

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Mid Eastern Builders, Inc.**
 Under Solicitation No. DTFAEA-04-R-00831

Docket No.: **04-ODRA-00330**

Appearances:

For the Protester, Mid Eastern Builders, Inc.: Michael L. Sterling, Vandeventer Black LLP

For the FAA Eastern Region: Brendan Kelly, Esq., Office of Center Counsel

I. Introduction

On December 22, 2004, Mid Eastern Builders, Inc. (“MEB”) filed the instant bid protest (“Protest”) with the FAA’s Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges an award made by the FAA Eastern Region (“Region”) pursuant to Solicitation DTFAEA-04-R-00831 (“the Solicitation”) for the construction of a new Air Traffic Control Tower and Base Building in Newport News, Virginia (“the Project”). MEB is an unsuccessful offeror that is challenging the Region’s decision to award a contract under the Solicitation to Smoot Construction Company (“Smoot”). Smoot has not intervened in the Protest.

MEB’s Protest essentially alleges that the Region’s award to Smoot was not in accordance with the express terms of the Solicitation or the FAA’s Acquisition Management System (“AMS”). More particularly, MEB alleges that the Region: (1) failed to consider cost as required by the AMS; (2) improperly weighted the stated evaluation factors; and (3) improperly evaluated MEB’s past performance. *See* MEB Protest at 3-5. The Protest seeks, among other things, suspension of the procurement pending the outcome of the Protest, and a contract award directed to MEB. *See* Protest at 6.

For the reasons discussed herein, the ODRA concludes that: (1) the evaluation scheme utilized by the Region in making its award decision was not consistent with the terms of the Solicitation or with the AMS; and (2) the Region’s evaluation of MEB’s past performance, which was critical to the Region’s award decision, was not consistent with the AMS and lacked a rational basis. The ODRA therefore recommends that the Protest be sustained.

II. Findings of Fact

1. On January 5, 2004, the FAA Eastern Region announced on the Internet that it was pre-qualifying bidders for the Project to construct a new Airport Traffic Control Tower and Administrative Base Building facility in Newport News, Virginia. The announcement requested specific pre-qualifying information, including a list of the last three similar prime contracts completed by the bidders during the past five years, and all prime contracts currently in progress. The announcement also requested information pertaining to potential bidders' specialized technical experience in such areas as high-rise pre-cast concrete panel construction, electrical and mechanical systems installation, high-rise construction, and pile driving experience. The announcement stated that the Solicitation would be provided to pre-qualified bidders. Agency Response ("AR"), Tab 2, p. 8.
1. The Region subsequently issued Solicitation No. DTFAEA-04-R-00831 on October 8, 2004 for the construction of the Project. AR, Tab 1, pp. 1-3.
1. The Solicitation states that the Government's estimated price for the Project is between 8.5 and 9.5 million dollars. The initial due date for offers was November 8, 2004. AR, Tab 1, p. 3.
1. The Solicitation clause entitled, "Basis for Award," states:

This is a "Best Value" procurement. Past performance, technical experience, financial capability and cost will be used for the basis for award. The Government reserves the right to award on initial offers without discussions or to conduct one on one discussions with one or more offerors. The Government is seeking offers that provide the best combination of quality and price in order to select the greatest value or "best buy" offer. Therefore, award may be made to other than the lowest price offeror.

AR, Tab 1, p. 19.

1. Amendment One to the Solicitation, issued on November 17, 2004, incorporates pertinent Department of Labor wage determinations and a copy of a January 5, 2004 Internet Announcement for the Project. Amendment One also addresses requests for clarifications by contractors regarding the drawings, specifications and solicitation clauses. Amendment One further extends the bid due date until November 23, 2004. AR, Tab 2.
1. Amendment Two, issued on November 23, 2004, provides that bidders could submit their asset breakdown sheet after the bid due date and indicates that offers remained due by 2 p.m. that same day. AR, Tab 2.

