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**Comptroller General
of the United States**

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

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Decision

Matter of: AIC International, Inc.

File: B-402652.2

Date: June 28, 2010

David P. Ledger, Esq., Cabot Mantanona LLP, and Shelly L. Ewald, Esq., Watt, Tieder, Hoffar & Fitzgerald, LLP, for the protester.

David A. Rose, Rose Consulting LLC, for Guam Pacific International, LLC, an intervenor.

Richard Huber, Esq., Department of the Navy, Naval Facilities Engineering Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging evaluation of protester's proposal is denied where record shows evaluation was reasonable and consistent with solicitation.

DECISION

AIC International, Inc., of Hagatna, Guam, protests the rejection of its proposal and the award of contracts to Guam Pacific International, LLC (GPI), of Barrigada, Guam, and Overland Corporation, of Ardmore, Oklahoma, under request for proposals (RFP) No. N40192-10-R-2800, issued by the Department of the Navy, Naval Facilities Engineering Command, for the award of multiple contracts for new

construction, renovation, and repair of government facilities on Guam. The protester argues that the evaluation of its proposal was unreasonable.¹

We deny the protest.

BACKGROUND

The RFP, which was set aside for small businesses, provided for the award of up to five indefinite-delivery/indefinite-quantity design/build contracts to the offerors whose proposals were determined to represent the best value to the government, with technical factors of significantly greater weight than price in the determination of best value. Technical factors (of equal weight) were offeror and lead design team experience; past performance; safety; workforce housing and logistics (WH&L); and technical approach (to performance of a specified seed project).² Price was to be evaluated on the basis of pricing for the seed project.

Thirteen proposals were received by the November 24, 2009 closing date. Evaluation panels reviewed the technical and price proposals; technical ratings and rankings (along with seed project prices) were as follows:

¹ In its initial protest, AIC also complained that the agency erred in awarding to GPI and Overland without investigating whether the firms were unusually reliant upon—and thus, for size determination purposes, should have been treated as affiliated with—their large business subcontractors. The agency requested, and we granted, dismissal of this argument prior to submission of the agency report. In addition, the protester initially alleged that the agency had ignored price in its determination of best value. The agency persuasively rebutted this allegation in its report with documentation demonstrating that both the source selection board and the source selection authority had considered price in their trade-off determinations, and AIC abandoned this argument.

² The seed project was for construction of a combat support vehicle maintenance facility at Andersen Air Force Base.

Technical Ranking	Overall Technical Rating³	Seed Project Price
1. GPI	Good	\$12,959,699
2. Niking Corp.	Good	[deleted]
3. Bulltrack-Watts JV	Good	[deleted]
4. Pacific West Builders	Good	[deleted]
5. P&S Constr.	Good	[deleted]
6. Overland	Good	[deleted]
7. Offeror A	Satisfactory	[deleted]
8. Offeror B	Satisfactory	[deleted]
9. Offeror C	Satisfactory	[deleted]
10. AIC	Satisfactory	\$12,478,276
11. Offeror D	Satisfactory	[deleted]
12. Offeror E	Satisfactory	[deleted]
13. Offeror F	Satisfactory	[deleted]

The ratings for the individual technical factors were as follows:

Firm/Rank	Experience	Past Perf.	Safety	WH&L	Tech. Approach	Overall
1. GPI	E	G	S	E	G	G
2. Niking Corp.	G	E	E	G	S	G
3. Bulltrack-Watts JV	G	G	G	G	S	G
4. Pacific West Builders	G	G	S	S	G	G
5. P&S Constr.	G	G	G	S	S	G
6. Overland	E	G	S	S	S	G
7. Offeror A	G	E	S	G	M	S
8. Offeror B	G	E	G	M	S	S
9. Offeror C	G	G	S	S	S	S
10. AIC	G	G	M	S	S	S
11. Offeror D	G	G	M	G	M	S
12. Offeror E	S	E	G	M	M	S
13. Offeror F	G	G	S	M	M	S

Agency Memorandum of Law at 2-3.

A source selection board (SSB) reviewed the findings of the evaluation panels and determined that the proposals of GPI, Niking, Bulltrack-Watts, Pacific West, and P&S

³ The rating scale used was excellent (E), good (G), satisfactory (S), and marginal (M).

represented the best value to the government; accordingly, the SSB recommended award to these firms. The source selection authority (SSA) concurred in the recommendation and also decided to make a sixth award to Overland based on his finding that there were only slight technical differences between its proposal and the fifth-ranked offeror's proposal. The SSA noted that in deciding to make a sixth award to Overland, he considered the lower-priced, lower-ranked proposals from AIC and Offerors A, C, D, and E, but determined that the cost savings associated with those proposals did not outweigh the technical benefits of Overland's proposal. The agency awarded contracts to the selected firms on March 10, 2010.⁴ After receiving a debriefing, AIC protested to our Office on March 29.

DISCUSSION

AIC challenges the evaluation of its proposal. The protester argues that the proposal should have been rated more favorably under each of the evaluation factors. In reviewing a protest objecting to an agency's evaluation, we will not evaluate the proposals anew or substitute our judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria and with applicable procurement statutes and regulations. Colson Servs. Corp., B-310971 et al., Mar. 21, 2008, 2008 CPD ¶ 85 at 5. Although we do not specifically address all of AIC's issues, we have fully considered all of them and find that they afford no basis on which to sustain the protest; as explained below, the record here demonstrates that the agency's evaluation was reasonable and consistent with the RFP.

First, the protester argues that its proposal should have received ratings of excellent rather than good under the experience and past performance factors because the evaluators found strengths (*i.e.*, the protester had considerable experience on high-cost, complex projects, and over half of its relevant projects had received performance ratings of excellent or outstanding), but no weaknesses in its proposal under the factors. AIC also argues that it was unequal treatment for the evaluators to rate its proposal as merely good for past performance while rating the proposal of Nike Corporation as excellent, given that the evaluators found with regard to both that "[m]ost of the relevant projects submitted as past performance received an Excellent or Outstanding client rating, while some of the projects received an Above Average or Good client rating." Protester's Comments, May 3, 2010, at 9.

In response, the agency explains that while the evaluators identified strengths in the protester's proposal under the experience and past performance factors, they did not identify significant strengths under either factor and did not find that the protester's proposal had exceeded solicitation requirements; accordingly, they did not consider the proposal to merit ratings of excellent. The protester has not demonstrated that

⁴ A task order for the seed project was issued to GPI.

the evaluators' conclusions were unreasonable or inconsistent with the RFP's evaluation factors. With regard to AIC's allegation of unequal treatment vis-à-vis the Niking Corporation, the protester misstates the evaluators' finding pertaining to its own past performance. The evaluators did not find that "most" of the relevant projects submitted by the protester received ratings of excellent or outstanding, they found that "over half" of the protester's relevant projects received such ratings. The record shows that the evaluators consistently distinguished between the proposals of offerors (such as Niking) with ratings of excellent or outstanding on most of their relevant projects, assigning these proposals overall past performance ratings of excellent, and the proposals of offerors with ratings of excellent or outstanding on many, but not most, projects (such as the protester), assigning these proposals ratings of good. In sum, the record does not support the protester's allegation of unequal treatment.

Next, AIC takes issue with the rating of its proposal as marginal under the safety factor. The RFP instructed offerors that they should furnish the following information for the 3 most recent years: DART rates,⁵ Occupational Health and Safety Administration (OSHA) citations, and safety awards. The solicitation stated that a DART rate of 1 or less was considered very low; a rate of 1.1 to 2 was considered low; and rates of 2.1 to 3, 3.1 to 4, and greater than 4 were considered moderate, high, and very high, respectively. The evaluators assigned AIC's proposal a rating of marginal for the factor based on their findings that the protester's DART rates (2.93 for 2006, 1.62 for 2007, and 2.06 for 2008) ranged from low to moderate (and thus did not represent a strength), and that the protester had been issued nine OSHA citations (for both serious and repeated non-serious violations that were of concern because they demonstrated ineffective corrective action) over the 3-year period, which represented a significant weakness.

The protester argues that the evaluators unreasonably concluded that its receipt of repeated citations for non-serious violations demonstrated ineffective corrective action. The protester points out that in two instances, it received repeat citations on either the same or successive days; AIC maintains that "[t]his pattern of OSHA having back to back inspections [did] not provide a reasonable time for the company to take remedial safety action." Protest at 7.

First, we point out that the protester's argument does not address one of the bases for the agency's finding of significant weakness—i.e., that the protester had received three OSHA citations for serious offenses. Second, only two of the nine inspections

⁵ The acronym DART stands for "Days Away, Restricted or job Transferred." DART rates reflect the number of incidents resulting in employees being off the job. The rate is calculated by dividing the number of incidents by the total number of hours worked by all employees during the calendar year, and then multiplying the quotient by 200,000.

were performed within a day after another inspection, and the protester has furnished no evidence--nor is it apparent from the documentation provided by the agency--that even in those two instances, the second citation was for the same violation as the first. In our view, the protester has not demonstrated that the evaluators' findings pertaining to the protester's OSHA citations were unreasonable.

AIC also complains that the evaluators failed to give it credit for the outstanding safety record of one of its proposed subcontractors. The protester contends that it was unequal for the evaluators to fail to consider information pertaining to proposed subcontractors given that they considered information pertaining to both partners of proposed joint ventures.

The RFP provided for the evaluation of only the offeror's safety record; it neither provided for the evaluation of, nor requested information pertaining to, the safety records of proposed subcontractors.⁶ The solicitation did provide, however, that in the event that the offeror was a joint venture for which no information was available, information for each joint venture partner was to be submitted. RFP at 25. Thus, it was consistent with the terms of the solicitation for the evaluators to consider the safety records of proposed joint venture partners, but not proposed subcontractors. To the extent that the protester is arguing that the RFP should have provided for consideration of subcontractor safety information, its complaint is an objection to the terms of the solicitation, which, to be timely, should have been filed prior to the closing date for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010).

AIC further argues that the evaluators unfairly failed to give it credit for three safety awards that it received in 2009. This argument is without merit because the record shows that the evaluators had a reasonable basis for excluding the awards from consideration--*i.e.*, the awards were not received during the time period for which offerors' safety records were to be evaluated. In this connection, the RFP instructed offerors to provide safety information "for the most recent three (complete) years of reported data," RFP at 25, which, since proposals were received in November of 2009, meant 2006, 2007, and 2008.

In its comments on the agency report, the protester complains that the evaluators treated its proposal unequally by assigning it a rating of marginal under the safety factor while assigning the proposals of Pacific West and Overland ratings of satisfactory. AIC maintains that it was unfair for the evaluators to have "punished [it] with a 'marginal' rating" for disclosing unfavorable information pertaining to OSHA citations, while rewarding Pacific West, which had failed to furnish required information regarding its OSHA citations, with a rating of satisfactory. Protester's Comments at 11. Similarly, AIC argues that it was unfair for the evaluators to have

⁶ Moreover, the protester did not furnish such information in its proposal.

rated Overland's proposal more favorably than its own given that the evaluators identified two significant weaknesses in Overland's proposal pertaining to safety--i.e., the offeror had a very high DART rate in 2007, for which no explanation had been provided, and two Overland employees had been killed in a work-related traffic accident in 2007.

The record demonstrates that the evaluators had a reasonable basis for assigning the proposals of Pacific West and Overland more favorable ratings than the protester's proposal under the safety factor. In addition to attributing a significant weakness to Pacific West's proposal for the omission of the offeror's history of OSHA citations, the evaluators identified three strengths in the proposal under the factor; similarly, in addition to attributing two significant weaknesses to Overland's proposal for the offeror's high 2007 DART rate and two work-related deaths, the evaluators identified four strengths under the factor. Thus, the record shows that, with regard to the proposals of both Pacific West and Overland, the evaluators' findings of significant weakness were counterbalanced by findings of strength. This was not the case with regard to the protester's proposal, however--in the protester's case, the evaluators identified no strengths to counterbalance their finding of significant weakness.

The protest is denied.

Lynn H. Gibson
Acting General Counsel