



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: M&W Construction Corporation

File: B-288649.2

Date: December 17, 2001

Michael J. Gardner, Esq., Francis E. Purcell, Jr., Esq., James S. Phillips, Esq., and Robert E. Korroch, Esq., Williams Mullen Clark & Dobbins, for the protester.
Mary E. Clarke, Esq., Defense Logistics Agency, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Incumbent contractor did not have organizational conflict of interest or unfair competitive advantage where, contrary to the protester's assertion, the agency, not the incumbent, drafted the statement of work used in the protested procurement.
 2. Agency reasonably found awardee's technical proposal to be technically superior to the protester's proposal, where the awardee's proposal contained more relevant details and evidenced superior qualifications.
 3. Awardee was reasonably considered to have past performance superior to the protester's, where the awardee had performed the identical work and had received consistent positive references for its work, while the protester had not performed directly relevant work and had received a negative reference for what it asserts is its most relevant contract.
-

DECISION

M&W Construction Corporation protests the award of a fixed-price contract to Teilhaber Manufacturing Corporation under request for proposals (RFP) No. SP3100-01-R-0010, issued by the Defense Logistics Agency (DLA), Defense Distribution Center, for the repair of a rack system at the Defense Distribution Mapping Activity in Richmond, Virginia. M&W asserts that the award was improper because Teilhaber has an organizational conflict of interest inasmuch as Teilhaber was assertedly involved in drafting of the scope of work (SOW) for this solicitation. M&W also asserts that the agency's technical and past performance evaluations were unreasonable.

We deny the protest.

BACKGROUND

The rack system in question was installed in 1998. Teilhaber manufactured the components for the system and another firm installed the racks. The system consists of 40 rows of racks, all approximately 237 inches in height, with varying depths and widths. According to the agency, because of a “questionable design” and “improper installation,” the racks quickly became “unsafe, unstable and unusable.” Agency Report at 2; Tab 16, Price Negotiation Memorandum, at 1. Because of the attendant safety concerns, the agency, on September 8, 2000, made a sole source award, based on urgency, to Teilhaber to repair three racks (Rows 1-3). After the completion of that contract, the agency then determined that the racks could be repaired rather than replaced, and that these services should be obtained under competitive procedures.¹

On April 25, 2001, the agency issued this solicitation for the repair of the existing rack systems (Rows 4-40) to render them structurally sound and operationally viable. The SOW required the contractor to disassemble the existing racks and to install 37 new rows of rack using existing (Teilhaber) components “to the maximum extent possible” where “undamaged” and “structurally sound,” with new components as necessary. The SOW did not require that the new components be Teilhaber components, only that they be compatible. However, there was a “Government preference” for Teilhaber components to ensure compatibility. Additional technical information would have to be submitted with the proposal if Teilhaber components were not used. RFP SOW at 1. Included with the RFP were five drawings to show the required repair design if Teilhaber components were used.²

The RFP advised offerors that award would be based on consideration of past performance, technical/business, and price. The technical/business factor had four subfactors: project management plan, organization structure and qualifications, system layout/design, and sprinkler system work. The solicitation provided that the combined technical/business capabilities and past performance factors were significantly more important than price. Price was to be evaluated for reasonableness.

¹ The record shows that agency officials initially considered a sole-source award to Teilhaber, and that, prior to the issuance of this RFP, Teilhaber submitted an unsolicited proposal for this work.

² The drawings, prepared by a government engineer, were the “as built” drawings from Teilhaber’s repair of the first three rows of racks. Agency Report, Tab 27, Statement of DLA Engineer.

The agency received proposals from Teilhaber and M&W by the May 29 closing date. The agency evaluated proposals, conducted several rounds of discussions, and received and evaluated best and final offers (BAFO) as follows:

	Teilhaber	M&W
Subfactor 1 Project Mgmt. Plan	Highly Acceptable Low Risk	Acceptable Low Risk
Subfactor 2 Organization Structure & Qualifications	Highly Acceptable Low Risk	Acceptable Low Risk
Subfactor 3 System Layout/Design	Highly Acceptable Low Risk	Acceptable Low Risk
Subfactor 4 Sprinkler System Layout	Highly Acceptable Low Risk	Acceptable Low Risk
Past Performance	Highly Acceptable	Marginally Acceptable
Price	\$2,699,275	\$2,235,164

Agency Report at 9-10, 12. Based on the evaluation, the agency determined to make award to Teilhaber on August 13, 2001. This protest followed.

