

Federal Aviation Administration
Office of Dispute Resolution for Acquisition

**Matter: Findings and Recommendations of the Office of Dispute Resolution
for Acquisition in the Protest of MARTIN RESNIK
CONSTRUCTION COMPANY, INC. under Solicitation DTFA08-98-
R-03206**

Docket: 98-ODRA-00061

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Appearances:

For the Protester: Martin Resnik, President, Martin Resnik Construction Company, Inc.

For the Agency: Bradford Talamon, Esq., Office of the Assistant Chief Counsel, Western Pacific Region.

I. Introduction

Martin Resnik Construction Company, Inc. (MRCC), protests the FAA's award of a contract for the construction of an ARSR-4 radar tower at Ajo, Arizona. MRCC was one of ten firms responding to a Screening Information Request, (SIR), issued by the FAA's Western Pacific Region which sought background information from companies interested in competing for the project. Based on a "best value" review of the information provided in response to the SIR, the contracting officer excluded MRCC and another firm from those selected to receive copies of the specifications and drawings needed to compete in the second phase of the acquisition. MRCC claims that the contracting officer's analysis was irrational, inconsistently applied among the offerors, and unduly biased by the

opinions of agency engineers. The protester demanded a stay of contract performance and reopening of the procurement to permit MRCC to compete. For the reasons discussed below, the Office of Dispute Resolution for Acquisition, (ODRA), recommends that the protest be sustained.

All document references are to the protest file, Tabs (1) through (20).

II. Findings of Fact

On November 12, 1997, The FAA's Western Pacific Region advertised solicitation DTFA08-98-R-03206 in the Commerce Business Daily. The solicitation sought background information on contractors interested in competing on the construction of a remote radar site near Ajo, Arizona. The project consisted of a two-story equipment building, radar tower foundation, fuel tanks, and related mechanical and demolition work preparatory to the installation of the actual radar by another contractor. A similar announcement was made on the Internet on November 14. Tabs (1) and (2).

The announcements contemplated that this acquisition would be completed in two phases. First, all interested offerors would submit background information on their companies, from which the CO would "downselect" those deemed to be the least competitive. Prices would not be solicited at this point. In the second phase, the remaining firms would receive specification and drawing packages, submit proposals, and then be rated to determine the overall "best value" to the government, including price.

Both the Commerce Business Daily and the Internet announcements identified four factors that the agency would consider in identifying the "best value" for "downselection" purposes. They were:

- • (1) Specialized Experience of the firm. Firms shall illustrate the scope of the effort, its complexity, how schedules were implemented and how objectives were met. (2) Past Performance on FAA and other contracts with respect to cost control, quality of work, and compliance with performance schedules. (3) Capacity and Capability of firm to accomplish

the work. The firm shall submit a complete resume. Firm shall provide recent experience and technical knowledge of project personnel. Firm shall provide current workload, total number of on-going projects, their construction value and percentage of completion. (4) Financial Capacity/Bonding Information. Firm shall provide working capital, banking and credit references. The SIR must be received at the designated office no later than **December 8**, 1997.

(Emphasis in original)

Both announcements also established a mandatory site visit for offerors on December 2. Tabs (1) and (2).

At the December 2 site visit, all attendees were provided with a two-page SIR document that reiterated the four technical factors, and gave a slightly refined definition of the elements of each factor. For example, under "Specialized Experience," the December 2 document requested more specific information on offerors' critical path methodology, conformance to specs, and standards of workmanship. The second page of that document requested information on ten specific aspects of each offeror, and provided a signature block. See Tab (3).

Ten contractors, including MRCC, submitted responses to the SIR by the December 8 deadline. A team consisting of the contracting officer and two engineers from the Region's Airways Facilities division evaluated each submittal. Ratings were assigned to each factor of each offeror's submission, defined as follows:

- • Excellent- The contractor's performance exceeds requirements by a substantial margin providing additional value to the government. There are virtually no areas for improvement.

Very Good- The contractor's performance exceeds requirements. There may be several areas for improvement, but these areas are more than offset by lower (sic) rated performance in other areas.

Good- The contractor's performance meets all requirements.

Marginal- The contractor's performance fails to meet all requirements. There are areas of good or better performance but these are more than offset by lower rated performance in other areas.

Unsatisfactory- The contractor's performance fails to meet requirements by a substantial margin. There are very few areas of good performance and these are more than offset by lower rated performance in other areas.

