P.L. II
R. Ayer

DECISION

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

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DLG00568

FILE: B-190530 DATE: January 11, 1979

~~DLG 00579~~

MATTER OF: The Ohio State University Research Foundation

Columbus (OH)

DIGEST:

1. Allegation that agency failed to follow stated evaluation criteria is denied where record shows that evaluation was consistent with reasonable interpretation of criteria and solicitation work statement and protester knew prior to submitting its best and final offer of agency's interpretation of the criteria.

2. Agency's consideration of in-place equipment and of availability of one offeror's existing computerized information system in evaluating proposals is not inconsistent with evaluation criteria since there is reasonable and logical relationship between those matters and established evaluation criteria dealing with availability of equipment and resources.

3. Although protester disputes existence of weaknesses in its proposal as found by agency evaluators, record does not indicate that evaluators' conclusions were unreasonable.

4. High score received by one offeror as result of initial evaluation by technical review panel does not indicate that offeror was "winner" of competition, but only that offeror was to be included in competitive range and evaluated further upon submission of best and final offer.

5. In selecting offeror for award, selection official is not bound by point scores, findings and recommendations of lower level evaluators.

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6. Alleged bias on part of agency project officer, purportedly manifested through such things as manipulation of site visitation team membership and distorting views of technical evaluators, is not indicated by record, which suggests that actions taken were rationally supportable and consistent with project officer's duties.

CNG 02248

The Ohio State University Research Foundation (OSU) protests the award of a cost reimbursement services contract to the University of Southern California (USC) under request for proposals (RFP) No. 77-50, issued by the Bureau of Education for the Handicapped, Office of Education, Department of Health, Education, and Welfare (HEW), for a second generation National Instructional Materials Information System (NIMIS II). OSU was the incumbent contractor for the first generation system (NIMIS I).

Los Angeles

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The gist of OSU's protest is that HEW neither followed nor fairly applied the stated evaluation criteria in its evaluation of OSU's proposal. This belief stems from the fact that when the technical proposals of all of the offerors were initially ranked by the technical review panel the OSU proposal ranked first. OSU reasons that its fall from first place was caused by the project officer's prejudice against OSU which was manifested in HEW's final evaluation of OSU's proposal. OSU contends that HEW ignored the established evaluation criteria by exhibiting an improper concern with the details of the computer (automated data processing [ADP]) hardware and software which ultimately would be used to implement NIMIS II. OSU takes the position that such inordinate concern was contrary to the scope of work outlined in the RFP. OSU further alleges that other considerations, outside the established criteria, were taken into account improperly to justify award to USC.

The RFP stated two reasons for the purchase of the services: continuing the development and operation of HEW's existing information retrieval system

(NIMIS I) and further extending NIMIS I to include other data bases. The RFP further stated that HEW was undertaking the NIMIS II procurement in part because it sought assurance that the NIMIS II system would utilize state of the art information system technology.

The evaluation criteria placed paramount importance on technical factors rather than price. The technical factors were identified as procedural plan, personnel, management plan, resources/facilities/equipment, and organization experience. Each of these factors was further explained in a sentence or two, and each was assigned a percentage weight.

Four proposals were received in response to the solicitation. A technical review panel made an initial review of the proposals in early August 1977 for the purpose of making a recommendation to the contracting officer regarding which offers should be considered within the competitive range. The panel recommended the inclusion of two proposals, numerically ranked as follows:

	Tech. Score	Cost 1 Yr.	Cost 3 Yrs.
OSU	79.75	$1,565,816	$4,365,518
USC	60	$1,494,156	$4,533,593
HEW estimate		$1,500,000	$4,500,000

On August 9, 1977 the contracting officer concurred with the review panel's recommendation and determined that the competitive range consisted of OSU and USC.

