

P. Williams
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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Natural and Technological Hazards Management Consulting, Inc.

File: B-249124

Date: October 28, 1992

Roger B. Kowieski for the protester.
Ronald A. Wiss for Edwards and Kelcey, Inc., an interested party.
Margaret M. Bees, Esq., Office of General Counsel, Federal Emergency Management Agency, for the agency.
Paula A. Williams, Esq., Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly selected higher rated, large business concern for negotiation of an architect-engineer contract is denied where procurement was unrestricted and, consistent with the published evaluation criteria, the agency accorded a small business preference factor to protester's proposal, but determined that the preference factor was insufficient to outweigh the technical superiority of the selected large business offer.

DECISION

Natural and Technological Hazards Management Consulting, Inc. (NTHMC), protests the Federal Emergency Management Agency's (FEMA) decision to select Edwards & Kelcey as the firm with which to negotiate an architect-engineer (A-E) contract to conduct flood insurance studies. NTHMC, a small business concern, challenges the selection decision on the grounds that FEMA improperly selected a large business.

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

FEMA is responsible for administering the National Flood Insurance Program which requires identification of all flood plain areas within the United States and the establishment of flood-risk zones within those areas. Pursuant to that responsibility, FEMA contracts with various architect-engineer (A-E) firms to conduct flood insurance studies throughout the country. The contracts result in written data and maps identifying flood hazard areas and actuarial flood insurance rate zones for use by affected communities.

FEMA's A-E procurements are conducted under the selection procedures set forth in the Brooks Act, as amended, 40 U.S.C. §§ 541-544 (1988). Under these procedures, after publicly announcing a requirement in the Commerce Business Daily (CBD), the agency establishes an evaluation board to review the performance data and statements of qualifications submitted by firms that wish to be considered. The evaluation board then conducts discussions with no less than three firms, ranks them, and submits the firms' qualifications to a selection official who selects the most highly qualified offeror; negotiations are then conducted with that offeror. See generally Federal Acquisition Regulation Part 36.6.

In accordance with these procedures, FEMA published a CBD announcement on November 12, 1991, stating that it intended to award multiple contracts for flood insurance studies in various geographic regions and requesting that interested parties submit Standard Forms (SF) 254 and 255.¹ The CBD announcement listed 10 specific evaluation factors that would be used in making the source selections.² The CBD announcement also stated that, "FEMA intends to utilize set-aside procedures, where applicable. . . . Determination of set-aside possibilities will be made after initial screening of submissions." The CBD announcement further indicated

¹SF 254, Architect-Engineer and Related Services Questionnaire, is the statement of qualifications submitted annually by firms wishing to be considered for A-E contracts. SF 255, Architect-Engineer and Related Services for Specific Project, is a supplement to the SF 254 and requires firms to furnish job specific experience.

²These factors included: (1) demonstrated experience and professional qualifications of firm and key personnel; (2) specialized experience and technical competence of firm and key personnel in flood assessment and flood plain mapping for riverine environs; (3) specialized in-house experienced staff in hydrology; (4) specialized in-house experienced staff in channel hydraulics; (5) firms' performance in and familiarity with the study communities or area; (6) evaluation of the firm's performance on previous and present flood insurance studies; (7) the geographical proximity of the firm's home/regional/branch offices to the areas to be studied; (8) capacity of the firm's home/regional/branch offices to meet the flood insurance study requirements, within a 12-month period, of the area to be studied; (9) experience of firm in working with local governmental authorities; and (10) in-house staff having completed a specialized training course in riverine hydrology/hydraulics.

that, in procurements not conducted under set-aside procedures, a preference factor would be given to small business concerns, minority concerns, and in-state firms.³

Five offerors, including NTHMC and Edwards & Kelcey, timely submitted SFs 254 and 255 seeking contracts in Region 11, the State of New Jersey. FEMA's evaluation board met in January 1992 to perform its initial screening of the submissions; based on this review, three firms, including NTHMC and Edwards & Kelcey, were selected for discussions. Edwards & Kelcey was a large business; NTHMC and the third offeror selected for discussions were small businesses.

By letter dated February 20, FEMA advised the three offerors that it had completed its initial evaluation and requested responses to discussion questions. The February 20 letter did not indicate that the procurement was being conducted under set-aside procedures, but noted that, consistent with the CBD announcement, offerors' "type and size of business" would be considered in selecting a firm for final negotiations. The letter required that responses to the discussion questions be submitted no later than March 3.

The three offerors timely submitted responses to the agency's discussion questions. On May 14, the evaluation board agreed on the following final technical scores for the offerors:

<u>Offeror</u>	<u>Score⁴</u>
Edwards & Kelcey	56.00
NTHMC	45.25
Third Offeror	36.00

Edwards and Kelcey was subsequently selected as the firm with which the agency would negotiate a contract and by letter dated May 22, NTHMC was notified of this selection. On May 28, NTHMC filed an agency-level protest asserting that, since it was a qualified small business concern, it was improper for the agency to award a contract to Edwards & Kelcey, a large business. FEMA denied the protest by letter dated June 8. In denying NTHMC's agency-level protest, FEMA noted that the procurement had not been set aside for small business concerns and that selection of Edwards & Kelcey was

³The CBD announcement listed the following order of preference: "(1) in-state 8(a) firms; (2) in-state small business firms; (3) in-state minority business; (4) in-state firms; and (5) all others."

⁴The total possible score was 72 points.

based on the large disparity between the rating of Edwards & Kelcey's offer and the rating of NTHMC's offer. FEMA's letter further indicated that it had not selected this procurement to be conducted under set-aside procedures because of the relatively few submissions it received and FEMA's limited budget. On June 18, NTHMC filed this protest with our Office.

NTHMC's protest does not challenge the respective point scores the agency assigned to its offer and that of Edwards & Kelcey.⁵ Rather, NTHMC protests that, notwithstanding the Edwards & Kelcey's higher score, NTHMC's status as a small business concern mandated its selection.

The agency responds that Edwards & Kelcey's offer was selected because of its significant technical superiority. The agency further explains that it considered NTHMC's small business status and accorded a preference to NTHMC on that basis; however, even after including the preference factor, Edwards & Kelcey's offer was considered superior due to the significant disparity in the technical scores of the two offers.

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Engineering Sciences, Inc., B-226871, July 29, 1987, 87-2 CPD ¶ 109; Arix Corp., B-195503, Nov. 6, 1979, 79-2 CPD ¶ 331. In reviewing a protest of an agency's selection of A-E contractors, we will not substitute our judgment regarding the relative merits of competing offers for that of the procuring agency, provided the agency's determination is reasonable and consistent with the stated evaluation criteria. James W. Hudson & Assocs., B-243277, July 5, 1991, 91-2 CPD ¶ 29.

Here, we find no basis to question the agency's selection of Edwards & Kelcey's offer. NTHMC has not challenged the agency's determination that Edwards & Kelcey's offer was technically superior. Further, the record indicates that the agency considered NTHMC's small business status, but determined that this status was insufficient to outweigh the technical disparity between the two offers. In explaining its application of the preference factor generally, FEMA states that the preference results in displacement of a higher-rated large business only in situations where "there was not a great disparity in the technical scores [of the small business and the large business]." In the procurement protested by NTHMC, FEMA determined that NTHMC's score--

⁵In responding to the agency report, NTHMC expressly stated, "we elected not to challenge the Board's ratings."

approximately 20 percent lower than Edwards & Kelcey's score--was not sufficiently close to permit Edwards & Kelcey's displacement. On the basis of the record presented, we cannot conclude that the agency's determination was unreasonable.

NTHMC's protest also indicates that it believes this procurement should have been conducted under small business set-aside procedures. To the extent the protest is based on this assertion, it is untimely.

Under our Bid Protest Regulations, protests based on alleged improprieties which are apparent in a solicitation must be filed prior to bid opening or the time set for receipt of proposals, 4 C.F.R. § 21.2(a)(1) (1992). Alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into it must be protested not later than the next closing date for receipt of proposals following the incorporation. Id.


Here, the CFD announcement published in November 1991, clearly indicated that this procurement would be unrestricted unless, following the agency's initial review of submissions, a determination was made to use set-aside procedures. The record indicates that, after reviewing the initial submissions, FEMA determined that it would not convert the Region 11 procurement to a small business set-aside; this determination was effectively communicated to NTHMC through the agency's February 20 letter advising NTHMC that discussions were being conducted with three of the initial offerors. Upon receiving FEMA's February 20 letter, NTHMC knew, or should have known, that the agency had not converted the procurement to one using set-aside procedures. Accordingly, if NTHMC believed that the procurement should have been restricted to small businesses, it was obligated to protest that matter no later than March 3, the date FEMA established for submitting a response to its February 20 letter. NTHMC's agency-level protest was not filed until May 28, and its protest to our Office was not filed until June 18. Accordingly, this portion of its protest is dismissed.

Finally, following its receipt of the agency report, NTHMC protests that FEMA failed to comply with the Brooks Act requirement that agencies "shall encourage firms . . . to submit annually a statement of qualifications and performance data [SF 254]." See 40 U.S.C. § 543. NTHMC maintains that if FEMA had complied with this requirement, it would have had, on file, submissions from more small business firms and would have had a basis for conducting this procurement as a small business set-aside.

FEMA responds that, in fact, it does solicit the submission of SF 254 from A-E firms on an annual basis--through its annual procurement of A-E services. FEMA explains that, because it has a limited need for A-E services it does not request submissions separate from its annual A-E procurement activities.

NTHMC has not disputed FEMA's factual assertions, nor has it identified any requirement that agencies must issue separate requests for SF 254 in situations where, as here, the agency meets the statutory requirement through its annual procurement activities. Accordingly, this portion of NTHMC's protest is denied.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel