Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Possehn Consulting

File: B-278579.2

Date: July 29, 1998

Dennis Possehn for the protester.
Daniel N. Hylton, Esq., Department of Agriculture, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency decision to narrow the competitive range without considering protester's low proposed price was improper where proposal received good ratings and was not determined to be technically unacceptable.

2. Under solicitation for location and installation of permanent forest inventory plots, protester's contention that evaluation of its proposal was unreasonable is sustained where the record shows that the agency's evaluation materials ignored evidence of required experience provided by the protester in its best and final offer.

DECISION

Possehn Consulting protests the award of a contract to Steve Holmes Forestry by the Forest Service, Department of Agriculture, pursuant to request for proposals (RFP) No. R5-06-97-33, issued for the location and installation of permanent forest inventory plots in the Lassen, Plumas, and Tahoe National Forests, as part of the agency's Forest Health Pilot Monitoring Project. Possehn argues that the agency's award decision is based on an unreasonable evaluation of its proposal.

We sustain the protest.

BACKGROUND

This protest is Possehn's second challenge to the Forest Service's procurement for permanent forest inventory plots in the above-named national forests. The purpose of these plots is to permit long-term monitoring of the health of these forests. A brief history of the procurement is set forth below.

The RFP was issued for these services on August 22, 1997, seeking fixed-priced proposals for approximately 300 forest health inventory plots, aggregated into nine groups. The RFP anticipated award to the offeror whose proposal offered the best

value to the government, based on the evaluation of price and technical factors, which were equally important. As modified by amendment 01, section M-1 of the RFP identified four technical criteria in descending order of importance: (1) offeror's experience establishing permanent forest and/or vegetation inventory plots; (2) past performance on similar contracts during the previous 3 years; (3) experience of key management personnel; and (4) qualifications of offered field personnel. The RFP also anticipated the possibility that the agency might make multiple awards. RFP § M-2.

After receiving 13 proposals; evaluating each proposal against the four technical criteria using a rating scale of A, B, or C; and comparing the proposed price of each offeror with the government's cost estimate, the Forest Service rejected the two lowest-priced proposals--including the proposal submitted by Possehn--and split the award between Holmes and Shasta Land Management, the two offerors with the next-lowest-priced proposals. The Forest Service explained that it was rejecting the two lowest-priced proposals because it did not believe the work could be performed properly at the offered prices.

Possehn protested the rejection of its proposal because of its low price, and also challenged several of the technical evaluation conclusions. Our Office sustained Possehn's protest after concluding that any concern about the reasonableness of Possehn's low prices could not be considered other than as a responsibility matter. Possehn Consulting, B-278579, Jan. 9, 1998, 98-1 CPD ¶ 10 at 4. As a result, we recommended that the Forest Service either refer the question of Possehn's responsibility to the Small Business Administration for a final determination under the certificate of competency procedures, or reinstate the proposal to the competition and perform a new cost/technical tradeoff among the offerors. Id. at 5.

Electing instead to reevaluate proposals, the agency, on January 11, 1998, excluded from the competitive range four proposals deemed unacceptable. Written discussion questions were provided to the remaining offerors, including Possehn and Holmes, and best and final offers (BAFO) were received. The following table shows the results of the evaluation of each of the nine proposals remaining in the competitive range against the technical criteria, ranked from lowest to highest price.

OFFEROR	Exper-ience	Past Perform-ance	Key Personnel	Qualifica-tions	Total Price
Possehn	B	B	B	B	$ 59,013
Holmes	A	A	A	A	$ 65,043
Offeror A	B	B	B	B	$ 66,300
Offeror B	A	A	A	A	$66,951 All or none
Offeror C	A-	A	A	A	$70,515
Offeror D	B	B	B	B-	$20,430 Items 1 and 3
Offeror E	A	A	A	A-	$ 87,464
Offeror F	A	A	A	A-	$ 93,110
Offeror G	A	A	A	A-	$256,940

As shown above, Possehn's proposal was assigned a rating of "B" under each of the four evaluation criteria. The evaluation narrative explained that the proposal was being downgraded--presumably from an A to a B--because the company lacked experience in establishing permanent inventory plots. Prior to making a selection decision, the Forest Service further narrowed the competitive range by excluding the three offerors without experience establishing permanent forest inventories. The excluded offerors were Possehn, and Offerors A and D.

By memorandum dated April 15, the contracting officer concluded that Holmes's high-rated proposal--which was also the proposal with the lowest price of those remaining after the exclusion of those offerors without prior experience preparing permanent forest inventory plots--offered the best value to the government. Accordingly, Holmes was selected for award of all of the services under the solicitation.[1] This protest followed.

