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Decision

Matter of: Shields & Dean Concessions, Inc.

File: B-292901.2; B-292901.3

Date: February 23, 2004

Ruth G. Tiger, Esq., Saltman & Stevens, for the protester.

Dorothy C. Slovak, Esq., Holland & Knight, for Global Golf Services, Inc., an intervenor.

Alton E. Woods, Esq., Sherry Kinland Kaswell, Esq., Pamela L. Barkin, Esq., and Perri Rothemich, Esq., Department of the Interior, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency failed to reasonably evaluate proposals for the award of a concession contract in accordance with the terms of the prospectus.

DECISION

Shields & Dean Concessions, Inc. (SHDE) protests the award of a concession contract to Global Golf Services, Inc. (GLGO) by the National Park Service (NPS), Department of the Interior, under prospectus No. GATE020-03, for the provision of visitor recreational services at two locations within the Jamaica Bay Unit of the Gateway National Recreation Area in Brooklyn, New York. SHDE, the incumbent concessioner, protests the agency's evaluation of proposals.

We sustain the protest.

BACKGROUND

On February 12, 2003, the NPS issued the prospectus seeking competitive proposals for the award of a 10-year concession contract to provide visitor recreational services at two locations within the Jamaica Bay Unit of the Gateway National Recreation Area. At the Flatbush Avenue location, the concessioner is required to operate and manage a 75-tee golf driving range and a snack bar; in addition, the concessioner is authorized to operate and manage tennis courts, pro shop merchandising facilities, a golf training center, a club house facility, heated tees, and indoor simulated golf practice systems. At the Jacob Riis Park location, the

concessioner is required to operate and manage an 18-hole pitch and putt golf course and to provide limited food service; in addition, the concessioner is authorized to operate and manage miniature golf and baseball batting practice facilities.¹ The prospectus was issued pursuant to the National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. § 5951 et seq. (2000). One of the primary objectives of this statute is the enhancement of competition in NPS concession contracting. See 36 C.F.R. Part 51. Specifically, the statute established a competitive selection process for the award of concession contracts. The prospectus identified SHDE as the incumbent concessioner, stating that SHDE “has operated satisfactorily during the terms of [its] two concession authorizations, and is expected to compete for the new contract.” Prospectus, Business Opportunity, at 2.

Under the prospectus, the NPS would select the “responsive proposal with the highest cumulative point score as the best proposal.” Prospectus, Proposal Instructions, at 3. The prospectus stated that only an offeror submitting a “responsive” proposal was eligible for award, defining a “responsive” proposal as a

timely submitted proposal that is determined by the [NPS] as agreeing to all of the minimum requirements of the new concession contract and prospectus and as having provided the information required by the prospectus.

Id. at 1.

The prospectus included the following five “principal selection factors” (PSF): (1) the responsiveness of the proposal to the objectives, as described in the prospectus, of protecting, conserving, and preserving resources of the park area; (2) the responsiveness of the proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates; (3) the experience and related background of the offeror, including the past performance and expertise of the offeror in providing the same or similar visitor

¹ As part of the overall concession contract, the concessioner also is required to perform various other maintenance, repair, housekeeping, and groundskeeping services for the agency, e.g., installation, maintenance, and replacement of all interior and exterior signs at the facility; trash and garbage disposal; maintenance of roads, parking areas, curbing, sidewalks, and walkways; seed, fertilizer, and herbicide application; operation, maintenance, and repair of all utility services; and winterization and dewaterization. In addition, the prospectus contains a provision entitled the “Concession Facilities Improvement Program” under which the concessioner is required to undertake and complete an improvement program (construction and demolition of a number of facility structures) projected to cost, according to the prospectus, approximately \$855,200. Prospectus, Business Opportunity, at 4-5.

services as those to be provided under the concession contract; (4) the financial capability of the offeror to carry out its proposal; and (5) the amount of the proposed minimum franchise fee,² if any, and/or other forms of financial consideration to the NPS. Under the terms of the prospectus, each of the first four PSFs, which contained multiple, narratively described subfactors, would be scored on a scale of 0 to 5 points; the fifth PSF, which required the insertion of the offeror's proposed minimum franchise fee, expressed as a percentage of the firm's annual gross receipts, would be scored on a scale of 0 to 4 points, with a score of 1 point being assigned where the offeror agreed to the minimum franchise fee contained in the prospectus. The prospectus advised that the agency's consideration of revenue to the government would be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.

The prospectus also included a secondary selection factor (SSF) that would assess the quality of the offeror's proposal to conduct operations in a manner that furthers the protection, conservation, and preservation of the park area and other resources through environmental management programs and activities. The SSF would be scored on a scale of 0 to 3 points.

In preparing proposals, the prospectus advised offerors that under the PSFs, the NPS identified subfactors to ensure that all elements of the selection factor were considered; the prospectus stated that "[y]ou, the Offeror, should ensure that you fully address all of the selection factors and related subfactors." Prospectus, Proposal Instructions, at 4. In addition, the prospectus advised that the proposal and related materials submitted should reflect the offeror's entire proposal, and that the NPS would consider an offeror's written submission as its "full and final proposal in response to the prospectus." Id. at 5.

² The prospectus required the concessioner to pay the NPS a minimum franchise fee, calculated as a percentage of the concessioner's annual gross receipts, of 8.5 percent on the combined driving range and golf course operation and 9 percent if miniature golf was also proposed. Offerors were advised that they could propose franchise fees higher than the stated minimum. Prospectus, Business Opportunity, at 3. While SHDE and GLGO each proposed a franchise fee that exceeded the minimum fee required by the prospectus, SHDE's proposed fee was less than GLGO's proposed fee.

Nine offerors, including SHDE and GLGO, submitted proposals. As relevant here, the agency assigned the following scores to the proposals of SHDE and GLGO:

	SHDE	GLGO
PSF 1	4	3
PSF 2	4	4
PSF 3	3	4
PSF 4	3.5	3.5
PSF 5	2	3.5
SSF	2.5	2
Total	19	20

Evaluation Report at 21, 30, 39, 45, 47, 50.

These selection factor scores were supported by narrative evaluation comments that corresponded to the subfactors under each PSF and to the SSF. The NPS assigned points to the selection factors, but not to the subfactors. (In evaluating proposals, since the agency did not assign points to the subfactors, it is not clear how the agency arrived at the score assigned for each selection factor.) Because GLGO's proposal had the highest cumulative point score—by only 1 point—the NPS decided to award to GLGO. As shown in the above chart, GLGO's proposal won the competition primarily due to the franchise fee selection factor, PSF 5; however, if the franchise fee selection factor is excluded, GLGO's proposal was actually lower rated. In effect, then, the NPS conducted a tradeoff, determining that the additional 1.5 points assigned to GLGO's proposal for PSF 5, reflecting GLGO's higher proposed franchise fee, offset the small point advantage of SHDE's proposal for the non-franchise fee selection factors which, under the terms of the prospectus, were more important than an offeror's proposed franchise fee. In short, the record reflects an extremely close competition in which any flaw in the evaluation of the SHDE and GLGO proposals could have affected the agency's selection decision.

ISSUES AND ANALYSIS

SHDE protests the evaluation of proposals, basically contending that the agency did not evaluate the proposals of SHDE and GLGO in accordance with the terms of the prospectus.³

³ This decision addresses SHDE's primary arguments regarding the agency's evaluation of proposals. In light of our decision sustaining the protest, we need not address the other arguments raised by SHDE challenging the agency's evaluation of proposals.

As a threshold matter, we point out that the NPS does not dispute the authority of our Office, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), to review this protest. Agency Report (AR), Dec. 15, 2003, at 1; AR, Feb. 3, 2004, at 1, 3. In this regard, where the government invites private offerors to compete for a business opportunity, the performance of which also involves the delivery of goods or services to the government, the contract is one for the procurement of property or services within the meaning of CICA and, therefore, is encompassed within our Office's bid protest jurisdiction. Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 6. Here, in addition to providing visitor recreational services for the 10-year term of the concession contract, the concessioner also is required to provide a variety of maintenance, repair, housekeeping, and groundskeeping services, as well as to undertake a construction and demolition program projected to cost more than \$800,000. Clearly, the value of the services to be provided by the concessioner to the government is significant, not de minimis, and it is, therefore, adequate to justify our review of this mixed transaction. Id. at 8.

While the portions of CICA regarding our Office's bid protest jurisdiction thus apply here, the CICA provisions governing the conduct of procurements do not. This is because CICA exempts "procurement procedures [that are] otherwise expressly authorized by statute." 41 U.S.C. § 253(a)(1) (2000). The NPS statute, as referenced earlier, provides for such a procedure since it establishes the processes that are to be followed when the NPS awards a concession contract. Where, as here, CICA and the implementing Federal Acquisition Regulation (FAR) (see FAR §§ 1.104, 2.101) do not apply to procurements that are within our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with any statutes and regulations that do apply. Starfleet Marine Transp., Inc., supra, at 9-10. In this case, based on our review of the record, including the proposals submitted by SHDE and GLGO, the agency's contemporaneous evaluation narratives, and the agency's arguments in response to the protest, we conclude that the agency did not reasonably evaluate the SHDE and GLGO proposals in accordance with the terms of the prospectus.

PSF 1--Environmental Management Program

This selection factor contained four narrative subfactors. The second subfactor required that each offeror "[s]ubmit with [its proposal] a draft Environmental Management Program (EMP) for this operation, addressing the elements identified in the draft CONTRACT, Section 6, Environmental and Cultural Protection, and the specific objectives listed below," which included: (1) solid waste management, including recycling; (2) water and energy conservation; (3) emergency planning and response; (4) pollution prevention and waste reduction; (5) reduction of emissions from vehicles and other operations that affect air quality; (6) sustainable design and construction practices; (7) pest management practices; and (8) education of public

regarding environmental protection/awareness. Prospectus, Proposal Package, at 8-9.

The requirement for an EMP was described in section 6 of the draft contract, which was included as a material part of the prospectus. Section 6 of the draft contract described an EMP as a “comprehensive written” plan to achieve the environmental management objectives of complying with all applicable laws pertaining to the protection of human health and the environment and incorporating best management practices in the concessioner’s operation, construction, maintenance, acquisition, provision of visitor services, and other activities under the contract. Prospectus, Draft Contract, at 13-14. The EMP was to “account for all activities with potential environmental impacts conducted by the Concessioner or to which the Concessioner contributes.” *Id.* at 14. More specifically, section 6 of the draft contract stated that the “EMP shall include, without limitation,” the following narratively described elements: (1) policy; (2) goals and targets; (3) responsibilities and accountability; (4) documentation; (5) documentation control and information management system; (6) reporting; (7) communication; (8) training; and (9) monitoring, measurement, and corrective action. *Id.* at 14-15.⁴

SHDE’s EMP, as included in its proposal, was a [deleted]-page document that substantively addressed each of the eight specified environmental objectives and each of the nine EMP elements, as listed above. In addition to substantive narrative discussions, SHDE’s EMP included, for example, [deleted] and other [deleted] documents and [deleted] guidelines. The contemporaneous NPS evaluation narrative for SHDE’s proposal stated that SHDE “adequately addressed all eight specific environmental objectives and demonstrated [its] understanding of the specific objectives. It also addressed all nine required EMP elements, and all to a level that demonstrated an understanding of those particular EMP elements and how these applied to the services required under the draft contract.” Evaluation Report at 17.

In contrast, GLGO’s EMP, as included in its proposal, consisted of [deleted] pages. In these pages, while GLGO listed as page headings the eight environmental objectives and provided a narrative for each, GLGO did not address with any degree of specificity the nine EMP elements. Nevertheless, the contemporaneous NPS evaluation narrative for GLGO’s proposal stated that GLGO “addressed all eight of the specific [environmental] objectives in its proposal and all eight were addressed to a level where the response demonstrated the Offeror’s understanding of the specific objective. GLGO addressed eight of the nine required [EMP] elements . . . and seven . . . were to a level that demonstrated its understanding of those particular

⁴ Section 6 of the draft contract required that the initial EMP be developed and submitted to the NPS for approval within 60 days of the effective date of the contract.

required EMP elements.” Id. at 16. Based on the contemporaneous evaluation narrative, it was the agency’s view at the time of proposal evaluation that GLGO did not address the first EMP element—policy—and that GLGO did not demonstrate its understanding of the first and second EMP elements—policy and goals and targets.⁵

An offeror’s EMP was evaluated under PSF 1, for which GLGO’s proposal received 3 points and SHDE’s proposal received 4 points. SHDE argues that under the terms of the prospectus, GLGO should not have been eligible for award because it failed to address all of the required EMP elements as listed in section 6 of the draft contract, which was included as a material part of the prospectus. In the alternative, based on the SHDE and GLGO responses to the requirement to submit an EMP, SHDE argues that for PSF 1, either GLGO’s proposal was scored too high or SHDE’s proposal was not scored high enough.

