

Protest of) Date: October 2, 1992
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 KLEINKNECHT MECHANIZATION GROUP)
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 Synopsis No. 91-0089) P.S. Protest No. 92-24

DECISION

Kleinknecht Mechanization Group ("KMG") protests its nonselection as a prequalified offeror for the Design/Build Fixed Mechanization portion of the Westchester General Mail Facility ("GMF"), Harrison, NY. KMG alleges its failure to be included among the firms eligible to submit offers on the project resulted from the contracting officer's improper evaluation of KMG's prequalification package.

On December 23, 1991, the Windsor, CT, Facilities Service Center issued Synopsis No. 91-0089, "Prequalification Package - Design & Build of Fixed Mechanization - General Mail Facility, Westchester, New York." The synopsis sought prequalification statements from interested offerors no later than January 17, 1992, and indicated that it was not a request for proposals.

Part A, Prequalification Procedure, of the synopsis stated:

Prequalification Statements will be evaluated by the Contracting Officer's staff.
Primary factors that will be considered are:

- " Construction Experience: Ten (10) years minimum as materials handling prime contractor having completed a minimum of three (3) projects in the 10 to 15 million dollar range;
- " Experience of the design portion of the team on projects within the above stated range;
- " Prior experience with Postal Service projects and Postal requirements[;]
- " Financial Stability and Bonding Capacity;
- " Project Management Capabilities;

- " Company Organization;
- " References and Previous Clients.

Other factors . . . will be considered including but not limited to the following:

- " Experience of the Design/Build Team and its success with Design/Build contracting and fast-track construction.
- " Prior Experience of the Design/Build team working together in Postal Service Projects.
- " Capacity (current workload in relation to company resources)
- " Available Staff (specific experienced staff to be assigned to project[]).
- " Home office location.
- " Work performed with own forces.
- " Experience in geographic area of the project.
- " Project control procedures.
- " Quality control program.
- " MBE Participation and Commitment

Eleven prequalification statements, including that of KMG, were timely received. On or about February 12, an evaluation committee met and selected six contractors to be placed on the pre-qualified list; KMG was not among these six. By letter dated April 20 (received April 22), the contracting officer informed KMG that, "due to the competitive nature of the responses, your firm was not selected [for prequalification]." KMG's timely protest to this office followed.

In its initial protest letter of May 6, KMG claims that the contracting officer's decision not to prequalify KMG was based on a faulty evaluation of its prequalification statement. KMG alleges that the evaluation committee did not evaluate KMG in accordance with the factors listed in the solicitation; instead, the evaluators focused on KMG's past performance on two fixed mechanization projects at the Brooklyn GMF and Queens GMF. KMG alleges that, since performance on specific postal projects was not listed as an evaluation factor in the solicitation, the contracting officer acted arbitrarily and capriciously in evaluating KMG on that basis. KMG seeks reevaluation of its prequalification submission and placement on the list of prequalified contractors for the Westchester Fixed Mechanization project.

In his May 21 report, the contracting officer denies that KMG was evaluated on factors not included in the solicitation. Instead, the contracting officer claims KMG was not prequalified because it did not meet the "construction experience" requirement, since its third listed project, with Lamson Conveyor Corporation, was actually a series of small projects below the required threshold amount.^{1/} Additionally, KMG's "references"

^{1/} We accept as true the contracting officer's statement regarding KMG's Lamson projects, as the protester has not directly challenged this allegation. On the other hand, we note that the contracting

factor was evaluated as poor because of problems the Postal Service experienced with KMG's project management, coordination, staffing, and scheduling at the Brooklyn and Queens facilities. Based on the above poor evaluation factors, the contracting officer asserts that KMG was properly determined not to be "among the best qualified."

By letter dated June 1, KMG responded to the contracting officer's report. KMG first argues that it is eminently qualified for the fixed mechanization work at the Westchester GMF, since it was prequalified for the only other design/build fixed mechanization project for the Postal Service, in Baltimore.^{1/} KMG also notes that it has completed two \$15 million fixed mechanization projects for the Postal Service, while some of the prequalified offerors have no prior postal experience. KMG asserts that its design team member has considerable postal experience, and that KMG meets all other primary evaluation factors.

KMG claims that the Postal Service indicated its bias against KMG by changing the initial evaluation factor as it appeared in the Commerce Business Daily ("CBD") notice of the solicitation ("De-sign and Construction [experience] of three (3) Fixed Mechanization projects in the 10 to 15 million dollar range . . .") in the actual prequalification package ("[experience] as a materials handling contractor having completed a minimum of three (3) projects in the 10 to 15 million dollar range."). KMG alleges that this change was intended to broaden the field of eligible offerors, harming KMG's rating relative to other offerors.^{1/}

KMG lists three additional deficiencies in the Postal Service's evaluation of its proposal: (i) a failure to consider and "weight" all evaluation factors; (ii) an improper poor rating based on KMG's performance on prior postal projects - a factor not listed in the solicitation; and (iii) an "uneven" application of the references factor to the various proposals received.

As to the first claimed deficiency, KMG notes that the standard evaluation form which the contracting officer provided KMG at its debriefing does not list all evaluation factors

officer does not appear to rely on this failing of KMG as conclusive, since he also relies on other factors in KMG's evaluation.

^{2/} Both KMG and the contracting officer go into some detail in alleging what constitutes a "design/build fixed mechanization" project. As that definition is not material to our decision, we will not restate the parties' arguments on the issue.

^{3/} This element of KMG's protest alleges a deficiency in the terms of the prequalification package. Procurement Manual ("PM") 4.5.4 b. requires that protests based on apparent deficiencies in the terms of a solicitation be filed before the due date for receipt of proposals. A prequalification package is considered a solicitation for purposes of our protest regulations. J.W. Bateson Company, Inc., P.S. Protest No. 88-52, November 1, 1988. Thus, this portion of KMG's protest must be dismissed as untimely. This office has no authority to rule on untimely protests. American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988.

in the solicitation, and therefore was an unreasonable evaluation format. "More importantly," KMG asserts that the contracting officer should have assigned points to the various factors, as has been done on other postal projects.

Second, KMG again claims the evaluation committee improperly rated KMG's experience factor as poor because of alleged performance problems at the Brooklyn and Queens projects. To KMG's thinking, the experience factor simply referred to having experience on postal projects, not a past performance-related review. By rating KMG's experience as poor, the contracting officer was not evaluating KMG in accordance with the terms of the solicitation.

Finally, KMG claims the evaluators did not look at all references of all offerors. While KMG was poorly rated because of perceived difficulties on past postal projects, KMG's non-postal references were not considered. Meanwhile, the evaluators did consider the non-postal references of other offerors. KMG asserts that this "uneven" consideration of references was arbitrary and capricious.

In its June 1 submittal, KMG also defends its performance at the Brooklyn and Queens GMFs, finding Postal Service administration and oversight of those projects, rather than KMG's shortcomings, as the actual cause of problems in the completion of those projects. Citing Mesa Constructors, P.S. Protest No. 83-39, September 20, 1983, KMG states:

The Postal Service's lack of management and specification changes [at Brooklyn and Queens] cannot be laid at KMG's feet as a basis for a determination of poor performance, and certainly cannot serve as a basis upon which to deny KMG prequalification.

By memorandum dated June 26, the contracting officer filed comments to KMG's June 1 letter.^{4/} The contracting officer notes that Postal Service personnel with specific knowledge of each offeror's (including KMG's) past performance were consulted in determining a rating for the references factor. The contracting officer explains that the standard evaluation form used for the prequalification packages includes broad categories which encompass all of the factors listed in the synopsis. The contracting officer denies that the Postal Service failed to attach a value to each evaluation factor, noting that each offeror was assigned a rating of "poor/fair/good/excellent" for each category. As to the references category, the contracting officer asserts it was reasonable to consider only KMG's prior postal experience in Brooklyn and Queens, since these were the only KMG projects within the contemplated \$10-15 million project range.

The contracting officer states that, in the opinion of the evaluation committee, the untimely completion of fixed mechanization at Brooklyn and Queens was caused by KMG's poor performance and management, not by postal administration and supervision. While admitting that two of the prequalified offerors have been late on past postal projects, the contracting officer notes "there is a big difference between being several weeks late and several months, as was the case for [KMG]." The contracting officer also alleges that prequalified offerors had indicated their intention to use in-house designers, thereby leading to higher ratings for design factors than KMG, which noted its reliance on an outside design company.

The protester filed further comments with this office by letter dated July 24. Because the evaluation form used to grade KMG's proposal bears no relationship to the list of primary and "other" factors out in the synopsis, KMG alleges that the evaluators "picked and chose" factors from KMG's proposal, rather than evaluating its submittal in accordance with all factors stated in the synopsis. KMG also claims the evaluators gave KMG a poor de-sign rating, even though KMG utilized the same outside design expert which other prequalified offerors indicated they would use.^{4/} Finally, KMG includes documentation on a Postal Service-issued modification to the Brooklyn GMF project, and asserts that postal changes delayed KMG's performance on that project by several months.

^{4/} Concurrent with his June 26 memorandum, the contracting officer provided this office with copies of evaluation sheets for each proposal received, filled out and signed by the members of the evaluation committee. The contracting officer also provided a grid sheet showing the rating for each offeror in each of eleven evaluation factors listed in the evaluation sheets. These eleven factors did not correspond directly with the seventeen primary and "other" evaluation factors stated in the solicitation.

^{5/} In a supplementary memorandum dated June 29, the Postal Service's Gary L. Flann notes that one prequalified offeror did not indicate that it would use an in-house designer; this was counted against its proposal, which nonetheless was prequalified based on its overall strength.

The contracting officer filed further comments by letter dated August 5. While claiming that the evaluators considered both postal and non-postal experience in arriving at an experience factor rating, the contracting officer again notes that only KMG's two postal projects (Brooklyn and Queens) were considered for its references factor, since they were the only two KMG projects in the \$10-15 million range contemplated by the synopsis. While the size of the Brooklyn and Queens projects was considered as favorable to KMG, management and delay problems on those projects "prevailed" in the evaluation committee's determination of ratings for KMG's experience and project management factors. The contracting officer also notes that the committee placed greater importance on the primary factors listed in the synopsis than on the "other" factors in making its evaluation of each prequalification package.

At the protester's request, a conference was held on August 14, pursuant to Procurement Manual ("PM") 4.5.7 j. Following the conference, KMG filed further comments by letter dated August 21. KMG again claims the contracting officer failed to evaluate KMG's proposal in accordance with the criteria stated in the solicitation, in violation of postal regulations. KMG also alleges that the evaluation form used by the committee contained no reference whatsoever to three of the solicitation's evaluation factors: work performed with own forces, experience in the geographic spelled area, and home office location. KMG claims these omissions prejudiced its evaluation, as it provided strong evidence for each of these factors in its proposal.

KMG also notes that the evaluation matrix prepared by the committee, listing each offeror's rating ("P/F/G/E") for each evaluation form factor, contains no marks for any other offeror in the references category. Notwithstanding the contracting officer's comments, KMG cannot understand why it was rated poorly for construction experience despite its \$35 million in fixed mechanization work, its design member's broad experience in fixed mechanization, and KMG's recent work on two large postal fixed mechanization projects. Finally, KMG reiterates that the Postal Service looked solely to perceived delay problems at Brooklyn and Queens in giving KMG a poor experience rating, rather than considering the overall success of the finished product in those locations and their present efficient operation.

Discussion

KMG criticizes the evaluation committee for considering KMG's perceived poor performance on prior postal projects in evaluating its proposal. Although quality of past performance on postal projects was not specifically listed as an evaluation factor in the solicitation, it was entirely reasonable for the evaluation team to consider the views of postal employees familiar with the prior performance of the offerors to evaluate their experience with postal projects and requirements. To ignore such knowledge would result in a hollow and artificial evaluation process. By way of analogy, this office has ruled that a contractor's performance under similar contracts is "highly relevant" in making a nonresponsibility determination. Cardinal Glove Company, Inc., P.S. Protest

No. 89-84, November 14, 1989; Harvey Janitorial Service, P.S. Protest No. 88-31, June 3, 1988. See also Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985 (it is the contracting officer's business judgment whether lack of diligent performance under prior contracts indicates that similar problems will be encountered in an upcoming contract). Accordingly, the committee could properly look to KMG's performance at the Brooklyn and Queens GMFs in judging such evaluation factors as project management and references.

However, KMG has also challenged the reasonableness of the evaluators' conclusions about its performance on those projects, claiming any delays were caused by poor administration and over-sight by the Postal Service, not by any inadequacy by KMG. KMG cites this office's decision in Mesa Constructors, supra, in challenging the contracting officer's characterization of its performance at Brooklyn and Queens.

Mesa, however, is distinguishable on its facts. The Mesa protest involved an offeror who was found nonresponsible because the contracting officer "concluded that Mesa had failed to meet the standard of a satisfactory record of performance as required by Postal Contracting Manual (PCM) 1-903.1 (iii)." The PCM, the predecessor to the PM, stated, in Section 1-903's "Minimum Standards for Responsible Prospective Contractors":

[A] prospective contractor must . . . [h]ave a satisfactory record of performance (contractors who are seriously deficient in current contract performance . . . shall . . . be presumed to be unable to meet this requirement). Past un-satisfactory performance, due to failure to apply necessary tenacity or perseverance . . . shall be sufficient to justify a finding of nonresponsibility.

In support of his conclusion, the contracting officer in Mesa cited five Mesa projects, some completed, some current, which he claimed indicated deficient performance by the protester. Most of these cited projects were the subject of then-current litigation, and Mesa presented evidence countering the contracting officer's allegations for all five projects. Additionally, as to Mesa's then-current project progress, which the contracting officer had deemed deficient, this office noted that "[t]he disagreements between [postal personnel] and Mesa were not of a nature significant enough to disqualify Mesa for award of the present solicitation." Accordingly, we found "that the contracting officer's determination is not supported by substantial evidence to support his finding that Mesa lacks tenacity and perseverance."

In contrast to Mesa, the comments received by this office in the instant case represent a much more general discussion of KMG's past performance. The contracting officer has noted his determination that delays at the Brooklyn and Queens GMFs were the responsibility of KMG, resulting in poor ratings for KMG in the areas of references and project management; while KMG has presented arguments that suggest otherwise, we are hesitant to overturn these portions of the contracting officer's evaluation on such a disputed factual basis. First, there is a "presumption of correctness" which attaches to statements of contracting officers. See QMC, Inc., P.S. Protest No. 91-52, December 27, 1991; Thermico, Inc., P.S. Protest No. 90-71, December 21, 1990; Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989; Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983. Second, our bid protest forum is poorly suited to resolving factual disputes as exist in this matter, as we cannot conduct adversary proceedings to any significant extent. International Business Machines Corporation, P.S. Protest No. 90-66, February 22, 1991; Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.

However, several inconsistencies in the committee's evaluation of KMG, as compared to those offerors who were prequalified, lead us to conclude that the evaluation of proposals was arbitrary and capricious and that KMG's protest should be sustained. First, KMG's poor experience and design/build ratings are inconsistent with the information supplied by the offeror. The record indicates that KMG had completed two large Postal Service fixed mechanization projects and would utilize as its design team principal I.G. Associates, a firm with extensive postal experience; KMG and I.G. had worked together on several projects in the past. Despite this strong evidence for three of the solicitation's primary factors (construction experience, design experience, and prior postal experience), and two "other" factors (Design/Build team experience and team working together), KMG received the lowest possible rating (poor) for the evaluation form's single experience factor. Such a conclusion by the evaluation committee is inconsistent with the evidence. While this office plays a limited role in reviewing technical evaluations of offerors, Southern Air Transport, *supra*, we will overturn a contracting officer's decision which is unsupported by substantial evidence. POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985.

Second, KMG's argument that not all of its listed references were considered is well-taken. While the contracting officer alleges that only KMG's projects of a similar size to the contemplated project were used as references, no such requirement is stated in the synopsis. If the evaluators planned to check only similar-sized projects for reference purposes, the synopsis should have so stated. Dawson Construction Co., Inc., P.S. Protest No. 91-47, September 25, 1991; Cohlma Airline, Inc., P.S. Protest No. 87-41, October 30, 1987 (evaluation of proposal must be based on factors outlined in solicitation).

In several other respects, the evaluation of KMG's proposal does not appear to have been in accordance with the synopsis terms, in violation of PM 4.1.4. The solicitation listed among the primary evaluation factors a requirement for experience with at least three \$10-15 million fixed mechanization projects. KMG was rated poorly for experience for having only two, not three, major projects. KMG's experience rating ignores the strong evidence (noted above) which it provided for several other experience-related evaluation factors. See TRW Financial Systems, Inc., P.S. Protest No. 91-19, May 29, 1991 ("since the solicitation did not state that any one factor was to be given predominant or paramount importance in the evaluation, the contracting officer could not have accorded any factor substantially more weight over others").^{1/}

There also appears to be no logical, consistent relationship between the evaluation factors listed in the synopsis and the evaluation form used by the committee. As noted above, while the synopsis listed several experience-related factors (construction, design, prior postal, design/build teamwork), the evaluation form contained only a single, general experience factor. The synopsis listed bonding capacity as a primary factor and workload capacity as an "other" factor; in the evaluation form, however,

^{6/} Three other offerors were apparently disqualified "at first glance" for lack of three major projects. The evaluation forms do not indicate any ratings for these three offerors in the various evaluation factors, only a "disqualified" notation under the initial, experience factor. Thus, it appears that the contracting officer, as to these proposals, treated the three-project requirement as a definitive responsibility criterion (i.e., a minimum technical requirement which must be met before a proposal can even be considered) rather than as an evaluation factor, in violation of PM 3.3.1:

Certain key areas must be considered in determining an offeror's responsibility. (At times the same areas may be used as evaluation factors. In such instances, the factors must be clearly stated in the solicitation and evaluated in accordance with its terms and conditions . . .).

. . . .

Special standards [of responsibility] may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for satisfactory contract performance. The special standards must be set forth in the solicitation and must apply to all offerors.

workload capacity is a primary factor, while bonding capacity is not listed. Similarly, project management is listed as a primary factor in the synopsis, but as an "other" factor on the evaluation form. With the exception of KMG's proposal, the evaluation forms contain no notations for any offerors in the references category (a primary factor in the synopsis), and there is no evidence that the "home office" or "experience in geographic area" factors were considered by the evaluators; the evaluation form is silent on them.^{1/}

The above indicates that the proposals were not evaluated in accordance with all factors stated in the synopsis. See C.D.E. Air Conditioning Company, Inc. - Coastal Mechanical Corporation, P.S. Protest Nos. 91-80 and 91-83, January 16, 1992; Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990. Thus, the contracting officer must reevaluate KMG's proposal, and the other proposals received, to develop a revised list of pre-qualified contractors for the Westchester project. The contracting officer should demonstrate, through the written evaluation record, that all solicitation factors have been considered and that each offeror has received a rating for each factor. See C.D.E. Air Conditioning, supra.

The protest is sustained to the extent indicated.

For the General Counsel:

William J. Jones

^{1/} While the protester's arguments concerning discrepancies between the solicitation and the evaluation form are valid, we cannot make them a basis for our decision, as they were untimely raised. KMG's initial protest notes in general terms that its proposal was not evaluated in accordance with the factors stated in the solicitation; however, the protester did not allege the specific inconsistencies which existed between the solicitation and the evaluation form until its letter of June 1. Because KMG has indicated that it received a blank copy of the evaluation form at its May 5 debriefing with postal officials, this particular argument in its protest should have been raised in its initial protest letter. See PM 4.5.4 d. ("protests must be received not later than ten working days after the information on which they are based is known or should have been known. . . .").