

**DECISION**



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

**FILE: R-203808**

**DATE: August 19, 1982**

**MATTER OF: Todd Logistics, Inc.**

**DIGEST:**

1. Protest of transportation services contract awarded by Corps of Engineers pursuant to country-to-country agreement under Engineers Assistance Agreement of 1965 is reviewable by GAO. Procurement was conducted pursuant to Defense Acquisition Regulation, and GAO will review matter to ensure that procuring activity has complied with standards enunciated in the Defense Acquisition Regulation.
2. Bias in evaluation of proposals will not be attributed to an evaluation panel on the basis of inference or supposition. Where written record is devoid of any evidence that procurement officials were biased against protester, protester has not carried its burden of proof.
3. It is not GAO's policy to conduct investigations as part of our bid protest function to establish the accuracy of a protester's speculative statements.
4. Where record indicates that evaluation of protester's proposal was in accordance with established criteria set forth in solicitation and the evaluation had a reasonable basis, protest based on offeror's disagreement with evaluation and charge that evaluators were biased is denied.
5. Award may be made without discussions where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions will result in fair and reasonable prices provided the solicitation so advises. Furthermore, since present procurement was on a cost-reimbursement basis, agency conducted cost analysis and

compared initial cost proposal of awardee to its independent Government cost estimate. In these circumstances, award on initial proposal basis is justified.

Todd Logistics, Inc. (Todd), protests against award of a contract to a joint venture composed of Daniel F. Young, Inc., Santini Brothers, Inc., and SPU Limited (hereinafter referred to as Young) pursuant to request for proposals No. DACA91-81-R-0012 issued by the Army Corps of Engineers, Engineer Logistics Command, on behalf of the Saudi Arabian Government, for furnishing transportation services to move materials and equipment from various locations worldwide to Saudi Arabia.

Todd charges that, because of false statements made by Todd's "former disgruntled employees" concerning, among other things, allegedly improper and fraudulent billing by Todd under the predecessor contract, the procurement officials involved in evaluating the proposals were biased against Todd and, therefore, did not evaluate Todd's proposal in accord with the solicitation's stated evaluation criteria. Todd contends that this pattern of prejudice emerged in a number of transactions between Army procurement officials and Todd in the latter months of 1980 and continued throughout the entire procurement process. In response, the Army urges dismissal of the protest on the basis that this is a foreign military sale outside our jurisdiction or, in the alternative, that the protest should be denied because the protester has alleged, but not proved, bias on the part of the evaluators and because the Todd proposal was evaluated in full accord with the criteria set forth in the request for proposals.

We conclude that this protest matter is within the scope of our concern, but we find that the protest is without merit.

Regarding dismissal, the Army explains that the procurement is governed by a country-to-country agreement entitled the Engineers Assistance Agreement of 1965 rather than a "Letter of Offer and Acceptance" commonly used for foreign military sales under the Arms Export Control Act. The Army states that funding for the procurement is provided in advance by the Saudi Arabian

Government and that a Treasury Trust Fund account is used only to control program expenditures. In these circumstances, the Army contracting officer expresses concern over potential difficulties arising from a GAO recommendation for corrective action. Further, the Army cites our decision in Mandex Incorporated, B-204415, October 13, 1981, 81-2 CPD 303, as precedent for dismissing this protest.

Our decision in Procurements Involving Foreign Military Sales, 58 Comp. Gen 81 (1978), 78-2 CPD 349, announced our intention to review, upon request of prospective contractors and other interested parties, the propriety of awards and proposed awards made by Department of Defense personnel acting under authority of the Army Export Control Act (formerly the Foreign Military Sales Act), 22 U.S.C. § 2751, et. seq. (1976). Even though the present procurement was authorized by a country-to-country agreement using Saudi Arabia's funds, we recently held that we would review this type of procurement where conducted pursuant to the Defense Acquisition Regulation (DAR), in order to ensure that the procuring activity has complied with the standards enunciated in the DAR. Saudi Maintenance Company, Ltd., B-205021, June 8, 1982, 82-1 CPD 552. Furthermore, we indicated in the June 8, 1982, decision that the Mandex decision is not precedent for dismissal because, there, we were persuaded by the Department of the Treasury that we were dealing with deposit fund accounts which, unlike trust fund accounts, were not the subject of legislation and were not established for a public purpose or public trust.

