



OFFICE OF THE GENERAL OF THE UNITED STATES
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National Scientific Corporation
2300 Ninth Street, South
Arlington, Virginia 22204

Attention: Mr. W. Edward Weems, Jr.
President

Gentlemen:

We have carefully considered the protest of the National Scientific Corporation (NSC) against the negotiated award of a contract to the E. F. Shelley and Company (Shelley) by the Office of Administrative Planning and Services (OAPS) for the Office of Federal Elections (OFE). To the extent possible we have processed the protest in accordance with our bid protest procedures. However, in view of the involvement of our Office as the contracting agency, the protest cannot be considered in the same light as one involving another agency. Nevertheless, OFE's award selection procedures have been carefully examined by staff members who were not involved in the negotiation and award of the contract to Shelley.

The contract was awarded on July 10, 1973. The next day NSC formally protested OFE's determination that an award to Shelley was most advantageous to the Government, price and other factors considered. Performance of the contract has been suspended pending resolution of the protest.

The procurement instructions applicable to OAPS and OFE require the disclosure of the factors to be used in the evaluation of proposals and their relative importance. Negotiated procurements must be competitive to the maximum extent practicable. To this end, written or oral discussions are required with all offerors submitting proposals which are determined to be within the competitive range, price and other factors considered. Accordingly, we have judged OFE's conduct against the standards generally applicable to competitively negotiated procurements.

Based on our consideration of the substantial record submitted by OFE and the submissions of the interested parties, we believe that the protest of NSC must be denied. The circumstances and reasons prompting this conclusion follow.

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The request for proposals solicited fixed-price offers for performing an analysis and evaluation of voter registration systems. Four evaluation criteria and their relative importance were identified as follows:

- "1. Cost: (35%);
- "2. Experience of corporation and corporate personnel in election administration and voter registration systems design and analysis (35%);
- "3. Contract plan including the sequence of tasks necessary to complete the final written report (20%);
- "4. A list of those states and localities to be included in the study (10%)."

To aid in evaluation against the first two criteria, offerors were requested to submit the following information with their proposals:

- "1. A general description of the offeror's firm together with resumes of personnel who will work on the contract with special emphasis on the experience of each in election administration and system design and analysis;
- "2. A list of references indicating experience of the firm of the type required in this procurement.
- "3. Cost and pricing breakdowns associated with the sequence of tasks necessary to fulfill the terms of this contract."

Thirteen sources responded by May 25, 1973, the closing date for receipt of proposals. Upon evaluation, the proposals of five offerors were determined to be within a competitive range, price and other factors considered.

Oral discussions were held with the offerors for the purpose of identifying weaknesses and resolving proposal uncertainties. On the basis of the discussions, revised price and technical proposals were submitted on June 19, 1973, by the five firms within the competitive range. The best and final offers were independently reevaluated by the Chief, Clearinghouse for Election Administration and his Deputy.

NSC and Shelley, determined to have submitted the best proposals, were awarded the following total points exclusive of costs:

	<u>NSC</u>	<u>SHELLEY</u>
<u>[Deputy]</u>	57.7	58.5
<u>[Chief]</u>	56	58

Since Shelley's fixed-price proposal of \$66,826 was \$542,65 lower than the \$67,368.65 fixed-price proposal of NSC, Shelley also received an advantage in the allocation of points for the first evaluation criterion.

By memorandum of June 29, 1973, the OFE evaluators recommended the selection of Shelley. In addition to reviewing the point evaluation, they made the following observations:

"In order to award a contract to a higher bidder, it seems necessary that the bidder be 'head and shoulders' (in quality) above the lower bidder. In the case of the voter registration systems contract, we feel that there is no justification in awarding this contract to National Scientific Corporation (NSC).

"In more detail the higher bidder should be clearly superior in the three award criteria as outlined in the RFP. * * *

* * * * *

"Therefore, we feel on the basis of overall bid quality and lowest cost, E. F. Shelley and Co., Inc. should be awarded the contract."

Subsequently, the Directors of OFE and OAPS concurred in this recommendation. During the bid protest conference held on July 30, and in its submissions to our Office, NSC's basic contention has been that OFE departed from the evaluation criteria in its evaluation of proposals. Specifically, it takes issue with OFE's application of the cost, experience, and contract plan evaluation criteria. NSC urges that proper application of the criteria would have resulted in the contract being awarded to it. In addition, NSC questions the fairness of OFE's conduct of negotiations.

With respect to "cost," NSC finds evidence of a departure from the criterion in the statement of the OFE evaluators that: "In order to award a contract to a higher bidder, it seems necessary that the bidder be 'head and shoulders' (in quality) above the lower bidder." This statement, NSC maintains, indicates that the cost factor was significantly more important than the 35-percent weight assigned.

We believe the statement focused on by NSC cannot be divorced from the context in which it was used. As the portions of the June 29 memorandum, quoted above, indicate, award to Shelley was recommended on the basis of "overall bid quality and lowest cost." In our view, the evaluators' comments are an affirmation that the points assigned adequately reflected their judgment of the merits of the respective proposals. We, therefore, cannot agree with NSC's view that OFE changed the importance of the cost evaluation criterion. However, a proposal need not be "head and shoulders" above a lower priced, but lower rated proposal before an award is justified. The question is whether the excellence of the higher rated proposal is worth the additional cost.

At this point, it should be noted that some of the documents in the record erroneously report NSC's fixed-price proposal to be \$67,638.65, rather than \$67,368.65. From our review of OFE's report of August 2, 1973, we are satisfied that this transpositional error occurred after OFE allocated the cost points. We do, however, agree with NSC that OFE should have considered its final fixed-price offer to be \$67,355--the same price as its initial offer. OFE's use of the \$67,368.65 figure results from reliance on a cost breakdown submitted with NSC's best and final offer. However, the cost breakdown states that "there is a difference of \$13.65 between the offered fixed price and the actual cost shown above. The difference is the result of computing costs on a percentage basis."

We now turn to NSC's objection to OFE's application of the second evaluation criterion, "Experience of corporation and corporate personnel in election administration and voter registration systems design and analysis." The points awarded NSC and Shelley for the experience criterion by OFE's evaluators were:

	<u>NSC</u>	<u>SHELLEY</u>
[Deputy]	34	31
[Chief]	34	30

OFE's report of July 27 contains the following justification for the allocation of points:

"N.S.C. has more direct experience in voter registration systems design and analysis than does /Shelley/. N.S.C. was awarded the greatest number of points for experience.

"However, /Shelley/ has a number of other things in its favor. A number of experts in the operation of voter registration systems have informed the OFE that the design, operation and analysis of automated registration systems is not that complicated a task from a systems standpoint. In fact, these experts have informed the OFE that anyone with a good background in data processing and systems analysis can acquire an operational background in voter registration systems design and analysis in a short period of time. Both the resumes of Brian J. Considine, /Shelley's/ proposed Project Director, and the recommendations of the U.S. Department of Labor and other agencies reveal that /Shelley/ has an exceptionally strong background in systems analysis.

"In addition, the resumes of Dr. Blue Carstenson, Anne Wexler and the corporate experience of /Shelley/ reveal a great deal of familiarity with the problems of voter registration. This familiarity, for example, was reflected in the proposed working plan submitted by /Shelley/. Thus we felt that /Shelley's/ outstanding experience in systems analysis coupled with their overall experience in voter registration warranted the high marks /Shelley/ received."

In response, NSC contends that the simplicity or complexity of voter registration systems is not relevant. In its view, the second criterion clearly states that points would be allocated on the basis of specific experience in election administration and voter registration.

NSC's objections on this score are obviously founded on its interpretation of the second criterion. Under its view, the depth of NSC's experience in all phases of election administration and voter registration systems design and analysis should have been worth more than the approximately 3.5 evaluation point advantage it obtained over Shelley.

This interpretative question was discussed extensively at the bid protest conference on July 29, and we asked OFE to present in detail what was intended. The OFE report of August 2 contains the following discussion:

"* * * It was not the intention of the Office of Federal Elections to so narrowly construe this evaluative criteria item. We felt that the experience criteria should be somewhat liberally interpreted so as to allow points to be awarded for a variety of election administration and voter registration systems design and analysis related experience. This is why the phrase 'experience of corporation and corporate personnel in election administration,' which covers a broad range of election related experience, was included in the above experience criteria. If we had wanted to consider only those with on-going experience in voter registration systems design and analysis, the above phrase would have been deleted; and we would have phrased this evaluative criteria item to read, 'Experience of Corporation and corporation personnel solely in voter registration systems design and analysis.' It is our opinion that NSC's narrow construction of this evaluative criteria item led them to wrongly conclude that the evaluative criteria were improperly applied. We contend, however, that the wording of this item clearly indicates that it was to be more broadly construed. As a result the ratings that E. F. Shelley (and the remaining offerors) received were the result of the proper application of these criteria.

"One point that was brought up by NSC in the protest hearing but was not repeated in their July 31 letter was that if general systems analysis or election administration related experience was an integral part of the evaluation of the experience criteria, this should have been included in the Request For Proposal. We strongly disagree. For one thing, it was impossible to include in the RFP all the possible ways that [an offeror] could acquire 'experience in election administration' or experience in 'voter registration systems design and analysis' and be awarded points. Credit could be, and was, allotted for a variety of * * * backgrounds in areas closely related to these evaluative criteria. As a matter of fact, all of the best and final offerors had significant experience in election administration and/or voter registration systems design and analysis which resulted in high point ratings."

We cannot say that NSC's interpretation of the evaluation criterion is unreasonable. On the other hand, we are unable to conclude that OFE's position is wholly without merit. In our view, the generality of the statement of experience criterion would support either position. Certainly, there is no question that experience in systems design analysis, election administration, and voter registration are identified as elements to be considered in evaluating the experience of offerors.

In its letter of August 3, 1973, Shelley states that it assumed that points would be assigned for each of these elements, in addition to specific experience in the design and implementation of voter registration systems. NSC itself recognizes that points would be awarded for different categories of experience.

Neither firm, however, was in a position to determine the value to OFE of each category of experience. The record does not indicate that either firm inquired as to the foregoing prior to the submission of proposals or during the course of negotiations. We have, of course, in numerous cases placed the burden on offerors to question the adequacy of the evaluation criteria in a timely manner. We think NSC's interpretation of the experience criterion was reasonable. Since NSC had no question about the evaluation criterion, there was no reason for it to demand greater specificity.

In any event, we are not persuaded that OFE was unable to further define in the RFP the experience criterion by indicating the relative importance that it placed on systems design and analysis experience. This emphasis could and should have been communicated in the request for proposals. While we are not prepared to say that it is possible to spell out all types of experience in "election administration" or "voter registration," we believe that the relative importance of these categories in relation to each other and to systems design and analysis experience should have been spelled out.

As a matter of procurement policy, greater specificity would have been preferable. However, even in cases where contracting officials depart from established criteria and weights, we have not objected so long as a sufficient correlation exists between the detailed criteria and weights actually used and the generalized criteria and weights identified in the request for proposals. 51 Comp. Gen. 397 (1972); 50 Comp. Gen. 390 (1970). On the basis of our review of the record, we must conclude that OFE consistently applied its interpretation of the experience criteria to the evaluation of all offerors and that all offerors had the same evaluation information.

The third evaluation criterion, "contract plan including the sequence of tasks necessary to complete the final written report--20%," is also subject to the same criticism in view of its generality in scope. In addition, OFE employed subcriteria in assessing the merits of the plans proposed by the offerors. These subcriteria should have been disclosed in the request for proposals.

OFE's evaluators' memorandum of June 29, 1973, contained the following narrative summary of the evaluation results and the points awarded by each for the third criterion:

"PLAN

"Shelley presented a much more comprehensive plan of action than did NSC. For example Shelley proposed detailed pre-site preparation, including analysis of state laws and demographic information, and extensive preparatory work with state and local officials to insure their cooperation. NSC made no reference to any of this pre-site preparation.

"Additionally, Shelley presented a very detailed survey guide that extensively outlined (16 pages) areas to be examined at each on-site visit. NSC presented only a bare outline of major survey topics.

	Points Awarded	
	<u>NSC</u>	<u>SHELLEY</u>
[Deputy]	14.7	18.5
[Chief]	13	19"

OFE's report of August 2 identified four equally weighted subcriteria which were used in evaluating the contract plans of all offerors. The subcriteria and the evaluation results for Shelley and NSC are, as follows:

	[Chief]		[Deputy]	
	Shelley	N.S.C.	Shelley	N.S.C.
1. Pre-site Preparation and Analysis	5	2	5.0	3.0

	[Chief]		[Deputy]	
	Shelley	N.S.C.	Shelley	N.S.C.
2. On-Site Analysis	5	4	4.5	3.0
3. Final Reports, Analysis and Recommendations	4	5	4.0	5.0
4. General Approach	5	2	5.0	3.7
TOTAL	19	13	18.5	14.7

OFE has treated as confidential the offerors' proposed contract plans. Thus, as NSC points out, it is unable to determine whether or not the entire plans were evaluated in accordance with the criterion. On the basis of the information available, NSC advances a number of asserted inconsistencies in the method of evaluating its proposal vis-a-vis Shelley's proposal.

First, NSC points to portions of its proposal which discuss pre-site preparation and analysis. NSC suggests that its responses were ignored because they were not categorized in its proposal as pre-site preparation and analysis. This conclusion is drawn from the statement in the OFE evaluator's memorandum of June 29 that: "NSC made no reference to any of this pre-site preparation." Standing alone this statement is misleading. If NSC's proposal responses in this area had been completely ignored, it should have received no points in this area. This statement must be viewed in the context of the evaluators' comparison of the NSC and Shelley proposals in this area. That is, Shelley presented a more "comprehensive plan of action" than did NSC, as evidenced in part by the pre-site investigation proposed by both. OFE's reports of August 2 and July 27, 1973, recognize that NSC's proposal responses were not ignored, rather they question the lack of specificity in the responses.

NSC also suggests that its higher score for the criterion, "Final Reports, Analysis, and Recommendations," is inconsistent with a conclusion that Shelley had a more "comprehensive plan of action." We do not agree. As explained at the bid protest conference and stated in OFE's report of July 27, 1973, the format of NSC's proposed report was "narrowly preferable" to Shelley's.

NSC's final objection to OFE's plan evaluation draws into question the competitive aspects of the procurement. With respect to the evaluation differences for the "General Approach" subcriteria, OFE's report of July 27, 1972, contains the following comments:

"General Approach

"Perhaps the most serious shortcoming in N.S.C.'s plan was their failure to respond to what might be classified as a possible conflict of interest problem. As N.S.C. clearly admits, they designed three of the state-wide automated registration systems and had a hand in upgrading the fourth. At the best and final offer conferences the Office of Federal Election expressed verbal concern that N.S.C. might be hesitant to fully and fairly evaluate these systems. In their written amendments submitted after the best and final offer conferences, N.S.C. failed to respond to these concerns, proposing to analyze and evaluate the registration systems of Virginia, Kentucky, Tennessee and Alaska from its office files. N.S.C. could have responded to this problem by hiring and assigning an independent investigator to analyze and evaluate the systems N.S.C. designed for the * * * states.

