

8520

A. Gallagher PL I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20540

FILE: B-184194

DATE: May 26, 1978

MATTER OF: University of New Orleans

DIGEST:

1. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by Government agencies.
2. Composition of technical evaluation panel is matter primarily within discretion of contracting agency. Protester's allegations that panel was not impartial, denied by agency, essentially amount to speculation about possible bias or unfairness, without factual substantiation.
3. Absent showing of fraud or alleged conflict of interest, GAO will not review qualifications of agency technical evaluation panel members.
4. Under Federal Procurement Regulations, agency's conducting negotiations with only one of several offerors in competitive range after receipt of best and final offers is improper. However, protester's allegation that such negotiations occurred in present case, denied by agency and successful offeror, is unsubstantiated where protester presents no evidence to support allegation.
5. Fact that protester proposed greater quantity of labor than successful offeror does not establish that protester was entitled to award. While agency considered quantity of labor in evaluation, RFP evaluation criteria did not emphasize quantity. GAO function is not to evaluate proposals, but to decide on record whether agency's determinations are clearly without reasonable basis. No grounds are seen to support conclusion that agency's evaluation here had no reasonable basis.

B-184194

6. Contention that agency should have discussed difference between quantities of labor proposed by successful offeror and protester in latest phase of lengthy procurement is without merit. Agency was satisfied there was no uncertainty as to what offerors were proposing, and protester had previously received information advising it in what areas agency believed its proposal to be deficient.
7. Where narrative description in RFP indicates that both cost and technical factors would be considered important in making award, such factors are regarded as of substantially equal importance. In negotiated procurement lowest cost is not necessarily determining factor in making award, and no basis is seen for objection to agency's choice of proposal 2.4 percent higher in cost than protester's but rated 44.9 percent higher in technical evaluation scoring. However, GAO believes agency's future RFP's should contain more explicit statement of relative importance of evaluation factors.

The University of New Orleans (UNO) has protested the award of a contract to Research Triangle Institute (RTI) under request for proposals (RFP) No. WA 75-R148, issued by the Environmental Protection Agency (EPA).

This is our fourth decision involving this procurement. A summary of the background facts and circumstances is contained in our third decision (University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201), which sustained an earlier protest by UNO and recommended that EPA reopen negotiations and obtain a new round of best and final offers.

EPA implemented our recommendation. UNO and RTI submitted best and final offers by October 12, 1977. These were technically evaluated and numerically scored by a panel of three EPA employees who,

B-184194

the agency states, had not been previously connected with the procurement. RTI's proposal received 848 points (out of a possible 1,000) and UNO's received 585. RTI's cost-plus-fixed-fee was \$522,842 and UNO's was \$510,456. Award was made to RTI on November 23, 1977. On December 1, 1977, UNO protested to our Office.

Freedom of Information Act Request

UNO asks that our Office determine whether EPA erred in denying the protester's Freedom of Information Act (FOIA) request for certain records of the evaluation of proposals. EPA's technical evaluation has been furnished to our Office as part of the record in the case. However, we have no authority under FOIA to determine what information must be disclosed by Government agencies to the public, DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47, and thus there is no basis for us to review EPA's FOIA decision or to furnish the technical evaluation record to UNO.

A related point is UNO's contention that it is entitled to, but has not received, "full disclosure" from EPA as to why it was not awarded the contract. In this regard, EPA points out that it advised UNO both orally and in writing that the protester could receive a comprehensive debriefing concerning its proposal if it so desired. However, UNO has apparently not availed itself of this opportunity.

Composition of Technical Evaluation Panel

The protester maintains that the technical evaluation of its October 1977 best and final offer was not accomplished by an "impartial mechanism" because two of the EPA evaluators were assigned to the evaluation panel by and were under the "direct administration" of an official in EPA's Office of Toxic Substances (OTS) who was involved in earlier evaluations of UNO's proposal which resulted in bid protests. UNO believes the evaluation should have been conducted outside OTS by "competent authorities."