1. MEB submitted its bid on November 23, 2004. The total bid amount was [DELETED]. MEB's bid also included information about its technical qualifications and past performance. The information addressed the same pre-qualifying information requested by the Region in the January 5, 2004 Internet Announcement. AR, Tab 3.
1. Smoot submitted its bid on November 23, 2004 in the total amount of [DELETED]. Smoot's bid also included information about its technical qualifications and past performance, essentially addressing the pre-qualifying information requested by the Region in the January 5, 2004 Internet Announcement. AR, Tab 4.
1. The Agency Response contains a declaration of the Contracting Officer describing the process used for evaluating the bids. *See Declaration of Glenn McCarthy* ("McCarthy Declaration"). The McCarthy declaration states:

The product team decided to break down the technical evaluation factors as follows:

- a.60% for technical experience
- a.30% for past performance
- a.10% for financial capability

Additionally, it was decided the 30% past performance would be determined on the following:

- a.7.5% for cost control
- a.7.5% for quality
- a.7.5 for cost
- a.7.5 % for customer satisfaction

After review of all the documents and information, both MEB and Smoot were given perfect scores in the area of technical experience.

After a review of all documents and information, both MEB and Smoot were given perfect scores in the area of financial capability.

The product team decided to contact three references from the contract work referenced in each of the offers to assist in determining past performance.

McCarthy Declaration, ¶¶7-12.

1. The Contracting Officer's Declaration further states that "[b]ased on exceptional past performance reviews, as shown in our past performance documentation ... it was determined Smoot would receive a perfect score." McCarthy Declaration, ¶14. He explained:

I have never received better past performance reviews in my experience as a contracting officer as I did for Smoot. This weighed heavily in my ultimate decision regarding which company to award the contract to.

Based on the unsatisfactory past performance reviews of MEB which we received from the references, it was determined MEB would receive 15% of the possible 30% in past performance. [citation omitted]

Accordingly, MEB received 3.75% out of the possible 7.50% in each of the four areas which made up the past performance score.

I also have had experience in dealing with MEB since I am also the contracting officer responsible for the administration of the new airport traffic control tower in Roanoke, VA. The information received from others during the past performance determinations of MEB as a contractor was similar to my experience.

McCarthy Declaration ¶¶15-17.

1. The record contains notes from three telephone conversations made with respect to MEB's past performance experience. The same FAA officials, including the Contracting Officer, participated in each call. Their notes from the conversations state the following regarding MEB:

Record of Telephone Conversation with Mr. [DELETED], dated November 29, 2004 concerning project described as "Route 168 South Toll Plaza and Administration building."

[DELETED]

AR, Tab 5.

Record of Telephone Conversation with Mr. [DELETED], dated November 30, 2004 concerning project described as "Richmond, Virginia, Parking Garage."

[DELETED]

AR, Tab 5

Record of Telephone Conversation with Mr. [DELETED], dated November 29, 2004 concerning project described as "New Roanoke, VA, ATCT."

[DELETED]

AR, Tab 5

1. The Region's "Best Value Findings and Determinations" document sets forth the basis for the decision to award the contract to Smoot as follows:

- 1) 10.0 (total percentage rating of 100.00%) for Smoot Construction Company;
- 2) 9.6 (total percentage rating of 96.2%) for [a third contractor not a party to this Protest]; and
- 3) 9.0 (total percentage rating of 89.9%) for Mid Eastern Builders (MEB), Inc.

Smoot Construction Company was ranked number one out of the three contractors evaluated. The Smoot Construction Company price proposal was approximately [DELETED] under the Government Estimate by [DELETED], which was determined to be fair and reasonable. In a price comparison, this amounts to [DELETED], approximately 5.2% over the MEB's price proposal of [DELETED]. MEB ranked third out of the three contractors evaluated.

AR, Tab 5.

1. By letter, dated December 8, 2004, the Contracting Officer accepted Smoot's bid in the amount of [DELETED]. AR, Tab 10.
1. Following a debriefing, MEB filed the instant Protest with the ODRA on December 22, 2004.

