

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220192.2 **DATE:** January 24, 1986
MATTER OF: Intelcom Educational Services, Inc.

DIGEST:

1. Where protester does not learn of specific grounds of protest until agency debriefing, a protest filed within 10 working days after the debriefing is timely.
2. Protest that agency arbitrarily downgraded cost reasonableness of proposal by 4.5 points and that those additional points would make protester's overall proposal "technically substantially equal" with awardee, thereby requiring protester's lowest proposed price to be controlling factor for award under RFP, is denied since the remaining 12.7-point differential in evaluation scores supports agency's finding--otherwise uncontested by protester--that successful offeror was technically superior to all other offerors.
3. In a negotiated procurement, award may be made to a higher priced, higher technically rated offeror as long as the decision to do so is reasonable and in accordance with the stated evaluation criteria. Protester's unsupported assertion that its proposal was "technically substantially equal" to awardee's proposal is not sufficient to show that contracting agency's determination that awardee was technically superior to other offerors was unreasonable or that source selection evaluation was inconsistent with evaluation criteria in the solicitation.
4. GAO will not attribute bias to procurement officials on the basis of inference or supposition; the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester. Protester has presented no such evidence and, therefore, has not met its burden of proof.

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5. Protester's claim for proposal preparation costs is denied because there is no showing that the government acted arbitrarily or capriciously in evaluation of protester's proposal.

Intelcom Educational Services, Inc. (Intelcom), protests the award to Management and Training Corporation (MTC) of a cost-plus-award-fee contract for the operation of the Cascades Job Corps Center located in Sedro-Woolley, Washington, under Department of Labor (DOL) request for proposals (RFP) No. 10JC-535-01. Intelcom contends that the contracting officer arbitrarily downgraded its cost proposal and unreasonably awarded a contract to a higher priced, "technically substantially equal" offeror in contravention of the terms of the RFP.

Intelcom also filed suit in the United States District Court for the Western District of Washington, Intelcom Educational Services, Inc. v. William E. Brock, Secretary, Dept. Of Labor, Civil Action No. C85-1836D, seeking injunctive and declaratory relief and raising substantially the same issues as raised in the protest. The court has indicated an interest in our decision.

We deny the protest.

The Cascades Job Corps Center is a comprehensive Job Corps Program operated on a 24-hour basis in the residential setting of Sedro-Woolley, Washington. In addition to training the enrollees at the center, the contractor is responsible for providing continuous supervision and support services while providing for the operation, maintenance, and protection of all property and equipment at the physical facility which is leased to the federal government by the state of Washington. The protester operated the center from October 15, 1982, through September 30, 1985, at which time MTC took over operations under the present contract award.

The Seattle Regional Office of the Job Corps issued the solicitation covering continued operation of the Cascades Job Corps Center on March 11, 1985, stipulating in the RFP the following basis for selection for award:

"Selection for Award

When one proposal is ranked the highest technically, and no other proposals are technically substantially equal, as determined by the Contracting Officer, price will not be a

controlling factor in award. (This does not mean, however, that a superior technical proposal will receive the award regardless of cost; the cost as negotiated must be reasonable.) When more than one proposal has a high technical ranking, and the proposals are technically substantially equal, price becomes a controlling factor. Substantially equal means proposals grouped at more or less the same technical level, in terms of final ranking, so that no one proposal is markedly superior to the others. No specific point score difference shall be determinative of this, but it shall be a matter for the Contracting Officer's judgment."

Thus, the RFP provided for award selection based on the proposal which offered the greatest value to the government in terms of technical capability and cost, rather than the offer with the lowest estimated cost; however, the importance of cost in relation to other evaluation factors would increase where the technical proposals were essentially equal.

The record shows that five proposals were submitted and the agency determined that three, including those submitted by MTC and Intelcom, were within the competitive range. Each offeror in the competitive range was given a list of concerns, questions and weaknesses compiled from the source selection panel members' worksheets regarding that offeror's proposal. Following discussions with each offeror and submission of best and final offers by July 23, 1985, the nine members of the source selection panel individually evaluated proposals assigning numerical weights for each criterion in accordance with weights identified in the RFP. MTC's offer, which was based on a price (total estimated cost and fee) of \$8,200,850 for the base 2 years of the cost-plus-award-fee contract, was scored the highest and received a total score of 83.6 points out of a possible 100 evaluation points. Intelcom's offer, although based on a total estimated cost and fee of \$7,098,448, was the lowest rated offer receiving 66.4 evaluation points. The agency advised Intelcom on August 27, 1985, that its offer was rejected and that award would be made to MTC. On September 6, 1985, Intelcom filed a protest with this Office under file number B-220192.1 which was dismissed because the protester did not comply with section 21.1(d) of our Bid Protest Regulations (4 C.F.R. part 21 (1985)) which requires that the agency be furnished with a copy of the protest within 1 day after filing. On September 13, 1985, Intelcom attended a

debriefing at the agency's Seattle Regional Office and, based upon the information received in that meeting, Intelcom proceeded to file a second protest with this Office and also filed a complaint in United States District Court seeking a preliminary injunction staying the effect of the award of the contract to MTC.

The agency contends that Intelcom possessed all information necessary to formulate its protest by September 5, 1985, when it was formally notified by the agency of the reasons for the rejection of its proposal. Thus, the agency asserts that Intelcom's filing with this Office on September 24, 1985, was in fact untimely under 4 C.F.R. § 21.2(a)(2) since it took place more than 10 working days after Intelcom knew or should have known the bases for its protest. However, we consider the protest to be timely because it was filed within 10 working days of the September 13 debriefing, at which the protester became aware of the evaluation of its cost proposal, and because we recognize that a protester may delay filing its protest until after a debriefing where the information available earlier left uncertain whether there was any basis for protest. Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 C.P.D. ¶ 495 at 6. Moreover, since we have been requested by the court for our opinion on the merits, we would consider the protest in any event. See 4 C.F.R. § 21.9(a); A.B. Dick Co., B-211119.3, Sept. 22, 1983, 83-2 C.P.D. ¶ 360 at 4.

Intelcom contends that the agency arbitrarily downgraded its cost proposal and unreasonably selected a higher priced offeror. In this connection, Intelcom argues that if its cost proposal were accorded the maximum nine evaluation points for the evaluation criterion entitled "reasonableness of costs" (it received 4.5 points), its resulting overall score would be considered "technically substantially equal" to MTC's within the meaning of the RFP's selection provision, causing price to become the controlling factor for award. In these circumstances, Intelcom argues that its offered price, which was the lowest of the three offerors, would put it in line for award.

There is no requirement that an agency award a cost-type contract on the basis of the lowest proposed costs. Talley Educational Services, Inc., B-211936, Feb. 14, 1984, 84-1 C.P.D. ¶ 188; Mitek Systems, Inc.-- Request for Reconsideration, B-208786.3, May 10, 1983, 83-1 C.P.D. ¶ 494. Rather, as in any negotiated procurement, award of a contract need not be made to the offeror

proposing the lowest cost unless required by the solicitation. See A.B. Dick Co., B-207194.2, Nov. 29, 1982, 82-2 C.P.D. ¶ 478. Procurement officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. Columbia Research Corp., 61 Comp. Gen. 194 (1982), 82-1 C.P.D. ¶ 8. An agency may make cost versus technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 C.P.D. ¶ 25. The determining element is the considered judgment of the procurement officials concerning the significance of the difference in technical merit among the offerors. Columbia Research Corp., supra. This Office will question that judgment only upon a clear showing of unreasonableness. American Coalition of Citizens With Disabilities, Inc., B-205191, Apr. 6, 1982, 82-1 C.P.D. ¶ 318.

Furthermore, when a cost-reimbursement contract is involved, the risk of a cost overrun is borne by the government. Therefore, proposed costs must be analyzed in terms of their realism since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor actual and allowable costs up to the contract ceiling. Thus, a determination of cost realism requires more than the acceptance of proposed costs as submitted; rather, the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agencies involved, since they are in the best position to assess "realism" of cost and technical approaches and must bear the major criticism for any difficulty or expenses resulting from a defective cost analysis. Since the cost realism analysis is a function of the contracting agency, our review is limited to a determination of whether an agency's cost evaluation was reasonably based and was not arbitrary. See Raytheon Support Services, Co., B-219389.2, supra, at 3, 4.

In this case, the solicitation did not indicate that award would be based on the lowest evaluated cost and it is clear that the protester was not entitled to award simply by having submitted the lowest cost, technically acceptable proposal. See also Lear Siegler, Inc., --Reconsideration, B-217231.2, May 30, 1985, 85-1 C.P.D. ¶ 613. Instead, the solicitation provided that price would be the controlling factor only in the event that proposals were evaluated as "technically substantially equal." Price itself was not an evaluation factor, but the evaluation scheme did allocate

9 points to the "reasonableness of costs"--which the RFP described as an evaluation of the credibility and reasonableness of the cost proposal relative to the technical proposal.

The record shows that Intelcom's best and final offer received 4.5 out of a possible 9 evaluation points under the "reasonableness of cost" criterion. The offer was downgraded for evaluated weaknesses in the areas of Completeness of Cost Data (information provided was insufficient to permit analysis), Adequacy of Support Data (wage survey data provided did not support proposed salaries), and Comparison of Costs Data (protester proposed costs substantially below its current costs as incumbent operator without indicating how such economies would be realized). Intelcom disputes each of these findings, and the protest record contains detailed analyses and responsive arguments on both sides of the cost reasonableness issue. The protester's essential argument is that, had its cost proposal received the additional 4.5 evaluation points available for a maximum 9 points for "reasonableness of cost," its new comprehensive score of 70.9 points would have been "technically substantially equal" to MTC's 83.6 total evaluation point score. Thus, the protester argues that price should have become the controlling factor for award selection. We do not accept the protester's premise that a reduction in the differential between the highest and lowest scored offerors from 17.2 evaluation points to 12.7 evaluation points makes those two offerors "technically substantially equal." As a result, we need not resolve this issue since we conclude as follows that its resolution in the protester's favor still would not provide a basis to invalidate the award to MTC.

As set forth in the RFP, the contracting officer's subjective business judgment, rather than specific point scores, determines whether proposals are "technically substantially equal," that is, the proposals in final ranking are not "markedly superior" to the others. The contracting officer determined that MTC's best and final proposal which received a total score of 83.6 evaluation points was technically superior to both the second ranked offer with 70.5 points and Intelcom's third ranked offer with 66.4 points. Thus, the contracting officer found that the 13.1-point difference between MTC and the second ranked offer and the 17.2-point difference between MTC and the protester constituted technical superiority for MTC's proposal within the meaning of the RFP's award selection provision. Since Intelcom was not technically substantially equal to MTC, it follows that price was not the controlling

factor and the protester's lower evaluated cost was only one factor for the contracting officer to consider in determining which proposal would be most advantageous to the government. The agency asserts that, even if Intelcom were given the additional 4.5 points for cost reasonableness, raising its total score to 70.9, MTC's proposal would still have been considered technically superior and would have resulted in award to MTC. In view of the fact that Intelcom's upgraded score would have been virtually the same as that of the second ranked firm, the record appears to support this argument.

In selecting MTC for award, the agency determined that although Intelcom's price was lower than MTC's, all evaluation materials and scores reflected a clear technical superiority on MTC's part which more than offset the price difference between the two proposals. Furthermore, the agency questioned the realism of several of the protester's projected costs which indicates that the price difference would have narrowed considerably had the agency actually adjusted the protester's costs to what it considered more realistic levels. Although the protester generally feels that the agency was arbitrary in making this determination, it has only offered argument on the agency's cost reasonableness analysis, which, as indicated above, even if resolved in favor of the protester, does not close the remaining 12.7-percent gap of technical superiority between MTC and Intelcom.

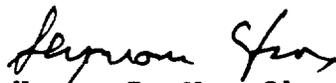
The protester has not offered evidence to show that the agency's technical judgments are in error, arbitrary or otherwise unreasonable--only that it believes they are wrong. Mere disagreement with the technical judgments supporting an agency's assessment of its minimum needs and the best methods for accommodating those needs, however, does not carry a protester's burden to prove that the agency's technical conclusions are unreasonable. See Lear Siegler, Inc.--Reconsideration, B-217231.2, supra, at 5.

In view of Intelcom's failure to provide details or supporting evidence on any evaluation issue other than cost reasonableness, and therefore its failure to support its contention that its overall proposal was technically substantially equal to MTC's, we find no basis to question the contracting officer's determination that MTC's proposal was technically superior to the protester's. We find the award to the technically superior offeror to be reasonable

and consistent with the RFP's award selection criteria which emphasized that technical superiority would be more important than price, and we have no basis for disputing the agency's determination that the final price associated with award to MTC was reasonable. Accordingly, Intelcom's protest of the award to MTC on this basis is denied.

Intelcom also generally alleges that the evaluation in this case was conducted "by individuals with an arbitrary bias against Intelcom." Where, as here, a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the award, the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester, since contracting officials otherwise are presumed to act in good faith. See Lear Siegler, Inc.,--Reconsideration, B-217231.2, supra, at 7. Intelcom has presented no probative evidence to support its allegation in this respect and, since we will not attribute prejudicial motives to such officials on the basis of inference or supposition, we find Intelcom has failed to meet its burden of proof.

Finally, in view of our determination on Intelcom's protest, and since there is no evidence before us that the government acted improperly, there is no basis on which to grant Intelcom's claim for proposal costs and attorney's fees. See Lear Siegler, Inc.,--Reconsideration, B-217231.2, supra, at 8.

for 
Harry R. Van Cleve
General Counsel