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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: Millar Elevator Service Company

File: B-284870.5; B-284870.6

Date: January 31, 2001

Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.

Jeffrey S. Baird, Esq., Bewley, Lassleben & Miller, for Amtech Elevator Services, an intervenor.

Robert J. McCall, Esq., General Services Administration, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. During reevaluation of proposals (which was part of corrective action in response to protest against award), agency's failure to consider negative information regarding awardee's performance of contract following initial award is unobjectionable, where performance problem involved only one aspect of contract, awardee corrected the problem, and references awardee submitted with its proposal rated its past performance excellent.
 2. Protest that awardee's evaluation score included points for items that were eliminated from the solicitation is denied where record shows that the agency did not consider these items in the final evaluation and award decision.
 3. Protest that evaluator was biased in favor of awardee is denied where protester did not present any credible evidence of bias and, in any case, failed to show that any bias negatively affected the protester's competitive position.
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DECISION

Millar Elevator Service Company protests the award of a contract to Amtech Elevator Services under solicitation for offers (SFO) No. GS-03P-00-CDC-0006, issued by the General Services Administration (GSA) for elevator modernization and maintenance in the Moorhead Federal Building in Pittsburgh, Pennsylvania. Millar complains that GSA performed an unreasonable evaluation of its and Amtech's technical proposals, and that one of the evaluators was biased in favor of Amtech.

We deny the protest.

The SFO, issued on October 29, 1999, contemplated the award of a fixed-price contract on a best value basis. The evaluation was to be based on the following technical evaluation criteria, listed in descending order of importance—design; maintenance and performance history; modernization experience and past performance; schedule, key personnel and staffing plan; women-owned business and small disadvantaged business participation in subcontracting—and price, which was slightly less important than the technical criteria.

Millar and Amtech were the only two offerors that responded to the solicitation. A source selection board evaluated the technical proposals and the contracting officer evaluated the price proposals. After two rounds of discussions and two rounds of best and final offers (BAFO), GSA performed a best value analysis and selected Amtech for award. Millar challenged the award decision in a protest to our Office (B-284870, B-284870.2). As part of an “outcome prediction” alternative resolution dispute conference conducted at the request of the parties, the General Accounting Office attorney handling the matter advised the parties that there appeared to be errors in GSA’s evaluation. Following the conference, GSA proposed corrective action that led to our dismissing the protest on May 11, 2000. Thereafter, GSA issued amendment No. 4 to revise the solicitation, requested third BAFOs, evaluated those BAFOs, and performed a new best value analysis. Contracting Officer’s Statement (COS) at 3, 4. Amtech again was selected for award and Millar now protests that award decision.¹

Millar challenges the evaluation on numerous grounds. In reviewing a protest against a procuring agency’s proposal evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation. National Toxicology Labs., Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ¶ 5 at 3. We have reviewed the record here and find all of Millar’s arguments to be without merit. We discuss Millar’s primary arguments below.

AMTECH’S PAST PERFORMANCE

Amendment No. 4 requested revised BAFOs, but provided that the agency would consider an offeror’s original proposal if it chose not to submit a BAFO. Amtech did not submit a revised technical BAFO, and GSA based its award decision on an evaluation of Amtech’s original proposal. Millar asserts that, during Amtech’s performance of the contract (following the original award), Amtech experienced performance problems in completing the lobby modernization work (awarded under option 1 of the solicitation). Protest (B 284870.5) at 3-5. To support this position,

¹ Millar also filed an earlier protest (B-284870.4) against the new award decision. We denied that protest by decision dated December 27, 2000.

Millar relies on a July 3, 2000 e-mail from the GSA project manager to other GSA personnel, and an August 2, 2000 letter from the GSA project manager to Amtech.² According to Millar, this negative information regarding Amtech's performance should have been, but was not, considered during the reevaluation and new award determination.

The agency confirms that there was a problem with Amtech's performance, but explains that the problem was due to a delay in the award of the contract; as a result of the delay, Amtech's performance of certain lobby modernization work had to be accelerated to coordinate with a separate lobby modernization contract. Agency Report (AR) at 6. GSA states that the performance problem concerned only the lobby modernization work, and that Amtech was performing the other portions of the contract well. Id.

