

DECISION

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

FILE: B-212403.3, B-213020, **DATE:** July 24, 1984
B-213043
MATTER OF: PAE GmbH

DIGEST:

1. GAO will not question a nonresponsibility determination unless protester demonstrates bad faith by the contracting agency or lack of any reasonable basis for the determination.
2. Protest against a deviation in the evaluation of offers is not sustained where the deviation did not operate to deny protester an award.
3. GAO will not become involved in appraising the qualifications of contracting agency personnel involved in the technical evaluation of offers except on a showing of fraud, bad faith, conflict of interest or actual bias.
4. Bias will not be attributed to procurement officials based on inference or supposition.
5. No pattern of discrimination against protester is found where determination that protester was not responsible contractor on two contracts was not without reasonable basis and award under third contract was to contractor whose offer was found to be better overall. Although contracting officer did not request preaward survey on contractor awarded third contract, while preaward was requested on protester in connection with other two contracts, matter of whether preaward surveys are conducted is within broad discretion of contracting officers.

PAE GmbH (PAE) protests the rejection of its offers under requests for proposals (RFP) Nos. DAJA37-83-R-0473 and DAJA37-83-R-0542 and request for quotations (RFQ) No. DAJA37-83-Q-0017.

We deny the protests.

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The contracting officer rejected PAE's proposal under RFP No. DAJA37-83-R-0473 on the basis that PAE was nonresponsible.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. S.A.F.E. Export Corporation, B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437.

The determination of nonresponsibility in this case was based, in part, on a finding that PAE lacked sufficient labor resources, particularly key personnel.

PAE contends that the determination was made in bad faith. The basis for the contention is that the determination was made on August 15, 1983, but that same day PAE was requested by phone to furnish by August 16 documentation as to management and key personnel that would be utilized, so that the contracting officer made the determination without waiting for the receipt of the documentation. Further, PAE contends that the short time span provided to furnish the documentation is additional evidence of bad faith. PAE also contends that the contracting agency demonstrated bad faith by allegedly falsifying evidence as to its past performance.

PAE had not furnished letters of commitment from key personnel with its proposal as required by the RFP. Also, the record of the phone request for the information indicates that PAE stated that it would take about a week to provide the documentation and, in fact, the required information was not furnished by that time. Therefore, PAE was not prejudiced by the determination being made on August 15. Further, it was not unreasonable for the contracting officer to make the determination of nonresponsibility on August 15 given the fact that the award had to be made on August 30 to allow 30 days for the phase-in of the contract which was to commence on October 1 and the need to negotiate the contract in the interim between August 15 and August 30. In view of the short time that remained between the August 1 closing date for receipt of proposals and the August 30 award date, the contracting officer decided to make the responsibility determination before engaging in negotiations for the contract. As to the alleged

falsification of PAE's past performance record, the contracting officer's determination was not based upon PAE's past performance and the falsification is alleged to have occurred about November 2, 1983. Therefore, it is not germane to the August 15 nonresponsibility determination.

Accordingly, the contracting officer's determination of nonresponsibility does not appear to have been made in bad faith or without a reasonable basis.

PAE's proposal under RFP No. DAJA37-83-R-0542 also was rejected on the basis that PAE was nonresponsible.

The determination of nonresponsibility in this case was based, in part, on a finding that PAE would not be able to hire capable or qualified personnel because of the exceedingly low wages it proposed to pay.

PAE denies that its labor rates were too low. However, PAE did not present any evidence that shows that it would have been able to hire competent staff at the wage rates it proposed.

The determination of nonresponsibility does not appear to be without a reasonable basis. In the circumstances, while PAE objects to other aspects of the nonresponsibility determination, on the grounds that they are unsupported and that the determination with regard to them was made in bad faith, we find it unnecessary to consider those objections.

PAE's proposal under RFQ No. DAJA37-83-Q-0017 was rejected because another offeror's proposal was determined to be better.

PAE objects to the rejection on several grounds.

First, PAE contends that its quotation was not properly evaluated. The Army concedes that the quotations were not evaluated in complete compliance with the evaluation plan, but contends that the deviation was minor and did not prejudice the protester.

Paragraph M-1 of the RFQ provides:

"Award will be made to the offeror whom the Government determines meets the stated requirements, and whose proposal is judged to be most advantageous to the Government based upon the source selection evaluation criteria set forth below."

Paragraph M-2 sets forth the evaluation areas and relative weights. The evaluation is divided into three factors: technical adequacy, program management, and cost and fees. The factors are subdivided into several related subfactors. Technical adequacy is weighted more than twice as important as cost and fees, and program management is weighted almost twice as important as cost and fees. The factors and subfactors were assigned numerical values in the Source Selection Evaluation Plan (SSEP) utilized by the Source Selection Evaluation Board (SSEB) in the evaluation of quotations.

Past performance was a subfactor under both technical adequacy and program management and was assigned a maximum of 125 points under each factor in the SSEP.

