

DECISION



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

60557

FILE: B-184318

DATE: February 23, 1976

MATTER OF: Iroquois Research Institute

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DIGEST:

1. Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are intertwined with other timely and related issues concerning evaluation of protester's proposal.
2. Offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality and mere statement that "cost and other factors" will be considered in award determination does not fully satisfy this requirement. However, basic technical deficiencies in proposal may not be attributed to agency's failure to fully emphasize importance of technical evaluation considerations.
3. Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost.
4. Where Government's statement of work is broad and general, proposal was nevertheless properly considered outside the competitive range since, consistent with evaluation factors listed in the solicitation, protester's technical proposal was considered to be so deficient as to be wholly unacceptable. Question whether Government unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors.
5. Objection to Government's failure to include detailed subordinate evaluation criteria in solicitation may not be sustained where sufficient correlation exists between divulged criteria and generalized criteria in solicitation. Even though sub-criterion is applied under two evaluation criteria of solicitation and may penalize offeror twice, such action is proper since it is supported by rational basis.

6. Conduct of negotiations with only firm considered to be in competitive range does not require additional D&F to support sole source award where procurement was negotiated pursuant to "Determination and Findings (D&F)" justifying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys.
7. Allegation that Government permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question ten years ago under grant from entity which is unrelated to procuring agency.
8. Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically non-existent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators.
9. Government has not unfairly changed basic accuracy requirement in solicitation for only one offeror where contract as negotiated contained original accuracy specification but merely failed to provide detailed information necessary to establish how successful offeror would in fact implement requirement. Government may insist on compliance with original specification.
10. Where contract, as negotiated, changed performance periods of solicitation, agency's failure to provide protester opportunity to submit revised proposal on basis of changed requirements was not necessary since protester was not considered to be in competitive range and changes are not directly related to reasons for rejecting protester's proposal. In absence of directly applicable FPR provision. ASPR 3-805.4(b) is followed for guidance.
11. Claim for proposal preparation costs is without merit since lack of good faith, arbitrariness or capriciousness must be established and no indication is apparent that proposals were not solicited and evaluated in good faith.

B-184318

Iroquois Research Institute has protested the Government's rejection of its technical proposal submitted under a negotiated procurement conducted by the Bureau of Land Management (BLM), Department of the Interior, for a "Bering Land Bridge Cultural Resource Study."

The request for proposal, No. 75-13, provided for award of a cost-reimbursement type contract.

Two phases of performance are contemplated. The first phase involves an analysis of geological and archaeological data relating to the Outer Continental Shelf areas of the Bering and Chuckchi Seas. This analysis is to be used to develop a ranking of probable submerged habitation sites in the area. The second phase calls for a marine archaeological survey, using contemporary techniques. A final report will describe the results of the marine archaeological survey and will evaluate existing archaeological techniques and explain any newly conceived or invented techniques. The study's stated objectives are to:

- a) perform a literature and data search for select geological and archaeological data;
- b) analyze the archaeological and cultural resource potential of the area;
- c) establish guidelines for survey priorities and intensity of survey effort; and recommend application and, if necessary, modification of current marine archaeological survey techniques and newly conceived or invented techniques, as they pertain to the Bering and Chuckchi Seas.

Proposals were received from four firms and were submitted to a Technical Proposal Evaluation Committee. It recommended award of the contract to the University of Alaska Museum (Museum) on the basis that its proposal was the only technically acceptable proposal submitted. On the basis of this advice the contracting officer determined that only the Museum was in a competitive range and therefore technical negotiations were held only with it. The Museum's technical and cost proposals were revised during negotiations and the contract was awarded to it.

Iroquois has raised numerous questions concerning this award action. We will treat these allegations under four basic headings: A.) Deficiency in RFP; B.) Evaluation deficiencies; C.) Preferential treatment of Museum and D.) RFP changes negotiated only with Museum.

A.) Deficiency in Request For Proposals

Iroquois argues that the determination that only the Museum was within the competitive range (eligible range for negotiations) was based upon the agency's improper failure to advise offerors of the relative importance of cost in relation to the other technical evaluation factors. Protester notes that section D of the RFP gave a specific set of criteria and percentages of relative importance for each offeror's technical proposal. At the close of section D the following was stated: "award will be made to that responsible offeror, whose offer, conforming to this request for proposal, is most advantageous to the Government, cost and other factors considered." Iroquois maintains that the RFP left offerors with an extremely general statement of the solicitation's technical requirements and with no information at all on what relative importance cost was to have in the evaluation. Because of this situation, the protester maintains that the RFP did not permit effective competition. Therefore, the protester feels any award based upon this solicitation is clearly improper.