We find nothing objectionable in the agency's evaluation of Amtech's past performance. The e-mail and letter Millar references do show that the agency was having a problem with Amtech's accelerating its performance to coordinate with the other lobby modernization contract. However, Millar has neither asserted nor shown that Amtech's problem extended beyond the lobby work, and the record shows that Amtech corrected the problem by providing an additional manager for the lobby work. AR at 11. Further, this one instance of negative past performance would have been viewed together with the fact that Amtech's proposal provided 18 references, and that all those contacted by GSA rated Amtech's performance as excellent. Supplemental Technical Evaluation and Consensus Report (CR) at 9. In this regard, the August 2 letter shows that Amtech recently very successfully completed a similar high profile GSA contract (the Byrne/Green Elevator Project). In light of these considerations, there is no basis to conclude that the problem Amtech experienced in performing the lobby work would have affected its past performance rating.

² In comments submitted on January 17, 2001, Millar supplemented its argument on this issue with what it believes are additional specific instances of Amtech's poor performance. However, Millar received the documents containing this information on November 3, 2000, pursuant to a Freedom of Information Act request. Since Millar did not raise its specific argument concerning this information within 10 days after November 3, this expansion of its original argument is untimely; our Bid Protest Regulations do not contemplate such a piecemeal presentation or development of protest issues. See 4 C.F.R. § 21.2(a)(2) (2000); OHM Remediation Servs. Corp., B-274644 et al., Dec. 23, 1996, 97-1 CPD ¶ 4 at 9; QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13; Cornet, Inc.; Datacomm Management Servs., Inc., B-270330, B-270330.2, Feb. 28, 1996, 96-1 CPD ¶ 189 at 2-3.

EVALUATION BASED ON ELIMINATED WORK

Millar maintains that, although amendment No. 4 deleted option items 1 and 2 (elevator lobby and telephone equipment) and asbestos abatement work from the solicitation, Amtech improperly received reevaluation credit related to the deleted work. Specifically, Millar asserts that, during the original evaluation, Amtech received credit for its asbestos abatement schedule and for the telephones it proposed for option 2, and that GSA did not delete any points from Amtech's evaluation score when it reevaluated the proposals.

GSA responds that, while, during the initial evaluation, one evaluator gave Amtech points for the telephones it proposed under option 2, AR at 8, these points were deleted from Amtech's score during the consensus evaluation because the telephones to be supplied by the offerors were prescribed by the solicitation and thus were not subject to technical evaluation. Id. Further, GSA states that, while it did not subtract during the reevaluation any points Amtech originally received for asbestos abatement, it specifically eliminated consideration of asbestos abatement during the final evaluation. Id. at 9; CR at 9.

Whether or not Amtech's point score was adjusted during the reevaluation, this allegation does not provide a basis for questioning the evaluation or award decision. Evaluation scores are merely guides for selection officials, who must use their judgment to determine what the actual technical difference between competing proposals might mean to contract performance. SEEMA, Inc., B-277988, Dec. 16, 1997, 98-1 CPD ¶ 12 at 6. Here, the record shows that GSA's award decision was based, not on the point scores, but on the identified strengths and weaknesses of the technical proposals balanced against the difference in the prices. In the final proposal evaluation and consensus report, there is no mention of any strength associated with the telephones Amtech offered in its proposal. The report similarly indicates that Amtech's original asbestos abatement evaluation was not considered in the reevaluation, stating that "Amtech's schedule was evaluated prior to asbestos being deleted in BAFO #3. Strengths and weaknesses associated with their asbestos abatement schedule will therefore not be discussed." CR at 9. Nor is either of these items mentioned in the best value and award determination. We conclude that these items had no effect on the award decision; they thus do not provide a basis for questioning that decision.

