



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mechanical Contractors, S.A.

File: B-277916

Date: October 27, 1997

Carlton G. Opel for the protester.

Carlos A. De Obaldia, Esq., De Obaldia & Garcia de Parades, for Formal Management Systems, Inc., an intervenor.

Theodore G. Lucas, Esq., Panama Canal Commission, for the agency.

David Hasfurthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Source selection decision cannot be determined reasonable where it is based on a misevaluation of the proposals of the protester and awardee.

DECISION

Mechanical Contractors, S.A. (MECSA) protests the award of a contract to a higher-priced offeror, Formal Management Systems, Inc. (FMS), under request for proposals (RFP) No. CC-97-33, issued by the Panama Canal Commission (PCC) for cleaning and painting of four miter gate leaves in the Panama Canal. The RFP calls for abrasive blast cleaning and exterior painting above the water line using inorganic zinc primer and coal tar polyurethane and below the water line using hot-applied coal tar enamel (CTE). The RFP also requires the performance of mechanical, electrical, and other necessary work. MECSA contends that the proposals of both MECSA and FMS were improperly evaluated under the specialized experience and past performance evaluation subfactors. MECSA contends that the evaluation board (EB) intentionally and unfairly evaluated the proposals with the result that this allegedly competitive procurement was actually a "sole source" to FMS, which has been performing this work for the last 10 years.

We sustain the protest.

The RFP, issued on May 12, 1997, required an offeror to submit a technical proposal and a price schedule. Technical proposals were to be evaluated on the basis of two equally weighted technical factors: technical approach and performance capability. The technical approach factor listed seven specific subfactors; the performance capability factor listed five specific subfactors, including specialized experience and past performance. These two subfactors each were assigned a possible 30 points, for a total of 60 points out of 100 points that could be given under the performance

capability factor. Under the specialized experience subfactor, offerors were to identify contracts performed by "prime and subcontractors" within approximately 3 years preceding the proposal due date. Under this subfactor, the RFP provided that contracts involving confined space removal/painting requiring forced ventilation would be relevant and "[s]pecialized experience in applying coal tar enamel or SSPC [Steel Structures Painting Council] certification at QP-2 will be favorably evaluated. . . ." (Emphasis added.) The past performance subfactor provided that the quality and timeliness of the offeror's past performance with similar projects would be considered, and offerors were asked to submit a list of similar projects they had performed within the past 3 years. An offeror's total technical evaluation score was to be equally weighted with the offeror's firm, fixed-price. Under the RFP, award was to be made to the offeror whose proposal was most advantageous to the government--technical, price, and other factors considered.

Three proposals, including those of MECSA and FMS, were received by the July 3, 1997, deadline for submission. After evaluation of the technical portion of each proposal by the EB, all three proposals were included in the competitive range.¹ Subsequently, each offeror was advised of areas of its proposal which needed to be further addressed and each was requested to submit a best and final offer (BAFO). The BAFO scores were as follows:

	Technical Approach	Performance Capability	Total Points
MECSA	60.85 points	66.2 points	127.05 points
FMS	72.7 points	81.55 points	154.25 points

Within the performance capability factor, MECSA received 19.5 points out of 30 under specialized experience and 15 points out of 30 under past performance. In contrast, FMS received 30 points out of 30 for specialized experience and 23.4 points out of 30 for past performance.

The evaluation record shows that under the specialized experience subfactor, the EB noted that FMS had successfully cleaned and coated all PCC miter gates for the last 3 years and that it had "abundant confined space experience." Under the past performance subfactor, the EB stated that the FMS projects were either timely completed or completed ahead of time. For MECSA, under the specialized experience subfactor, the EB noted as a weakness that MECSA had "listed very

¹The proposal by the third offeror is not relevant to this protest, and we therefore do not discuss it further.

little CTE application experiences during the last 3 years" and under the past performance subfactor the EB noted that "late completion was detected on various projects listed. Liquidated damages [were] cited on some."

