



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Emmert International

File: B-280478; B-280478.2

Date: October 7, 1998

Terry W. Emmert for the protester.

Joseph J. Jakubik for International Chimney Corporation, an intervenor.

Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award to higher-priced offeror was unobjectionable where, in evaluating relative merits of proposals to relocate lighthouse, agency reasonably determined that awardee's proposed "soft move" was preferable to protester's proposed "hard move," and tradeoff decision in favor of awardee's more expensive proposal was consistent with the solicitation.

DECISION

Emmert International protests the award of a contract to International Chimney Corporation (ICC) under request for proposals (RFP) No. CAHA-175, issued by the National Park Service (NPS), Department of the Interior for relocation of the Cape Hatteras Light Station at Cape Hatteras National Seashore, Dare County, North Carolina. Emmert objects to the agency's evaluation of proposals and to the selection of ICC's more costly proposal for award.

We deny the protest.

The procurement was conducted under design-build procedures in two phases. In the first phase, six firms submitted qualification statements. Two firms, the protester and the awardee, were determined highly qualified and were invited to compete in phase two, at issue here, for a base design services contract, including the transportation system for the lighthouse and associated structures, and a construction services option to be awarded contingent upon funding availability.

The phase two solicitation provided for award on the basis of best value with technical factors significantly more important than price, considering the total base contract amount plus the option. It further provided for the evaluation of proposals on the basis of the following technical factors (and subfactors):

A. Design Proposal

1. Preparatory Work (Suitability of Work, Compatibility with Building Fabric)
2. Lift Method (Suitability and Reliability)
3. Transportation System (Suitability and Reliability of System)
4. Expectations of Incidental Building Damage during Move
5. Foundations (Suitability for Loads and Site Conditions; Compatibility with Existing Appearance)
6. Protection of Historic Building Fabric

B. Management Plan

1. Design Build Schedule
2. Management Philosophy
3. Team Organization/Key Personnel
4. Quality Control Plan
5. Safety Plan
6. Public Relations

After evaluation, the awardee's and protester's proposals were included in the competitive range. Discussions were held and final proposal revisions (FPR) were submitted and evaluated. ICC's highest-priced offer of \$9,489,000 received the highest technical score of 95.66 (out of 100 available) points. Emmert's low offer of \$8,736,000 received 76.33 technical points. The agency concluded that the superiority of ICC's technical proposal justified its higher price and represented the best value. Award was made to ICC on June 19, 1998 in the amount of \$1,454,000 for the base contract, with the construction option to be awarded in the amount of \$8,035,000, contingent upon funding.

Of relevance in the evaluation was the distinction between the types of moves offered for the lighthouse. The protester offered a "hard move," which essentially involves lifting the lighthouse with hydraulic jacks, inserting needle beams through the base of the lighthouse, and installing a movable rail track system under the beams, consisting of rollers or skates in between a runner beam and a track beam. After movement of the lighthouse 2,900 feet to the new location, it would be lowered with hydraulic jacks onto a new foundation. In such a hard move, the

hydraulic jacks would lift and lower the lighthouse, but would not operate during the actual move. In contrast, the awardee offered a "soft move," which essentially is a hard move with added hydraulic jacks above the rollers or skates which operate during the move to keep the load level, thus providing a hydraulic "float" which allows for settlement and variations in the moving track.

The technical evaluation panel (TEP) concluded that Emmert's proposed hard move "poses a higher risk of damage to a historically significant structure, such as the lighthouse," and "a move system with less probability of [structural] cracking [i.e., a soft move] provided a more suitable method." Letter from the Contracting Officer to Emmert International 1 (June 19, 1998). In addition, the TEP concluded that there were other weaknesses in Emmert's proposal associated with the hard move, including "height of the lift, the loading concentration, reliability on [deleted], potential for track settlement, and lack of contingency plan to maintain the dewatering system during possible evacuation of the island." *Id.* Further, the TEP was concerned that "Emmert proposed very little in terms of bracing [of the exterior of the lighthouse]" and that "[i]n addition, Emmert's FPR failed to clearly address how track settlement would be corrected." Contracting Officer's Statement, July 21, 1998, at 2. In contrast, the TEP concluded that ICC's proposed soft move was technically superior because it "pose[d] less risk of damage to a historically significant structure, such as the lighthouse," and that "ICC's lift method and transportation system has proven very successful in relocating structures with a footprint resembling the Cape Hatteras Lighthouse." Source Selection Determination, June 16, 1998, at 2. On the basis of this evaluated technical superiority, the agency determined that payment of ICC's \$753,000 price premium was justified. *Id.*

The protester takes issue with the evaluation, alleges bias on the part of the agency, and concludes that the award to ICC at a \$753,000 price premium did not represent the best value. Based on our review of the record, we conclude that the evaluation was proper and that there is no indication of improper bias on the part of the evaluators.¹ We discuss the most significant arguments below.

¹Because the protester filed the protests *pro se*, electing not to engage counsel, it had access only to a redacted evaluation record, which included the evaluation of its own, but not the awardee's, proposal. However, the agency provided unredacted narrative reports and contracting officer's statements to the protester in response to the protests. In these circumstances, we review the entire record *in camera* in reaching our decision.

EVALUATION OF MOVING METHODS

Soil Modification

Soil modification was considered under the first design subfactor, preparatory work (Emmert's proposal received 14 and ICC's proposal 17.3 of 18 available points), and the third design subfactor, transportation system (Emmert's proposal received 11 and ICC's proposal 15.67 of 16 available points).

The protester argues that the agency failed to consider and understand the importance of proper soil modification in the move, which negatively affected the evaluation of its proposal. Specifically, the protester maintains that, based on inconsistent soil density and a high water table along the moving route, soil improvement was imperative, so that if any settling occurred, it would occur evenly and result in no damage to the lighthouse. In this regard, in order to eliminate uneven settlement, the protester proposed a plan of soil [deleted] to control soil stability. ICC instead proposed a stone base along the moving route, and the protester contends that this will result in uneven settlement as the lighthouse is moved, which will not be compensated for entirely by the additional hydraulic jacks because a "washboard effect will impose severe force on the lighthouse as the jacks try to compensate for the uneven settlement." Protester's Comments, Sept. 10, 1998, at 4.

The agency responds that the TEP thoroughly understood the critical nature of soil modification and [deleted] in Emmert's approach, based on the need to control track settlement, due to the limited one-half inch settlement tolerance in the firm's design. In this regard, of concern to the TEP was the difficulty of controlling soil stability in Emmert's design, as described in the firm's own proposal. See Contracting Officer's Supplemental Statement, Aug. 24, 1998, at 6-9. For example, the agency cites the protester's response to discussion question No. 2, "[i]s [deleted] along the move corridor a critical element in the design?" Emmert responded "[a]bsolutely," and then went on to alert the TEP that "[i]n an extreme event, resulting in full saturation of the subgrade sands, it will be necessary to stop work to prevent failure of the track system and seriously jeopardizing the structure." Letter from the Contracting Officer to Emmert International 1 (Apr. 24, 1998); Protester's Technical Proposal Additions and Adjustments, May 29, 1998, at 1-2.²

²Further, in this regard, the agency cites Emmert's response to discussion question no. 5, "[w]hat is your design criteria of the [deleted] system along the track route?" Emmert answered that "the system will be capable of field modification if necessary to adapt to unanticipated conditions," but failed to describe what modifications could be made. Letter from the Contracting Officer to Emmert International 2 (Apr. 24, 1998); Protester's Technical Proposal Additions and Adjustments, May 29, 1998, at 2.

The agency asserts that, based on the TEP's concern with the uncertainty of soil stability control in Emmert's design, it reasonably concluded that the soil modification methods proposed by Emmert [deleted] were inadequate and insufficiently reliable to provide the limited track settlement tolerance.

Conversely, the TEP concluded that ICC's soft move--which, instead of soil modification and [deleted], depended upon stabilization of the subgrade and use of a stone base--could better accommodate the inevitable settlement and variation in the track system, and thus was preferable. Contracting Officer's Supplemental Statement, Aug. 31, 1998, at 7-8. Regarding the alleged "washboard effect" in ICC's design, the TEP determined that ICC's "considerably slower rate of movement" for the lighthouse (6 weeks versus Emmert's proposed 8 days) and "utilization of certain propriety equipment" (i.e., a second set of hydraulic rams or push jacks to move the lighthouse more continuously, versus Emmert's proposal for one set of push jacks), "will adequately mitigate" this effect. Id. at 10.

Our Office will review an agency's evaluation of proposals to determine if the evaluation was reasonable and consistent with the RFP's stated evaluation criteria. DDD Co., B-276708, July 16, 1997, 97-2 CPD ¶ 44 at 3. Disagreement with the evaluation does not render it unreasonable. Id.

We find no basis to question the evaluation. Contrary to the protester's position, the evaluation record indicates that the evaluators thoroughly considered the differing levels of soil modification among the competing proposals, balanced their relative strengths and weaknesses, and concluded that ICC's soft moving system, with less soil modification and nonreliance on [deleted], had "greater capacity to compensate for variance of the track as the soils settle beneath," and "provide[d] a more reliable and suitable method," and thus was technically superior. TEP Final Selection Recommendation, June 18, 1998, at 3.³ The protester has failed to rebut

³For example, under the subfactor preparatory work, the TEP recognized that "Emmert's proposal requires [deleted], in addition to other soil preparation" and "provides more soil investigation information than ICC," while "ICC has [deleted] for [the] move route." Final Selection Recommendation Memorandum, June 18, 1998, at 2. Additionally, the evaluators found that "ICC[s] proposal for soils preparation, such as including a stone base course, is an adequate approach for the soft move method," and concluded that "[b]y avoiding reliance on [deleted], ICC provides a more suitable soils preparation proposal." Id. Further, under the transportation system subfactor, the evaluators recognized that "Emmert states that they will rely upon [deleted] of the soils to ensure the half-inch tolerance is not exceeded," but concluded that "[i]f for any unforeseen reason the settlement exceeds the half-inch tolerance, Emmert does not address how this will be accommodated for." Id. at 2-3. In contrast, the evaluators considered that "ICC's [soft move] system can

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any of the agency's evaluation conclusions in this area concerning either its own or the awardee's design. Given the absence of evidence contradicting the evaluation conclusions, Emmert's complaints constitute no more than disagreement with the agency's technical judgment, which is insufficient to establish that the evaluation was unreasonable. See Solid Waste Integrated Sys. Corp., B-258544, Jan. 17, 1995, 95-1 CPD ¶ 23 at 6.⁴

Structural Cracking

Structural cracking was covered by the fourth design subfactor, expectations of incidental building damage (Emmert's proposal received 2.33 and ICC's proposal 3.33 of 4 available points). Emmert argues that the agency failed to investigate past building moves, which would have indicated the success of hard versus soft moves. In particular, the protester cites a similar successful hard move identified in its proposal, the Cudecom Building in Bogata, Columbia, where there was no structural damage, as well as two soft moves, where there was structural cracking. Emmert also complains that the evaluators misread a letter submitted with its proposal as discrediting hard moves based on possible cracking. Specifically, the letter (written by ICC in the capacity of a consultant to a third party), stated that:

[I]t should be understood by all that during a hard move, the building is subjected to many disruptions, even though they may be minor, as it is being loaded and moved. There is no soft flexible connection in between other than the building[']s own flexibility. The possibility of cracking exists in all types of moves and probably more so in this type of move versus a soft move.

³(...continued)

compensate for settlement in excess of 12 inches" and "anticipates 1 to 2 inches of settlement occurring as the lighthouse moves," and concluded that "ICC's tolerance will be easier to achieve," and that "ICC provides greater capacity for unforeseen settlement, thus providing a more reliable and suitable approach." Id.

⁴Emmert challenges the finding of a deficiency in its proposal for lack of a contingency plan to maintain the [deleted] system during possible evacuation of the island. However, under our Bid Protest Regulations, protests such as this, in order to be timely, must be filed with our Office no later than 10 days after the protest basis was or should have been known. 4 C.F.R. § 21.2(a)(2) (1998). Emmert first raised this issue in its comments filed on August 10, 1998, more than 1 month after receiving the notice of award letter, which listed this aspect of the firm's proposal as a weakness. See Letter from the Contracting Officer to Emmert International 1 (June 19, 1998). The argument therefore is untimely and we will not consider it.

Letter from ICC to Empire State Development 2 (Feb. 2, 1998) (attached to Emmert's Technical Proposal Additions and Adjustments, May 29, 1998). Emmert contends that the letter, when read in its entirety, does not dismiss the hard move method as a viable approach.

In response to the protester's first point, the agency states that it relied on the information contained in the proposals and was neither obligated, nor saw any need, to investigate other projects, given the unique conditions involved in the move of the lighthouse, *i.e.* historical significance and site conditions of Cape Hatteras. We see nothing unreasonable in this position. Where conditions are particular to a project, it is reasonable for an agency to eschew comparison to other projects; the protester has not established that the material conditions here are the same as the conditions at the sites of the other relocations. To the extent that other projects were deemed at all relevant, the evaluation record indicates that the agency favorably considered similar successful structural moves presented by ICC (*i.e.*, lighthouses) in making its price/technical tradeoff.⁵ As for Emmert's Bogata building move, the TEP considered it, but concluded that it was not directly comparable to the instant move because the footprint was considerably larger, the moving distance was shorter (300 versus 2,900 feet), and the move was not accomplished by Emmert itself (rather, a consultant on Emmert's team was a consultant to the Bogata project). Emmert has not rebutted the dissimilarities of the Bogata move, as evaluated by the agency, or otherwise indicated that it submitted evidence of similar lighthouse moves which the agency failed to consider. We therefore have no basis to question the evaluation in this area.

We also find nothing objectionable regarding the agency's reading of the letter in Emmert's proposal. First, even if Emmert is correct that the remainder of the letter was supportive of hard moves, based on our reading of the letter, the agency reasonably read the cited language as critical of the hard move method. By including the letter in its proposal without qualification or explanation, the protester took the risk that the agency would find certain portions of it more persuasive than others, and that it could have a negative impact on the evaluation of its proposal. Herndon Science and Software, Inc., B-245505, Jan. 9, 1992, 92-1 CPD ¶ 46 at 4 (it is the offeror's responsibility to submit adequately written proposal in order to establish that what it proposes will meet the government's needs). In any case, it is clear from the record that the letter was not the basis for the agency's evaluation conclusions; rather, as already discussed, the agency based its preference for ICC's proposed method on consideration of the proposals as a whole.

⁵The phase two RFP here did not specifically provide for the evaluation of past projects, although consideration of past performance information was specifically provided for in phase one of the procurement.

EVALUATOR QUALIFICATIONS

Emmert argues that the evaluators lacked the necessary expertise, particularly regarding soil engineering and large structural relocation, to adequately evaluate proposals.⁶ The protester concludes that the award must have resulted from bias in favor of ICC.

This argument is without merit. The selection of individuals to serve as proposal evaluators is a matter within the discretion of the agency; we will not appraise the qualifications of such individuals absent a showing of possible fraud, conflict of interest, or actual bias on the part of the evaluators. Kasco Fuel Maintenance Corp., B-274131, Nov. 22, 1996, 96-2 CPD ¶ 197 at 4; Solid Waste Integrated Sys. Corp., B-258544, Jan. 17, 1995, 95-1 CPD ¶ 23 at 6. Where a protester alleges bias, it must provide credible evidence, not mere inference or supposition, demonstrating that the agency's bias translated into action which unfairly affected the protester's competitive position. American Native Medical Transport, L.L.C., B-276873, Aug. 5, 1997, 97-2 CPD ¶ 73 at 7; Areawide Servs., Ltd., B-265650.2, Dec. 28, 1995, 95-2 CPD ¶ 287 at 4.

Emmert's allegation of bias is based on the fact that news of the award was released (apparently by publication in a newspaper) several days prior to the award date. However, it is not apparent how the unauthorized early release of the awardee's name supposedly translated into action which unfairly affected the protester's competitive position.⁷ Moreover, since we find no error in the evaluation of the proposals, we have no basis to conclude that the evaluation unfairly affected the protester's competitive position. Alcon Env'tl., Inc., B-275859.2, Apr. 11, 1997, 97-1 CPD ¶ 139 at 6 n.6.

⁶The panel consisted of three voting members--a structural engineer, an historic architect, and a civil engineer--all licensed professionals with a total of more than 60 years of experience, including extensive experience in NPS design and construction. The panel also included two non-voting consultants, both university professors, one of whom authored the report "Saving the Cape Hatteras Lighthouse from the Sea," and the other of whom is a registered professional civil engineer.

⁷The agency states that it has no knowledge of the early release of the awardee's name. It reports that members of the TEP signed nondisclosure statements and were cautioned not to reveal the name of the awardee until after official notice of award had been made. According to the agency, the only official release by the contracting office was the 24-hour notice of pending award sent to the congressional liaison in Washington, D.C. on June 18, 1998.

PRICE/TECHNICAL TRADEOFF

Emmert maintains that ICC's proposal did not represent the best value to the government in light of its more than \$700,000 price premium. In a best value acquisition, as here, an agency has discretion to make award to an offeror with a higher technical score and a higher price, where it reasonably determines that the price premium is justified considering the technical superiority of the awardee's proposal, and the result is consistent with the evaluation criteria. Hellenic Technodomiki S.A. B-265930, Jan. 3, 1996, 96-1 CPD ¶ 2 at 3. The agency has met this standard. Given that technical considerations were more important than price under the RFP, and the agency's specific finding that ICC's proposal's technical advantages outweighed Emmert's lower price, there is no basis for objecting to the tradeoff.⁸

The protest is denied.

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of the United States

⁸Additionally, Emmert complains that contract performance was not stayed pending resolution of the protest because, prior to filing its protest, our Office failed to inform the firm of the Federal Acquisition Regulation (FAR) requirement for filing within 5 days after the debriefing in order to obtain such a stay. See 31 U.S.C. § 3553(c), (d) (1994); FAR § 33.104(c)(1). First, we have no record of the protester's calling our Office prior to the filing of its protest--the first record of a call from the protester is July 7, 1998, 14 days after the debriefing and 8 days after Emmert filed its protest. Second, because the stay provisions are codified in the United States Code and the FAR is published in the Federal Register and the Code of Federal Regulations, Emmert was on constructive notice of the stay provisions. Environmental Tech. Assessment Compliance Serv., B-258093, Dec. 13, 1994, 94-2 CPD ¶ 239 at 3. Finally, in light of our finding that the protest is without merit, the matter of the stay is academic.