



## Decision

**Matter of:** Pardee Construction Company  
**File:** B-256414  
**Date:** June 13, 1994

Steven E. Levy, Esq., and Virginia A. Jonnson, Esq., Sandler & Rosen, for the protester.  
James J. McCullough, Esq., Deneen J. Melander, Esq., and Lawrence E. Ruggiero, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Hunt Building Corp., an interested party.  
Diane Hayden, Esq., Department of the Navy, for the agency.  
Katherine I. Riback, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest that agency improperly evaluated protester's proposal is denied where record shows that the agency's evaluation of the proposal was reasonable and in accordance with the solicitation's evaluation scheme.
2. Protest objecting to the propriety of solicitation provisions that were incorporated by amendment is untimely where filed after contract award.
3. Allegation of bias is without merit where there is no evidence that the agency evaluated proposals in an unreasonable manner which adversely affected the protester.

### DECISION

Pardee Construction Company protests the award of a contract to Hunt Construction Company, under request for proposals (RFP) No. N68711-93-R-1378, issued by the Department of the Navy. Pardee contends that its proposal was unreasonably evaluated by the Navy, and that the selection of Hunt was the result of bias.

We deny the protest in part and dismiss it in part.

The agency issued the RFP on April 29, 1993, seeking proposals for a firm, fixed-price contract for the design and construction of 374 new family housing units at Camp Pendleton, California. The RFP provided that proposals would be evaluated under the following technical evaluation

criteria, in descending order of importance: (1) Building Design; (2) Site Design and Engineering; (3) Building Engineering, Material Quality, and Maintenance; and (4) Energy Performance. Price and technical factors were to be of equal weight.

The agency issued eight amendments before initial proposals were received which added, deleted, or modified various solicitation provisions. Amendment No. 4, issued on July 1, revised the boundaries of the construction sites and the site utilization, and amendment No. 8, issued on July 29, notified prospective offerors that rebates or energy incentives issued by San Diego Gas & Electric would inure to the benefit of the agency, not the contractor.

Six offerors submitted proposals by the August 16 amended closing date. Both Hunt's and Pardee's proposals were assigned an overall technical rating of "Highly Acceptable," and the remaining three proposals were assigned an overall technical rating of "Acceptable." The agency conducted written discussions with all of the offerors and issued amendment No. 9 which provided, in pertinent part, that the entrance/exit from Stuart Mesa Road should be designed as a collector road. On October 25, the agency received five revised proposals. The proposals were reevaluated by the technical evaluation board (TEB), and the original ratings remained unchanged. The agency requested best and final offers (BAFO) by November 19. Pardee's BAFO received an overall technical rating of "Highly Acceptable," and proposed the highest price of \$34,486,608. Hunt's BAFO also received an overall technical rating of "Highly Acceptable," and was priced at \$33,884,200. The agency determined that Hunt's proposal was the most advantageous to the government and awarded the contract to Hunt on January 24, 1994. This protest followed.

Pardee first argues that the agency failed to give it credit for the "numerous special design features" that were incorporated into its proposal. Pardee contends that its proposal was technically superior to Hunt's and, if properly evaluated, should have been selected for award.

In reviewing a protest challenging the propriety of a technical evaluation, we will not reevaluate proposals or make our own determination regarding their relative merits, as the evaluation of proposals is the function of the contracting agency. Choctaw Mfg. Co., Inc., 72 Comp. Gen. 218 (1993), 93-1 CPD ¶ 409. Our review is limited to determining whether the agency's judgment was reasonable and

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<sup>1</sup>One offeror failed to provide the required technical proposal and its proposal was not further considered.

consistent with the evaluation criteria and applicable statute and regulations. Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39.

Contrary to Pardee's allegation, the record reflects that the special design features that Pardee included in its proposal were given consideration and appropriate credit by the TEB. The agency noted that Pardee's proposal contained additional features such as ample landscaping, divided streets with landscaped medians, sidelights at entries, covered entrance porches, and interior pot shelves. The agency considered these extras and determined that they did not increase the overall quality of life for the occupants of the unit and did not offset the high price. In particular, the agency noted that Pardee's proposal did not include any family housing unit features, exceeding the solicitation requirements, that offered value to the Navy. Some of the additional features offered by Pardee were determined not to offer value, such as Pardee's proposed "[a]rchitecturally sensitive meter enclosures," which exceeded the RFP requirement that individual unit meters be "sight screened." The agency also determined that the appliances that Pardee offered in its proposal were of overall moderate quality.

Hunt's proposal also included extra features not required by the RFP, such as microwave ovens, a second door to the patio, tiled entry ways, dressing mirrors and ceiling fans in all master bedrooms, vaulted ceilings, windows in garage and utility rooms, and icemakers. The agency concluded that these extra features in Hunt's proposal were of a high quality and would increase the quality of life for the unit tenants. Additionally, the agency determined that the appliances that Hunt offered in its proposal were of an overall high quality.