Turning to the merits of the protest, Todd has attempted to show a pattern of prejudice by describing in great detail a number of its dealings with the contracting officer and other Army officials in support of its charge that Army officials were prejudiced against Todd and, consequently, that it was not given a fair opportunity to compete for this contract. While we have carefully reviewed all of Todd's accusations concerning bias, we will only summarize the more serious charges here to highlight those transactions which, in our view, best illustrate the reasons why Todd thinks this entire procurement process was biased against Todd.

Todd had been performing similar services for the Corps of Engineers for over 4 years immediately preceding the award to Young under the present solicitation.

Todd's latest contract for performing logistics management services and shipping cargo for the Corps was a 1-year, cost-plus-award-fee contract which contained four 1-year options. The Corps had twice exercised its options under Todd's contract, extending the performance period to March 30, 1981. According to the president of Todd, he met with the contracting officer and his staff on several occasions in October 1980 and understood that Todd's contract was to be extended for 9 months. In fact, the president of Todd reported that on October 4, the contracting officer had offered Todd a 9-month extension, which he had accepted on behalf of Todd. On November 9, however, the contracting officer notified Todd that there had been a "misunderstanding" and that no decision concerning an extension of Todd's contract had been made.

Todd learned in the months that followed that "former disgruntled employees" had made allegations against Todd concerning ineffective performance under its contract with the Corps, fraud, bribery, and Todd's imminent bankruptcy. Todd charges that Army procurement officials relied upon these falsehoods without properly investigating them. Todd further contends that the contracting officer reversed his decision to extend Todd's contract and decided to compete the follow-on contract because he believed the unfounded allegations.

The Army reports that the contracting officer's decision not to exercise the Todd option for a third 1-year period was unrelated to any allegations made by former Todd employees. The contracting officer states that the actual reason he decided to compete this follow-on contract was because the inland portion of the requirement had to be deleted at the direction of the Saudi Arabian Government and because the estimated volume of cargo had been reduced significantly. The contracting officer readily admits discussions with the president of Todd, in October 1980, concerning the possibility of a 9-month extension, but states that such extension never was consummated because of the above changes in the cargo shipping requirement. The Corps vehemently denies that this decision was the result of a "calculated series of deceptions" as alleged by Todd.

In any event, solicitation No. DACA91-81-R-0012 was issued on December 24, 1980, calling for proposals on a cost-plus-award-fee basis for a 2-year period in support

of a multi-billion-dollar military construction effort managed by the Corps of Engineers in Saudi Arabia. Nineteen proposals were received. The evaluation of proposals included technical, experience, and estimated cost as factors. Initial evaluation resulted in Young receiving a total score of 86.3, while Todd received a total score of 85.5, and all other offerors received lower total scores (ranging from 81.9 to 9.9). The lowest estimated cost was offered by Transnational Shipping Corporation. Todd's estimated cost of \$16,106,428 was the second lowest, while Young's estimated cost of \$18,224,669 was the seventh-ranked cost proposal.

The Corps decided to award the contract on the basis of initial proposals in spite of the closeness of the two highest evaluations. Todd alleges that this is yet another example of the bias which the contracting officer had against awarding to Todd. Todd further points out that the chairman of the technical evaluation board generally gave Todd the lowest rating in each subcategory. Todd believes this to be significant for two reasons: (1) the chairman had allegedly indicated to Todd's representatives on May 27, 1981, that he believed the allegations against Todd and (2) the chairman would have a great amount of influence over other members of the technical evaluation board, especially those with less knowledge about the cargo shipping field.

The Corps reports that the decision to award on the basis of initial proposals was based upon several factors: (1) there had been adequate competition; (2) it was the source selection chairman's opinion that discussions with the two top-rated offerors would not be likely to result in any change in the ranking of these proposals; (3) there were no significant points in either of the top-rated proposals which necessitated discussions; and (4) the requirement was considered to be urgent because Todd's contract had expired and Todd was performing for 90 days only under the "Continuity of Services" clause of its contract. The Corps emphatically denies that the decision to award on the basis of initial proposals was the result of prejudice against Todd. Furthermore, the Corps argues that examination of the evaluation scoresheets shows no bias on the part of the chairman of the technical evaluation board or any of its members and that board members were experienced in transportation matters.

Todd contends that it underwent a preaward survey which resulted in it being held to be nonresponsible. Todd argues that this negative recommendation was again the result of bias on the part of Corps officials. The Corps refutes Todd's assertion and explains that preaward surveys were conducted simultaneously on both Todd and Young in order to save time in the event that Young was held to be nonresponsible and, therefore, not eligible for award. The Corps points out that the preaward survey was conducted by the Defense Contract Administration Services Management Area (DCASMA)--an objective, outside group which was generally unfamiliar with Todd's operation (with the exception of one individual who coordinated the survey on behalf of the Corps' Engineer Logistics Command). The Corps also points out that the negative rating was not given Todd in any area related directly to ability to perform, but, rather, was the result of Todd's refusal to provide DCASMA with access to its affiliated subcontractors' books and records to accomplish accounting system review. In this regard, Todd asserts that it had a legal right to prevent access to such records and that the request for such information again shows that Corps officials were biased and believed the allegations concerning Todd's billing practices.

Finally, Todd requested a debriefing after being informed that Young had been awarded the contract, but the Corps initially refused to give Todd a debriefing. The Corps refused to debrief Todd because Todd had filed a protest, and the Corps indicated it would only debrief Todd after the protest was resolved. Todd cites this as still another example of the unfair treatment it consistently received from Corps procurement officials. The Corps of Engineers eventually debriefed Todd on August 5, 1981, but only after Todd raised this issue in its protest before our Office.

The above allegations are relevant to our consideration of whether the evaluation of proposals was conducted fairly. However, we will not decide whether the contracting officer should have exercised Todd's option because, as we have held on many occasions, where an option is exercisable at the discretion of the Government, issuance of a new solicitation is a matter of contract administration and is not for consideration under our Bid Protest Procedures (4 C.F.R. part 21 (1982)). See, for example, Logistical Support, Inc., B-203741, July 8, 1981, 81-2 CPD 22. Furthermore, we will not

review the negative results of the preaward survey, because the preaward survey never resulted in a negative determination of Todd's responsibility and was not the reason that Todd was not awarded this contract. Rather, Todd lost the competition on the basis of Young receiving a better evaluation score. Therefore, the negative preaward survey is essentially an academic issue. Similarly, since the Army has now debriefed Todd, the issue of the failure to give Todd a debriefing has been rendered academic. Media Works, Inc., (B-204602.2, January 19, 1982), 61 Comp. Gen. \_\_\_, 82-1 CPD 42. We will examine, however, these charges insofar as they may manifest a general atmosphere of prejudice and unfair treatment of Todd during the procurement process and in the evaluation of proposals, in particular.

Even where bias is shown, we will deny a protest if there is no indication that the bias adversely affected the protester's competitive standing. Earth Environmental Consultants, Inc., B-204866, January 19, 1982, 82-1 CPD 43; Art Services and Publications, Incorporated, B-206323, June 16, 1982, 82-1 CPD 595. The critical test for determining bias in the agency's evaluation of proposals is whether all offerors in the competition were treated fairly and equally. However, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. See Pioneer Contract Services, Inc., B-197245, February 19, 1981, 81-1 CPD 107, and cases cited therein. Where the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. In this respect, we must note that, where the subjective motivation of an agency's procurement personnel is being challenged, it may be difficult for a protester to establish--on the written record which forms the basis for our Office's decisions in protests--the existence of bias. Pioneer Contract Services, Inc., supra.

We are not persuaded by the transactions enumerated above that Corps of Engineers officials were biased against the protester. Apparently, the allegations against Todd by its former employees were rather serious. The Corps of Engineers either investigated the charges itself or referred the matter to appropriate investigative agencies. Regardless of whether the rumors were true, this was a prudent course to follow. Since

the present procurement was being conducted simultaneously with investigations into the charges against Todd, it is entirely possible that the contracting officer, evaluators, and preaward survey team members knew some of the allegedly false rumors that had been circulating about Todd. This alone is not sufficient for our Office to infer that these Government officials were prejudiced against Todd. Moreover, the written record is devoid of any evidence that procurement officials were biased against Todd. Todd maintains that Corps of Engineers officials would be unlikely to document a record replete with prejudice and partiality. Todd also maintains that the chairman of the technical evaluation board admitted that he believed the charges against Todd. However, in the face of the Army's denial of these officials being biased or of bias having influenced procurement decisions, we cannot find that the protester has proved its case. See Pioneer Services, Inc., supra.

The protester has requested that we conduct an investigation to ascertain the truth behind its allegations. However, it is not our policy as part of our bid protest function to conduct an investigation to determine the accuracy of a protester's speculative statements. See Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Moreover, each of the transactions enumerated above could easily have been motivated by something other than bias. In any event, the protester has failed to carry its burden of proof regarding its charge of bias.

Regarding the evaluation of proposals and the decision to award on the basis of initial proposals, it should be noted that it is not the function of our Office to reevaluate technical proposals. However, we will examine the record to determine whether the judgment of the contracting agency was clearly without a reasonable basis. See Ridgeway Electronics, Inc., B-199557, January 13, 1981, 81-1 CPD 21. Moreover, even though agencies are required to point out deficiencies or excesses in an offeror's proposal, the extent and content of discussions is primarily a matter of procuring agency judgment. See University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50.

The evaluation criteria set forth in the request for proposals stated that proposals would be evaluated in three general areas: technical, experience, and cost.

The technical area was to be twice as important as either experience or cost, which were to be given equal weight. Various subfactors were listed under each general evaluation area. Todd charges that the technical evaluation board did not follow the criteria of the request for proposals and added factors which were not stated in the request for proposals. We have reviewed the request for proposals, the evaluation plan, the individual scoresheets (consisting of narrative and quantitative ratings), and the memoranda of negotiations (including the comparisons of both the Young and Todd cost proposals to the independent Government estimate) in light of the allegation that the evaluators were biased. We cannot conclude that the Corps' actions were without a reasonable basis.

In accordance with the request for proposals, evaluators were to award each offeror's proposal up to a total of 50 points for subfactors under the heading of technical (including internal operating procedures, facilities and equipment, management, and administration) and up to 25 points for experience (including recent successful experiences related to a reasonably comparable requirement and professional credentials of key personnel). Four evaluators independently rated each offeror and an average rating was computed in each area. Offerors' names were deleted from each proposal in an effort to prevent bias from becoming an influencing factor. (We recognize that deletion of offerors' names would not prevent knowledgeable evaluators from figuring out which proposal was submitted by which firm.) Cost proposals were independently compared to the Government estimate and examined to determine whether they were representative of the probable actual cost to perform. Cost proposals were also given a quantitative value of up to 25 points (the lowest costing proposal received 25 points and less points were awarded as the estimated costs rose). The scores for all three areas were added together to arrive at a total evaluation score.

Todd charges that the chairman of the technical evaluation board was biased because he had already decided to believe the allegations against Todd. We have examined the scoresheets and found no discernible pattern which would indicate bias on the part of this official. While he frequently rated Todd lower than other evaluators, he also frequently rated Young lower than the other evaluators.

The scoresheets show that, overall, Young was rated 4.2 points better than Todd in the technical and experience areas. This difference was primarily attributed to the fact that Young, as a joint venture of three corporations, had advantages in the scope of its international experience because: (1) its export facilities were more widely spread in major cities worldwide, (2) it could provide greater flexibility in meeting fluctuating operational needs, and (3) it had superior export and handling facilities outside of the continental United States as required in the request for proposals at section "c," paragraph 2.1.3. Furthermore, the narrative reports and scoresheets show that Young was rated "very good" in the subcategory of "credentials," while Todd was rated only "average" in this subcategory; this difference was due in large measure to the perceived better organizational structure presented by Young and because Todd had not made clear which of its personnel would perform in which major functional areas.

Based upon our review of the above information, we cannot find that the results of the evaluation were without a reasonable basis. Nor do we find any indication that the evaluation was biased against Todd or in favor of Young. Accordingly, the protest is denied on this point.

Todd also charges that the contracting officer improperly made award to Young on the basis of initial proposals without discussions. Due to the extreme closeness of the overall total scores (86.3 for Young and 85.5 for Todd), Todd believes discussions were mandatory. We do not agree.

In negotiated procurements, discussions are generally required to be conducted with offerors within a competitive range except in certain specified instances. We have held that award may be made without discussions where the record supports the existence of adequate competition (or there is accurate prior cost experience with the product or service) to ensure that award without discussion will result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions. Centurion Films, Inc., B-205570, March 25, 1982, 82-1 CPD 285. This exception has been incorporated into the Defense Acquisition Regulation in section 3-805.1(a)(v) (1976 ed.).

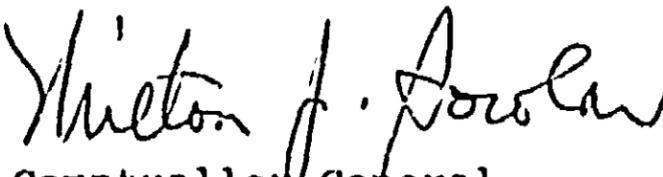
The present solicitation provided for possible award without discussions in paragraph 10(g) of the General Instructions. The Corps made the award on an initial proposal basis because of urgency and the short time-frame in which to conduct discussions. Todd's contract had expired on March 31, 1981, and Todd was performing during a phaseout period for only 90 days. Moreover, Young had been rated the highest in an evaluation which included estimated cost as part of the total point score. Also, because this was to be a cost-reimbursement contract, the Corps was required to compare Young's proposed costs to the Corps' own independent cost estimate. This cost analysis showed Young's proposed costs to be reasonable. Finally, the Corps determined that discussions, if held, were unlikely to change the ranking of the two top-rated offerors. The Corps' technical/experience evaluation had found both Young and Todd to be extremely well qualified with no significant flaws which would have to be raised in discussions. We also note that 19 proposals were received in this competition. In these circumstances, we think that award on an initial proposal basis without discussions was justified. See Shapell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161.

Finally, we would be remiss if we did not comment upon the fact that the Corps of Engineers was willing to spend over \$2 million more to award to Young when the difference in total evaluation scores was only 0.8 on a scale of 100. We have held that, where cost is assigned points as an evaluation factor along with other factors, the fact that a proposal receives the highest number of points does not in itself justify acceptance of the highest rated proposal without regard to price. See Timberland-McCullough, Inc., B-202662, B-203656, March 10, 1982, 82-1 CPD 222, and cases cited therein. The basis for the selection must be stated or otherwise indicated in the record. The University Foundation, California State University, Chico, B-200608, January 30, 1981, 81-1 CPD 54. Here, the Corps did not make a formal determination that the extra costs associated with Young were justified in order to award to the offeror with the greater technical and experience rating. However, we find that such a determination could have been made and that the Corps did, in fact, consider this matter before awarding to Young.

First, the Timberland-McCullough case concerned a contract to be awarded on a fixed-price basis with price

and technical to be weighted equally in the evaluation process. Here, cost and experience were only to be weighted at half the value of technical. Thus, the cost factor alone was only one-third as important as technical and experience combined. By subtracting out the points awarded for cost from the total evaluation scores, we find that Young was rated 4.2 points, or approximately 7 percent, higher than Todd in the technical/experience areas. The costs associated with Young were approximately 13 percent more than Todd's proposed costs. Since technical/experience were three times more important than cost, the extra expenditure was indeed justified. Furthermore, the Corps compared both offerors' cost proposals to its own estimate and determined that Todd's proposed costs were underrepresented. Therefore, Todd actually had been given an inflated score for its cost proposal which made the initial total evaluation scores very close. In these circumstances, we find that the award to Young, the higher cost offeror, was justified.

The protest is denied.

for   
Comptroller General  
of the United States