

**September 6, 2000**

**P.S. Protest No. 00-14**

**A-1 MASONRY CONSTRUCTION  
AND GENERAL CONTRACTORS**

**Solicitation No. 362575-00-A-0035**

**DIGEST**

Protest of determination of contractor's lack of capability is denied. Information which accompanied proposal failed to establish that protester had the experience which the solicitation required.

**DECISION**

A-1 Masonry Construction and General Contractors (A-1) protests its failure to receive an indefinite quantity contract for general construction repairs and alterations.<sup>1</sup>

The Mid-Atlantic Facilities Service Office, Greensboro, NC, (FSO) issued solicitation 362575-00-A-0035 for the construction services at postal owned and leased facilities in the Greater South Carolina District on April 24, 2000. The solicitation included the following in the "Notes to Offerors" on page 2 of the solicitation:

**EVALUATION AND AWARD FACTORS:** Award will be made to the responsive offeror who submits the best offer based on price and price-related factors.

Minimum Requirements:

1. Five years[] experience in this type of work
2. Licensed, as required by State law, for this type of work in the stated area.

Evaluation Requirements:

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<sup>1</sup> The protest file includes several versions of the contractor's name. "A-1 Masonry Construction and General Contractors" appears in the typed letterhead on the protest submitted to this office, but the body of the letter refers to "A-1 Masonry Construction and General Contracting." The name on its offer was "A-1 Masonry Construction and General Contractor," while its contractor's license is in the name "A-1 Masonry Construction Company." Its bonding representative corresponded with it using that name, while its bank corresponded with it as "A-1 Masonry Contractors Inc." Subsequent correspondence with this office on a printed letterhead reading "A-1 Masonry Constructions, Inc.," refers to the company as "A-1 Masonry and General Contracting."

*The following documents must be submitted with your offer.*

- 1) List and briefly describe a minimum of five (5) projects in progress or completed within the past three years, preferably in the \$2,500-\$250,000 cost range, which will best demonstrate your ability to work multiple projects. Include Postal Service and other government contracts.

The list should include client/owner contact name and telephone number. Provide current information for references. If the Postal Service is unable to contact the references listed to verify experience and performance, that project may not be considered.

- 2) A letter of reference from your firm's principal financial institution. . . .
- 3) A statement from one or more acceptable corporate sureties . . . .
- 4) Copy of contractor license.

Please answer the following questions:

- 5) Year company established: \_\_\_\_\_

. . . . [All emphasis in original.]

Offerors' prices were to be expressed as a "multiplier" which would be applied to prices established in a schedule. Offers were due May 24.

Eleven offers were received, of which A-1's had the second-lowest multiplier.<sup>2</sup> A-1 completed item 5 in the list above with the number 14 and provided a copy of its South Carolina contractor's license.<sup>3</sup> It attached a sheet headed "Customers" which identified eleven customers by their city and state, but provided no details of the work or customer contact information. A second sheet, headed "References," listed four customers, each with one or more listed projects, a contact, and the contact's phone number. The FSO's evaluation document which explained the basis for the awards noted that "all [of the firms on the References sheet] appeared to be construction firms with whom A-1 Masonry worked as a subcontractor."<sup>4</sup>

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<sup>2</sup> The lower-priced offer was found unsatisfactory, a decision which has not been challenged.

<sup>3</sup> The license, issued in February, 2000, showed the classification "BD5." A newsletter on the South Carolina Contractors' Licensing Board webpage identifies category BD as "Building."

<sup>4</sup> Six of the seven projects listed on the References sheet appeared to be associated with names on the Customer sheet. For example, hypothetically, the customer "ABC Construction" with a project "XYZ Motel" on the References page appears related to the entry "XYZ Hotel, Anytown, South Carolina" on the Customers page. Two of the customers on the References sheet were also listed on the Customer's sheet.

The contracting officer's statement recites that three of the four references could not be reached. Handwritten notations on the references page indicate that messages were left for three of the contacts at 4:30 p.m., June 1, and that there were no answers to calls to those numbers placed at 8:30 a.m., June 2. The one contact who was reached described A-1's completion of a \$30,000 firewall as a subcontractor to the prime contractor on a project.

FSO personnel left a message for A-1 requesting that it provide additional documentation of its experience in general construction. A representative returned the call to state that the information would be sent. Two pages were received; one was a duplicate of the Customers sheet previously furnished, and the second, which identified six additional customers and their locations, provided no contact persons or telephone numbers for them.<sup>5</sup>

The FSO evaluation document states that "Dun&Bradstreet indicates A-1 Masonry specializes in masonry work (100%)" and concluded: "Based on information provided, A-1 Masonry does not meet the minimum requirement of five years['] experience in general construction (repair and alteration work) nor did A-1 Masonry respond to evaluation requirements as stated in the solicitation." Eventually, awards were made to the next four lowest offerors at multipliers higher than A-1's offered multiplier.

A-1 requested a debriefing concerning the contract awards and was provided a telephonic debriefing on June 28. A timely protest to this office followed.

The protest notes that A-1 offered a lower multiplier than did the awardees, that the awardees don't "live in the state of South Carolina."<sup>6</sup> Noting his status as a Viet Nam veteran and as a minority, A-1's president contends that the award "is Racism in the worst form." The protest notes that it had been performing construction in South Carolina since 1986 and had just been selected as Regional Construction Company of the year.

The protest also complained about the nonprofessional manner in which the debriefing had been conducted, asserting that the postal participants in the briefing were "snickering, laughing, [and] hollering" during the telephone conversation.

The contracting officer's statement responding to the protest states that A-1 "did not submit the required evaluation documentation nor meet the minimum requirement of five years['] experience in general construction work." As a result, it was considered "non-responsive." With respect to the debriefing, the statement asserts that there was no snickering, laughing, or hollering, and that the offeror was treated "in a professional manner."

Replying to the contracting officer's statement, the protester asserts that "there was some confusion in the communication with [the FSO] concerning references"; asserts a willingness to provide additional references; and asserts that "more effort was made to discount our bid than address the positive" and "the evaluation was merely an attempt to 'weed out' A-1 and award this contract to favored contractors."

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<sup>5</sup> Three or four of the six customers appear to be construction firms.

<sup>6</sup> The protest file does not address the accuracy of this assertion, but nothing in the solicitation required that a contractor be domiciled in that state. To the contrary, the Notes to Offerors discussed, in the context of South Carolina's taxation system, the possibility that a contractor might not be a state resident.

## DISCUSSION

The solicitation required that offerors demonstrate two requirements in order to be determined eligible for an award based on its price: A valid state contractor's license and five years' experience in general contracting repair and alterations work. A-1 appears to have established that it is properly licensed, but, in the contracting officer's view, it has not established the second.

The determination that A-1 lacked the minimum required experience involved the determination of the offeror's capability:

This office's reviews of determinations of . . . capability are limited[.] The contracting officer's determination of an offeror's lack of capability is subject to limited review by this office: A capability determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such an evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is not capable, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

*Victor Partners*, P.S. Protest No. 98-34, March 19, 1999 (citations and internal quotations omitted).

A-1's offer was rejected because the FSO could not determine, from the information submitted and the FSO's further inquiries to the one reference who could be reached and its inquiry to Dun & Bradstreet, that A-1 had the desired experience in the kind of work that the Postal Service was seeking to have done. Instead, the information submitted and the FSO's inquiry reasonably suggested that A-1 did not primarily work as a general contractor, but as a specialty sub-contractor to general contractors. It was not arbitrary or capricious for the contracting officer to conclude from the information submitted that it lacked the experience required. *Cf. MAC/MYC, Inc.*, P.S. Protest No. 97-28, November 4, 1997.

A-1's complaints about the manner in which its debriefing was conducted are not for our consideration; the conduct of a debriefing is an administrative matter outside the scope of our review under the protest procedure. *Cummings-Allison Corporation*, P.S. Protest No. 91-18, June 4, 1991. In any event, our bid protest forum is ill-suited to resolving factual disputes, and we must adopt the contracting officer's position, absent evidence sufficient to overcome the presumption of correctness which attaches to it. *See, e.g., Arthur D. Berry*, P.S. Protest No. 90-56, November 27, 1990. That evidence is lacking here.

In regard to A-1's suggestion that the contracting officer's determination was racially biased, it is the protester's responsibility to present evidence to establish its position affirmatively. No factual substantiation of this allegation was supplied by the protester, and we may not make such a finding based on speculation. We have examined the record for evidence of underlying prejudice on the part of the Postal Service and have found nothing which suggests even remotely that racial prejudice was a factor in the nonresponsibility determination. "[P]rejudicial motives will not be attributed to individuals on the basis of inference or supposition." *Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service*, P.S. Protest No. 86-78, October 18, 1985, quoting *University of New Orleans*, Comp. Gen.

Dec. B-184194, May 26, 1978, 78-1 CPD ¶ 401. This allegation, unsupported by any evidence, is not a ground for overturning the contracting officer's determination.

The protest is denied.

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Contract Protests and Policies