While MECSA's price of \$2,564,500 was lower than the FMS price of \$2,640,000, the EB performed a price/technical tradeoff analysis. The EB determined that the FMS technical evaluation score of 154.25 points out of 200, as compared to MECSA's score of 127.05 points, overcame the price differential because the FMS proposal cost \$17,115.02 per technical point and the MECSA proposal cost \$20,507.80 per point. On that basis, the EB concluded that the FMS proposal was the most advantageous to the government. The EB's recommendation was adopted by the source selection official, and award was made to FMS. In its award letter, the PCC listed MECSA's lack of recent CTE application experience and late completion on various projects as weaknesses in the firm's proposal. After its debriefing, MECSA filed this protest. Contract performance has been suspended pending our resolution of the protest.

MECSA challenges the evaluation of both its own proposal and that of FMS. In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP's stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. After reviewing all of the supporting documentation submitted by the PCC, we conclude that the technical evaluation in this procurement is not adequately supported. We also conclude that without adequate support for the technical evaluation, the award determination lacked a reasonable basis. See Redstone Technical Servs.; Dynamic Science, Inc., B-259222 et al., Mar. 17, 1995, 95-1 CPD ¶ 181 at 8-9.

The only contemporaneous supporting documentation showing the reasons for the scoring of MECSA's proposal are the evaluation sheets and the summary of findings of the EB. These documents identify only one weakness for MECSA under the specialized experience subfactor (little CTE experience over the last 3 years) and one weakness under the past performance subfactor (late completion on various projects). Our review of the record raises concern about the reasonableness of the evaluation regarding both perceived weaknesses.

Regarding the lack of CTE experience over the last 3 years, MECSA contends that the PCC failed to evaluate proposals in accordance with the RFP, which, in MECSA's view, indicated that substantially equal importance would be given to an offeror's CTE experience "or" an offeror's possession of SSPC certification at QP-2. MECSA proposed a subcontractor with certifications at QP-1 and QP-2 to perform the CTE work. The protester states that the certification is given by the national council that publishes a number of standards on the cleaning of steel and the application of protective coatings (standards which are incorporated into contracts

by various governmental agencies, including the PCC), and that the PCC's stated intent in considering CTE experience "or" SSPC certifications was to permit competition for this procurement. MECSA contends that the EB's failure to give its proposed subcontractor's QP-2 certification substantial equality with CTE experience was unreasonable. MECSA argues, in effect, that the EB's preference for CTE work over QP-2 certification in its evaluation of specialized experience favored FMS, the only contractor performing CTE work on the PCC's miter gate leaves for the past 10 years.

While the PCC states in its report to our Office that the solicitation "did not guarantee equal or equivalent treatment" of CTE experience and QP-2 certification, the PCC states that the EB did, in fact, give favorable consideration during the evaluation to the certification possessed by MECSA's subcontractor. The PCC also states that favorable consideration was given to the CTE experience gained by MECSA during performance of a contract for the painting and cleaning of cylindrical valves.

Notwithstanding these post-protest statements by the PCC, there is no indication in the contemporaneous evaluation record that MECSA was given any credit for its QP-2 certification. Instead, the record indicates only that, as noted above, the EB found as a weakness under this subfactor that MECSA's proposal listed very little CTE application experience. It thus appears from the evaluation record that, as the protester has alleged, MECSA was downgraded for a lack of CTE experience with no weight given to the proposed subcontractor's certification. While the RFP would certainly permit the EB to downgrade MECSA to some degree for its lack of CTE experience, there is nothing in the contemporaneous record to establish that the offeror's possession of the requisite certification, through its proposed subcontractor, was considered at all. The failure to address this issue in the evaluation record was unreasonable and inconsistent with the RFP language that QP-2 certification would be favorably evaluated under the specialized experience subfactor.

Regarding the evaluation of MECSA's proposal under the past performance subfactor, as noted above, offerors were to list similar projects for the past 3 years. The EB reviewed 17 contracts performed by MECSA in the past 3 years and concluded that 3 of those contracts showed either late completion or liquidated damages; that conclusion was the basis of the EB's determining that there had been late completion on "various projects" and therefore awarding MECSA a score of only 50 percent on past performance. Upon review of the entire record, including the parties' post-protest pleadings, we find that the reasonableness of that score is in doubt. The PCC itself now concedes that the EB looked at the incorrect universe of projects, since most of the 17 contracts that the EB reviewed were not similar to the work to be performed under this procurement. According to the PCC's post-protest submissions, only 5 contracts should have been considered similar (and