I. Discussion

The standard of review employed by the ODRA in bid protests involves a determination of whether the challenged Agency action had a rational basis, was arbitrary, capricious, or an abuse of discretion and was supported by substantial evidence. *See Protest of All Weather, Inc.*, 04-ODRA-00294; *Protest of L. Washington and Associates*, 03-ODRA-00287; and *Protest of IBEX Group, Inc.*, 03-ODRA-00275. Under the above standard, the Protester bears the burden of proof and must further demonstrate that it was prejudiced as a result of the Agency's action. *See Protest of All Weather, Inc., supra*. It is well established in FAA caselaw that the ODRA will not substitute its judgment for that of the Source Selection Officials "so long as the source selection decision is rationally based, consistent with the AMS and consistent with the stated evaluation and award criteria." *Id.*

A. The Region's Evaluation Scheme

It is undisputed in this case that the Solicitation issued by the Region called for an award to the bidder offering the "best value" to the Agency. *See Finding of Fact ("FF") 4*. It is also undisputed that the Solicitation expressly provided that the Region would evaluate four factors in making its best value determination and that the Solicitation did not identify any relative weighting that would be given to the four identified factors. *See Protest at 3; AR at 2*. "There was no specification regarding how much weight would be applied to each factor." *Id.*

The Protest alleges that, based on the lack of relative weighting of the factors in the Solicitation, "MEB reasonably concluded that the four factors would be weighted equally, and submitted its proposal accordingly. From the plain language of the SIR's list of evaluation criteria, MEB had every reason to believe that the cost of the project would be, at the very least, as important

to the FAA as its subjective evaluation of ‘past performance.’” Protest at 3. The Protest further alleges, and the Region concedes, that unbeknownst to MEB and the other bidders, the Region ultimately utilized an uneven weighting system for the four factors and included specific weighted sub-factors in the past performance evaluation. *Id.*; AR at 2. On this point, the Agency Response states:

The Region decided it would apportion the following weights into the technical evaluation criteria: 60% for technical experience; 10% for financial capability; and 30% for past performance [citation omitted]. The past performance component was broken up in the following manner: 7.5% for cost control; 7.5% for quality; 7.5% for cost; and 7.5% for customer satisfaction. Cost, as in every contract award, was an evaluation factor. However, cost was not used in the technical qualification evaluation shown in Region File, Tabs 7 - 9. This is not to imply that cost was not an evaluation factor in the selection decision.

AR at 2.

MEB urges that the Region failed to comply with the AMS and with the terms of the Solicitation by introducing the weighted sub-factors and using unequal weighting for the four identified factors. *See* FF 4 and 9. In this regard, MEB’s Protest alleges:

MEB followed the criteria outlined in the SIR. Believing that costs were at least as important as the four past-performance sub-factors combined, MEB focused its efforts on keeping its bid price down. MEB’s efforts paid off, as it ended submitting the low bid, providing a savings to the FAA of [DELETED] over Smoot’s proposal, the next lowest bid. Following the dictates of the AMS, MEB reasonably believed that the objective weighting system would provide them a clear advantage in at least 25% of the criteria – cost – before turning to the other factors.

Protest at 4.

MEB further contends that the evaluation scheme employed by the Region effectively eliminated cost as a factor in the evaluation, arguing that no score for cost was ever calculated on the same scale as the other factors, and “[i]n fact, it appears that cost played no role in the Team’s evaluation.” *Id.* at 5.

For its part, the Region disputes MEB’s allegations regarding the absence of cost as an evaluation factor, asserting that “[c]ost, as in every contract award, was an evaluation factor,” and that, although not evaluated as a technical qualifications factor, cost was considered in the selection decision. AR at 2. The Region also challenges MEB’s assertion that it was required to weight the four factors evenly:

MEB submits that since no weights were provided in the Solicitation for the various evaluation criteria, it should be “presumed” that each of the four categories should be weighted 25%. The Region does not agree. MEB believes that if each of the four factors listed in the Solicitation were given a weight of 25%, that it would have been awarded the contract. Again, the Region does not agree.

AR at 3.

The Region explains that, after completing its review of the technical factors “the Product Team turned to cost.” AR at 5. The Region goes on to explain that:

When reviewing all offers in their entirety, it was determined that although Smoot’s offer was approximately 5% higher than MEB’s offer, because of the far superior past performance rating, the “best value” to the Government would be for the award to be made to Smoot.

AR at 5-6.