Ordinarily a protest based upon alleged solicitation improprieties which are apparent prior to submission of proposals would be considered untimely if, as here, it is filed after the time for submission of initial proposals. See 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). Nevertheless, we feel compelled to consider the merits of the protester's arguments concerning the RFP evaluation criteria because the issues raised are intertwined with other timely and closely related issues concerning the validity of the Government's evaluation of protester's proposal.

As the protester points out, we have stated in numerous decisions that in order to achieve effective competition the contracting agency should advise offerors of the relative importance of cost to the technical factors. See, for example, Signatron Inc., 54 Comp. Gen. 530, 535 (1974) 74-2 CPD 386; ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. Thus, offerors are entitled to know whether a procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality.

In this regard we believe that the solicitation could have more clearly explained the relative importance of cost to technical considerations. The mere statement that "cost and other factors" will be considered in the award determination does not in our opinion fully satisfy the requirement. To this extent we agree with the protester.

However, at the same time we believe the protester overstates the effect that the RFP's failure to clarify the importance of cost, had on the evaluation of its proposal. Offerors were aware that a cost reimbursement contract was to be awarded. With regard to the award of such contracts, the Federal Procurement Regulations (FPR) provide that the offeror's cost estimate is important in determining the offeror's understanding of the project and ability to organize and perform the contract; and that 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. FPR 1-3.805-2 (1964 ed.). Moreover the RFP did advise the offerors that proposals not conforming to the four categories of "technical standards" would "be judged unresponsive". The record shows that Iroquois' technical proposal was found to contain basic deficiencies. The evaluation team judged its proposal to be unacceptable for the following reasons:

"C. Iroquois Research Institute

1. A lack of comprehension of the basic problem was noted. The offeror states that a fundamental goal of the project is to recover potential archeological artifacts (page 16). This was not requested in the RFP. Furthermore, the title of the proposal, implying preservation of Nautical Archeology in Beringia, indicated this lack of understanding of the problem.
2. There was an incomplete approach to the archeology of the area. For example, there is evidence in the literature that inhabitants of Beringia were not exclusively big-game hunters.
3. Definite arrangements for vessel leasing were not presented. As stated in the RFP, the U.S. Government will not furnish any equipment or supplies (vessels, geophysical instruments).

4. Personnel commitments were considered insufficient with regard to experience and the obvious lack of geophysical expertise. "

Perhaps Iroquois might have undertaken to make definite arrangements for vessel leasing and offered other personnel if the RFP had stated more explicitly that technical considerations would be of primary importance in the evaluation. However, it is not reasonable to blame the lack of RFP guidance as to the relative importance of cost and technical factors for shortcomings in the protester's "comprehension of the basic problem" or for its "incomplete approach to the archeology of the area." We do not believe that such basic technical deficiencies in the protester's proposal may be attributed to any failure on the part of the agency to fully emphasize the relative importance of cost and technical considerations in the evaluation. A proposal may be determined to be outside the competitive range on the basis of its technical unacceptability without regard to cost. 52 Comp. Gen. 382, 389 (1972) and 53 Comp. Gen. 1 (1973). Therefore, we think this aspect of the protest is without merit.

B.) Evaluation Deficiencies

Iroquois also objects to the elimination of all but one offeror from the competitive range and the ensuing negotiations since it believes that the Government has narrowly and unreasonably interpreted the solicitation's statement of work. In this connection, Iroquois notes that the statement of work covered both the objectives of the study and the general scope of the work in about two pages. It argues that these work requirements were extremely broad and general. In Iroquois' opinion technical proposals coming within the scope of such broad descriptions should have been considered to be within the competitive range, particularly where advantageous cost proposals were also submitted.

In our opinion, the test of whether the Government unfairly construes its work statement too narrowly should be judged not solely for the work statement but must be looked at in the light of the evaluation factors set out in the solicitation and those which the Government utilized in ranking proposals.

Regarding the Government's evaluation factors Iroquois contends that the evaluation team and the contracting officer actually substituted a format, and even a set of evaluation criteria different from that which was specified in the solicitation. In particular, Iroquois notes that the technical panel formulated a more detailed and different set of criteria than those enunciated in the RFP. Protester argues that the use of these different criteria and the

ensuing point values violated a basic and clear condition of the RFP. Moreover, Iroquois believes the agency applied the identical detailed criteria under two distinct evaluation factors provided in the solicitation. Thus Iroquois argues that if a proposal was deficient under such detailed criteria, the evaluation would penalize the proposal twice for a single shortcoming and presumably would favor a proposal which was strong in that area. Iroquois does not believe this was consistent with the terms of the solicitation.