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[1]In selecting Holmes for award, the contracting officer also decided to terminate the partial award initially made to Shasta Land Management, whose proposal was not included in the competitive range.

ANALYSIS

Possehn raises numerous contentions in support of three general arguments--that the agency was biased against it, and as a result, performed an unreasonable evaluation; that the agency failed to recognize that only a professional forester registered in the state of California would be allowed to perform these services; and that the agency performed an unreasonable cost/technical tradeoff. During the course of this protest, the protester was advised, by telephone conference call with all parties, that several of its contentions were untimely, factually incorrect, or raised issues not for consideration by our Office.[2] However, for the reasons set forth below, our review of Possehn's remaining contentions leads us to conclude that the competitive range determination here was improper, and certain elements of the evaluation were unreasonable.

The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, and in considering an agency's evaluation of proposals and subsequent competitive range determination we will not evaluate the proposals anew in order to make our own determinations as to their acceptability or relative merits. Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101 at 4. This discretion is not unfettered,

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[2]For example, Possehn's contention that there is little meaningful difference between experience preparing permanent forest inventory plots and non-permanent forest inventory plots is untimely with respect to the first of the four technical evaluation criteria. The RFP at amendment 01, section M-1, clearly states that experience preparing permanent inventory plots will be ranked higher than experience with non-permanent inventory plots. Under our Bid Protest Regulations, this allegation of an impropriety in the solicitation had to be protested to our Office prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1998). Moreover, several of Possehn's complaints that the agency overlooked information provided in its BAFO are factually incorrect. The evaluation criticisms Possehn referenced in its protest comments to support certain of these arguments (for example, those found in Possehn's Comments on the Agency Report, June 5, 1998, at 3) were taken from the initial evaluation, not the BAFO evaluation. The criticisms were, in fact, removed from the final evaluation materials. Similarly, Possehn's contention that the agency ignored its experience in the Sierra Nevada Mountains was shown to be based on a misunderstanding, since the evaluation expressly credits Possehn's Sierra Nevada experience. Finally, Possehn's complaint that the agency failed to consider whether offerors were properly licensed by the state of California raises an issue not reviewable by our bid protest forum. Compliance with state or local requirements is generally a matter between the contractor and the issuing authority, and will not be a bar to contract award absent a specific requirement in the solicitation. Mark Dunning Indus., Inc., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226 at 5-6.

however, as competitive range determinations and proposal evaluations must be consistent with law and regulation and have a reasonable basis in the record. S&M Property Management, B-243051, June 28, 1991, 91-1 CPD ¶ 615 at 3; Howard Finley Corp., B-226984, June 30, 1987, 87-2 CPD ¶ 4 at 3.

Under Federal Acquisition Regulation (FAR) § 15.609(a) (June 1997), a competitive range must be determined on the basis of cost or price and other factors that were stated in the solicitation. Accordingly, the Forest Service's narrowing of the competitive range on the basis of experience installing permanent inventory plots without any consideration of price--and in so doing, excluding Possehn's lowest-priced proposal--was improper unless the excluded proposals were found to be technically unacceptable. S&M Property Management, supra, at 3-4. Here, the record contains no finding that the three proposals eliminated during the narrowing of the competitive range were unacceptable, and in fact, the record shows that all three received overall ratings of "B" on a scale from "A" to "C." Thus, we conclude that Possehn's proposal was improperly excluded from the competitive range.[3]

The record also supports Possehn's claim that the evaluation of field crew qualifications ignored additional information included in the BAFO showing such experience for one of Possehn's two crew members.

During discussions, the Forest Service provided materials to Possehn indicating that, with respect to the projects identified in response to the experience criterion, the agency could not determine whether prior projects involved permanent or non-permanent inventory plots. Contracting Officer's Letter to Possehn, Jan. 12, 1998, at 2. In response to this criticism, Possehn's BAFO provided greater detail throughout its proposal on whether prior projects involved permanent or non-permanent inventory plots. With respect to one of the two field personnel identified in Possehn's proposal, the BAFO explained that the employee had

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[3]For the record, we note that the Forest Service argues that even if Possehn's proposal were included in the competitive range, and a cost/technical tradeoff were performed between the proposals submitted by Possehn and Holmes, the agency would have selected the Holmes proposal. Generally, we accord little weight to agency efforts to defend, in the face of a bid protest, a prior source selection through submission of new analyses, which the agency itself views as merely hypothetical, because such reevaluations and redeterminations prepared in the heat of the adversarial process may not represent the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In addition, the hypothetical used by the agency is premised upon an assumption that Possehn lacks experience establishing permanent forest inventory plots. As shown below, we conclude that the Forest Service should revisit this assumption given evidence in the record that one of Possehn's crew members has such experience.

experience working for the Forest Service establishing "permanent vegetation sampling plots." As shown above, the RFP expressly sought experience with either permanent forest or permanent vegetation inventory plots, but the evaluation under the field crew qualifications criterion does not reflect this information from the BAFO, and in fact, incorrectly states:

> Field crew members do not have experience establishing permanent plot inventory systems, therefore, Possehn was rated 'B' for qualifications of field crew.

