GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

PROTEST OF:		
WATKINS SECURITY AGENCY OF D.C., INC.	)	
	)	CAB No. P-0709
Under Contract No. POFA-20050D-003	)	

For the Protester, Watkins Security Agency of D.C., Inc.: Dirk Haire, Esq., Holland and Knight LLP. For the Government: Howard Schwartz, Esq., and Jon N. Kurlish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

OPINION

(*LexisNexis Filing ID 6589730*)

Watkins Security Agency of D.C., Inc., has protested award of the subject contract on the basis that the evaluation of both its proposal and the proposal of the awardee, Hawk One Security, Inc., were arbitrary and unreasonable. We find the District's justification of substantial parts of the evaluations to be unpersuasive. We further find that the evaluation narratives do not indicate that either the evaluators or the contracting officer carefully reviewed the Best and Final Offers ("BAFO") of either the protester or the awardee and that the evaluations were based in substantial part on faulty assumptions of the BAFO contents. Since portions of each evaluation are clearly arbitrary and unreasonable, it is impossible for the Board to determine whether the award determination as a whole was not arbitrary and unreasonable. The protest is sustained and the matter remanded to the contracting officer for a *de novo* reevaluation of the BAFOs, or, if the contracting officer finds that it is necessary to receive further BAFOs, to appropriately evaluate those offers.

BACKGROUND

On September 7, 2004, the Office of Contracts and Procurement issued a solicitation on behalf of the Metropolitan Police Department requesting proposals to perform security services at 167 public schools currently being performed by the protester under a contract with the District of Columbia Public Schools ("DCPS"). The change in the contracting agency undertaking the solicitation was mandated by the School Safety and Security Contracting Procedures Act of 2004, D.C. Law 15-350, April 13, 2005, which provided that "[r]esponsibility for the issuance of a Request for Proposals for any security guard or security related contract for DCPS for a contract term to begin June 30, 2005, or later shall be transferred to the MPD as of August 2, 2004." In addition, the enactment of the Child and Youth, Safety and Health Omnibus Temporary Amendment Act of 2004, D.C. Law 15-117, imposed requirements in performing future contracts beyond those required in the previous DCPS contract. Both of these changes required offerors to submit proposals substantially different from proposals which may have been responsive to previous solicitations for similar services.

DISCUSSION

Although the evaluation of technical proposals is within the discretion of the contracting agency because the agency is responsible for defining its own needs and the best method of achieving them, the Board will examine the record to determine whether an award decision was reasonable. *Trifax Corporation*, CAB No. P-0539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847. An evaluation is clearly unreasonable if it is based in substantial part on a plainly erroneous reading of a proposal. *Intown Properties, Inc.*, B-262236.2, Jan 18, 1996, 96-1 CPD ¶ 89.

The Agency Report states that "Watkins Security's proposal continued to exhibit real technical weaknesses after the BAFO. For example, after BAFOs and the fourth round of responses, some five weaknesses persisted in the Understanding of Requirements subfactor of the Management Capability factor. (AR Ex.18.A, 4-5). One of the Child Safety Act related weaknesses referenced was Watkins' failure to have its proposed list of criminal offenses, that would automatically disqualify persons from employment as guards, match up with the Solicitation requirements." (AR, 21). The contracting officer's Business Clearance Memorandum ("BCM"), quoting the evaluation and citing page 12 of Watkin's proposal, emphasizes the importance of this weakness by specifically giving a list of offenses allegedly not covered by Watkins disqualification policy. The BCM stated, "[f]or example, a conviction for possession of controlled substances; theft, fraud, forgery, extortion or blackmail; trespass or injury to property; and burglary are excluded from the list of automatically disqualifying offenses." (AR Ex. 6, 27). In fact, pages 12 and 13 of Watkin's BAFO specifically list the offenses given in the example.[1] Reliance on an objectively incorrect reading of the proposal makes that portion of the evaluation unreasonable *per se*.

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[1] C.3.30.2 CRIMINAL BACKGROUND CHECKS:

> All Watkins employees (pre-employment or existing employees) assigned duties and/or responsibilities to this contract will submit to a Criminal Background check to certify that they meet the standards of the Act and of the contract.
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> * * *
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> [Watkins] will provide evidence that a criminal background check has been done on all applicants/employees for school security positions (with disqualifying Convictions, i.e. not simply arrests) including murder, attempted murder, manslaughter, arson, assault, battery, assault and battery, assault with a dangerous weapon, mayhem, threat to do bodily harm, burglary, forgery, kidnapping, theft, fraud, forgery, extortion, blackmail, illegal use or possession of a firearm, trespass or injury to property, sexual offenses, including, but not limited to indecent exposure, promoting, procuring, compelling, soliciting or engaging in prostitution, corrupting minors (sexual relations with children), molesting, voyeurism, committing sex acts in public, incest, rape, sexual assault, sexual battery, sexual abuse, child abuse, cruelty to children, and unlawful distribution or possession or possession with intent to distribute a controlled substance testing prior to working on the contract. . . . Conviction of any of the aforementioned offenses will automatically disqualify any employee or potential applicant from working under this contract.
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> C.30.2
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> Conviction of any of the aforementioned offenses will automatically disqualify any employee or potential applicant from working under the contract
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> (AR Ex. 16, 12-13 [emphasis supplied])

Factual discrepancies in substantial portions of the evaluation of Hawk One's proposal also appear. Hawk One received an "excellent" rating meaning "it exceeds most, if not all requirements; no deficiencies" and the maximum point score for the evaluation subfactor which included "understanding of the requirements of the Child and Youth Safety and Health Act." Although the District's supplemental response asserts that the Hawk One proposal "complied fully with the CSA requirements for drug testing,"[2] the contention is not supported by the record. The CSA mandates random testing for *all* employees in a "safety-sensitive" position. (§ 2032(b)). The Hawk One policy on "random testing" neither covers "all employees in a 'safety-sensitive' position," nor makes sense. The policy provides:

> Random testing will be conducted for 1) employees involved in a vehicular or other type of accident that results in physical injury, property damage, or both; and 2) employees returning to a safety-sensitive position after completing a counseling and rehabilitation program for illegal drug use or alcohol abuse."

(AR Ex. 22, 6). Since a "safety-sensitive position" includes "employment in which the employee has direct contact with children and youth, is entrusted with the direct care or custody of children and youth, and whose performance of his or her duties may affect the health, welfare, or safety of children and youth," (CSA, Sec. 2031(11)), virtually all positions under this contract are "safety sensitive." Thus, the majority of the contract employees, those employees who are not involved in an accident or enrolled in counseling or rehabilitation program, will never be subject to random testing. Although Hawk One's statement describes its program as "random testing," the Board is at a loss to understand how testing which is triggered by an accident or counseling could reasonably constitute "random" testing meeting the CSA requirements.

Hawk One received a rating of "Acceptable," meaning "meets requirements; no deficiencies" for Management Capability. RFP § C.5.1.4.5 specifically required that the designated project manager have "work experience including the supervision of 350 or more employees." Hawk One proposed a project manager who it admits had not managed more than 300 employees. (AR Ex. 17, Staff Qualification Matrix). In its reply, the District asserts that the proposed manager "had supervised workforces of one hundred and three hundred persons . . . and the District [was] within its discretion [to] properly consider this to be qualifying." (Reply, 10). The Board is not aware of any authority which would permit the District to accept a proposal which varied from a specific specification requirement without offering the same

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[2] The District reply reads:

> The T[echnical] E[valuation] P[anel] and the Contracting Officer correctly found Hawk One to have complied fully with the CSA requirements regarding drug testing, the TEP mentioning that this information was provided in the "third response." (BCM, p. 27; AR18B, p 3; compare the requirements of the CSA at AR1D). This third supplement to the proposal was contained in Hawk One's Response to [RFP] Amendment 9, submitted April 1, 2005 (AR22). Included with the Response to Amendment 9 was Hawk One's revised Drug and Alcohol Use Policy. This Policy provides for random drug testing and for notification of employees of the testing by providing them a copy of the policy and requiring that the policy be read and acknowledged by their signature on a copy that Hawk One would retain.

(Reply, 5)

variance to all offerors. *See*, *Greater Washington Dental Services, Inc., Quality Plan Administrators, Inc*. CAB Nos. P-0675 and P-0677, Oct. 22, 2003, 52 D.C. Reg. 4146; *Minnesota Mining and Manufacturing Co. v. Shultz*, 583 F. Supp. 184 (D.D.C. 1984). The evaluation given was unsupported by the facts and unreasonable.

The Board has not reviewed all aspects of the evaluations. Nor does the Board presume to reevaluate the proposals which would usurp the authority of the contracting officer and be beyond the charter of the Board. The Board does, however, find that the noted discrepancies between the record and the evaluation of proposals are so substantial that the Board cannot find the overall evaluation reasonable. The Board gives no opinion on any aspect of the evaluation not discussed here. The Board cannot reach any conclusion as to whether correction of the cited errors would affect the overall evaluation or whether any of the specifications should be amended. The errors in the particular factors noted may, by themselves, affect the total evaluation and the errors may further have had an impact on the evaluation of other factors as well, also potentially altering the outcome.

Because the evaluations of Watkins' and Hawk One's proposals were unsupported to a substantial degree, the award to Hawk One was unreasonable. If no amendments to the solicitation are required, we direct that the District reevaluate the BAFO's in their entirety. If amendments to the specifications are necessary to properly state the minimum needs of the District, solicitation of new BAFOs will be required prior to reevaluation. Since the identity of the offerors has now been made public, as has the awardee's pricing, we believe that reevaluation without amendment of the specifications is preferable. If the contracting officer determines that Watkins should have received the award, the contract with Hawk One should be terminated and award made to Watkins.

The protest is sustained.

SO ORDERED.

August 29, 2005

/s/ *Matthew S. Watson*
Administrative Judge

/s/ *Jonathan D. Zischkau*
Chief Administrative Judge

/s/ *Warren J. Nash*
Administrative Judge