In the process of evaluation the review panel compiled lists of the respective strengths and weaknesses of the two offerors. On August 15, 1977, HEW furnished each of the two offerors with a summarized list of its strengths and weaknesses. In general, the strengths and weaknesses listing showed OSU to be perceived as strong in the field of special education but lacking in technical expertise and experience in the area of information system technology. Some 24 weaknesses were listed, and while several were related to computer technology and experience, others involved

staffing, planning, management, and budgeting. The list caused OSU some concern for OSU read it as indicative of a shift in the RFP's requirements. OSU advised HEW by letter as follows:

> "We have observed, based on the 'strengths and weaknesses' listing, that significant variances are developing from the work statement as set forth in RFP #77-50. Our offer is predicated on the actual work as specified in the RFP, commensurate with levels of effort indicated. Any shift from RFP #77-50 statements not specifically announced by formal amendments has not been addressed. It was necessary for us to take this approach at the time the proposal was prepared, but we remain open to suggestions for modifications in the future. We would expect, however, that all such modifications would be communicated formally to our contract administrator * * * by way of amendments to RFP #77-50."

On August 25, 1977 HEW responded to OSU as follows:

> "You have indicated that you observe significant variances between the listing of strengths and weaknesses and the work statement as set forth in RFP 77-50. All offers submitted in response to RFP 77-50 have been evaluated by the review panel in strict accordance with the evaluation criteria as specified in the RFP. Since you have not stated the specific variances which you observe in your letter, we cannot respond to this concern. You may wish to raise this concern during our site visit."

The record does not indicate that OSU pursued the question further.

Also on that date, HEW, conducting telephonic negotiations with OSU, asked that OSU address, among

other things, the following cost proposal matters in its best and final offer:

> "Compared to peer positions and the importance technical reviewers saw in the position, the head of the information specialist (ADP) staff unit seems not to have a salary or position of importance expected. Re-consider.
>
> * * * * *
>
> "Cost estimates for consultants, ADP services, and ADP key staff seems light by comparison to other areas of costs. Does this mean that past sunk-costs (NIMIS I design and hardware/software development) will be exploited in NIMIS II? i.e. is NIMIS II conceived as being NIMIS I plus minor changes? Clarify."

HEW representatives also visited OSU on August 26, 1977. The following are extracts from the site team's comments:

> Comment: "Ohio State University: The current NIMIS center appears seriously weak in two critical areas: (1) management and supervision of the project, and (2) computer-based systems and data processing technologies. It appears unlikely that these weaknesses could be overcome... It is almost certain that a contract with this offeror would result in simply a continuation of the present NIMIS I system, perhaps with some extension. But the project staff appears to lack the technical expertise and vision to develop NIMIS II as a new information system which takes advantage of the current state-of-the-art in computer-based information systems."
>
> Comment: "My chief reservation regarding the OSU proposal -- and it is a rather

> serious one -- has to do with its technical aspects. None of the senior project personnel has in-depth experience in designing, implementing and operating a large computer-based system. The OSU proposal, supplemented by the discussion during our site visit, certainly reflected this lack of experience. Although considerable technical expertise is available at OSU and within the Columbus area (not to mention elsewhere in the country), it would be difficult for the OSU team to acquire the right kind of talent on a consulting basis. In order to make the right technical judgments, the top manager of the project team should himself have sufficient technical competence to be able to attract and motive high-quality information specialists, propose and evaluate technical alternatives, and establish adequate project management procedures. These are tasks that cannot be delegated without exposing the project manager to too much dependence on technicians whose competence he cannot judge..."

On September 1, 1977 HEW conducted a final telephonic negotiation session with both offerors. The topics covered included additional "negotiable" items which had resulted from the site visits. OSU was asked, inter alia, to:

> "Provide assurance that NIMIS II files and software for input, research and product development will be available to * * * [HEW] and its chosen designates at the end of year 3 without need to use OSU chosen vendors."

HEW set September 8, 1977 as the deadline for best and final offers. Both offerors met the deadline with modified technical and cost proposals. The final analysis of the best and final offers found OSU to have nine unresolved weaknesses. Of the nine, five related either directly or indirectly to information system technology. The final analysis also listed

nine unsatisfied "negotiable" items, four of which related to the information system technology issue.

On the basis of the final analysis of the best and final offers and the recommendations of HEW's Deputy Commissioner for Education of the Handicapped, HEW selected USC for award of a three year cost reimbursement contract commencing October 1, 1977. HEW justified the award on the ground that USC had cured the weakness in its proposal while OSU had failed to cure four of the nine areas perceived by the evaluators as weaknesses in the OSU proposal.