AMTECH'S ENHANCED SCHEDULE

The solicitation originally required offerors to complete performance of the asbestos abatement work within 100 days, and the entire contract within 850 days, after receiving notice to proceed, SFO, vol. 1, part 2, at 2.4, and also invited offerors to propose an enhanced schedule. In its proposal, Amtech offered an enhanced schedule under which it would complete the asbestos work in [DELETED] days and the entire contract in [DELETED] days. During the reevaluation, in light of the

deletion of the asbestos abatement work, the agency determined that the new required schedule was 750 days, and that Amtech's proposed schedule should be evaluated as [DELETED] CR at 9-10. Millar protests that, because Amtech did not submit a revised BAFO in response to amendment No. 4, it was improper for the agency to assume that Amtech still intended to propose--as it had in its original proposal--an enhanced schedule to complete the contract.

This allegation is untimely. Millar received the CR on November 1, 2000, together with the agency report responding to Millar's earlier protest (B-284870.4). The CR put Millar on notice that the agency had considered Amtech's proposed schedule to be [DELETED] days in the reevaluation. CR at 9-10. Millar's comments in response to the agency report (B-284870.4) show that Millar also was aware, no later than November 7, that Amtech had not submitted a revised BAFO, and that the reevaluation of Amtech's proposal was based on the firm's preexisting proposal. Millar therefore knew, or should have known, of this alleged evaluation impropriety no later than November 7. Since this argument was not raised by November 17, that is, 10 days later, it is untimely and will not be considered. See 4 C.F.R. § 21.2(a)(2).³

BIAS

Millar asserts that one of the agency evaluators--the project manager who was administering Amtech's contract during the reevaluation--should have been disqualified due to bias in favor of Amtech. Specifically, Millar points to language in the evaluator's August 2 letter to Amtech (discussed above) alluding to the efforts he personally made to assist Amtech in receiving the award, and indicating his hope that Amtech would receive the award following the reevaluation. Protest (B-284870.5), exh. 8, Letter from GSA to Amtech (Aug. 2, 2000). Millar asserts that these statements indicate the evaluator's clear preference for Amtech, and that the evaluator thus was not in a position to provide an unbiased evaluation.

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. RONCO Consulting Corp., B-280113, Aug. 11, 1998, 98-2 CPD ¶ 41 at 5. Thus, we will sustain a protest allegation of bias only where the protester produces credible evidence of bias and demonstrates that the agency bias translated into action that unfairly affected the protester's competitive position. Id.

³ We are aware that the record contains a conflict regarding Amtech's enhanced schedule: the CR states that Amtech's proposed schedule of [DELETED] days was reduced by [DELETED] days, to [DELETED] days, while the agency report states that it was reduced by [DELETED] days, to [DELETED] days. This inconsistency does not affect our conclusion that the issue was untimely raised.

We do not agree that the August 2 letter evidences bias in the proposal evaluation. That letter was written to Amtech by the evaluator in his role as project manager, not for the purpose of praising Amtech, but to persuade Amtech to accelerate performance on the lobby work. The favorable comments about Amtech were part of the project manager/evaluator's attempt to make Amtech understand that it had a great deal to lose if it did not work to resolve the lobby modernization problem. While statements in the letter indicate that the project manager/evaluator was favorably disposed to Amtech's receiving the award following the reevaluation, it seems clear, reading the letter as a whole, that those statements reflected the project manager/evaluator's knowledge of Amtech's exemplary performance under a prior high profile contract. We do not think the fact that an evaluator has a favorable opinion of an offeror based on a consideration that was part of the evaluation scheme--past performance was an evaluation factor under the RFP--establishes that the evaluator was biased, so as to call the fairness of the evaluation into question.

There is nothing else in the record to indicate that the evaluator in question influenced or attempted to influence the award in favor of Amtech. Specifically, there is no showing by Millar that any bias affected the protester's competitive position; despite Millar's multiple protests challenging the procurement on numerous grounds, we have found here, as well as in our prior decision (Millar Elevator Servs. Co., B-284870.4, Dec. 27, 2000, 2001 CPD ¶ __), that the evaluation and award decision were reasonable.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel