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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: East Bay Elevator Company, Inc.

File: B-286315.3

Date: August 30, 2001

Laurence Schor, Esq., Susan L. Schor, Esq., and Jeremiah S. Regan, Esq., McManus, Schor, Asmar & Darden, for the protester.

Thomas Y. Hawkins, Esq., General Services Administration, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably assessed proposal favorably under solicitation evaluation criterion calling for specialized experience with a particular control system where the proposal listed corporate experience with the same or similar equipment and proposed to employ the predecessor contractor's on-site service mechanic whose experience at the building for which services were being procured explicitly encompassed the specialized experience in question.

2. Agency decision not to conduct discussions as part of a reevaluation performed as corrective action is unobjectionable where the underlying solicitation provided for award without discussions.

DECISION

East Bay Elevator Company, Inc. protests the award of a contract to Star Elevator, Inc. under request for proposals (RFP) No. GS-09-00-KSC-0086, a total small business set-aside issued by the General Services Administration (GSA) for elevator maintenance services at the Phillip Burton Federal Building/United States Courthouse in San Francisco, California. East Bay contends that the agency misapplied the solicitation evaluation criteria in its evaluation of the proposals, and improperly failed to conduct discussions.

We deny the protest.

The contract was initially awarded to Star on September 8, 2000, on the basis that its proposal was the low priced and highest rated technically acceptable proposal; after receiving a debriefing, East Bay filed a protest with our Office objecting to the award determination. Before responding with an agency report, GSA determined that there was a potential evaluation problem arising from the absence of technical proposal evaluation standards in the source selection plan (SSP) used by the evaluators. Agency Corrective Action Letter, October 18, 2000, at 1; Agency Cost Entitlement Report, May 30, 2001, at 2. As a result, the agency undertook corrective action in the form of reevaluating the extant proposals under a revised SSP. During the reevaluation period, GSA permitted Star to continue to perform the contract because the agency concluded that this was necessary in order to ensure the safety of tenants and building visitors. On May 11, 2001, based on the reevaluation, GSA's contracting officer determined that award to Star was appropriate. After receiving notification of this determination and a debriefing, East Bay filed this protest with our Office.

The RFP evaluation clause called for a "best value" award based on price and the technical factors of experience and past performance, which were stated to be equal in weight and, when combined, of greater weight than price. RFP at 40. Under the experience criterion, the RFP stated that "[o]fferors which do not, as a minimum, demonstrate experience performing recurring operations and maintenance services of facilities comparable in size and complexity to the Federal Building . . . within the past five years (with at least five years of performance completed), will be determined to have an unsatisfactory level of experience, and will be excluded from further consideration." Id. This criterion further provided that "[t]he experience of subcontractors . . . will be considered commensurate with the scope of that entity's responsibilities in fulfilling contract requirements," and that "[s]pecialized experience with escalator[s] by Peelle, Houghton Elevator, Millar CVT microprocessor controls (CVT/NET and CVT-AI) for low and high rise is required." Id. With respect to discussions, the RFP included Federal Acquisition Regulation § 52.212-2-1(g), stating that the government intends to evaluate offers and award a contract without discussions with offerors. RFP at 38. Under the evaluation clause, the RFP also contained a note stating:

After receipt of the offers, the Government will initially perform a price analysis and rank proposals by price. The Government will then begin evaluation of Experience and Past Performance, beginning with the lowest priced offeror. If an offeror possesses sufficiently higher ratings for Experience and Past Performance, and has offered a low fair and reasonable price, the Government may elect to refrain from evaluating other offers, which have significantly higher pricing. Although it could be found that those other offerors possess higher Experience and Past Performance ratings, the Government may

determine without further evaluation that their higher priced proposals do not justify the additional expenditure. The Government may then make award without discussions.

RFP at 40.

Three proposals were received. East Bay proposed a total price of \$2,423,681.40, which was approximately 14 percent higher than Star's price of \$2,124,903. Star's technical proposal was highest rated with a total score of 6.5 (out of a possible 10), and East Bay's was second with a score of 4.2. The third proposal was determined to be technically unacceptable for failure to meet minimum RFP requirements. Agency Report, Tab 8; Source Selection Evaluation Panel Report, Aug. 29, 2000, at 1-3. The contracting officer determined to award to Star, without conducting discussions, based on her determination that of the two technically acceptable proposals, Star's offered the lower evaluated price and the higher technical rating. Agency Report, Tab 9, Evaluation of Proposals and Source Selection Determination, Sept. 8, 2000, at 1-2. In the subsequent corrective action taken in response to East Bay's protest, the agency reevaluated the proposals under a revised SSP (using different technical evaluators), again without conducting any discussions. The contracting officer's rationale was that discussions were inappropriate because East Bay's price had been revealed, and the reevaluation was narrowly focused on the application of objective experience criteria to the existing proposals. Agency Report, Contracting Officer's Statement, July 5, 2001, at 2.