Tab (4)

Upon completion of the evaluation, the team drafted a summarized report and a matrix depicting each company's score, by each of the three evaluators, under the four technical factors. MRCC was rated (with notational comments), as follows:

• • *Specialized Experience*: Good, (small projects), Good, and Good.

Past Performance: Marginal, Marginal, Marginal, (didn't meet completion).

Capacity/Capability: Marginal, (fit for small jobs), Marginal, Marginal, (didn't offer solution).

Financial Capacity/Bonding Info: Marginal, Marginal, Marginal, (absence of working capital).

See Tab (5).

The evaluation team ranked MRCC ninth of the ten responses received, and the CO determined to "downselect" MRCC and the tenth ranked offeror from the second phase of the acquisition. A third company was disqualified for failing to attend the mandatory site visit. Of the seven firms thus eligible to compete in phase two, five submitted offers by the due date of January 22, 1998. Tab (6).

Meanwhile, on December 23, 1997, the contracting officer notified MRCC that it had been "downselected," and that it would not be considered further for that acquisition. Tab (7). The contracting officer also had a telephone conversation on that day with the protester in which she discussed some of the reasons for MRCC's ratings and "downselection."

On December 30, MRCC sent the contracting officer a letter taking issue with the rationale she had given in their December 23 conversation. Much of that conversation had focused on MRCC's performance on a prior FAA construction job at Mill Valley, California. The protester insisted that the delays incurred at Mill Valley were attributable to the government and other contractors, and that downselection of MRCC on that basis was unfair. The December 30 letter concluded by asking the contracting officer to reconsider her decision on the Ajo procurement. See Tab (8).

On January 9, 1998, MRCC again wrote the CO asking that she provide a written response to the requests for reconsideration that he made on December 23 and 30. The protester also asked that she "explain" the qualifications of the companies that were selected for the phase two competition. Tab (9).

On January 12, MRCC filed its protest with the FAA's Office of Dispute Resolution for Acquisition, (ODRA), enclosing copies of prior correspondence and citing the CO's lack of responsiveness. The protester requested stay of the award, along with a reopening of the procurement to permit MRCC to compete. Tab (10). William R. Sheehan was assigned to the case as the Dispute Resolution Officer, (DRO).

On January 13, The CO responded to MRCC's letter of December 30, providing a more detailed explanation of her rationale for "downselecting" MRCC on the Ajo competition. The letter makes numerous references to MRCC's performance at the Mill Valley project, and concludes by denying protester's request for reconsideration, and by advising MRCC of its protest rights before ODRA. Tab (11).

On January 15, MRCC forwarded the CO's letter of two days earlier to ODRA, citing it as evidence that she relied entirely on "hearsay from several engineers with whom myself and my company have been at issue with several times in the past." The protester again asked ODRA to review the CO's decision. Tab (12).

On the morning of January 22, the DRO conducted an initial teleconference with the parties in which the CO and the protester explained the basic facts and their respective positions. The DRO outlined various processes available to resolve the dispute, and indicated that if adjudication by ODRA was necessary, the agency would be required to submit a report with documentation, followed by protester's rebuttal. The parties were requested to consider alternative dispute resolution (ADR) procedures. Due dates were

established for the agency report and rebuttal in the event adjudication was necessary. Tab (13).

On January 26, MRCC renewed its request for a stay of contract performance. Tab (14). ODR reviewed the information contained in that letter, and by Order dated February 2, ODR denied the request to recommend suspension. Tab (15).

On February 9, counsel for MRCC first contacted ODR and asked to gain access to the SIR responses of the other offerors. Tab (16). Counsel stated that he needed access to the decision making process to determine whether MRCC had been fairly treated. Specifically, counsel expressed concern that MRCC had been evaluated differently from other offerors similarly situated. The DRO explained that counsel could apply for a protective order, under which he could gain access to the SIR responses of other offerors. Counsel made application, and on February 23, was admitted to a protective order under which he could obtain the relevant documentation. Tab (17). On February 26, counsel posed his document production request directly to agency counsel; production was completed on March 16.

Meanwhile, on March 4, 1998, the DRO conducted a teleconference with the parties in which he clarified the issues to be addressed and the deadlines for briefings. The agency submitted its final report on March 16, and the protester submitted its rebuttal on March 26. Tab (18)

III. Issues Presented

This case presents two issues for consideration, namely: (1) whether the contracting officer's analysis and scoring of MRCC's SIR response was rationally based; and, (2) whether the protester provided credible evidence of bias on the part of evaluators or the contracting officer.