The Army states that the SSEB considered evaluation of past performance under both factors as needlessly duplicative and dropped 125 points from the evaluation.

The Army alleges that the deviation from the SSEP did not constitute a change from the evaluation in the RFQ since the past experience of all offerors was evaluated in both areas, the only deviation being that a maximum of 125 points was assigned to both areas rather than 250 points.

The SSEB was composed of two panels, a cost evaluation panel and a technical/management evaluation panel. The technical management evaluation does not show what weight was given to past performance in each factor. Since technical past performance is different than management past performance, it appears that relative standings of offerors could be affected. Once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme. Kirk-Mayer, Inc., B-208582, Sept. 2, 1983, 83-2 C.P.D. ¶ 288.

The record of the evaluation shows that the evaluation panel considered both technical and management past performance together. Consequently, it does not appear that the Army deviated from the evaluation communicated to the offerors in the RFQ.

In any event, the record also shows that PAE's total evaluation score was more than 125 points less than the evaluation score of the successful offeror. Therefore, even if PAE received a full additional 125 points for past performance and the successful offeror received none, PAE's

evaluation score would still have been less than the score of the successful offeror. Consequently, PAE was not prejudiced by the point score change. See Lingtec, Incorporated, B-208777, Aug. 30, 1983, 83-2 C.P.D. ¶ 279.

Next, PAE contends that the chairman of the technical/management evaluation panel was not qualified to act because he has no prior experience in either operating or administering government operations and management contracts or in evaluating proposals for such contracts. The Army contends that the chairman of the evaluation panel was well qualified because he is a graduate engineer who has been employed in positions which qualified him for the duties of chairman of the panel.

Although the Army did not identify the qualifying positions of employment, our office will not become involved in appraising the qualifications of contracting agency personnel involved in the technical evaluation of offers except on a showing of fraud, bad faith, conflict of interest or actual bias. See Crown Point Coachworks and R & D Composite Structures; North American Racing Company, B-208694 et al., Sept. 29, 1983, 83-2 C.P.D. ¶ 386; Cadillac Gage Company, B-209102, July 15, 1983, 83-2 C.P.D. ¶ 96.

PAE alleges that the chairman was biased against PAE because he was involved in a termination for default of a contract with PAE. The termination for default was subsequently changed to a termination for convenience. However, bias will not be attributed to procurement officials based on inference and supposition. Martin-Miser Associates, B-208147, Apr. 8, 1983, 83-1 C.P.D. ¶ 373. PAE has not shown any actual biased action by the chairman on this procurement.

PAE also alleges that the contracting officer was not in a position to make a qualified decision for the award, since he was assigned as contracting officer only after best and final offers had been requested by the preceding contracting officer. However, the Army contends that the successor contracting officer, who actually awarded the contract, was fully qualified and was fully informed of all aspects of the procurement. In substantiation, the Army states that the successor contracting officer was acting chief of the section awarding the contract and the Army submitted a memorandum by the preceding contracting officer detailing the personal involvement of the successor prior to being appointed as successor contracting officer. We find no evidence of fraud, bad faith, conflict of interest or actual bias with respect to the successor contracting

B-212403.3, B-213020,
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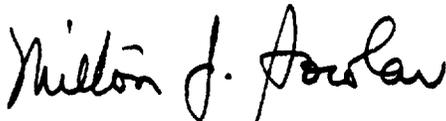
officer's participation in the procurement and, therefore, have no basis to object to his participation. See Crown Point Coachworks and R & D Composite Structures et al., B-208694 et al., supra; Cadillac Gage Company, B-209102, supra.

Finally, PAE alleges that a pattern of discrimination against PAE is demonstrated by its failure to receive an award for any one of the three contracts noted above even though it was the lowest offeror for each contract. It contends that further evidence of discrimination is the fact that preaward surveys were conducted under the RFP's on PAE, which has been a successful contractor in Germany for 7 years, and not on the contractor to whom award was made under the RFQ, which contractor was registered in Germany for less than 8 months.

Although PAE was the lowest offeror on the first two contracts here protested, it was found by the contracting officer not to be a responsible contractor on those contracts and we have found that those determinations were not without a reasonable basis. Although PAE was the lowest offeror on the RFQ, another offer was found to be better overall. In a negotiated procurement, award may properly be made to a higher cost but higher technically rated proposal if reasonable and consistent with the established evaluation. Cadillac Gage Company, B-209102, supra.

Further, the record indicates familiarity by the contracting officer with prior satisfactory performance by the contractor to whom an award was made under the RFQ. On this basis, the contracting officer determined that a preaward survey was unnecessary. We have held that contracting officers have broad discretion whether to conduct a preaward survey. Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 C.P.D. ¶ 264.

Accordingly, we are unable to conclude that there is a pattern of discrimination against PAE.

for 
Comptroller General
of the United States