Source Selection Decision, April 15, 1998, at 4.

While our review of the record shows that the evaluation materials set forth in the Source Selection Statement fail to recognize the experience of one of Possehn's two crew members, the agency's Postaward Debriefing and Denial of Agency Protest, and the Contracting Officer's Statement, both acknowledge that one of Possehn's two crew members had such experience.[4] On the other hand, we have no contemporaneous evidence that the experience was recognized prior to Possehn's pursuit of this protest. Since we accord greater weight to contemporaneous evaluation and source selection materials than to explanations prepared in response to protest contentions, we cannot justify disregarding the written statement found in the Source Selection Decision. Cygnus Corp., B-275181, Jan. 29, 1997, 97-1 CPD ¶ 63 at 8; DynCorp, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 7 n.13. Accordingly, we conclude that the evaluation unreasonably overlooked the experience of one of Possehn's two field crew members.

Possehn's next challenge to the evaluation is that the agency unreasonably downgraded the company for its lack of experience establishing permanent forest inventory plots under all four evaluation criteria, instead of only under the offeror's experience criterion.[5]

We conclude that the agency's consideration of permanent inventory plot experience under the evaluation criteria covering past performance, key personnel

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[4]For example, the Postaward Debriefing and Denial of Agency Protest, April 24, 1998, states at the second unnumbered page, "Of the field personnel, Dave Young has one season of experience establishing permanent vegetation sampling plots."

[5]As noted above, Possehn also argues that there is no material difference between preparing non-permanent plots and permanent plots. However, given that the solicitation clearly advised that permanent plot experience would be rated more highly than non-permanent plot experience, this portion of its challenge had to be raised with our Office prior to the due date for receipt of proposals, and is untimely at this juncture. 4 C.F.R.§ 21.2(a)(1).

experience, and field personnel qualifications (which apparently led to Possehn's receiving a rating of "B" for those criteria) is consistent with the RFP's evaluation scheme. Given the guidance included in the solicitation under the offeror's experience criterion that the agency would rate permanent experience higher than non-permanent experience, we view as within the reasonable discretion of the agency the decision to assign a slightly lower rating to offerors whose past performance, key personnel, and field personnel qualifications involve non-permanent rather than permanent experience. In this regard, we note that the Forest Service did not determine that offerors lacking permanent forest inventory experience were unacceptable--hence our decision sustaining Possehn's challenge to its exclusion from the competitive range--but instead made distinctions about the relative merit of such experience in a manner consistent with the clear import of the stated evaluation scheme. Thus, we deny Possehn's protest of its evaluation in this area.

Finally, Possehn contends that many of the agency's actions are the likely result of bias against Possehn for bringing its earlier successful protest. While Possehn correctly noted certain irregularities in the record,[6] without clear evidence of bias, we will not attribute prejudicial motives to agency contracting officials on the basis of inference or supposition. Meridian Management Corp., Inc.; NAA Servs. Corp., B-254797, B-254797.2, Jan. 21, 1994, 94-1 CPD ¶ 167 at 6.

RECOMMENDATION

We recommend that the agency reevaluate the BAFO submitted by Possehn to ensure that the evaluation accurately reflects the experience of one of the company's two field crew members, and make an appropriate judgment about the value of that experience. Following the reevaluation, we recommend that the agency either properly narrow the competitive range, giving appropriate consideration to the role of price, or appropriately determine, through a cost/technical tradeoff, which of the proposals offers the best value to the

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[6]For example, Possehn points out that when the agency elected to reevaluate proposals after our earlier decision sustaining Possehn's first protest, the reevaluation did not mention one of the weaknesses noted for Holmes in the initial evaluation. Since no further submissions had been provided that might have permitted the correction of the weakness, Possehn argues that the omission of the negative evaluation findings is evidence of bias. While our Office also pointed out this irregularity to the agency during the course of a conference call to discuss the record, we note that the Forest Service did use a different evaluator than it used initially. In addition, the weakness involved was relatively minor and, at best, would have been reflected as a weakness under the past performance criterion, as opposed to the more heavily-weighted criterion of experience. In short, we do not find that this matter, on its own, is evidence of agency bias.

government. At the end of the process, if the contracting officer determines that Possehn's proposal offers the best value, we recommend that the agency terminate the award to Holmes and award to Possehn.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys fees, if any. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), Possehn's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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