within the past 3 years), of which one was completed late.² The contracting officer now contends that the EB's mistaken consideration of nonsimilar contracts did not affect MECSA's 50-percent past performance score, since the percentage of the contracts completed late is now slightly higher (one out of 5, or 20 percent) than was the case under the EB's evaluation (3 out of 17, or 18 percent). While the percentages may not have shifted substantially, however, the absolute number of contracts considered late was actually smaller than what the EB believed during the actual evaluation--indeed, there was only one allegedly similar contract where lateness was noted, so that, with respect to similar contracts, the EB's finding that late completion was a concern on "various projects" was unsupported.

The protester also challenges the PCC's evaluation of the specialized experience of FMS, because the EB originally failed to consider certain safety violations under relevant FMS contracts. In particular, the protester alleges that the PCC failed to take into account a serious accident, which caused a fatality and which occurred during the performance within the past 2 years of a similar contract for the PCC. The PCC admits that the fatal accident occurred and that the contract was both recent and similar. Indeed, the PCC's Safety Division determined that the accident was the fault of FMS (a finding appealed by FMS). While recognizing the importance of safety in the current evaluation, the PCC states that FMS did not disclose the accident in its proposal and that (apparently because it was not mentioned in the proposal) the EB did not consider it.³

In response to the protest, the EB reevaluated the original scoring of the FMS proposal for this subfactor. Upon reevaluation, after considering this accident, the FMS score for this subfactor was reduced from 30 points (100 percent) to 15 points (50 percent). The FMS total evaluation score was reduced from 154.25 to 139.25 points. The PCC states that even with the lower score, the FMS evaluated price of

²The protester suggests that, among the 17 contracts that the EB actually reviewed, there may have been fewer than 3 which were actually completed late because of the possibility that the notation in the records regarding liquidated damages merely indicated that the contract included a liquidated damages provision, not that such damages were actually assessed. The protester also denies the "similarity" of the one contract of the 5 that the PCC now contends were similar and recent. Although the disputes regarding these matters could have been clarified during discussions, in light of our recommendation we need not resolve the disputes here.

³At the debriefing, when asked if the EB was aware of, and had considered, the accident in the evaluation, the answer from the debriefing officials was "yes." The PCC now reports that the EB had not, in fact, considered the accident in its evaluation.

\$18,958.17 per point was still lower than MECSA's evaluated price of \$20,507.80 per point, and the EB confirmed its prior determination that the FMS proposal was the most advantageous to the government.

MECSA also points out that on another recent relevant contract for cleaning and painting miter gates identified in the FMS proposal, FMS received an unsatisfactory performance rating in the safety area. The PCC argues that, since it gave FMS a satisfactory performance rating for the contract, it was reasonable that this safety issue should have no effect on the past performance rating. This approach appears inconsistent with the PCC's downgrading of MECSA for the lateness of its performance under another contract, where MECSA apparently received an overall satisfactory rating.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

While the PCC argues that the errors which occurred would not have affected its source selection, we conclude, particularly in light of the multiple, material errors explained above, that the protester was prejudiced by the agency's actions. As a result of the PCC's reevaluation of the specialized experience of FMS (to take into account the fatal accident which occurred during performance of a recent, similar contract), the difference in point scores between the two competing proposals is quite small. In light of its proposal's lower price, we think that, but for the agency's actions, MECSA would have had a substantial chance of receiving the award.

Regarding the PCC's reevaluation of the proposals to correct errors identified by the protester, while we consider the entire record, including statements and arguments made in response to a protest in determining whether a selection decision is supportable, we accord much greater weight to contemporaneous source selection materials than to judgments, such as the selection officials' reevaluation here, made in response to protest contentions. Dyncorp, 71 Comp. Gen. 129, 134 n.12 (1991), 91-2 CPD ¶ 575 at 7 n.13; Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10. This reflects our concern that reevaluations and redeterminations prepared in the heat of an adversarial process may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ ____ at 15.

The protest is sustained.

We recommend that both proposals be reevaluated, that the reevaluation be documented, and that a new selection decision be made. If the PCC determines that MECSA is in line for the award, the award made to FMS should be terminated and award made to MECSA. We also find that MECSA is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). MECSA should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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