In response to the protest (but not reflected in the contemporaneous evaluation record), the NPS explains that in evaluating proposals, particularly an offeror’s proposed EMP, the agency considered information found within the offeror’s entire proposal, explaining that “information in a proposal that addressed a particular selection factor could be found not only under the principal or secondary selection factor itself but also elsewhere in the proposal.” Declaration of Evaluation Panel Chair, Jan. 9, 2004, at 1. More particularly, in evaluating whether GLGO addressed the nine required EMP elements, the agency “reviewed [GLGO’s] proposal as a whole.” Id. at 2. For example, with respect to the first EMP element—policy—the agency stated that although GLGO “did not expressly provide a single ‘clear statement’” in accordance with section 6 of the draft contract, GLGO’s “substantive commitments in this regard were contained throughout its proposal, including its agreement to [the] terms of the contract.” Id. at 3. The agency lists each EMP element and the various pages within GLGO’s proposal where the firm purportedly addressed these elements.

Here, where the prospectus required an offeror to submit a “comprehensive written” EMP, we are troubled by the agency’s position in response to the protest that GLGO complied with this requirement based on statements scattered throughout its proposal. In our view, such statements do not constitute a “comprehensive written” plan as contemplated by the prospectus. Moreover, even if such an approach, as just described, reasonably could be construed as satisfying the requirement that an

⁵ Section 6 of the draft contract states that for “policy,” the “EMP shall provide a clear statement of the Concessioner’s commitment to the Environmental Management Objectives.” Section 6 of the draft contract states that for “goals and targets,” the “EMP shall identify environmental goals established by the Concessioner consistent with all Environmental Management Objectives. The EMP shall also identify specific targets (i.e. measurable results and schedules) to achieve these goals.” Id. at 14.

offeror submit an EMP, the agency's post hoc explanation of its evaluation is not consistent with its contemporaneous evaluation narrative that states that GLGO addressed only eight of the nine required EMP elements and demonstrated its understanding of only seven of them. Clearly, even if what GLGO submitted reasonably could be construed as an EMP as contemplated by the prospectus, the agency's contemporaneous evaluation narrative shows that this EMP was incomplete and inadequate because GLGO did not address, nor demonstrate an understanding of, all nine of the required EMP elements. On this record, we conclude that in evaluating GLGO's proposal, the agency either improperly relaxed for GLGO the prospectus requirement for the submission of a comprehensive written EMP or did not reasonably downgrade GLGO's proposal based on the firm's failure not only to address, but also to demonstrate an understanding of, all nine of the EMP elements as required by the prospectus.⁶

PSF 1--Environmental Program Manager

The third subfactor under this selection factor required an offeror to identify its proposed environmental program manager, including a brief description of his or her qualifications and past experience with regard to managing an environmental program. This subfactor also required an offeror to specify the amount of time the "[environmental program] manager [would] spend performing his [or] her duties." Prospectus, Proposal Package, at 9. SHDE and GLGO each identified in their respective proposals an individual who would serve as the firm's environmental program manager. As relevant here, SHDE stated in its proposal that its proposed environmental program manager would be "engaged [deleted]," and as evidenced from this individual's resume, he would work "[deleted] hours per week" in that position. SHDE's Proposal at 0017, 0193. GLGO stated in its proposal that its proposed environmental program manager was "committed to spending [deleted]

⁶ In contrast, the voluminous, multi-page, substantive EMP submitted by SHDE reasonably constituted the "comprehensive written" plan as contemplated by the prospectus. As discussed above, the agency's contemporaneous evaluation narrative recognized that SHDE addressed, and also demonstrated its understanding of, the eight environmental objectives and the nine EMP elements. Although the contemporaneous evaluation narrative for SHDE's EMP also stated that "five of SHDE's EMP elements lacked sufficient detail and standard operating procedures that would typically be included in an effective EMP to allow it to serve as a consolidated environmental resource for management and operational staff," the evaluation narrative nevertheless included "the opinion of the Panel that these details and standard operating procedures could easily be developed and incorporated into the EMP once an Offeror is operational." Evaluation Report at 21. Thus, the agency's contemporaneous evaluation narrative does not indicate that SHDE's EMP was other than acceptable or otherwise provide a basis for downgrading SHDE's proposal.

days a week overseeing Environmental Programming and Environmental Management” for GLGO, and as evidenced from this individual’s resume, he would work “[deleted] hours per week” in that position. GLGO’s Proposal at 32, 142. The contemporaneous NPS evaluation narrative stated that SHDE and GLGO each identified an environmental program manager and each firm “specif[ied] that the [proposed] environmental program manager would spend [deleted] hours/week performing his/her duties in the park.” Evaluation Report at 17.

Again, for PSF 1 (the same selection factor under which an offeror’s EMP was evaluated), GLGO’s proposal received 3 points and SHDE’s proposal received 4 points. SHDE challenges the reasonableness of the agency’s evaluation, particularly the agency’s equalizing of the amount of time—[deleted] hours—that each offeror’s proposed environmental program manager would spend in the position. SHDE points out that its proposed environmental program manager committed to spending more than [deleted] hours per week in that position (i.e., “[deleted] hours per week”), while GLGO’s proposed environmental program manager expressly committed to spending significantly less than [deleted] hours per week in that position, specifically, “[deleted] days,” or “[deleted] hours,” per week.

In response to the protest (but not reflected in the contemporaneous evaluation record), the NPS explains that because the individual proposed by SHDE had other duties, for example, serving as the [deleted] and holding [deleted] responsibilities, the agency estimated that this individual would only be able to spend between [deleted] to [deleted] hours per week on environmental program management matters. The NPS also noted that two other managers (the [deleted] and the [deleted]) on the SHDE team would likely spend some time on environmental program management matters. Accordingly, the NPS now explains that it estimated that the total amount of time that these three SHDE team members would spend on environmental program management matters was between [deleted] to [deleted] hours per week. Declaration of Evaluation Panel Chair, supra, at 3-4. In contrast, recognizing that GLGO’s proposed environmental program manager was committed to spending only [deleted] days, or [deleted] hours, per week in that position, the NPS explains that a number of other managers (the [deleted], the [deleted], the [deleted], and the [deleted]) on the GLGO team also would have environmental program management responsibilities. For this reason, the NPS now explains that it estimated the total amount of time that these five GLGO team members would spend on environmental program management matters was between [deleted] to [deleted] hours per week. Id. at 4.

Again, we are troubled by the agency’s evaluation of proposals under PSF 1. Here, SHDE and GLGO each identified, in accordance with the terms of the prospectus, a specific individual to serve as the firm’s environmental program manager and indicated the amount of time the individual would spend performing the duties

associated with the position. Under the terms of the prospectus, it is the information as submitted for the specifically identified individual proposed to serve as the offeror's dedicated environmental program manager that reasonably should have been evaluated by the agency in assessing whether the offeror had proposed a qualified individual who was committed to serve in the position for a sufficient number of hours per week in order to carry out the responsibilities associated with protecting, conserving, and preserving park resources. In response to the protest, the agency appears to acknowledge that the [deleted]-hours commitment from GLGO's proposed environmental program manager was not sufficient in order for this individual to carry out the responsibilities associated with the position. The agency nevertheless asserts that GLGO otherwise satisfied the prospectus requirement for a sufficiently committed and dedicated environmental program manager based on the work that four other members of the GLGO team allegedly will perform. However, the agency's consideration of a "team approach" in evaluating the sufficiency of the commitment of the individual proposed by GLGO to serve as the firm's dedicated environmental program manager was not contemplated by, nor consistent with, the terms of the prospectus, as described above. On this record, we believe the agency did not reasonably evaluate the hourly commitment of GLGO's proposed environmental program manager.

CONCLUSION AND RECOMMENDATION

In view of the closeness of the competition--as discussed above, there was only a 1-point difference between the total cumulative scores assigned to the SHDE and GLGO proposals--we conclude that any of the flaws in the NPS evaluation could have changed the agency's selection decision. This problem is compounded by the agency's failure in its evaluation to indicate the scores being assigned to the subfactors under the selection factors, thus making it impossible to understand how the agency arrived at the score assigned for each selection factor. Thus, for example, we have no idea what weight was accorded to the EMP subfactor under PSF 1, which makes it impossible to determine the potential effect of the above-discussed evaluation flaw involving GLGO's EMP on the selection decision.

Accordingly, we sustain the protest. While our recommendation under these circumstances normally would be for the agency to reevaluate proposals, with a view to possibly awarding to a different firm, this remedy is not feasible here because the concession contract awarded to GLGO did not contain a termination for convenience clause. Our Office has held that in the absence of such a clause, we will not recommend termination of an awarded contract, even if we sustain the protest and find the contract award improper. See, e.g., Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11-12; SWD Assocs.--Costs, B-226956.3, Sept. 1, 1989, 89-2 CPD ¶ 206 at 2. For this reason, we recommend that the agency reimburse SHDE for its proposal preparation costs as well as the

reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (2003). SHDE's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel