

95310

DECISION



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

50579

FILE: B-181705

DATE: February 25, 1975

MATTER OF: Agbabian Associates

DIGEST:

Although protester's proposal was judged technically acceptable, contracting officer has wide discretion in evaluating technical and cost proposals and he properly awarded a cost plus fixed fee contract at a higher estimated cost where record shows reasonable support for agency's greater confidence in proposal selected.

Agbabian Associates (Agbabian) protests the award of a contract under Request for Proposals (RFP) NHTSA-4-B526 issued by the National Highway Traffic Safety Administration (NHTSA). The objective of the contract was to obtain data from a series of automotive crash tests to support a Vehicle Rating System being developed under an existing contract with the General Electric Company. The RFP indicated that two cost plus fixed fee contracts would be awarded as a result of the solicitation.

Essentially, Agbabian contends it should have been awarded a contract since it is technically qualified to perform and its proposed costs were less than one of the successful offerors.

Six proposals were received in response to the RFP and three were determined to be within the competitive range. After receipt of proposals and prior to conducting negotiations, the NHTSA decided that its crash test program could be enhanced by a minor change in the specifications. The original RFP stipulated that crash tests were to be conducted with "bullet" and "target" vehicles and that two instrumented anthropomorphic test dummies conforming to the design, performance and calibration criteria described in Title 49, Code of Federal Regulations (CFR), Part 572 were to be placed inside each "target" vehicle. Since additional test data could be obtained if dummies were placed in the "bullet" cars as well, the specifications were changed accordingly. NHTSA believed the change was minor in nature and would not prejudice those offerors who were not considered for negotiations.

Negotiations were conducted with three firms: Agbabian Associates (Agbabian), Dynamic Science Division (Dynamic), and Calspan Corporation (Calspan). Each offeror was requested to include in its best and final offer an option for the placement of a test dummy in "bullet" cars. The following best and final offers were submitted:

	<u>Basic Program</u>	<u>Dummy Option</u>	<u>Total Cost Plus Fixed Fee</u>
Dynamic Science	\$295,761	\$40,159	\$336,280
Agbabian Associates	315,990	12,490	328,480
Calspan Corporation	266,254	34,565	300,819

Contracts were subsequently awarded to Dynamic and Calspan.

The procuring agency concedes that Agbabian's proposal was technically acceptable and that its past performance on NHTSA contracts has been excellent. However, the agency reports that Agbabian has had no previous experience using an anthropomorphic test dummy conforming to the requirements outlined in 49 C.F.R. 572. The cited regulation sets forth design and performance criteria so that measurements can be made with precision. It also provides calibration requirements for 11 performance tests to which the dummy must be subjected to insure that repetitive tests results will be obtained. The agency believes that the difference in the proposal costs for the dummy option between Agbabian and the other contractors was due to a difference in the offerors' contemplated calibration procedures. While past experience with the regulatory requirements for anthropomorphic dummies was not essential, it was a consideration in the agency's final selection since cost and technical evaluations among the three competing firms were close. Such experience was listed in the solicitation as an evaluation factor. In addition the agency reports:

"Our final decision was more affected, however, by the Facilities and Equipment area which was one of the two most important and heavily weighted evaluation factors in the RFP. Both Calspan Corporation and Dynamic Science had the necessary test facilities and equipment to conduct the tests. Agbabian's facilities and test equipment, while nearly adequate, required the addition of load cells, a car-to-car crash site camera pit, and dummy calibration facilities. These inadequacies were discussed during negotiations, and Agbabian agreed to construct the

necessary additional facilities and capitalize their costs. However, with reference to their construction schedule, they made the following statement '. . . (it is expected that this can be completed within approximately 60 days after receipt of contract award if commenced at contract award).' Any difficulties Agbabian may have encountered with the construction of their facilities could have delayed the entire program. The National Highway Traffic Safety Administration was unwilling to assume this risk (1) because of our responsibility to submit timely crash test data to General Electric for performance on their contract and (2) because of our commitment to Congress to issue the first consumer information package for one class of automobiles by the end of calendar year 1975."

Agbabian states that it has been instructed in the past through discussions with both technical and contracts personnel at the procuring agency that all offerors considered within the competitive range and selected for negotiation were considered capable in all respects to perform the proposed work. Furthermore, it understands that selections beyond that point are based on cost only, unless major technical gains could be obtained by selection of a higher bidder.

Agbabian's understanding of negotiation procedures is incorrect. The fact that a proposal is initially determined to be within the competitive range does not necessarily prevent a subsequent rejection of the proposal as technically unacceptable. See 52 Comp. Gen. 198; 53 Comp. Gen. 860 (1974). Generally, a proposal must be considered to be within a competitive range so as to require negotiations unless it is so technically inferior or out of line with regard to price that meaningful negotiations are impossible. 48 Comp. Gen. 314 (1968).

In the present case the solicitation contemplated awards of two cost plus fixed fee contracts and provided that:

"Award will be made to that offeror (1) whose proposal is technically acceptable and (2) whose technical/cost relationship is the most advantageous to the Government; and who is considered to be responsible within the meaning of Federal Procurement Regulation 1-1.12. Cost will be a significant factor in the award decision, although the award may not necessarily be made to that offeror submitting the lowest estimated cost. Likewise, award will not necessarily be made for capabilities that would appear to exceed those needed for the successful performance of the work."

Generally, we have recognized that under negotiating procedures contracting officers have a wide discretion in evaluating technical and price proposals and in determining which offer is most advantageous to the Government, price and other factors considered. 47 Comp. Gen. 336, 341 (1967). An award may properly be made to an offeror who has submitted a technically superior proposal at a higher estimated cost than that proposed by an offeror submitting a technically inferior, although acceptable, proposal. B-170633(1), May 3, 1971. In the context of cost-reimbursement type contracts, ultimate cost to the Government, although a factor to be considered in evaluation, is not the controlling factor since there is no assurance that the actual cost of the procurement will not exceed an offeror's proposed estimate. B-170374, March 2, 1971. Moreover, Federal Procurement Regulations (FPR) 1-3.805-2 which embodies these principles provides that:

"In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed (see § 1-3.808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government."

In view of the above, it is clear that for purposes of the subject procurement, cost was not to be the determinative factor so as to require the agency to accept Agbabian's admittedly responsive proposal. In the circumstances, we believe there is a reasonable basis for the greater confidence of the agency in the successful offeror's prior experience and in our opinion the agency acted within its discretionary powers in rejecting Agbabian's proposal.

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Accordingly, the protest is denied.

Deputy

R. F. Keller
Comptroller General
of the United States