"Finally, [Shelley's] overall plan reflected more thought and preparation than N.S.C.'s in our judgment. [Shelley's] plan included extensive pre-site preparation, development of survey guide, on-site visits, further development of the survey guide and, finally, the development and distribution of an extensive survey-guide and questionnaire to 100 sites."

NSC concedes that this matter was raised during the oral discussions. However, it maintains that it was only mentioned in passing and the Chief of the Clearinghouse for Election Administration specifically stated that it did not concern him and "would not be counted against us in the evaluation." In support of its position, NSC observes that the June 29 Memorandum of Negotiations failed to indicate that this subject was discussed.

At the conference of July 30, the emphasis placed by the parties on the discussion was a matter of dispute. OFE's view

of the discussion and the importance of its concern with NSC's objectivity was reaffirmed in its report of August 2:

"Our concern that NSC would have conflict of interest problems in evaluating their own registration systems was not 'mentioned in passing,' and while their non-response to the issue did affect their point award, it by no means accounted for three (3) points. The General Approach Section point scores (worth five (5) points) were in effect a reflection of how the Office of Federal Elections viewed the plan in toto; i.e., as an entity rather than three (3) separate segments. What we considered to be an overall lack of incisiveness in NSC's plan accounted for their low score in this area, not merely a conflict of interest situation."

* * * * *

"NSC states that OFE deducted three (3) (out of a possible five (5)) points from the General Approach section of the plan evaluation because of a failure to respond to a conflict of interest situation. (Note - /the Deputy's/ evaluation did not deduct three (3) points. /NSC/ seems to feel that /the Chief's/ evaluation was the sole determination of contract award. This is not true, in fact a contract would not be awarded if /the Chief/ and /the Deputy/ did not agree that one proposal received the highest number of award points.) It was stated by OFE that this situation was a contributing factor to a loss of points but it was not the sole reason."

Given the nature of the services solicited, the expression of concern about a firm's objectivity is a serious matter. One of the essential elements to be considered in awarding contracts of this nature is whether the offeror will be able to objectively analyze and evaluate the material gathered during contract performance. Against this background we are not persuaded that NSC was told to forget the issue. However, discussion of this question should have been recorded in the Memorandum of Negotiations. OFE is now transcribing negotiation sessions to avoid any subsequent dispute about what matters were discussed.

The Memorandum of Negotiations shows that the offerors were asked a number of identical questions designed to remedy a lack of specificity common to all proposals. In addition, specific

weaknesses in the proposals were identified and solutions suggested. NSC has questioned OFE's failure to recommend a specific solution to its concern about NSC's objectivity, particularly in view of OFE's treatment of Shelley's initial deficiencies in the experience area. OFE asked Shelley to consider a new project director because of his lack of experience. The suggestion did not result in the removal of the proposed project director, but did prompt a substantial revision and improvement in Shelley's approach to performing the study.

Generally, notice to an offeror of a problem and an opportunity to respond would more than satisfy the basic requirement of fair and equal treatment which is fundamental to the concept of competitive negotiations. NSC maintains that since OFE went further, particularly in the case of Shelley, it was required to treat NSC the same way by suggesting a specific solution to the conflict of interest problem--namely, the use of an independent investigator to analyze and evaluate the system of the states designed by NSC.

In retrospect we agree that it would have been appropriate for OFE to have suggested a specific solution to the problem. This, of course, would have negated any charges of unfairness in the conduct of negotiations. However, it seems to us that NSC also had a duty to pursue the matter further in order to have had the question resolved without relying on a solution to be advanced by OFE.

On balance, we are not persuaded that the failure of OFE to specifically recommend a solution to the conflict problem is a deficiency which requires reopening of negotiations. In reaching this conclusion, we have given considerable weight to OFE's position, with which we have no reason to disagree, that in the context of the award decision the failure of NSC to respond to OFE's concern was not decisive in the ultimate selection of Shelley.

Sincerely yours,

R.F.KELLER

[Deputy Comptroller General
of the United States