



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hard Bodies, Inc.

File: B-279543

Date: June 23, 1998

Sherry K. Morton for the protester.

Marleen J. Phillips, Esq., and Kathy B. Cowley, Esq., Department of the Navy, for the agency.

Paul Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Evaluation of offeror's past performance was reasonable where it was performed in accordance with stated evaluation criteria and reflected valid assessment of offeror's experience.

DECISION

Hard Bodies, Inc. (HBI) protests the award of a contract to FMF Corporation under request for proposals (RFP) No. N00600-97-R-2454, issued by the Department of the Navy as a total small business set-aside for operation of a fitness/wellness center at the Office of Naval Intelligence in Washington, D.C. HBI challenges the RFP evaluation criteria and their application by the agency.

We deny the protest.

This procurement is for the management and operation of a fitness/wellness center for approximately 1,250 military and civilian Naval personnel. The successful offeror will be responsible for staffing the center; facilitating participation through a predetermined application process; planning, organizing, and coordinating wellness/intervention programs and activities; and evaluating program activities and submitting regular reports. The RFP contemplated the award of a fixed-price contract for a base year with 4 option years.

The original RFP provided for award to the offeror submitting the lowest-priced, technically acceptable proposal. Prior to the closing date, the agency amended the RFP (amendment No. 0001) to change the basis of award and the evaluation criteria. As amended, section M.5 of the RFP provided for the evaluation of past performance to "evaluate the relative capability of the offeror" to meet the RFP requirements. While the RFP called for evaluation and consideration of the past performance of significant or critical subcontractors, the RFP specifically provided

that past performance of "key personnel," if any, shall not be considered. Past performance was rated on the basis of anticipated risk in delivery of a quality product, on time, without degradation of performance. An "outstanding" rating represented "no risk"; a "better" rating represented "very little risk"; a "satisfactory" rating represented "some potential risk"; and a "marginal" rating represented "significant potential risk." A "neutral" rating was assigned to offerors which had no relevant past performance available for evaluation.

Amended section M.2 provided for award to the offeror whose technically acceptable proposal was determined most advantageous to the government based on price and past performance. This section also provided that "only proposals that are determined to be technically acceptable will be considered for award" and "[t]he evaluation will consider past performance as more important as technical approach." (Emphasis added.) After receipt of proposals, the agency again amended the RFP (amendment No. 0003) to change the foregoing section M.2 sentence to read: "The evaluation will consider past performance as more important than technical approach." (Emphasis added.)

Four offerors including HBI and FMF submitted initial proposals by the October 14 closing date. The agency completed initial evaluations by February 6, 1998. At that time, both FMF's and HBI's proposals were rated as "unacceptable" but capable of being made acceptable through modification. While FMF's past performance was rated as outstanding, HBI's proposal received no rating in this regard because HBI had submitted insufficient information. Both proposals were included in the competitive range, and the agency conducted discussions on February 11. Both offerors submitted revised proposals on February 20 and best and final offers (BAFO) on February 27.

In the final evaluation, both FMF's and HBI's proposals were rated technically acceptable. However, FMF's proposal was rated "outstanding" for past performance, while HBI's proposal was rated "acceptable."¹ FMF's proposal was priced at \$306,413.28 while HBI's was priced at \$266,820. In making her award determination, the contracting officer observed that FMF's proposed price, though higher than HBI's price, was lower than the government estimate, and recognizing that both proposals were rated technically acceptable, she concluded that FMF's past performance rating of "outstanding," two levels higher than HBI's rating, justified payment of the higher price proposed by FMF.

¹HBI notes that the word "acceptable" was not listed among the ratings specifically set forth under the RFP evaluation criteria. The agency explains, and the record clearly shows, that even though the evaluators used a technically incorrect word, their evaluation of HBI's past performance was entirely consistent with the RFP definition of "satisfactory." Accordingly, HBI was not prejudiced by the agency's failure to use the denominated term.

After receiving notice of the award and a debriefing, HBI filed this protest. The agency has issued a stop work order to FMF pending the outcome of the protest.

HBI first protests the terms of amendment No. 0003, arguing that its change of the evaluation criteria was designed both to eliminate HBI from the competition and to skew the evaluation to favor a predetermined offeror. Specifically, HBI contends that under the original award basis (low priced, technically acceptable offer), its proposal would have been selected for award. This protest ground is untimely. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1998). Here, the real change in the award basis and evaluation criteria was made in amendment No. 0001, issued prior to the original closing date of October 14, 1997. Thus, HBI's protest of March 17, 1998 is untimely and not for consideration.²

HBI next argues that the agency miscalculated HBI's past performance. In HBI's view, had the agency done a proper past performance evaluation, HBI would have been awarded the contract on the basis of its lower price.³

It is not the function of our Office to evaluate proposals *de novo*. Rather, since determining the relative merit of competing proposals is primarily a matter within the contracting agency's discretion, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Advanced Tech. and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3; Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203 at 3. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Medland Controls, Inc., B-255204, B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260 at 3. From our review of the record, the agency's evaluation here was reasonable.

²HBI argues that its protest did not arise until February 11 when it received amendment No. 0003 which made the one-word change of the phrase "important as" to "important than." Even if this minor clarification were viewed as substantive, HBI did not protest it until after the next closing date for receipt of proposals. Since HBI submitted proposal revisions and a BAFO without complaint, HBI's protest of the amended solicitation is untimely in any event.

³HBI's protest also generally questions the propriety of awarding this contract at a higher price. In a negotiated procurement, where, as here, the RFP does not make price the determinative factor, the government is not required to select the lowest-priced technically acceptable proposal. Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 3-4.

HBI argues that since it received "outstanding" ratings on its past performance reference questionnaires, the agency was required to rate HBI's overall past performance as outstanding. Section L.9 of the RFP, as amended, required offerors to submit past performance information on "directly related or similar" contracts and subcontracts, including those "which are of similar scope, magnitude and complexity to that which is detailed in the RFP." (Emphasis omitted.) The agency explains that it rated HBI's past performance as "acceptable" because HBI's past performance information did not indicate that HBI had experience in actually operating and managing a fitness facility of the size and scope contemplated here. In this regard, HBI's proposal listed 10 relevant contracts, 8 of which were with the federal government, and all of which encompassed only the teaching of various aerobics and fitness classes. HBI did not claim to have management experience; on the contrary, HBI observed that "as a company [it had] never serviced a fitness center contract." HBI relied on its proposed fitness director as providing for such experience. Along with the description of past contracts, HBI also submitted five past performance questionnaires, three of which rated HBI's overall performance as "outstanding," and two of which rated it as "neutral." Since all five of these contracts were for aerobics and toning classes for 15 to 30 persons per class under contracts much smaller than that protested, the agency reasonably concluded that the "outstanding" and "neutral" ratings on those contracts warranted only an overall "acceptable" rating. HBI's mere disagreement with the agency's evaluation does not establish that the evaluation was unreasonable. Medland Controls, Inc., supra.

While HBI argues that its proposed fitness director's more than 20 years of experience should have been considered as part of the past performance evaluation, the amended RFP made clear that key personnel experience would not be considered as part of this evaluation. Instead, key personnel were evaluated under the technical evaluation. Although our Office has recognized that an agency properly may consider the experience of supervisory personnel in evaluating the experience of a new business, see Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176 at 5, an agency is not required to attribute such personnel experience to the contractor as an entity. Atlantic Coast Contracting, Inc., B-270491, B-270590, Mar. 13, 1996, 96-1 CPD ¶ 147 at 3.⁴

⁴When it debriefed HBI, the agency suggested that the protester could obtain the necessary experience by adding a subcontractor with the requisite management experience. Based on this advice, HBI contends that the agency should have considered its experience as a subcontractor to Hummer Associates, the prime contractor on the incumbent contract. HBI listed this contract as part of its past performance information. However, HBI's experience consisted of conducting five aerobics classes per week, with payment made on a per-class basis. HBI apparently recognized its limited value since this contract was listed as the eighth of 10 references. To the extent HBI is arguing that the agency should have considered
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Finally, HBI claims that the contracting officer was biased against it. This bias allegedly arose from a "verbal altercation" HBI had with the contracting officer in January 1998. According to HBI, it was inquiring about the status of the procurement and the contracting officer allegedly was "irate" and "very disrespectful and unprofessional" because she felt that HBI's "frequent calling . . . was an inconvenience." The contracting officer denies any bias against HBI.

Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. In addition to producing credible evidence showing bias, the protester must demonstrate that the agency bias translated into action that unfairly affected the protester's competitive position. Id. Here, even assuming the contracting officer was "irate" in response to "frequent" phone calls from a prospective offeror, this alone does not support an allegation of bias; HBI merely infers bias based on the evaluation and the award determination. We will not attribute bias in the evaluation of proposals on the basis of inference or supposition. TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37 at 4. Moreover, since the record establishes the propriety of the agency's evaluation of HBI's proposal, there is no basis to question the motives of the contracting officer.

The protest is denied.

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⁴(...continued)

Hummer's management experience, that consideration would be improper since HBI did not propose Hummer to work with it on the new contract.