In its proposal, Star had listed experience maintaining elevators which had CVT controls at a Herbst-owned building on Van Ness Avenue. Agency Report, Tab 6, Star Proposal, Herbst Foundation Job Reference, at 1. Star's proposal also listed experience with several Kimpton Hotels and the agency reevaluation panel noted that the elevator/escalator systems at these hotels include Millar CVT microprocessor controls. Agency Report, Tab 19, Revised Evaluation and Source Selection Determination Memorandum, May 11, 2001, at 4. In addition, Star listed as its proposed on-site mechanic a named individual ("FD"), who was currently employed by Millar as the on-site mechanic at the Burton facility, and has 5 years of experience servicing Millar CVT microprocessor controls.

To demonstrate its experience, East Bay had similarly listed FD as its proposed service mechanic, indicating that it had spoken to this individual during a building walkthrough, and noting that the individual (whose last name East Bay did not include in its proposal) had "expressed his willingness to continue working for the follow-up contractor," and that "East Bay Elevator intends to offer this position again to [FD] if East Bay Elevator Company is awarded this contract." Agency Report, Tab 5, East Bay Proposal, Key Personnel Resume, at 1. In evaluating both proposals, the agency noted that FD possessed the requisite experience, but since there was no guarantee that FD would accept the employment offer, chose to "give greater weight in evaluating the experience of the firm providing the proposal."

Agency Report, Tab 19, supra, at 2-3. The reevaluation panel concluded that East Bay's proposal did not list projects which satisfied the experience requirement, and that Star's proposal did so, having listed "work at two (2) or more facilities of comparable size and complexity to the Federal Building at 450 Golden Gate Avenue, S.F., CA within the past five years (with at least five years of performance completed) with specialized experience with . . . Millar CVT microprocessor controls (CVT/NET and CVT-AI)." Id. at 3, 5.

As a result of the reevaluation, East Bay's proposal received a substantially lower technical score than Star's, and the evaluators determined that the proposal failed to satisfy the RFP's experience requirement, which the SSP now indicated called for having 5 completed years of experience on at least one building of similar size and complexity as the Federal Building. Agency Report, Tab 18, Revised SSP, at 4. In particular, Star's proposal received a technical score of 7, consisting of 4 out of a possible 5 points under experience and 3 out of a possible 5 points under past performance. Because East Bay's proposal did not list experience that was either comparable or comprised at least 5 years of completed performance, the proposal received a technical score of 1.5 under experience. Since East Bay's proposal did not meet the requirement for similar experience, the proposal was not given any numerical score under past performance. Agency Report, Tab 19, supra, at 3-5. In view of the fact that East Bay's proposal was evaluated as technically unacceptable for failure to satisfy the 5 year experience requirement, and Star's proposal was evaluated as technically acceptable, with a higher technical score, at a lower price, the contracting officer determined that Star warranted award as the only offeror whose proposal met the solicitation's minimum requirements, and also as the low priced, high technically scored offeror. Id. at 1.

East Bay argues that Star's proposal was misevaluated as having satisfied the solicitation provision calling for Millar CVT experience, and should have been rejected for failure to satisfy this requirement. Our Office will review an agency's evaluation of proposals to assume that it is fair, reasonable, and consistent with the evaluation criteria stated in the solicitation and with applicable statutes and regulations. J.A. Jones Management Servs., Inc., B-284909.5, Oct. 2, 2000, 2001 CPD ¶ 64 at 4. Here, we see no basis to question the agency's evaluation.

East Bay's argument is premised on its assumption that the solicitation evaluation provision concerning Millar CVT experience establishes a requirement, which must be specifically satisfied in order for a proposal to be evaluated as technically acceptable. This misconstrues the effect of the provision, which does not set forth any specific and objective standard, qualitative or quantitative, which the RFP states must be satisfied as a precondition to receiving award. See AT&T Corp., B-260447.4, Mar. 4, 1996, 96-1 CPD ¶ 200 at 5. The provision at issue simply calls for an unspecified type of experience with a particular system without requiring any particular duration of experience, licensing, or level of expertise. Under these circumstances, the agency had a reasonable basis to evaluate Star's proposal

favorably in this regard in light of either Star's experience servicing a building which its proposal stated contained elevators with CVT controls, or the agency evaluator's knowledge that other buildings listed in Star's proposal for experience contained Millar CVT controls, or based on Star's proposed employment as its site mechanic of a named individual who concededly has experience servicing Millar CVT systems.¹

East Bay objects that the two proposals were treated differently because GSA accepted Star's representation regarding Millar CVT experience, but downgraded East Bay's proposal for relying on FD's experience. Protest at 4. East Bay's argument is that GSA waived the CVT requirement for Star but treated East Bay unequally by downgrading FD's experience. *Id.* As evidenced above, this is factually incorrect. Star's proposal separately evidenced CVT experience under the projects which Star listed to demonstrate the requisite experience. The agency treated FD's experience as secondary with respect to both proposals because his employment was not guaranteed, and his experience was not considered sufficient by itself to satisfy the mandatory RFP requirement for 5 years of completed corporate experience in maintaining a comparable facility. Accordingly, GSA's evaluation of both proposals in this regard is unobjectionable.