B-184194

In this regard, the contracting officer states that the two evaluators were neither appointed by, nor do they report to, the OIS official in question, and finds the protester's allegations to be vague and unsubstantiated.

The composition of a technical evaluation panel is a matter primarily within the discretion of the contracting agency. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176; Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458; Department of Labor Day Care Parents' Association, 54 Comp. Gen. 1035 (1975), 75-1 CPD 353. While EPA used a new technical panel to evaluate the proposals in the present case, we have in any event held that, absent evidence of bias, there is nothing intrinsically wrong with an agency using evaluators who were previously involved in evaluating proposals for an earlier phase of a program. Washington School of Psychiatry, supra. In regard to what is necessary to make a showing of bias, we have stated that "It must be emphasized * * * that unfair or prejudicial motives will not be attributed to individuals on the basis of inference or supposition." A.R.F. Products, Inc., 55 Comp. Gen. 201, 208 (1976), 76-2 CPD 541; see also Joseph Legat Architects, supra; Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 385-388 (1975), 75-2 CPD 232. We believe UNO's allegations basically amount to speculation about possible bias or unfairness on the part of EPA evaluators, without any factual substantiation.

UNO also alleges that an EPA contract manager's training manual establishes a policy that no two members of a proposal evaluation panel may be from the same organization. EPA denies that it has any such policy, and we have been unable to identify what document UNO is referring to. In any event, we have held that internal agency guidelines concerning the composition of a technical evaluation panel do not create any substantive rights in offerors, and thus a protester has no basis to raise an objection that such guidelines were not followed. See Kirschner Research Institute, et al., B-186489, B-186492, September 27, 1976, 76-2 CPD 289.

B-184194

Qualifications of Technical
Evaluation Panel Member

UNO next contends that one of the evaluators was an engineer and thus lacked the appropriate technical background to evaluate proposals for a research study of halogenated organic substances in the environment and their epidemiology. In this regard, absent a showing of fraud or allegations of conflict of interest, our Office will not become involved in examining the qualifications of an agency's technical evaluation panel members. See Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206; Joseph Legat Architects, *supra*; Gloria G. Harris, B-188201, April 12, 1977, 77-1 CPD 255; Emventions Inc. - Request for Reconsideration, B-183216, November 28, 1975, 75-2 CPD 354. No allegations of fraud or conflict of interest are involved with respect to the engineer's participation in the evaluation in the present case.

Alleged Improper Negotiations

UNO also suggests that EPA may have conducted negotiations with RTI after best and final offers were received in October 1977.

As noted in 56 Comp. Gen. 958, *supra*, our decision on a prior protest by UNO concerning this procurement, an agency's conducting negotiations after receipt of best and final offers with only one of several offerors in the competitive range is improper under the Federal Procurement Regulations (FPR's). However, UNO has offered no evidence to support its allegation, and both EPA and RTI have flatly denied that any such negotiations took place. RTI has stated that its only contacts with EPA after submission of its best and final offer were several telephone calls it initiated to inquire when an award decision might be made. RTI states that in each instance the contracting officer declined to give it any information, and the conversations were thereupon terminated. In this light, UNO's allegations of improper negotiations are unsubstantiated on the record.

B-184194

Parenthetically, we note that EPA's January 20, 1978, report requested clarification of 56 Comp. Gen. 958. EPA states that it had developed a negotiation procedure in which one offeror is selected after best and final offers for final negotiations, and that our Office, at EPA's request, had commented on the procedure in August 1977 without objecting to this aspect of it. However, our August 1977 comments were on a draft EPA negotiation procedure. Moreover, EPA's report on the protest considered in 56 Comp. Gen. 958 made no mention that any special negotiation procedure had been used in the procurement, nor had the RFP advised offerors of that fact. It was not until January 1978 that our Office was officially informed that the draft EPA negotiation procedure we commented on in August 1977 had in fact been used in the previous phase of this procurement in March, April and May 1977. In these circumstances our decision in 56 Comp. Gen. 958 was based upon the pertinent provisions of the FPR's and well-established precedent interpreting and applying them.