It is clear from the record that HEW was indeed concerned with the ADP aspects of proposals. A specialist in HEW's Technical Assistance Section, after reviewing the OSU initial proposal, advised the contracting officer as follows:

> "This offeror did not specify in sufficient detail the computer configuration that will be used to implement NIMIS II. I was unable to determine if the Ohio College Library Center's computer facility was going to be used as in the past or if a shift to the University Systems (U.S.) IBM equipment was going to replace OCLC's Xerox equipment. Is OCLC part of University Systems and if so which facility will be used. A complete breakdown of the computer configuration is required. This includes a description of the main-frame and all peripherals that will be used for this project. A cost breakdown or rate per hour (wall clock or CPU hr) along with guaranteed turnaround times by type of processing is required. They should also estimate the number of hours of use they anticipate for each year."

The comments of the site team, quoted above, also reflect this concern. Additionally, a September 13, 1977 written recommendation of the project officer contains the following statement:

> "The O.S.U. offer was surprisingly weak for an incumbent contractor. The lack of good staff work in preparing a plan for meeting RFP specifications for NIMIS II was seen by reviewers and my special advisors to be a case of rigid adherence to decisions made in NIMIS I development. Had there been involvement by strong and imaginative and knowledgeable persons (related to automatic data processings present state of the art), the response to the RFP might have been other than it was from O.S.U."

OSU believes that its proposal was not fairly evaluated to the extent that OSU failed to provide such specifics in its best and final offer.

OSU concedes that its proposal did not contain the detailed ADP information. It maintains, however, that it was not required to furnish such specifics in light of section II D of the RFP, which required that within 45 days of the contract award the contractor furnish the Government with a "finalized version of the NIMIS II specifications as defined in the scope of work section [II] A.1 * * *." Section II A.1 reads, in part, as follows:

> "II SCOPE OF WORK
>
> A. Tasks to be Accomplished
>
> 1. Develop NIMIS II standards and specifications, which should include:
>
> a. Specifying actionable target-population services level objectives.
>
> b. Detailing NIMIS II specifications that will encompass: contents of each data base (with specific item identification), quality standards for each product, and performance standards and specifications for each distribution strategy, data input, data maintenance,

data searching and retrieval operations. All of these, consistent with, and within the context of target population service level objectives.

c. Assessing NIMIS I (the current system), and explicit identification of any changes, additions, deletions or modifications which will be required to meet NIMIS II specifications."

OSU takes the position that the requirement for a "45 day document" in effect precluded a responsive offeror from specifying, in its proposal, a specific hardware/software configuration. As OSU reads the RFP, offerors were required to submit only a procedural plan, as spelled out by section III A.4., as follows:

"4. Procedural Plan

This section should fully describe the offeror's theoretical and technical approach employed to comply with each task enumerated in the RFP work scope. While a general statement of strategy is appropriate, procedures should be specific with regard to each task. These specifications should indicate exactly how the work will be conducted, not merely general approaches and strategies. Particular attention will be paid to the proposed hardware/software plan, the specific actionable objectives, the control and assessment procedures and the marketing and distribution strategy. The offeror is reminded that the procedural plan shall become part of the contract and the legal responsibility of the winning offeror. The winning offeror may only modify this section through negotiation with the BEH and the contracts officer." (Underscoring added.)

OSU admits to having puzzled over the relationship between the 45 day document requirement and the requirement that the proposal contain a hardware/software plan. It was clear to OSU that the proposal of a specific hardware/software plan in its offer would predetermine many of the specification options that OSU believed were to remain open until after award. However, OSU concluded that there was:

> " * * * only an apparent contradiction between what is required by the 'forty-five day document' and what is required by way of the 'hardware/software plan.' Clearly, to commit oneself to a particular hardware/software package at the time of the proposal obviates much of the system planning that is to take place in the forty-five day post-contract award period. It is simply not reasonable to believe that the Bureau of Education for the Handicapped intended [offerors] * * * to first select 'machines' and then to fit its programs of service to the handicapped to its hardware. The only reasonable interpretation of the RFP is the one we used and that is to withhold commitment to hardware/software until after the key NIMIS II system features were chosen via the forty-five day document." (Emphasis in original.)

