designing and anchoring docks to work under extreme lake fluctuations. * * *

On June 21, 1977, notice of award to Mr. Eden was sent to Mr. Eden and the other offerors, but before the lease was executed and sent to Mr. Eden, Macmillan attempted to lodge a protest against the award with the Rock Island District. Subsequently, after the lease was extended and sent to Mr. Eden, Macmillan filed a protest here.

Macmillan contends that: (1) the successful offeror's proposal was improperly evaluated with regard to financial and experience factors; (2) one evaluator improperly influenced other evaluators during the selection process; and (3) the agency should have withheld award when advised that Macmillan would protest.

EVALUATION OF SUCCESSFUL OFFEROR

First, Macmillan argues that the agency should have verified Mr. Eden's financial statement, which was dated 9 months prior to the closing date for receipt of proposals and submitted with Mr. Eden's proposal.

The Corps of Engineers explains that each offeror's financial capability to carry out its proposal under the concession was evaluated based on the unaudited financial statements provided with each offeror's proposal. The Ad Hoc Committee did not seriously question the financial capability of Mr. Eden or Macmillan to carry out the development each proposed. The fact that one offeror may have

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superior financial capabilities over another would become a factor for consideration in awarding the lease only in the event that the proposals for development and experience of the offerors were approximately equal.

With regard to the evaluation of Mr. Eden's financial statement, it is not the function of our Office to evaluate proposals of unsuccessful offerors to determine which could have been selected for award. That function is the responsibility of the contracting agency, since it must bear the burden of any difficulties resulting from a defective evaluation. Thus, procurement officials enjoy a reasonable degree of discretion in the evaluation of proposals. Their determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386; QUAD Corporation, 56 Comp. Gen. 745 (1977), 77-1 CPD 453.

We note that the solicitation did not require that offerors submit audited financial statements or even current financial statements and in the circumstances the consideration of Mr. Eden's unaudited financial statements prepared within 9 months of the date of consideration was not unreasonable.

Accordingly, since all offerors were treated equally and the solicitation did not require an audited financial statement, we cannot conclude that the agency's use of the unaudited financial statement in the evaluation of proposals was arbitrary or in violation of procurement statutes or regulations.

Secondly, Macmillan argues that agency records show that Mr. Eden continually failed to make prompt rental payments due the Government from his concession at the Coral Marina. Macmillan contends that the District Engineer and several evaluators either were aware of or should have been aware of Mr. Eden's past delinquent rental payments and that those delinquencies should have been considered in assessing Mr. Eden's financial qualifications.

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In response, the Corps of Engineers explains that Mr. Eden brought his late rental payments up to date on April 2, 1976, and his rental payments for 1976 and 1977 have been made in a timely manner. During the time period in which Mr. Eden was late in submitting his rental payments to the Government (1974-1975), he was constructing major fixed improvements on his lease area including a new sales and service building, a 70 stall covered dock and parking facilities for 70 cars. At that time he was also installing ground-fault circuit interrupters and rebuilding a dock which was damaged and partially destroyed during the previous winter season by a combination of low water levels and subsequent ice conditions. Although these factors do not excuse Mr. Eden's late payment of his rent, in the agency's view they do present mitigating circumstances since it was apparent that Mr. Eden was reinvesting his cash and profits in Marina facilities to serve the public and was not intentionally neglecting or refusing to acknowledge his rental obligations to the Government.

At issue here is the impact of Mr. Eden's past late rental payments on his ability to perform satisfactorily under the instant lease. For the reasons explained above, the agency concluded that there were adequate mitigating circumstances for the late payments, thus reducing their negative impact.

Next, Macmillan contends that Mr. Eden's experience in operating a marina was unsatisfactory in that: (1) he failed to take prompt corrective action as required by a citation from the Iowa Bureau of Labor; (2) he failed to comply with public safety features (handrails on walkways and general clean-up) required by his lease at the Coral Marina; (3) the public has been dissatisfied with his operation of the Coral Marina as evidenced by a petition signed by users of the Coral Marina; and (4) as mentioned above, his failure to pay rent on time.

In response, the Corps of Engineers explains that on March 9, 1977, 11 safety violations were observed by the Iowa Bureau of Labor. Mr. Eden was reinspected on June 2, 1977, and all previously noted OSHA violations had been properly corrected within the stated time limits

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except for one. Having been unable to correct that violation or devise a solution to the problem, Mr. Eden requested the assistance and technical expertise of both the Corps and Iowa Bureau of Labor experts in resolving this problem. However, neither agency was able to provide a solution and, shortly thereafter, the Bureau withdrew the charged violation. Other safety violations were deemed by the Corps of Engineers to be minor, technical in nature, and easily correctable. The agency is aware of the petition and argues that many signers have one surname-- the name of a man who initiated the petition and who had a dispute with Mr. Eden concerning the payment of rent to Mr. Eden, a dispute resolved in small claims court largely in Mr. Eden's favor.

In this situation, Mr. Eden's late rental payments and the other matters relate to the responsibility of Mr. Eden. We have discontinued reviewing agency affirmative responsibility determinations except where the solicitation lists definitive responsibility criteria or where there is a showing of fraud or bad faith. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. In view of the foregoing explanation by the Corps of Engineers, we cannot conclude that the agency official's conduct even remotely constituted fraud or bad faith. Accordingly, we will not consider the protest, as it relates to Mr. Eden's responsibility, on the merits and the agency's affirmative responsibility determination will not be disturbed.

INFLUENCE BY ONE EVALUATOR ON OTHER EVALUATORS

Macmillan states that the Corps of Engineers admits that three members of the "impartial" selection committee were familiar with Mr. Eden's operation of the Coral Marina and, therefore, Macmillan "feels that it was not given a fair shot by the selection committee and Mr. Eden was in effect given three advocates upon a six member committee."

Macmillan refers to an affidavit from one evaluator who states: "I told them that Mr. Eden had been a good marina operator and that he has continued to improve and add new facilities to his marina to serve the boating

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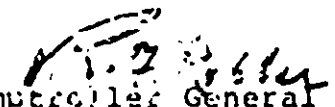
public." To Macmillan, this clearly shows that one evaluator made extremely influential remarks about Mr. Eden's operation without divulging the history of problems with Mr. Eden or giving the other offerors the same opportunity, thereby acting in an arbitrary manner towards Macmillan.

The agency explains in reference to the affidavit that three members of the Ad Hoc Selection Committee were familiar with Mr. Eden's operations at Coral Marina, and that one evaluator disclosed to those members not familiar with his operations that while this lease concession has not been without problems, he has found Mr. Eden to be generally cooperative and that the agency and Mr. Eden has been able to work work reasonable solutions to the problems which have arisen under the lease.

The record does not reveal what impact, if any, the one evaluator's remarks had on the other evaluators. Based on the proposals submitted, each evaluator could readily observe that Mr. Eden was the only offeror with experience in operating a marina concession on a lake with fluctuating water levels. The fact that he had operated the concession for the Corps of Engineers for several years and he continued to do so could reasonably be interpreted by the three other evaluators as meaning that Mr. Eden's performance was satisfactory. We do not believe that the evaluator's comments added any information to that which was in Mr. Eden's proposal or intuitively obvious in the circumstances. Accordingly, we have no basis to conclude that those evaluators who were familiar with Mr. Eden's Coral Marina concession improperly influenced the other evaluators in the selection process.

In view of our above conclusions, the consideration of Macmillan's third argument--the agency's failure to withhold award when appropriate officials were on oral notice of Macmillan's intent to protest--is unnecessary.

Protest denied.


Deputy Comptroller General
of the United States