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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** Zafer Construction Company; Kolin Construction, Tourism, Industry and Trading Co. Inc.

**File:** B-295903; B-295903.2

**Date:** May 9, 2005

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Sheril D. Collins, Zafer Construction Company and Gündüz S. Güngen and Naci Kologlu, Kolin Construction, Tourism, Industry and Trading Co. Inc., for the protesters.

Stephen G. Anderson, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, for Framaco-Epik-Metis Joint Venture, an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Protest that agency unreasonably evaluated protester's proposal is denied where record shows that evaluation was reasonable and consistent with stated evaluation criteria, and protester's contentions amount to disagreement with the evaluation.
  2. Protest that award was improper because awardee was unable, after award, to obtain site identified in its proposal for construction of man camp, is denied where solicitation did not require firm commitment or executed lease for sites identified in proposals.
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## **DECISION**

Zafer Construction Company and Kolin Construction, Tourism, Industry and Trading Co. Inc. protest the award of a contract to Framaco-Epik-Metis (FEM) Joint Venture under request for proposals (RFP) No. SGE500-04-R-1122, issued by the Department of State, American Consulate General, Frankfurt, Germany, for the design and construction of a "man camp facility" for the United States Embassy in Kabul, Afghanistan. Both protesters argue that the agency improperly evaluated their proposals and that the award to FEM was improper.

We deny the protests.

The RFP, issued October 18, 2004, contemplated the award of a fixed-price contract for the construction of a 500-person residential camp for the U.S. Embassy security force, to include, among other things, housing units, dining, laundry, bath and recreational facilities, office/training and classroom facilities, walkways, an infirmary, and vehicle maintenance and weapons storage facilities. The RFP included a detailed statement of work (SOW) outlining the contractor's responsibilities and including, for example, a description of the required buildings, the utility and drainage requirements, and required access roads.

Award was to be made on a "best value" basis considering price, present and past performance, and technical/business management, which included the following subfactors: (1) project schedule, (2) technical description, (3) management, (4) safety, and (5) quality control plan. As relevant here, under the technical description subfactor, the solicitation specifically stated that the agency would evaluate proposals for site layout--considering whether facilities were located in a logical manner and provided occupants easy access to each facility--and site selection--considering, among other things, whether the proposed site was within a reasonable distance of the Embassy, provided the guard contractor easy control of the site, ensured the highest degree of physical security, and provided multiple avenues of entrance. The technical/business management factor was more important than price and present/past performance, which were of equal importance. The RFP stated that the agency intended to award a contract without discussions and that initial proposals therefore should contain offerors' best technical and cost terms. The RFP further advised that a 10-percent price reduction would be applied, for evaluation purposes, to offers submitted by American-owned firms.

RFP section L, Instructions, Conditions, and Notices to Offerors or Respondents, identified a possible site--part of the Afghani Army Camp--that "may be an available site for the man camp." RFP, Amend. 4, at 3, 7. The solicitation advised that the government would offer some assistance in arranging a 5-year lease, with an option to extend, for this site. *Id.* at 7. However, the RFP also specifically stated that this site was provided "only as a potential solution for those offerors that are unable to identify locations elsewhere. This is not the Government preferred site." RFP, Amend. 5, at 2. For any site identified, offerors were to provide a narrative describing the extent of their investigations regarding the site, including, for example, the point of contact established, discussions between the landowner and the offeror concerning the agreement to lease land and the details of the proposed lease agreement for at least a 5-year term. Additionally, offerors were to provide details of their discussions or agreements concerning the yearly cost of the lease; drawings indicating the proposed site layout design; and documentation to describe the design/build services, security, facilities, heating and cooling systems and utilities, and equipment.

The agency received 14 proposals, including those of Zafer, Kolin, and FEM, by the amended December 6 due date. After evaluation, a technical evaluation panel

assigned the following adjectival ratings to the proposals for the technical/business management factor:

<b>Offeror</b>	<b>Construction Schedule</b>	<b>Site Layout</b>	<b>Site Selection/Location</b>	<b>Design/Construction</b>	<b>Management</b>	<b>Safety</b>	<b>Quality Control</b>
Zafer	Poor	Fair	Poor	Fair	Good	Good	Good
Kolin	Good	Good	Poor	Fair	Fair	Good	Good
FEM	Fair	Good	Good	Good	Good	Good	Good

Agency Report (AR), Tab 17, Technical Evaluation Spreadsheet, at 2, 4.

The contracting officer, serving as the source selection authority (SSA), then reviewed the proposals, and assigned two overall ratings, one for the site-related factors (layout and selection/location) and one for overall technical/business management. The contracting officer’s ratings were as follows:

<b>Offeror</b>	<b>Site Factors</b>	<b>Overall</b>
Zafer	Poor	Poor
Kolin	Poor	Poor
FEM	Good	Good

AR, Tab 18, Award Documentation, at 6-8.

Neither Kolin, whose proposal was priced at \$10,488,151, nor Zafer, whose proposal was priced at \$11,304,805, qualified for the 10-percent price preference for American-owned firms. AR, Tab 18, Award Documentation at 5. FEM, an American-owned firm, offered a price of \$14,886,000; after the preference was applied, the agency calculated FEM’s evaluated price as \$13,397,400. *Id.* In its source selection decision, the agency recognized that, while the proposals were generally “acceptable with minor graduation of difference” under the construction factors (construction schedule, design/construction, management, safety and quality control plan), FEM’s proposal offered significant advantages under the site factors. *Id.* at 8. Specifically, the agency noted that, while Zafer’s and Kolin’s proposals identified only the government-identified site, FEM’s identified alternate sites.<sup>1</sup> The contracting officer determined that one of FEM’s alternative sites was superior because it was located

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<sup>1</sup> The agency’s evaluation notes that Zafer’s proposal did not specifically identify a proposed site and states that, although “it was not exactly clear to the evaluation team” that Zafer was proposing the government-identified site, no alternative sites were offered. As a result, the agency apparently evaluated the proposal on the basis of the government-identified site. AR, Tab 18, Award Documentation, at 7-8. Kolin proposed a possible alternate site that was available for purchase, but provided no definitive information on this site, and the agency apparently evaluated the proposal only on the basis of the government-identified site. *Id.* at 7. The protesters do not object to this aspect of the evaluation.

in a fairly calm area within a short drive to the Embassy, and offered numerous routes to the Embassy. Additionally, the site offered up to three entrances/exits onto three different roads. The SSA concluded that this site offered the “best location to set up a safe and secure compound,” and that “[n]o other proposed site offered the same or similar advantages.” *Id.* at 8. The SSA requested that FEM clarify the extent of its investigations into the availability of this site. FEM responded that it had been unable to “negotiate ownership and leasing issues,” but felt that, if awarded the contract, it would “be able to settle the leasing issues with the relevant authorities . . . .” AR, Tab 16, FEM Letter Clarifying Proposed Site and Site Availability, at 1. On the basis of these evaluation results, the agency determined that it was reasonable to pay a premium “for the conditions in Kabul,” and made award to FEM.

Upon being notified of the award, both protesters requested a debriefing. By letters dated February 2, the agency debriefed both protesters, providing each with the technical evaluation panel’s evaluation results for their own and the awardee’s proposals. Both protesters also were advised that their proposals were downgraded for failure to identify an adequate site, which was a significant weakness. By letter dated February 4, Kolin requested additional information. The agency furnished a response by letter dated March 1. In this response, the agency also advised Kolin that FEM was unable to obtain a lease on the site identified in FEM’s proposal and used in the evaluation. Agency Report on Kolin Protest, Tab 23, at 2. On February 7, Zafer protested to our Office; Kolin protested on March 4.

#### EVALUATION OF GOVERNMENT-IDENTIFIED SITE

Zafer asserts that it understood that offerors were to propose on the government-identified site as “the Bid Requirements,” and complains that its proposal thus improperly was downgraded for identifying this site. Zafer Comments at 5. Kolin likewise complains that its proposal was improperly downgraded for site selection, arguing that it was improper for the agency to identify a site “as one that could be acceptable,” and then later rate Kolin’s proposal poor for site selection based on its identifying that site. Kolin Protest at 2.

In reviewing protests challenging the evaluation of proposals, we will examine the record to determine whether the agency’s judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Information Sys. Tech. Corp., B-291747, Mar. 17, 2003, 2003 CPD ¶ 72 at 2.

This aspect of the evaluation was unobjectionable. Contrary to Zafer’s assertion, nothing in the solicitation required that offerors base their proposals on the government-identified site; in fact, the solicitation expressly allowed offerors to identify alternate sites. As for Kolin’s suggestion that, having identified the site, the agency could not then downgrade proposals based on that site, the RFP specifically stated that the government-identified site was not the “preferred” site; this was sufficient to put offerors on notice that the agency believed the site had

shortcomings; there was no reason for offerors to believe that these shortcomings would not be factored into the evaluation. In this regard, in its award documentation the agency described the site as being within a reasonable distance of the Embassy, but in a high-risk area and having only a single access via the Jalalabad Road, which is also known as the Bagram road, or “ambush alley” by U.S. troops. AR, Tab 18, Award Documentation, at 6. Offerors were invited to visit the site, which would have allowed them to identify the weaknesses inherent in the site. We conclude that the agency’s evaluation of Zafer’s and Kolin’s proposals as poor in this area was reasonable.<sup>2</sup>

## EVALUATION OF KOLIN’S PROPOSAL

Kolin complains that its design should have been rated as superior to FEM’s because it “conforms [to the] Technical Specifications, contained more functional designs and provided 50.68% greater building area for the camp” at a lower price.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, with an exception for protests that challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. 4 C.F.R. § 21.2(a)(2) (2005). In such cases, protests must be filed not later than 10 days after the date on which the debriefing was held. *Id.*

As noted above, the agency provided Kolin a debriefing regarding the evaluation of its proposal, including the evaluation of its site design/layout, by letter dated (and apparently received) February 2. Therefore, to be timely, Kolin’s protest regarding this area of the evaluation had to be filed no later than February 14 (the first business day after Saturday, February 12). Kolin argues that its March 4 protest was timely because the debriefing continued after its receipt of the February 2 letter. As explained above, Kolin raised additional questions in a follow-up February 4 letter to the agency, to which the agency did not respond until March 1. This argument is without merit. The agency states—and there is nothing in the February 2 letter or elsewhere in the record to the contrary—that it never indicated to Kolin that the February 2 debriefing letter was not final, or that the debriefing would be considered

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<sup>2</sup> In its protest, Zafer also argued that the solicitation did not list site layout and site selection as evaluation factors, and asserted that “in normal evaluation circumstances the highest and the lowest [evaluated] factors [for each proposal] are generally thrown out.” Zafer Protest at 7. The agency responded to these arguments in its report, and Zafer did not rebut the agency’s position in its comments on the report. Accordingly, we consider these issues abandoned. See *Delco Indus. Textile Corp.*, B-292324, Aug. 8, 2003, 2003 CPD ¶ 141 at 3 n.2.

concluded only after the agency responded to further questions the protester might have after February 2. Under these circumstances, there is no basis for finding that the debriefing continued beyond February 2. The fact that Kolin may not have been satisfied with all aspects of the debriefing, and that it continued to pursue questions with the agency, did not extend the time for filing a protest with our Office based on information provided in the debriefing. See New SI, LLC, B-295209 et al., Nov. 22, 2004, 2005 CPD ¶ \_\_. We conclude that Kolin's protest in this area was untimely, since it was not filed until March 4, that is, more than 10 days after February 2.

#### AWARD TO FEM

Both protesters argue that the award is improper since FEM's proposal was selected for award primarily on the basis of the site proposed, and the record shows that FEM was unable to obtain a lease for that site after award. Zafer Comments at 6; Kolin Comments at 2.

This argument is without merit. First, while section L called for information regarding offerors' discussions and contacts with the owner of the identified sites, nothing in the RFP required offerors to have a firm commitment or an executed lease agreement for the sites identified in their proposals, and nothing in the section M evaluation provisions indicated that the probability of the offerors' obtaining the site would be factored into the evaluation. In this regard, instructions to offerors in section L of an RFP are not the same as evaluation criteria established in section M; rather than establishing minimum evaluation standards, the instructions only provide guidance to assist offerors in preparing and organizing their proposals. Family Entm't Servs., Inc., d/b/a IMC, B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5 n.2. Thus, there was no basis for the agency to deny FEM the award based on its lack of some commitment for its identified site.<sup>3</sup> (We note that it appears from the record that no offeror, including Zafer and Kolin, provided a firm commitment for the lease of a site with its proposal.)

Further, our Office will not review protests based on an awardee's alleged failure to comply with contract terms after award, or on allegedly improper contract modifications; these matters concern contract administration, which is the responsibility of the contracting agency. 4 C.F.R. § 21.5(a). Even if a contract modification arguably is significant, in the absence of evidence that the contract was awarded with the intent to modify it, we will not question the modification unless it

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<sup>3</sup> To the extent the protesters argue that the RFP should have required a commitment of some sort for the proposed sites, the protest is untimely. Under our timeliness rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1). Since Zafer's and Kolin's protests were filed after award, any protest on this ground is untimely.

is shown to be beyond the scope of the original contract, so as to require a separate procurement. Tracor Flight Servs., Inc.-Recon., B-238200.2, May 4, 1990, 90-1 CPD ¶ 450 at 3. Here, there is no indication that the agency awarded the contract to FEM with the intention of modifying it--indeed, the record shows that both FEM and the agency believed that FEM would be able to obtain a lease for the identified site--and there is no argument, or reason to find, that this modification is beyond the scope of the contract.

The protests are denied.

Anthony H. Gamboa  
General Counsel