ORGANIZATIONAL CONFLICT OF INTEREST

M&W argues that DLA should have excluded Teilhaber from the competition because that firm helped to prepare the SOW and, therefore, has an organizational conflict of interest that may have given Teilhaber an unfair competitive advantage.

The Federal Acquisition Regulation (FAR) sets forth both general and specific instructions on organizational conflicts of interest in subpart 9.5. The FAR requires that if a contractor: (1) “prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services,” or (2) “provides material leading directly, predictably, and without delay to such a work statement,” the contractor may not supply the system or services, except in certain limited situations. FAR § 9.505-2(b)(1). This restriction is intended to: (1) avoid the possibility of bias in situations where a contractor would be in a position to favor its own capabilities, see FAR § 9.505(a), or (2) avoid the possibility that the contractor, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements. FAR § 9.505(b); see GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263 at 6. The responsibility for identifying and resolving conflicts of interest is that of the contracting officer, who in doing so is admonished to exercise “common sense, good judgment and sound discretion.” FAR §§ 9.504, 9.505. We will not disturb a contracting officer’s determination regarding a conflict of interest unless it is shown to be unreasonable. Abt Assocs., Inc., B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269 at 6.

The record here does not support M&W's claim that Teilhaber had an organizational conflict of interest or that Teilhaber gained an unfair competitive advantage. Specifically, the record shows that DLA engineers prepared the SOW in the current RFP. Agency Report, Tab 27, Statement of DLA Engineer. While the protester expresses doubt whether DLA actually prepared the SOW without the assistance of Teilhaber, this SOW largely mirrors the SOW for the solicitation that was awarded to Teilhaber on a sole-source basis for the repair of Rows 1-3. See M&W Comments, Tab 2, Teilhaber's Contract to Repair Rows 1-3; RFP SOW. M&W does not argue, and the record does not in any way suggest, that Teilhaber helped to prepare the SOW for the repair of Rows 1-3.³

Moreover, to alleviate any competitive advantage that Teilhaber may have had by virtue of its repairing Rows 1-3 using its (Teilhaber's) components, the agency provided all offerors with the "as built" drawings of the repair of Rows 1-3, which were prepared by a DLA engineer and which were the required design if Teilhaber components were used. While M&W asserts that Teilhaber still had a competitive advantage, the mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage; an agency is not required to compensate for every competitive advantage inherently gleaned by a potential offeror's prior performance of a particular requirement, unless the offeror's advantage was created by improper preference or other unfair action by the procuring agency. Optimum Tech., Inc., B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7. Here, the advantages gained by Teilhaber as the incumbent were fair ones. Indeed, incumbent contractors with good performance records can offer real advantages to the government, and proposal strengths flowing from a firm's prior experience are proper considerations in selecting an awardee. Benchmark Sec., Inc., B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133 at 10-11.

TECHNICAL EVALUATION

The protester challenges the agency's evaluation for each of the four subfactors, under each of which M&W's proposal received acceptable/low risk ratings and Teilhaber's proposal received highly acceptable/low risk ratings. The evaluation of technical proposals is primarily the responsibility of the contracting agency. Our Office will not make an independent determination of the merits of technical proposals; rather we will examine the record to ensure that the agency's evaluation was reasonable and consistent with the stated evaluation criteria. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115 at 8. A protester's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. SWR Inc.,

³ On December 4, 2000, Teilhaber submitted an unsolicited proposal to complete the remaining racks (Rows 4-40). Teilhaber's proposed SOW is a digest of the SOW as set forth in the sole-source contract. M&W Comments, Tab 2, Teilhaber's Contract to Repair Rows 1-3; Tab 4, Teilhaber Letter to DLA (Dec. 4, 2000).

B-286044.2, B-286044.3, Nov. 1, 2000, 2000 CPD ¶ 174 at 3. As discussed below, we find the agency's evaluation reasonable.

Project Management Plan (PMP)

While M&W's project management plan was ultimately found to "meet[] the requirements of this subfactor,"⁴ Teilhaber's was found to provide an excellent and very detailed plan for managing and coordinating the proposed work. Agency Report, Tab 9, Evaluation of M&W's BAFO, at 1; Tab 11, Evaluation of Teilhaber's Initial Proposal, at 1. For example, Teilhaber's project management plan listed items that were not noted at all by the protester's project management plan, such as dumpster delivery, palletizing excess components, and inspection for sharp edges. Agency Report, Tab 10, Teilhaber's Initial Proposal. This evaluation was reasonable.

Organization Structure and Qualifications

While M&W's proposal was found to "meet[] the requirements of this section,"⁵ Teilhaber's proposal was found to "clearly demonstrate[] a thorough understanding of the requirements." Agency Report, Tab 7, Evaluation of M&W's Revised Proposal, at 3; Tab 11, Evaluation of Teilhaber's Initial Proposal, at 11. Teilhaber was found "uniquely qualified to perform the job because of his past experience" in rebuilding the first three rows of racks and because it is the manufacturer of the components. Agency Report, Tab 11, Evaluation of Teilhaber's Initial Proposal, at 3. In this regard, Teilhaber's proposal notes that many of its proposed personnel have hands-on experience installing its products, and that its proposed installation manager and site supervisor worked on the previous contract repairing Rows 1-3. Agency Report, Tab 10, Teilhaber's Initial Proposal, vol. II, § 2. This evaluation subfactor lists matters that would merit "additional consideration" in the evaluation, for example, "work experience with the Teilhaber Shelf Q rack product and evidence

⁴ M&W's project management plan was initially found to be very general and without any detail. Specifically, the agency found that the M&W's project management plan lacked a schedule of events that tracked the necessary work and failed to identify the key aspects that will impact on the timely completion of the project. Agency Report, Tab 4, Evaluation of M&W's Initial Proposal at 4. After two rounds of discussions, the agency determined that M&W's proposal met the requirements of this subfactor.

⁵ M&W's proposal was initially rated unacceptable with high risk for this subfactor because it did not identify specific responsibilities for each individual, failed to identify individuals that would be on-site, and did not identify all subcontractors. Agency Report, Tab 4, Evaluation of M&W's Initial Proposal at 4. After discussions, M&W's proposal was found acceptable. Agency Report, Tab 7, Evaluation of M&W's Revised Proposal, at 3.

that offeror's team has worked together on previous successful project." RFP at 31. Given the fact that Teilhaber has experience installing its components and is basically proposing the same installation team, whereas M&W's proposal does not show a comparable organization structure and qualifications, Teilhaber's higher rating under this subfactor is reasonable.

System Layout and Design

With regard to this subfactor, M&W essentially argues that because both offerors propose to repair the racks using Teilhaber components, their proposals' ratings should have been identical. According to the RFP, one of the elements that will be judged under this subfactor is the completeness of the layout. RFP at 32. The evaluators noted that while M&W's "proposal meets the requirements of this section," Teilhaber's proposal contained "an excellent design which is laid out in extremely fine detail." Agency Report, Tab 4, Evaluation of M&W's Initial Proposal, at 9; Tab 11, Evaluation of Teilhaber's Initial Proposal at 4. As the protester acknowledges, Teilhaber's proposal included a proposed storage location matrix, and a list of new parts to be supplied, whereas M&W's proposal did not. Agency Report, Tab 10, Teilhaber's Proposal § 3; Protester's Comments at 10. M&W stated in its proposal that it would utilize Teilhaber components and provided general statements regarding its system layout and design, but it did not provide any significant details. Agency Report, Tab 3, M&W's Initial Proposal at 13. Given the level of detail provided by Teilhaber for this subfactor, we find the evaluation reasonable.⁶

Sprinkler System Work

With regard to this subfactor, M&W contends that Teilhaber, as the incumbent contractor, had already figured out how to support the sprinkler system during the rack repair of Rows 1-3, while M&W had to "guess" at a solution.⁷ Protester's Comments at 12. As noted, an agency is not required to construct its procurements

⁶ While M&W questions this rating by noting that one evaluator rated Teilhaber's proposal only acceptable under this subfactor, we note that evaluators may have different judgments as to a proposal's merits, and one evaluator's scoring is not unreasonable merely because it is based on judgments different from those of other evaluators. Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 7.