Having reached this conclusion, OSU proceeded to present an "open-ended plan" for identifying hardware/software options. Thus OSU's best and final offer contains the following passage:

> "Since usage is specifications-dependent, * * * it is not possible to forecast which system or systems would or would not be used nor can we forecast the amount of time required for processing."

We find OSU's interpretation is inconsistent with the RFP when that document is read in its entirety. While OSU reads the RFP as precluding submission of

proposed specifics concerning hardware/software in light of the "45 day document," we believe the requirements of the procedural plan are neither obviated by the "45 day document" requirement nor inconsistent with it. Thus, we believe that the procedural plan which was to become "part of the contract and the legal responsibility of the winning offeror", was to include "specifications" (with particular attention paid to the "hardware/software plan") with respect to how each task set forth in the "work scope" was to be accomplished, and that based on the proposal as accepted by HEW, a "finalized version" of overall NIMIS II specifications would thereafter be furnished under the contract. In other words, while the final commitment to specific hardware/software was not required as part of the procedural plan, something more than OSU's "open-ended plan for identifying hardware/software options", such as the specific types and/or brand names of ADP equipment as well as some indication of type of software, was required so that HEW could measure how offerors proposed to take advantage of recent technology to expand NIMIS I to provide for the desired NIMIS II. Certainly, in view of the specific procedural plan requirement that each offeror fully describe "the offeror's theoretical and technical approach employed to comply with each task", we do not see how it can be argued that such a specific hardware/software plan was not required. Moreover, to view the RFP otherwise would be inconsistent both with HEW's stated purpose of assuring that proposals reflect consideration of all avenues which could take advantage of technological improvements, and with the proposal evaluation criteria which weighted 10% of the technical considerations to the "appropriateness and availability of resources (other than human) and facilities and equipment proposed for use in the conduct of this project." (Emphasis supplied.)

In addition, OSU's letter, written after it received the list of the strengths and weaknesses of its proposal, suggests that OSU was on notice that HEW was concerned with specific ADP aspects of proposals; HEW's response, indicating that the evaluation statements were consistent with the RFP, clearly put OSU on notice that HEW did

indeed view the RFP requirements as encompassing hardware/software specifics. The record is silent as to why OSU apparently did not further pursue the matter with HEW or why it continued to confine its proposal in accordance with its own interpretation of the RFP. Under the circumstances, OSU's doing so, of course, was at its own peril.

In any event, it appears that the rejection of OSU was not due solely to the lack of hardware/software detail in its proposal. The evaluators found OSU's best and final offer to be inferior to USC's because of remaining weaknesses not only in the information system expertise area, but also in the areas of lack of leadership in marketing and dissemination, poor activity planning, and lack of budgetary planning for the second and third year of the contract period and, in the words of an HEW evaluator/consultant, " * * * basically a series of cosmetic changes to their last offer." We note, in this connection, that OSU has provided a detailed analysis purporting to show that its proposal in fact did not suffer from those perceived weaknesses. We have not, however, independently evaluated OSU's proposal, as that is beyond our function in this type of case. See Riggins & Williamson Machine Company, Inc., 54 Comp. Gen. 783 (1975), 75-1 CPD 168. Upon reviewing the record, we find only that OSU strongly disagrees with the HEW evaluation conclusions; it has not clearly shown that the conclusions are unreasonable.

Consequently, we cannot conclude either that HEW improperly evaluated OSU's proposal or, in light of the other weaknesses perceived in OSU's proposal, OSU was unduly prejudiced by HEW's concern with hardware/software matters.