East Bay also objects to GSA's determination that its proposal did not satisfy the requirement for 5 years of similar completed performance, without which the RFP stated that a proposal was unacceptable. East Bay believes that it satisfied the requirement based on its proposal to employ FD, who allegedly possessed such experience. Protest at 5. While an agency properly may consider the experience of supervisory personnel in evaluating the experience of a new business, The Project Management Group, Inc., B-284555, Apr. 14, 2000, 2000 CPD ¶ 66 at 4, there is no legal requirement that an agency attribute employee experience to the contractor as an entity. Hard Bodies, Inc., B-279543, June 23, 1998, 98-1 CPD ¶ 172 at 4. Here, while FD's experience as a site mechanic could reasonably be viewed as relevant for evaluating experience repairing Millar CVT controls, his position was not supervisory, and the agency had reasonable concerns about the certainty of his employment with either offeror. Unlike Star's proposal, East Bay's proposal did not otherwise establish that the firm or a proposed subcontractor had the requisite

¹ East Bay disputes whether any of the buildings listed in Star's proposal actually contain the Millar CVT equipment. This allegation is based on declarations from a Millar employee which claim that only Millar and one other firm (not Star) have any experience servicing Millar CVT systems in the Bay Area, and that the specific referenced Millar CVT systems are not found in any of the buildings listed in Star's proposal. Since East Bay states in its protest that it planned to use Millar as its subcontractor on this contract, these statements are clearly self-serving, and of questionable probative value. In any event, we see no reason for the agency to have doubted the accuracy of Star's proposal in this regard, particularly in light of the firm's CVT experience available through FD.

5 years of similar experience. In these circumstances, we find reasonable the agency's determination that East Bay's proposed offer of employment to FD was not, by itself, sufficient to satisfy the RFP requirement for 5 years of completed similar corporate experience.

East Bay's other objection to its evaluation arises from its contention that the agency failed to conduct meaningful discussions. East Bay contends that had it been afforded discussions, it would have shown that Millar, whom it states that it planned to use as a subcontractor, satisfied certain of the solicitation experience requirements by virtue of experience possessed by a predecessor company.² Protester's Comments at 3. There is generally no obligation that an agency conduct discussions where, as here, a solicitation specifically instructs offerors of the agency's intent to award on the basis of initial proposals. Techseco, Inc., B-284949, June 19, 2000, 2000 CPD ¶ 105 at 4. The contracting officer has broad discretion in deciding whether to hold discussions, which our Office will review only to ensure that it was reasonably based on the particular circumstances of the procurement. McShade Enters., B-278851, Mar. 23, 1998, 98-1 CPD ¶ 90 at 4.

East Bay argues that the notice of intent to award without discussions was limited by the above-quoted evaluation note to mean that discussions could be dispensed with only where one offeror has sufficiently higher experience and past performance ratings, has offered a low and reasonable price, and other offerors have significantly higher price and, as a result, GSA elects to refrain from evaluating other offers. Protest at 7. GSA points out that the note was meant to set forth circumstances that would justify award without conducting past performance reviews for all offerors. Agency Report at 10. The language does not limit the agency's right to make award without discussions; it simply describes a particular instance in which the government might make award without discussions. The protester's interpretation represents a strained reading of the language which would substantially conflict with the prior notice of intent to award without discussions. In our view, the fact that the note indicates as its last line that in a designated instance the agency could award without discussions does not limit the reservation of the agency's right to do so in other circumstances as well. Here, given the notice of intent to award without discussions, since GSA intended to conduct a limited reevaluation, and was

² In this regard, we note that East Bay's proposal makes no mention of Millar as a proposed subcontractor; indeed, the only reference in the proposal to Millar is in FD's resume where, under the column calling for the name of FD's immediate supervisor, East Bay entered "[u]nknown, [Millar] is a competitor of East Bay Elevator Company." Agency Report, Tab 5, supra, at 1.

concerned that Star's price had been disclosed, East Bay has not provided any valid basis to question GSA's decision not to conduct discussions.³

The protest is denied.

Anthony H. Gamboa
General Counsel

³ The protester has also raised a number of collateral issues including an assertion that the reevaluation constituted a prohibited sole source procurement and that, under the circumstances, the procurement was improperly set aside for exclusive small business participation. These issues are without merit and will not be considered. They are based primarily on an erroneous assumption that the reevaluation somehow constituted a new procurement, and on the proposition that the proposals were misevaluated which, as discussed above, we have concluded was not the case.