IV. Analysis

In making a recommendation concerning all substantive protest issues, the FAA's Office of Dispute Resolution for Acquisition will apply the same standard of review applicable

under the Administrative Procedure Act, 5 U.S.C. 706. Thus, agency actions will generally be upheld, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, (1971).

A. Rationality of the technical scores assigned

MRCC's principal argument is that it is a highly experienced contractor with significant FAA experience, and there is no rational basis for the low scores it received. The evaluation team assigned MRCC three ratings of "Good" and nine ratings of "Marginal" across the four criteria. Eight other companies averaged "Excellent" or "Very Good." MRCC complains that this cannot be explained by an objective comparison of the SIR responses. Its specific points and observations may be summarized as follows:

- • Specialized Experience:

MRCC demonstrated experience on three ARSR sites, while only one other offeror, (Company D), had any ARSR experience. Notwithstanding that, seven of the other offerors received ratings of "Excellent" or "Very Good," while MRCC received only a qualified "Good."

Several companies demonstrated little or no FAA work at all, yet were scored higher. One offeror's experience, (Company C), was almost exclusively in residential construction, yet it was rated higher than MRCC.

Past Performance:

MRCC complains that the files contain no references from FAA engineers or others commenting on the quality of the work cited by the other companies. In contrast, three letters from engineers on MRCC's past projects gave decidedly negative references. The protester also points out that those letters are dated February or March 1998, months after the "downselect" decision. It argues that the team irrationally applied *past performance* in the negative sense: MRCC's past performance counted as a strong negative, while everyone else's lack of FAA experience seemed to be a strength.

Capacity/Capability:

MRCC was rated "Marginal," yet there is no explanation for the high grades assigned to most of the others. One company's entire response was barely 4 pages, yet it was rated "Very Good." (MRCC's response was some 23 pages, listing numerous FAA jobs). Another company scored highly in this factor with only 12 employees, yet MRCC was deemed "Marginal" with 30 employees.

Financial Capability/Bonding:

Little or no information was provided by most of the other companies, yet all but one scored considerably higher than the protester. In contrast, MRCC provided financial statements from its bank, but received only "Marginal" ratings.

ODRA reviewed each of protester's allegations here, as well as the other companies' SIR responses on which they were based. In great measure, MRCC's allegations appear to be substantiated, in that the other submittals, standing alone, do not appear to warrant the large disparity in scores. For example, on its face, the MRCC response appears to demonstrate more FAA projects than most of the others. As a further example, none of the others cited ARSR experience; one company *did* have fewer employees than MRCC; and the experience of one of the highest rated firms did appear to be concentrated in residential construction.

On the other hand, ODRA recognizes that the evaluation team's scores incorporated the members' individual experience and knowledge in the subject matter, which ODRA is not in a position to question. For example, several offerors demonstrated extensive experience in large-scale utility, water project, and other major construction jobs, which the evaluation team might well have deemed to be similar to an ARSR project. Some of those companies also demonstrated projects of greater complexity and cost than did MRCC. The ODRA will not question these judgments, absent evidence of irrational or arbitrary scoring.

On that point, the only contemporaneous documentation other than the scoring matrix that might explain the scoring is the team's technical evaluation of "pro's" and "con's" on each contractor. Tab (19). In the case of MRCC, the "pro's" recognize MRCC's prior ARSR experience, yet the "con's" focus heavily on other engineers' dissatisfaction with the quality of work on those projects. The technical evaluation concludes by stating that MRCC was "ranked near the bottom of the list" *because of* "comments from other engineers." Those frustrations are echoed by the post-protest memoranda from project engineers about the quality of MRCC's performance at the prior sites. (Mt. Kala, Mill Valley, Oakland). Tab (20).

Taken as a whole, the record indicates that while the evaluators followed the SIR criteria, the *quality* of MRCC's past performance played a decisive role in the scoring. This is reinforced by the CO's debriefing letter of January 13, in which she makes numerous references to the FAA's dissatisfaction with the Mt Kala and Mill Valley jobs. ODR can only conclude that the *quality* of MRCC's past performance was an overriding influence in the scoring for this acquisition. From the record, it is clear that the Western Pacific Region was unhappy with MRCC's performance on the prior jobs, and that dissatisfaction permeated all aspects of the scoring on this acquisition.