OSU's allegation that other factors outside the evaluation criteria were utilized to justify award to USC primarily concerns HEW's consideration of USC's in-place hardware and software and USC's offer to merge certain portions of USC's data base into the NIMIS II data base. The record indicates that HEW

did take into account USC's in-place hardware/software and its "local contribution." For example, with respect to the latter, the HEW project officer, in his recommendation of September 13, 1977, makes the following observations:

> "U. S. C. is offering to merge those records of the mature and self-sustaining NICEM data base (general education's equivalent to NIMIS) as appropriate into the NIMIS II base. This is no small contribution.
>
> * * * * *
>
> "The millions of dollars invested in the USC NICEM system (including the materials filed and the software/hardware developed) become a 'local contribution' of this offeror of untold value. Re-classifying NICEM entries to special education specifications will make the NICEM/NIMIS union a resource of immeasurable value to those devising I. E. P.s for handicapped children.
>
> * * * * *
>
> "The value of the 'local contribution' (NICEM content and software/hardware developed) surely must be in the millions of dollars."

OSU contends that it was never advised that these matters would be award criteria, that they were not listed as such in the RFP, and that therefore HEW acted improperly in considering them.

We disagree. Although agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account. Checchi and Company, 56 Comp. Gen. 473 (1977), 77-1 CPD 232. All that is required is that those aspects be logically and reasonably related to or encompassed

by the stated evaluation factors. Genasys Corporation, 56 Comp. Gen. 835 (1977), 77-2 CPD 60; Metro Contract Services, Inc., B-191138, July 5, 1978, 78-2 CPD 6; Checchi and Company, supra. Here, the complained of considerations both seem reasonably related to the stated evaluation criteria. As pointed out above, we believe HEW could properly consider the proposed hardware/software aspects of each proposal, and that this was consistent with the evaluation factor which measured the appropriateness and availability of resources and equipment. While nothing required an offeror to have its proposed equipment in place, the fact that one offeror did so was not an inappropriate consideration when the "availability of equipment" is under evaluation. Similarly, we think the availability of the NICEM data base and USC's offer to utilize it in connection with NIMIS II was an appropriate consideration under the resources/facilities/equipment criterion.

The major element of OSU's protest is the assertion that the project officer had a long-standing desire to terminate the relationship with OSU and that this anti-OSU bias manifested itself throughout the latter part of the selection process. OSU suggests, for example, that the site team visits were prompted by this bias and became "necessary" only after "OSU was ranked #1 * * * by the * * * Panel Review Team," and that the bias was also reflected in the make-up of the visitation team. OSU further asserts that the project officer, in his memoranda and recommendations, distorted the actual comments of the technical review panel member so as to make USC appear better and OSU worse than the panel members viewed them.

We find OSU's contentions are not supported by the record. Moreover, those contentions suggest a fundamental misunderstanding of the selection process.

The key to OSU's position is that, as a result of the evaluation by the technical review panel, it had an "overwhelming lead," was rated "decisively first," and was "the clear-cut and decisive winner of the award." That simply isn't the case. OSU's averaged numerical score was nearly 20 points higher than the averaged

score for USC. However, while two of the evaluators rated OSU substantially higher than they did USC, one evaluator rated USC higher while the fourth panel member gave the same score to both offerors. This evaluation disparity does not indicate that OSU was a clear winner merely because its average score was higher than its competitor's. See Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427. As we said in that case, "it is apparent that averaged scores may reflect the disparate, subjective and objective judgments of the evaluators," 56 Comp. Gen. at 716, and it is for that reason that numerical scores in general are used as guides in selection decisions, but usually "do not determine the outcome of a competitive source selection." Telecommunications Management Corp., 57 Comp. Gen. 251, 254 (1978), 78-1 CPD 80; see also Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Moreover, in this case the numerical scoring was accompanied by identification of strengths and weaknesses. One evaluator found no weaknesses at all in the OSU proposal; the others, however, did. Given the inherent nature of the negotiated procurement process, it cannot be said that an initially acceptable proposal containing a number of weaknesses is a "winner"; it is merely a proposal which, through the discussion and negotiation process, may be modified to eliminate those weaknesses, and which as modified will again be evaluated against other competing proposals.