The record reflects a reasonable basis for the agency's conclusion that the extra features offered by Pardee did not provide any utility or value greater than was provided by the extra features offered by Hunt. See Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 CPD ¶ 106. Hunt's proposal actually received higher ratings than Pardee's under various subcriteria and was given a "Highly Acceptable" rating under the building engineering criterion, under which Pardee's proposal received an "Acceptable" rating. Overall, the proposals were treated as technically equal. Accordingly, since Hunt's proposed price was more than \$600,000 lower, the agency reasonably determined to award to Hunt.

Pardee contends that the agency's selection of Hunt was the result of bias. In support of this argument, the protester asserts that Hunt has been awarded numerous contracts by the

agency, and that the agency improperly considered as added features in Hunt's proposal, 2 tennis courts and 20 additional parking spaces, which were located outside the boundaries of sites 1 through 4, as described in the solicitation. According to the protester, the agency therefore could not properly consider these features.

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. Northwestern Travel Agency, Inc., B-244592, Oct. 23, 1991, 91-2 CPD ¶ 363. In addition to producing credible evidence showing bias, the protester must demonstrate that the bias translates into agency action which unfairly affected the protester's competitive position. Id.

The fact that Hunt has been awarded other contracts by the agency provides no evidence of bias. As to the agency's evaluation of Hunt's additional off-site features, the RFP does reference off-site facilities. However, more importantly, these features had no effect on the evaluation and award decision. These additional off-site features in Hunt's proposal were valued at less than \$60,000, and even without them Hunt's proposal included over \$900,000 more in additional features than Pardee's proposal. It is clear from the record that, irrespective of the off-site features, the agency had a reasonable basis to evaluate Hunt's proposal as technically equal to Pardee's, hence Hunt's lower proposed price was determinative in any case. There is simply nothing in the agency's evaluation processes which is indicative of bias.

Finally, Pardee raises two allegations concerning the contents of five amendments to the RFP. Pardee first argues that the agency engaged in technical leveling by the issuance of amendment Nos. 4, 8, and 9, which "disclosed Pardee's design improvements and technical analyses and certain relevant information which the [c]ontracting [o]fficer learned from Pardee." Pardee's second allegation is that the agency's issuance of amendment Nos. 10 and 11 provided an unfair advantage to its competitors by allowing extra time to submit revised proposals.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specify that protests based upon alleged improprieties in a solicitation which are apparent from the face of the solicitation must be filed prior to the closing time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1994). This rule includes challenges to alleged improprieties which did not exist in the initial solicitation but which are subsequently

incorporated into the solicitation by amendment, Servicio Internacional de Proteccion Baker, S.A., B-241670, Jan. 22, 1991, 91-1 CPD ¶ 64. In such cases, the solicitation must be protested not later than the next closing time set for receipt of proposals following the incorporation. Id.

The allegations concerning the various amendments to the solicitation are untimely. Pardee's contention regarding the alleged improprieties in amendment Nos. 4 and 8 should have been filed prior to the August 16 closing time for submission of initial proposals. Pardee's protest concerning the alleged improprieties in amendment No. 9 should have been filed prior to the October 21 closing time for receipt of revised proposals. Similarly, Pardee's protest concerning the "unfair advantage" given its competitors by the agency due to the additional time to submit revised proposals as provided by amendment Nos. 10 and 11, should have been filed prior to the November 19 closing time for receipt of BAFOs, as provided in amendment No. 11. An offeror may not participate in a procurement and then wait until after it is not selected for award to protest alleged improprieties fully disclosed and incorporated by various amendments into the solicitation.

Pardee also argues that its protest should be considered under the good cause or significant issue exceptions to our timeliness regulations. See 4 C.F.R. § 21.2(c).

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Industrial Acoustics Co., Inc.--Recon., B-246260.2, Jan. 28, 1992, 92-1 CPD ¶ 120. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. The only exceptions to the timeliness requirements

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<sup>2</sup>We note that amendment Nos. 4 and 8 could not have had the effect of technical leveling, as alleged by the protester, because these amendments were issued before proposals were due. The concept of technical leveling is not applicable to the pre-proposal stage of the procurement. Rather, technical leveling arises only where, as the result of successive rounds of discussions, "the agency has helped to bring one proposal up to the level of other proposals by pointing out inherent weaknesses that remain in the proposal because of the offeror's own lack of diligence, competence, or inventiveness after having been given an opportunity to correct them." Impact Instrumentation, Inc., B-250968.2, Mar. 17, 1993, 93-1 CPD ¶ 241.

are where there was good cause for the untimely filing (some compelling reason beyond the protester's control prevented the protester from filing a timely protest) or the protest presents a significant issue (one of widespread interest to the procurement community that has not been considered before). Id. This protest falls under neither exception, since nothing prevented Pardee from timely protesting the contents of these amendments, and the issues raised are either unique or of widespread interest to the procurement community. See Industrial Acoustics Co., Inc.--Recon., supra.

The protest is denied in part and dismissed in part.

/s/ John M. Melody  
for Robert P. Murphy  
Acting General Counsel