ODRA believes that the *quality* of MRCC's past performance was an appropriate consideration in this process. Evaluators may certainly consider the quality of past performance cited by offerors. T. Head & Co., B-275783, March 27, 1997, 97-1 CPD 169. The very point of reviewing *past performance* is diminished if the agency cannot consider the quality of that performance. At the same time, however, where *negative* past performance is to have as large an impact as it did here, the offeror should have an opportunity to address those concerns before the agency effectively removes him from the competition.

The FAA's Procurement Toolbox Guidance supports this conclusion. Under "Past Performance" at page T3.2.2-6, the Toolbox discusses how *past performance* should be evaluated and applied as a factor in FAA acquisitions. Subsection 3.c., entitled "Disclosure of Negative Information," reads, in pertinent part:

- • If the IPT receives negative information that will have a significant impact on the likelihood of an award to an offeror, the IPT should disclose the information and provide an opportunity to respond. This is true even if the SIR states that award may be made on initial offers.

As found above, the negative reports from engineers on MRCC's prior jobs, Tab (20), clearly had a major impact on the scoring, which in turn was the basis for the "downselect." While the language contained in section T3.2.2-6 above is to serve only as guidance, the result of ignoring it in this case was extreme, in two respects. First, the impact here was not merely "significant"; it was decisive. MRCC was removed from the competition solely because of the reported dissatisfaction with its prior performance. Secondly, at least one of those "prior" contracts is not yet complete, and some of the allegations of negative past performance are the subject of MRCC claims which have yet to be negotiated or adjudicated. The contracting officer assigned to that project, or an adjudicator, may well decide that some or all of those MRCC claims have merit. Under

these facts, MRCC should have been afforded an opportunity to address past performance issues before being excluded from the present acquisition.

B. Bias of contracting officials

The protester has also alleged bias on the part of the contracting officer and the engineers involved in the SIR evaluation. MRCC complains that all the members of the team were prejudiced against the company because of performance concerns on the Mill Valley and Mt Kala projects. MRCC points to the CO's letter of January 13, which makes numerous references to delays and problems at the Mill Valley job. MRCC cites that letter as evidence that the CO intended to eliminate it from the competition any way possible. In response, the CO asserts that she was not predisposed against any of the offerors, and that to avoid the appearance of such, she purposely replaced one potential technical evaluator with whom MRCC had past disagreements.

In reviewing such allegations of bias on the part of evaluators and decision-making officials, ODRA believes the appropriate standard of review is that adopted by other fora which have confronted the same issue. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. California Environmental Engineering, B-274807,

January 3, 1997, 97-1 CPD 99. Where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a prejudice against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569, July 3, 1995, 95-2 CPD 52; Ameriko Maintenance Co., B-253274, August 25, 1993, 93-2 CPD 121.

On reviewing the record, ODRA believes that the protester has not met the above standard. No substantiation of the alleged bias is given, other than a reference to the fact that one of the evaluators previously "had been at issue" with MRCC over the Mill Valley project. This falls short of the "credible evidence" standard and will not by itself support the protester's allegations. Moreover, as discussed above, the problem was not that the evaluators were biased, but rather that MRCC never had a chance to address the negative input that resulted in its "downselection."

V. Conclusion and Recommendations

For the reasons explained above, ODRA concludes that MRCC should have been given an opportunity to address the negative references which played such a decisive role in the scoring. Thus, ODRA recommends that the protest be sustained. ODRA further recommends that MRCC be provided an opportunity to address fully the agency's concerns about its performance on prior jobs. We recommend that this be done as soon as possible to prevent negative impact on any future procurement.

With respect to the instant acquisition, the agency has informed ODRA that while award has not yet been made, it is imminent, pending resolution of some final environmental concerns. The agency also points out that the completion date of the project is crucial because the site must be ready for the follow-on contractor in four months. Further, the agency states that after final offers were submitted but before award was made, the CO released the pricing submitted by all five offerors. ODRA does not know why the pricing was released, but that fact, combined with the urgency described above, precludes a recompetition that would include the protester. Accordingly, we recommend that MRCC be reimbursed any reasonable bid & proposal costs that it incurred in preparing its response to the SIR. ODRA further recommends that in future procurements, the Contracting Officer afford offerors an opportunity to address negative past performance references in accordance with AMS Toolbox Section T 3.2.2. before eliminating companies from the competition solely on the basis of those references.

William R. Sheehan, Dispute Resolution Officer

For the Office of Dispute Resolution for Acquisition