Evaluation and Selection

UNO maintains that it should have received the award because its proposal was technically acceptable, offered the lowest cost, and proposed 78 percent more professional man-hours than RTI's proposal (40,044 hours for UNO and 22,528 for RTI).

As we observed in our first decision concerning this procurement (University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22) the criteria for the evaluation of proposals and the selection of a contractor are as set forth in the RFP, consistent with applicable procurement regulations. UNO points out that FPR § 1-3.805-1 (1964 ed. amend. 153) provides that award of a contract may properly be influenced not only by lowest cost but by considerations such as which proposal " * * * promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors." However, this regulation is to be applied within the framework of the RFP evaluation

R-184194

criteria in making a determination as to which proposal is most advantageous to the Government, price and other factors considered.

Amendment No. 2 to the RFP, dated January 5, 1977, provided that in addition to cost certain technical categories would be considered in the evaluation, and established a numerical scoring scheme. Several of the categories dealt with personnel training and experience (totaling 400 evaluation points); other categories involved equipment and facilities (100), appropriateness, completeness and adequacy of work plan development (250), knowledge of subject (100), grasp of desired output of study (100), and completeness and conciseness of work plan (50).

The RFP required offerors to identify types of personnel and proposed man-days, but it did not require that any specific minimum quantity of effort be proposed. Moreover, it is apparent that the RFP technical evaluation categories did not indicate that any particular emphasis or weight would be placed in the evaluation on the quantity of effort proposed per se. In this regard, EPA states that while the proposed quantity of labor was taken into consideration in the evaluation, this was not, given the RFP evaluation criteria, its primary concern.

We note that the same contention with regard to the quantity of proposed labor was raised by UNO in a prior protest concerning this procurement. It was not necessary to consider the contention earlier because our decision (56 Comp. Gen. 958, supra) sustained UNO's protest on other grounds. However, the record developed in that protest indicates that EPA's evaluators believed RTI's proposed quantity of labor to be reasonable and its proposed costs to be realistic. The evaluators, on the other hand, had difficulty determining from the proposal work plan how UNO's proposed quantity of labor would actually be utilized. The RFP in this regard had emphasized that offerors take "special care" to adequately describe in their proposals how they

B-18419.

intended to conduct the study contemplated by the RFP Scope of Work. The record indicates that the newly-appointed technical panel which evaluated the proposals in the current phase of the procurement had similar difficulties in understanding UNO's utilization of its proposed quantity of labor.

In short, the quantity of effort proposed was a matter to be taken into consideration in the technical scoring of proposals. It is not our Office's function to evaluate proposals, nor will we become involved in substituting our judgment for that of the agency as to the precise numerical scores which should have been assigned to offerors' proposals. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 68-69 (1975), 75-2 CPD 60. Our function is to examine the record and consider whether the agency's determinations in the technical evaluation--which are entitled to considerable weight--clearly have no reasonable basis. Joseph Legat Architects, supra, and decisions discussed therein. We see no grounds to conclude that EPA's determinations in regard to evaluating the quantity of labor proposed by UNO and RTI clearly had no reasonable basis. Thus, UNO's contention that it was entitled to the award because it proposed a greater quantity of labor than RTI is without merit.

UNO also alleges that the tremendous discrepancy in proposed quantity of professional man-hours between UNO and RTI should have been discussed by EPA, because FPR § 1-3.805-1(a)(5) provides that award shall not be made without further exploration or discussion where there is uncertainty as to the pricing or technical aspects of any proposals.

We note that the cited section of the FPR's deals with the requirements for making an award on the basis of the initial proposals (without any negotiations), whereas the present case involves an award made after discussions or negotiations had been conducted and best and final offers submitted. In any event, EPA states that in its view there were no uncertainties requiring further discussion. It

B-184194

must be noted that the present procurement is the latest phase of a procurement action which began several years ago and in which discussions have previously been conducted. Also, EPA points out that UNO " * * * had the rare advantage of having acquired [during a prior protest] at least one of the detailed technical evaluations previously performed on his proposal [and] thus possessed detailed information on his previous deficiencies and omissions and unique insight into the Government's thinking." This is significant because it appears that UNO's October 1977 best and final offer was basically a resubmission of the proposal UNO had previously presented to EPA. In the circumstances, we see no merit in UNO's objection.

UNO next contends that since its proposal was judged technically acceptable, " * * * the matter should have come down to price." However, it is well established that in a negotiated procurement lowest cost is not necessarily the determining factor in making an award, and that an agency may properly select a higher-rated technical proposal at higher cost if the agency reasonably determines that the superior performance expected from the offeror justifies the additional cost involved. See FPR § 1-3.805-2. Olin Corporation, Energy Systems Operations, B-187311, January 27, 1977, 77-1 CPD 68; Houston Films, Inc. (Reconsideration), B-184402, June 16, 1976, 76-1 CPD 380; Augmentation Incorporated, B-185137, March 16, 1976, 76-1 CPD 179; Applied Management Sciences, Inc., B-184654, February 18, 1976, 76-1 CPD 111; Riggins & Williamson Machine Company, Inc., et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; and Systems Consultants, Inc., B-179825, March 12, 1974, 74-1 CPD 128. In making this kind of tradeoff, agency officials are accorded " * * * a considerable range of judgment and discretion * * *," EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338, and their judgment will not be disturbed by our Office unless clearly without a reasonable basis.

B-184194

As the EPSCO decision also points out, in making a source selection the relative importance which the RFP attached to price or cost versus technical factors must be considered. The present RFP stated that technical proposals would be evaluated to determine their acceptability, and would be scored in accordance with the technical criteria, discussed supra, which were described at some length. It further stated that offerors' proposed costs would be separately considered, and indicated that technical advantages or disadvantages could offset cost differentials. Finally, it stated that the award made would be the one most advantageous to the Government, "price and other factors considered."

While the RFP did not contain any explicit statement as to the relative importance of cost and technical factors, we believe it did indicate that both would be considered important in making a selection. Absent any contrary indication in the RFP, they would therefore be accorded substantially equal weight. 52 Comp. Gen. 686, 690 (1973). In these circumstances, with RTI's proposal being 2.4 percent higher in cost than UNO's but rated 44.9 percent higher in the technical scoring, we see no grounds to conclude that EPA's decision to award to RTI clearly had no reasonable basis. UNO's contention that it was entitled to award because its proposal was technically acceptable and lowest in cost is accordingly without merit.

While we have no objection to EPA's selection, we do think that EPA's future RFP's for this type of project should contain a more explicit indication of the relative importance of the evaluation factors. Offerors are entitled to know whether a procurement is intended to achieve a minimum standard at lowest cost, whether cost is secondary to technical quality, or whether the two are of equal importance. See Iroquois Research Institute, 55 Comp. Gen. 787, 790-791 (1976), 76-1 CPD 123. An explicit statement as to relative importance of the evaluation factors is preferable as a matter of sound procurement policy, because otherwise offerors are placed in

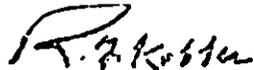
B-184194

the position of having to interpret the RFP's narrative description of the evaluation factors and reasonably judge their relative importance. See GDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237. By letter of today, we are calling this observation to the attention of the EPA Administrator.

Finally, UNO's references to FPR § 1-2.407-1 (1964 ed. amend. 1.9) and other provisions in FPR Part 1-2 (1964 ed. as amended) are not pertinent to the issues involved here, as this portion of the FPR deals with formally advertised procurements, whereas the present procurement was negotiated.

Conclusion

The protest is denied.


Deputy Comptroller General
of the United States