⁷ The protester makes much of the fact that its proposal was not rated acceptable under this subfactor until it submitted a drawing that detailed the support members utilized for supporting the sprinkler pipe. However, the RFP required that offerors provide a drawing "that depicts the offeror's approach to supporting the sprinkler system during the dismantle and re-assembly process of the rack system." RFP at 29.

in a manner that neutralizes the competitive advantages that some potential offerors (including incumbent contractors) may have over others by virtue of their own particular circumstances where the advantages did not result from unfair action on the part of the government. See Optimum Tech., Inc., *supra*. In contrast to M&W's proposal, Teilhaber's proposal was "very detailed" for this subfactor. Agency Report, Tab 11, Evaluation of Teilhaber's Initial Proposal, at 15. Based on our review, we find the agency's evaluation of this subfactor reasonable.

PAST PERFORMANCE

As noted, Teilhaber received a highly acceptable past performance rating and M&W a marginally acceptable rating. Teilhaber's past performance history was consistently positive on relevant contracts, in particular its contract for the first three rows. In contrast, M&W did not submit "any evidence of ever having performed this type work." Most of M&W's references concerned ordinary construction projects, not related to the installation of racks. With regard to the contract that M&W asserted was most relevant, for the renovation of bleachers at five different schools, the contract reference expressed extreme dissatisfaction with M&W's work. Agency Report, Tab 16, Price Negotiation Memorandum, at 5-6; Tab 17, Source Selection Decision Document, at 1-2.

While the protester asserts that too much weight was given to prior experience in installing Teilhaber racks in evaluating past performance, the agency was to evaluate each offeror's past performance of contracts that are "similar in scope and size" to the work to be performed under this contract. RFP at 27. Agencies properly may take into consideration specific, albeit not expressly identified, experience in making qualitative distinctions between competing proposals, so long as the specific experience is logically encompassed by or related to the RFP's requirements and stated basis for evaluation; accordingly, it is not objectionable for an agency to rate a firm that has previously performed the same type of work called for under the RFP higher than a firm with more general experience. Chant Eng'g Co., Inc., B-280250, Aug. 7, 1998, 98-2 CPD ¶ 38 at 4. M&W's claimed most relevant experience was for bleacher renovations at five different schools, which, when added together, total \$1.5 million. We think the agency could reasonably find that this bleacher work was not "similar in size and scope" to the present work of one large renovation project. Agency Report, Tab 9, M&W's Revised Proposal, at 15. Moreover, in contrast to Teilhaber's consistently positive references, M&W's most relevant reference was

very negative.⁸ Thus, the agency reasonably evaluated Teilhaber's past performance superior to M&W's.⁹

AWARD SELECTION

M&W argues that the best value determination was flawed because it did not account for the protested evaluation errors. Since we have found that there was nothing unreasonable or objectionable in the agency's evaluation, there is no basis to question the determination that Teilhaber's proposal represented the better value.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁸ The protester, in its comments on the agency report, contends that the agency should have pointed out this adverse past performance information during discussions. The protester was advised at the debriefing of the nature of this adverse information and that it was considered in the evaluation. However, its initial protest did not complain about the content of discussions. Thus, this protest contention, raised more than 10 days after the factual basis for this ground was known, is dismissed as untimely. 4 C.F.R. § 21.2(a)(2) (2001). Similarly, the protester's comments, for the first time, contest the agency's determination that Teilhaber's price is reasonable. However, at the debriefing, M&W's representative stated his belief that this price was unreasonable and M&W's initial protest did not contest this aspect of the evaluation. Thus, this issue is dismissed as untimely as well.

⁹ M&W argues that the agency improperly failed to consider prior relevant experience that one of its employees had regarding specialized pallet storage racks. While the agency noticed this individual's claimed experience in the evaluation, M&W's proposal failed to provide dates, telephone numbers or points of contacts, so that the agency could not confirm this information. Agency Report, Tab 9, M&W's BAFO; Tab 23, M&W's Debriefing Memorandum, at 1. It is an offeror's responsibility to prepare an adequately written proposal demonstrating the merits of the proposal, and an offeror fails to do so at its own risk. Engineering Mgmt. Res., Inc., B-248866, Sept. 29, 1992, 92-2 CPD ¶ 217 at 5.