In this regard, we also point out that in the evaluation and source selection process, the selection official is not bound by the findings, scoring, and recommendations of technical evaluators and other lower level review bodies and officials, Grey Advertising, Inc., supra, and cases cited therein, but rather has "a very broad degree of discretion * * * in determining the manner and extent to which [he] will make use of technical evaluation results." Department of Labor Day Care Parents' Association, 54 Comp. Gen. 1035, 1040 (1975), 75-1 CPD 353; Checchi and Company, supra. Thus, even if the technical review panel had unanimously recommended award to OSU, it would have been within the selection official's discretion to select USC for award provided that the selection would have had a

reasonable basis and been consistent with the evaluation criteria. Grey Advertising, Inc., supra.

In light of these principles, we cannot accept OSU's apparent contention that it "came in first" in the competition and then lost because of the project officer's bias. OSU was only one offeror in the competitive range; although the average score of the initial evaluators placed OSU higher than USC, neither OSU nor USC was a "winner" until the negotiation process had been completed with the submission of best and final offers and the selection of an awardee by the HEW selection official.

With respect to the specific allegations of bias, the record does not establish that improper bias played a role in the selection of USC. To the contrary, the record suggests that HEW strove to avoid any possible bias. For example, two individuals designated for the site team were dropped from the team when OSU complained of their possible pro-USC views. The requirement for the site visit itself apparently came not from the project officer, but from the HEW contracting officer. As for the constitution of the site team, the record indicates that the project officer sought to have experts in two areas--ADP and special education--on the site team just as there were on the technical review panel, and he expressed the hope that they would be the two review panel members who were not Office of Education (OE) employees. When one of those was unable to serve on the site team, other specialists in the same area from outside OE were obtained. The fact that two members of the review panel, who may have been those who, in OSU's words, "did not think much of the USC proposal," did not serve on the site team does not establish bias. Although the record does not reflect any particular reason why those two individuals did not serve on the site team, we note that it is not unusual for evaluation personnel to change during ongoing negotiated procurements, and we have held that such changes do not automatically suggest impropriety. Department of Labor Day Care Parents' Association, supra; Checchi and Company, supra.

With respect to the project officer's role in analyzing and describing the evaluators' comments, it appears that OSU may believe that the scoring and comments of the technical review panel members should have been controlling. Source selection, however, frequently involves multiple layers of review, with each level free to make its own good faith evaluation and put its particular gloss on what was submitted by the lower level reviewers. See, e.g., Burns & Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57; 50 Comp. Gen. 390 (1970). Here, it appears that under the review procedures established for the procurement, the technical review panel was to evaluate initial proposals; the project officer was to summarize the comments of the panel members; a non-Government consultant was to independently evaluate the competitive range proposals and report to the project officer; the site team visits (when they became necessary) were to be made, with team member comments to be considered as part of the overall evaluation; other HEW experts were to be consulted; negotiations were to be conducted; and the project officer was to summarize the entire evaluation and negotiation process and make his own recommendations, through his superior, to the selection official. We see nothing improper with this evaluation approach.

We also find nothing improper with the project officer's actions during the evaluation. While there may well be room for argument over whether his summary of the strengths and weaknesses found by the evaluators could have been more precise, on the whole we do not find that it was inconsistent with the overall tenor of the evaluators' findings. Moreover, his recommendations are consistent with the comments of most of the site team members, the outside consultant, and other experts within HEW who were consulted. In short, while it is possible that the project officer desired to terminate HEW's contractual relationship with OSU, the record reflects a rational basis for the position taken by the project officer, and does not establish that his actions were motivated by improper anti-OSU bias.

There is no room for bias and favoritism in the award of Government contracts. When allegations of bias

are made and supported, they deserve careful attention. In this case OSU appears to hold the good faith belief that it lost the contract solely because of the project officer's bias. It furnished lengthy submissions detailing the bases for its belief. Consequently, we have carefully reviewed the matter, paying particular attention to the alleged manisfestations of bias and weighing those against the documentation contained in the procurement file furnished by HEW. We have found little in that voluminous record which supports OSU's position. While we have not set forth in this decision every detailed assertion made by OSU in support of its basic allegation, we have considered them, and find overall that the award was rationally supportable and consistent with the established evaluation factors. Thus, we can only conclude that OSU has not met its burden of demonstrating the validity of its position.

The protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States