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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: PAI Corporation

File: B-298349

Date: August 18, 2006

Susan W. Ebner, Esq., and Ronald S. Perlman, Esq., and John Jacko, Esq., Buchanan Ingersoll & Rooney PC, for the protester.

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DIGEST

1. Protest that agency was biased against the protester is denied where record contains no evidence of bias.
 2. Protest that agency unreasonably evaluated protester's proposal is denied where record demonstrates that evaluation was reasonable and in accordance with stated evaluation criteria.
 3. Protest that agency failed to hold meaningful discussions with protester regarding significant weaknesses or deficiencies in protester's proposal is denied where items protester asserts should have been discussed either were discussed adequately, or were not significant weaknesses or deficiencies, and therefore were not required to be discussed.
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DECISION

PAI Corporation protests the award of a contract to Consolidated Safety Services, Inc. (CSS) under request for proposals (RFP) No. NNA04055727R, issued by the National Aeronautics and Space Administration (NASA) for occupational safety, industrial hygiene, and medical services (OSIHM) at Ames Research Center. PAI asserts that agency contracting officials were biased against PAI, and that the agency unreasonably evaluated its proposal.

We deny the protest.

The solicitation, issued on December 17, 2004, provided for award on a “best value” basis, with evaluation factors for mission suitability (comprised of three subfactors, in descending order of importance: understanding the requirement; management approach, organizational structure, corporate or company resources, and key personnel; and safety and health plan), past performance, and cost. Past performance and cost were of equal weight and were each weighted slightly less than the mission suitability factor.

Three offerors--CSS, PAI, and Integrated Science Solutions, Inc. (ISSi)--submitted proposals. Following the evaluation of initial proposals, NASA placed the three offerors' proposals in the competitive range, held discussions, and solicited, received and evaluated final proposal revisions (FPR). In the final evaluation, CSS's, ISSi's, and PAI's proposals received 968, 904, and 849 (out of 1,000 available) points, respectively, for mission suitability. With respect to past performance, CSS and ISSi were rated excellent, and PAI was rated very good. CSS's proposed cost was \$33.6 million, compared to PAI's \$32.9 million and ISSi's \$31.2 million. Based on these results, the agency determined that CSS's proposal represented the best value, and made award to that firm. PAI protests the award decision on several bases.

BIAS

PAI explains that it was the incumbent contractor for the OSIHM services under a combined OSIHM and Environmental Services (ES) contract. ISSi was a subcontractor to PAI, and the president of ISSi was the project manager. In February 2002, PAI fired the project manager because PAI determined that she was violating a conflict of interest agreement she had signed with PAI. PAI asserts that the contracting officer's technical representative (COTR) on that contract was a friend of the project manager and was angry at PAI for firing her. PAI maintains that this animus translated into bias against PAI under the current procurement. According to PAI, evidence of this bias includes the COTR's refusal to approve two substitute project managers PAI proffered to replace the fired individual (under the prior contract). Instead, the agency approved a third substitute, who performed poorly and left the company within 6 months. Thereafter, NASA approved one of the initially rejected substitutes.

In order for a protester to succeed in a claim of bias on the part of contracting officials, the record must establish that the officials intended to harm the protester; government officials are presumed to act in good faith, and our Office will not attribute unfair or prejudicial motives to them on the basis of inference or supposition. AllWorld Language Consultants, Inc., B-291409.3, Jan. 28, 2003, 2003 CPD ¶ 31 at 2. Moreover, in addition to producing credible evidence of bias, a protester must show that any bias translated into action that unfairly affected the protester's competitive position. Id.

There is no evidence of bias here. Rather, PAI merely recites agency actions in connection with the prior contract and concludes that the COTR's and other officials' actions must have been motivated by a desire to deny PAI the award here. There is no basis for reaching this conclusion. The contracting officer and COTR both deny that they were or are biased against PAI or took any purposeful action to deny PAI the award. Declaration of Contracting Officer at 3; Declaration of COTR at 1, 2. The COTR specifically denies that she had any relationship, other than a professional relationship, with the fired program manager, and explains that she was upset when PAI fired the program manager solely due to her concern with the continued efficient running of the program. Declaration of COTR at 2. NASA concedes that agency officials should not have been actively involved in selecting the replacement project manager, but echoes the COTR's explanation that her involvement reflected her concern for the program. NASA Response to Agency-Level Protest at 12. PAI has not shown that the COTR had other than a work relationship with the fired program manager, that the COTR harbored animus toward PAI, or that any bias (assuming that it did exist) translated into unreasonable or otherwise improper action to PAI's disadvantage during the current procurement.¹

EVALUATION

PAI challenges the evaluation of its proposal 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 and applicable procurement statutes and regulations. National Toxicology Labs., Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ¶ 5 at 3. We have reviewed the record and find PAI's arguments to be without merit. We discuss several of PAI's principal arguments below.²

¹ PAI also maintains that bias is demonstrated by NASA's decision to separate the OSHIM and ES contracts into two contracts, and the fact that a representative of the contracting officer replied affirmatively to a vendor who inquired whether NASA contemplated changing contractors. However, an agency's separating a requirement into two separate contracts, without evidence of any improper motivation, does not demonstrate bias, nor does an agency remark that it foresees a change in contractors. In any case, it remains that PAI has not shown how any evidence of bias translated into action that unfairly affected its competitive position.

² Many of PAI's arguments are untimely. For example, PAI asserts that its proposal improperly was assigned a weakness for procurement and storage controls under the safety and health plan subfactor, that it was not credited with a number of accomplishments under the past performance factor, that its employee turnover was improperly criticized as high. A protest issue that does not involve a solicitation impropriety must be raised within 10 days after the protester knows or should know the basis of protest. 4 C.F.R. 21.2(a)(2) (2006), Ti Hu, Inc., B-284360, Mar. 31, 2000, 2000 CPD ¶ 62 at 3. Here, during its debriefing, PAI was given the evaluation
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Understanding the Requirement

Much of the protest is based on PAI's view that the agency applied different standards in evaluating its proposal than it applied in evaluating the two other offerors' proposals, both of which are ranked higher than PAI's.³ PAI complains, for example, that, under the understanding the requirement subfactor, CSS's proposal was assigned two significant strengths—one for hygiene, safety, health unit emergency response, and computer systems supporting technical requirements, and a second for thorough understanding of federal and state regulatory framework and proposed effective system to ensure timely identification and communication of new requirements to the government ensuring on-time regulatory submittals. In contrast, PAI complains, its proposal was assigned only one significant strength for a thorough understanding of all of the technical requirements and the federal and state regulatory framework. PAI asserts that equal treatment dictated that this one strength be broken into two individual strengths.

NASA responds that the proposals were evaluated differently because CSS's two strengths reflected a finding of both a thorough understanding of the requirements and proposed mechanisms to ensure timely identification of new requirements, while PAI's one strength was based on a single finding of an understanding of the requirements. Based on this explanation, the evaluation in this area appears reasonable; PAI has not shown otherwise.

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documents for its own proposal, as well as the source selection decision document explaining the award decision and listing the evaluated weaknesses and strengths for each proposal. In its comments on the agency report, PAI raised certain evaluation arguments (including those listed above) for the first time. Because these arguments were based on information disclosed at the debriefing, they are untimely. Similarly, PAI's protest that CSS medical director was not certified in advanced cardiac life support is untimely because the issue was evident from the agency report, but PAI did not raise it until more than 10 days later in supplemental comments.

³In some instances PAI challenges the initial evaluation; for example, it notes that the agency initially questioned ISSi's and CSS's experience. However, the record shows that the agency resolved the experience issue with the offerors during discussions. Where concerns raised during an initial evaluation have been resolved by the final evaluation, the initial evaluation generally is immaterial. See American Indian Sci. and Eng'g Soc'y, B-232217, Dec. 12, 1988. Similarly, we generally will not address evaluation challenges based on comments of individual evaluators, rather than the consensus evaluation, since the consensus evaluation is the basis for the award decision. Instrument Control Serv., Inc., B-285776, Sept. 6, 2000, 2000 CPD ¶ 186 at 3 n.6.

Management Approach

PAI complains that, under the management approach subfactor, its proposal was assigned a significant strength for offering nine key personnel that exceeded the solicitation requirements, while ISSi's received a significant strength for offering three key personnel that exceeded the solicitation's statement of requirements (SOR). PAI asserts that its greater number of personnel exceeding the requirements warranted assigning its proposal greater credit in this area than ISSi's. NASA responds that, in evaluating the proposals, it did not compare proposals to each other but, rather, considered only how each proposal compared to the SOR; it concluded that, since both proposals listed key personnel that exceeded the SOR, each should be assigned a strength. We find nothing improper in the agency's evaluation approach. There is no basis for precluding the agency from assigning maximum evaluation credit to a proposal that exceeds the solicitation requirements solely on the basis that another proposal may exceed the requirements to a greater extent, absent an evaluation criterion to that effect. Since both proposals exceeded the terms of the RFP, the agency reasonably could assign them the same rating.

Integrated Team Approach

PAI complains that its proposal should have been assigned a significant strength for proposing an integrated team approach. In this regard, PAI's initial proposal offered MACTEC and El Camino as teaming partners, and was assigned a significant strength for offering an integrated team approach with its major subcontractors. When, during discussions, the agency expressed concern about MACTEC's past performance, PAI removed MACTEC as a teaming partner and instead proposed the firm as a bench resource from which services would be ordered, if needed, using a blanket purchase agreement. NASA removed the significant strength from PAI's evaluation in this area, finding that this arrangement would not be as beneficial to the government because MACTEC would not share in the award fee pool and thus could be less committed to being available to perform.

PAI asserts that removal of the strength was not warranted since, whether MACTEC is a teaming partner or a subcontractor, MACTEC specialists can be deployed at prearranged prices as they are needed. PAI further asserts that the agency incorrectly found that MACTEC would not participate in the award fee pool--in fact, MACTEC would be a 10 percent partner in the pool--and ignored the fact that PAI still has a teaming agreement with El Camino hospital.

This argument is without merit. In its FPR, PAI's technical proposal removed MACTEC as a teaming partner, and the cost section of PAI's FPR stated only that teaming partners would share in the award fee pool, with no mention of other subcontractors sharing in the pool. Final Proposal Revision at 1, 11, S-1, S-2. Given

the language of PAI's proposal, NASA reasonably concluded that MACTEC was not proposed to share in the award fee pool. The agency could reasonably conclude from this that MACTEC might not be as committed to the contract, and that PAI might need to find a replacement during performance. While PAI's teaming arrangement with El Camino remained, we see nothing unreasonable in the agency's deciding that PAI's less favorable approach following discussions (i.e., the elimination of one of its originally proposed teaming partners) did not warrant a significant strength.

Management Approach/Key Personnel

PAI challenges the agency's assigning its proposal a significant weakness under the management approach/key personnel factor based on the finding that its offered industrial hygienist/technical lead person did not meet the experience requirements listed in the SOR. In this regard, the solicitation required technical leaders to have, among other things, a minimum of 10 years of experience in the discipline of their functional area. SOR at 44-45. During the initial evaluation, NASA determined that PAI's proposed industrial hygienist/technical lead did not meet this requirement, and brought this matter to PAI's attention during discussions. In response, PAI provided information regarding the position, but NASA ultimately found that the information presented showed that the proposed individual had only 7.5 years of relevant experience. More specifically, NASA found that positions held by the individual under three prior contracts—two as an environmental scientist and one as a state air quality inspector—listed to demonstrate experience involved professional environmental experience, rather than the required experience in the field of industrial hygiene.

The evaluation in this area was reasonable. First, with respect to the environmental scientist positions, PAI listed the individual's duties as including, among other things, solid waste management and yard waste composting. PAI Response to Discussion Questions at 8. PAI asserts that this experience should have been deemed relevant because the solicitation lists “[m]anaging, packaging, transporting and disposing of radioactive waste and ‘mixed waste streams’” as part of the industrial hygiene function. PAI Supp. Response, July 20, 2006, at 10. The protester's characterization of the solicitation is incorrect. Our review of the SOR shows that the quoted waste management function is not listed as a function of the industrial hygienist; rather, it is listed in a different section of the SOR, as a matter related to radiation protection to be performed by a certified health physicist. SOR ¶ 2.2.2.1. Thus, the agency reasonably concluded that these two prior positions did not demonstrate relevant experience for the industrial hygienist/technical lead.

PAI listed the responsibilities for the individual's air quality inspector position as: review of air pollution permits, inspection of air pollutant sources and asbestos abatement projects, and technical management of NESHAP compliance. PAI Response to Discussion Questions at 8. NASA states that it did not regard this

position as relevant experience because, whereas an air quality inspector inspects pollution sources for compliance with permit conditions and with environmental regulations—that is, from an environmental standpoint—an industrial hygienist working for a state air quality control department typically would be engaged in activities such as monitoring indoor air quality for the department’s workers, or would act as a toxicologist, conducting human health risk assessments to determine the impact of specific air pollution sources on community health. Supp. Declaration of COTR, July 13, 2006, at 1. We find no basis for questioning this distinction.

We also note that the SOR includes tasks that concern indoor air quality—e.g., the contract calls for program development, implementation, coordination and training for programs, including indoor air quality, SOR ¶ 2.2.1.1, and also states that the industrial hygiene group must be appropriate for managing key NASA facilities programs, such as indoor air quality. SOR ¶ 6.4.1, at 45. PAI’s proposal did not state that the proposed individual’s experience as an air quality inspector dealt with indoor air quality. PAI asserts that the nature of the experience as concerning indoor versus outdoor air quality does not affect its relevance, but we see no reason why the agency could not make this distinction given the specific solicitation references.

Past Performance

PAI argues that it unreasonably was assigned a weakness under the past performance factor for having a relatively high turnover of key personnel. PAI maintains that this downgrading was unfair, since NASA is partially responsible for past turnover due to its involvement in replacing the fired program manager, and since the project manager, who was fired for violating a conflict of interest agreement, also contributed to the turnover issue. The evaluation in this area was reasonable. First, the record shows that the weakness assigned reflected not only the turnover in project managers, but also turnover in business managers and other non-key personnel. Agency Report at 17. In any case, regardless of any agency involvement in replacing the fired program manager, there was nothing unreasonable in the agency’s holding PAI responsible for the need to replace its employee under the contract.⁴

PAI complains that it improperly was treated differently from CSS, because it was assigned a weakness for employee retention, while CSS, with a reported turnover

⁴ PAI complains that the agency unfairly did not penalize ISSi in the evaluation, even though its president was the program manager responsible for violating the conflict of interest agreement that led to her dismissal. However, ISSi did not have a prior contract with a high turnover rate, so NASA had no basis for assigning ISSi a weakness for high turnover.

rate of 18 and 19 percent (for professional and medical personnel, respectively), was not assigned a weakness. As noted above, however, PAI's assigned weakness was based on turnover of key personnel as well as high turnover of other personnel. In contrast, CSS was found to have a very low turnover in key personnel and 18 and 19 percent turnover of other personnel. We find nothing unreasonable in NASA's view--and resulting assessment of a minor weakness against only PAI--that PAI's high turnover in key personnel could be more disruptive to contract performance than turnover of non-key personnel. Agency Response, July 25, 2006, at 2.

DISCUSSIONS

PAI argues that the agency failed to hold adequate discussions with it in a number of areas where its proposal was assigned significant weaknesses. For example, PAI asserts that NASA should have advised PAI that it had concerns about the responses of PAI's proposed industrial hygienist to a pop quiz given during the PAI's oral presentation, and should have told PAI that it did not have to offer as many key personnel who exceeded the SOR in order to receive a high rating in that area. In this latter regard, PAI states that it would have been able to offer personnel with less experience at a lower cost.

Discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7. There is no requirement, however, that discussions be all encompassing or extremely specific in describing the extent of the agency's concerns; agencies need only lead offerors into the areas of their proposals that require amplification. Professional Performance Dev. Group, Inc., B-279561.2 et al., July 6, 1998, 99-2 CPD ¶ 29 at 5.

The discussions here were adequate. First, of the several items PAI identifies as significant weaknesses or deficiencies, only one, the qualifications of the industrial hygienist, was identified by the agency as a significant weakness in PAI's proposal. NASA did not find PAI's key personnel to be a weakness or deficiency, and did not consider PAI's price unreasonable, and therefore was not required to raise this with PAI during discussions. With respect to the industrial hygienist, as discussed above,

NASA specifically advised PAI that it had concerns about the proposed individual's qualifications. NASA was not required to specify that it was not satisfied with her response to the pop quiz.⁵

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ PAI argues that NASA also failed to address with CSS all significant weaknesses found in its proposal. We fail to see how any error in the agency's conduct in this regard could reasonably be viewed as prejudicial to PAI.