The Region argues that no support exists for MEB’s assertion that “each of the four criteria listed in the evaluation factors of the Solicitation should have been given a weight of 25%.” AR at 6. Moreover, the Region argues that its failure to weight the stated evaluation factors equally was not prejudicial to MEB:

Even if 25% weight was given to each of the four factors listed in the evaluation criteria selection, MEB would not been awarded the contract. Specifically, superior past performance reviews of Smoot far out weighed the cost savings to the Government.

AR at 6.

Notwithstanding the Region’s contention to the contrary, there is support in the AMS for the principle that, absent specific weighting in the Solicitation, all of the identified factors should have been weighted evenly. Specifically, AMS Section 3.2.2.2.3.1.2.3, which pertains to the receipt and evaluation of proposals, states, in the subsection entitled “Evaluation Criteria” as follows: “Relative importance between criteria is not required (when relative importance is used, the relative order of importance between criteria should be disclosed).” The subsection entitled “Evaluation Criteria” states:

The evaluation criteria form the basis on which each offeror's submissions are to be evaluated. Once the criteria have been established and disclosed to offerors, criteria should not be modified without first notifying offerors competing at that stage of the process and allowing such offerors to revise their submissions accordingly.

Thus, while it is true that the Region was not required to establish relative importance between the criteria, once it assigned varying degrees of relative importance among the factors within the criteria, it was incumbent on the Region to disclose that fact to bidders prior to the bid submission due date.

While the ODRA has not previously addressed the issue of undisclosed weighting of evaluation criteria, several ODRA decisions have emphasized that award must be based on the stated evaluation criteria. *Protest of Information Systems & Networks Corporation*, 98-ODRA-00095; *Protest of B&M Lawn Maintenance, Inc.*, 03-ODRA-00271. In addition, the well established rule at the Government Accountability Office (“GAO”) is that evaluation factors expressly identified in the

solicitation are presumed to be weighted equally absent any indication to the contrary. *See, e.g., Hyperbaric Technologies, Inc.*, B-293047.2, 2004 CPD ¶87, February 11, 2004 (where the Solicitation did not identify the varying importance among the individual evaluation factors, and in the absence of any indication in the RFP of the relative importance among the individual factors, they are viewed to be of equal importance). As the ODRA previously has stated, GAO precedent may be viewed as persuasive authority where such precedent is consistent with the FAA's AMS and ODRA caselaw. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159 at F.N. 3. In this case, GAO's rule is completely consistent with the principles set forth in the AMS, and the ODRA adopts the GAO rule in this case.

As discussed above, the relative weightings for the four overall criteria were not disclosed to the bidders prior to bid submission. FF 5 and 6. The Region has provided no explanation of why it weighted the four factors identified in the Solicitation unequally, or why it failed to amend the Solicitation so as to notify prospective bidders of the relative importance of the factors prior to the bid submission date. FF 9. Under the circumstances here, the Region's approach was not in compliance with the AMS and constituted an abuse of discretion.

A. The Region's Evaluation of MEB's Past Performance.

As discussed above, the Solicitation identified "past performance" as one of four factors to be evaluated by the Region in making its "best value" award determination. As is further discussed above, it is undisputed that the Region utilized an evaluation plan under which 30 out of a possible 100 points of its technical evaluation were available under the past performance category. FF 10. Moreover, the Region sub-divided the past performance category into four sub-categories, *i.e.*, cost control, quality, cost, and customer satisfaction. *See* AR at 2.

Additionally, it is undisputed that MEB and Smoot both received the highest possible scores for their respective technical experience and financial capability. AR, Tab 8. It further is undisputed that MEB's bid was approximately 5% lower than that of Smoot, and that both bids were under the Government's estimate for the work involved. Thus, the only basis on which the Region, under the stated evaluated criteria, could possibly have made an award to Smoot rather than to MEB was the difference in past performance ratings of the two companies.

Based on the results of telephone interviews conducted by the Region and documented in the Agency Response, Smoot received the highest possible score, *i.e.*, 30 points for past performance. FF 10. In contrast, MEB initially was given a score of 19.88, out of a possible 30 points, for past performance. *Id.* This score later was reduced to 15 out of 30 because of a miscalculation by the Region. *See* AR at 4, Tabs 7 and 9. The Region's position is that "Smoot was given a perfect score of 30% in the area of past performance because each interview demonstrated that in the areas of quality, timeliness, cost control and cost satisfaction, Smoot was superior." AR at 4. With respect to MEB, the Region's position is that "interviews with references provided by MEB, however, showed that there were problems in the area of past performance.... As a result,

MEB was provided with a past performance rating of only 15%.” AR at 5. For its part, MEB contends that:

MEB has submitted information to the Team regarding three prior jobs of similar size, complexity, and scope. The Team contacted persons from only two of those jobs and called a third person from another job MEB had performed. The Team apparently received conflicting reports from the third person. As far as MEB can tell, the Evaluation Team did not take steps to confirm the comments or reconcile the conflict, to determine if any concerns were an aberration.

Protest at 4.

It is undisputed that the Region’s Evaluation Team made no attempt to reconcile the apparent inconsistencies in the past performance information set forth in the interview notes. *See* AR, Tab 5. Nor did the Region seek further information or clarification from MEB. Rather, the Region merely dismisses MEB’s allegation on this point.

MEB claims in its Protest that the Team should have gone further than it did in determining past performance ratings. However, it is respectfully submitted that **the Team was satisfied in its past performance determinations and did not believe that further inquiry was necessary or warranted.**

AR at 5 (emphasis added). The Region’s position on this point is inconsistent with the AMS and ODRA caselaw.

A. Prejudice to MEB

Under the AMS, offerors should be provided an opportunity to address negative past performance references, where such references have a significant impact on the selection process. *See Protest of J. Schouten Company*, 98-ODRA-66. AMS Toolbox Section T3-2.2 C(3) states:

Disclosure of negative information. If the IPT/PT receives negative information that will have a significant impact on the likelihood of an award to an offeror, the IPT/PT should disclose the information and provide an opportunity to respond.

Additionally, Subsection (6) of the same Toolbox Section provides:

Evaluating Disputed/Negative Information. When the IPT/PT receives negative information, or information that is disputed, the IPT/PT should carefully consider the offeror’s response and determine what weight to apply, based on the facts obtained from the questionnaire, interview, or other sources. The file should be documented to explain why the IPT/PT assigned a particular rating. This is especially important in situations involving unresolved disputes.

As we said in *Schouten*, *supra*, while the referenced Toolbox section does not state a policy that is mandatory in all cases, the failure to permit a bidder to address adverse past performance information is irrational where (1) the impact of that information has a decisive effect on the award decision; and (2) the information in question is uncertain or otherwise unreliable. In the

instant case, the Region's records concerning MEB's past performance references reflect internally inconsistent information that MEB never had the opportunity to address. For example, it was reported that there was a [DELETED]; that the contract was [DELETED]; that a [DELETED] and that despite a rating of [DELETED]. FF 11. Given this conflicting information, the failure of the Region to inquire further was prejudicial to MEB, which had the highest possible scores in the other technical areas evaluated and offered the lowest price.

I. Conclusion

For the foregoing reasons, the ODRA finds that the Region failed to conduct its evaluation in a manner consistent with the Solicitation and with the requirements of the AMS. More specifically, the ODRA concludes that the Region failed to follow the AMS in its weighting of the evaluation factors and failed to explain the rationale for the weighting system that it ultimately employed. Further, the Region failed to conduct a past performance evaluation of MEB in a manner consistent with the requirements of the AMS and the Region's actions were prejudicial to MEB.

As a remedy, the ODRA recommends that the Region be directed to: (1) suspend performance of the existing Smoot contract pending its completion of the actions directed herein; (2) conduct a re-evaluation of the existing offers of MEB and Smoot based on even weightings of the four stated factors in the Solicitation; (3) re-evaluate MEB's past performance, and, in completing that re-evaluation, provide MEB with an opportunity to respond to the past performance information that was provided to the Region previously; (4) if results from the re-evaluation affect the award decision, take the necessary actions to terminate the existing contract with Smoot and make award to MEB; and (5) report to the Administrator through the ODRA, within 21 business days from the date of the Administrator's Order, on the outcome of the re-evaluation and the actions that the Region is taking to implement the Order.

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