The agency contends that the subcriteria utilized in this case were developed as an internal guide and neither enlarged nor detracted from the basic criteria provided in the solicitation. The detailed criteria were developed for the purpose of eliciting the most objective evaluation possible. The contracting officer agrees that in certain respects a technical proposal which was deficient in the evaluation factor of "Understanding the Problem," might also be affected detrimentally in the area of "Method of Approach" because of such deficiency. For example, if an offeror did not show a comprehensive understanding of the hypothesis of how early man lived, such deficiency would adversely affect that offeror's rating both for "Understanding the Problem" and for "Method of Approach." It is the agency's view that "when the foundation upon which a proposal is based is weak, then the entire structure of the proposal will, of necessity, be weakened."

Even though detailed evaluation information generally is not required to be included in the solicitation, we would not object, as a general proposition, to the use of such detailed subcriteria in the evaluation process provided there is sufficient correlation between the generalized criteria stated in the solicitation and the factors actually used. In such circumstances we are concerned with whether prospective offerors have been sufficiently advised of the evaluation criteria which will be applied to their proposals. Kirschner Associates, Inc., B-178887(2), April 10, 1974, 74-1 CPD. We note that Iroquois has not indicated precisely the subcriteria to which it objects and we see no basis for questioning the validity of the subcriteria applied in this case. We believe it is not necessarily improper to penalize an offeror twice for a single deficiency under two separate evaluation criteria. It is inevitable that a proposal which has been found to be deficient in the area of understanding the problem might also be downgraded for its method of approach. With regard to Iroquois' proposal, the technical evaluators concluded that it demonstrated a lack of comprehension

of the basic problem because the proposal erroneously indicated a fundamental goal of recovering potential archeological artifacts. Furthermore, an incomplete approach to the archeology of the area was noted by the evaluators. Iroquois' proposal also was considered deficient because it failed to indicate definite arrangements for vessel leasing and its personnel commitments were considered insufficient as to experience and geophysical expertise. For these reasons Iroquois' technical proposal was regarded as not even marginally acceptable and the agency believed that a major rewrite of the proposal would be required to make it acceptable.

Moreover, we are inclined to agree with the agency's statement that potential offerors were allowed a reasonable degree of scientific freedom to investigate possible solutions to recognized problems, to obtain the required literature and to apply new methods in the evaluation of the survey techniques. While the approach taken by Iroquois may have been judged as too narrow, we cannot conclude that the agency's interpretation of the solicitation was unreasonably narrow or that the evaluation of Iroquois' proposal was not reasonable.

Iroquois also argues that the use of a competitive solicitation together with the subsequent failure to make the "Determination and Findings" (D&F) required for a sole-source procurement was improper in this case. Iroquois cites the provision in FPR 1-3.210(b) requiring the procurement agency to justify its determination to negotiate on a sole-source basis with a written "D&F."

In this connection, the agency notes that the procurement was competitively solicited and that an appropriate written "D&F" was made to justify negotiation pursuant to FPR 1-3.210(a)(8), which provides for use of negotiation procedures with respect to procurements for studies and surveys. In our opinion, such agency action satisfied the requirement for a written "D&F."

C.) Preferential Treatment of the Museum

Iroquois alleges that the Museum was permitted to use a public research vessel in performance of the contract and that such action was unfair since the vessel was not made available to any other offeror. Specifically, Iroquois reports that its employees tried to determine the availability of the "R/V Acona," a marine research vessel which would be suitable for use in the field work to be performed under this procurement. All inquiries on the

availability of this ship indicated that it was not available for use by Iroquois.

The agency has denied protester's allegation that the Museum was given an opportunity to use a public research vessel which was not made available to other offerors. Furthermore, the solicitation stated that such a vessel would not be furnished by the Government and the agency categorically denies that it provided assistance to any of the offerors regarding the acquisition of a research vessel. As to the use of "R/V Acona," the report indicates that the vessel was acquired by the University of Alaska approximately ten years ago under a grant from the National Science Foundation and that the procuring agency has no control over that vessel. Thus it appears that Iroquois' position in this regard is without merit.

Iroquois has also raised the possibility that a conflict of interest may have tainted the impartiality of two evaluators of the technical proposals. Specifically, it is alleged that those individuals, one of whom was the author of the RFP, were enrolled during the most recent academic term at the University of Alaska. On this basis the protester asserts that the technical evaluation team's rejection of all proposals except the Museum's may have been affected by a conflict of interest and that the award of the contract to the Museum was illegal and must be terminated.

However, we find no evidence of a conflict of interest, since it appears that the relationship between the two evaluators and the successful offeror was so remote as to be practically non-existent. In this connection, the report states that the agency employee, who assisted in the drafting and evaluation of the RFP and was a member of the evaluation team was enrolled as a part-time student in the University of Alaska at Anchorage during the 1974-1975 academic year. The agency reports that the Museum is a part of the state university system but is not involved in the teaching aspects of the system. In addition, the Anchorage campus, at which this employee attended classes, and the Fairbanks campus, at which the Museum is located are separate administrative entities. Moreover, this individual's rating of the university's proposal was only two points higher than the university's average score and his rating of the protester was approximately six points higher than its average score. Therefore, Iroquois fared better overall with this individual than with the other evaluators. With regard to the second employee, the agency reports that this employee

was enrolled in a school which is not a part of the University of Alaska system and the protester has offered no evidence to the contrary. Accordingly, we must conclude that the protester's allegation that a conflict of interest tainted this procurement is without substance.

D.) RFP changes negotiated only with the Museum

Iroquois alleges that the agency significantly relaxed the RFP requirements for navigational accuracy in the performance of the second phase of the contract. The solicitation specified that the marine survey be conducted according to "USGS Operating Order II 75-3, dated January 20, 1975." That order set minimum requirement for the navigational accuracy of "+ 50 feet at 200 miles." According to Iroquois, this requirement would insure that the location of the square mile survey area could be identified to a specific degree of accuracy and that the location of any artifacts could be identified with the same accuracy. In this connection, the solicitation required each proposal to specify exactly how it would meet the requirements of the USGS Operating Order. The Museum's proposal was incorporated, as negotiated, into the contract and provided, in part, that: "Since accurate navigation will be of utmost importance, any ship employed on this project should be equipped with sophisticated navigational devices, such as a satellite navigator." According to the protester this effectively changes the RFP requirement for a navigational accuracy of + 50 feet at 200 miles, since, in open sea, navigational devices such as a satellite navigator can achieve no greater consistent accuracy than approximately 300 feet at 200 miles. BLM denies that it significantly lessened the RFP requirement for navigational accuracy in its negotiations with the Museum. It maintains that the contract still requires a navigational accuracy of + 50 feet at 200 miles since USGS Operating Order II 75-3 is incorporated in the instrument. In addition, the agency contends that the navigational system to be used by the Museum has the capability of obtaining a navigational accuracy of + 30 feet, significantly more accurate than the RFP requirement, although not a Government requirement.

In this connection our analysis indicates there is some doubt whether the Museum will, in fact, obtain the required navigational accuracy through the use of a satellite navigator even though it is theoretically possible to do so. A conference was held on this protest and in response to our questions the Museum's representative indicated that the vessel would not remain firmly anchored against movement or swinging for appreciable periods. We think

this is a requirement which is necessary to obtain the stated accuracy. Thus it appears that the Museum's proposal did not include sufficient information to establish whether or not it would meet the accuracy requirement specified by the Government. (We note, however, that the Museum's representative further indicated at the conference that the contractor might prefer to use other systems not stated in its proposal to obtain the required navigational accuracy.)

In the circumstances we believe that the agency could insist, if it intends to implement the second phase of this contract, upon compliance with the specified accuracy requirement. The agency has not relaxed its requirement in this regard since the contract, as negotiated, contained the original accuracy specifications and merely failed to provide the information necessary to establish how the contractor would in fact implement this requirement. This indicates a deficiency in the negotiation process rather than a change by the Government in its stated requirement which would have unfairly affected other offerors.

Iroquois also argues that during negotiations the Government improperly modified its performance schedule without providing other offerors with an opportunity to propose on an equal basis. The solicitation, as issued, contemplated that performance would be accomplished in two phases, with a five month interval between them. The Museum successfully negotiated a change, eliminating the five month interval by extending the time for performance of the first phase to coincide more closely with commencement of the second phase. (The time for performance of phase two was also extended from 6 to 12 weeks.) The protester contends that these were fundamental changes in the solicitation's requirements which required the contracting officer to amend the solicitation and provide all offerors with an opportunity to respond.

In this connection, we have noted the points raised by Iroquois to the effect that the extended performance time would have enabled it to improve on the personnel proposed for the work since other individuals would have been available during this period. In addition, Iroquois states that the change would provide an opportunity to prepare a more attractive and comprehensive product; permit for greater flexibility in scheduling the ocean-going vessel and other equipment needed for performance and would permit performance "with far less intensity" than required by the solicitation.

On the other hand the procuring agency believes that the changes negotiated in the performance schedule are insignificant when viewed in the light of the extensive technical deficiencies in the protester's proposal. The agency contends that the change would not have enabled the protester to upgrade its proposal inasmuch as deficiencies related in part, to Iroquois' understanding of the problem and its method of approach to the requirement.

When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirement, such change or modification must be made in writing as an amendment to the request for proposals, and a copy furnished to each prospective contractor. Federal Procurement Regulations 1-3.805-1(d) (1964 ed). This regulation, unlike Armed Services Procurement Regulation (ASPR) 3-805.4(b), does not specifically indicate that the stage in the procurement cycle at which the changes occur, govern which firms should be notified of the changes. In this connection, ASPR provides that if the competitive range has been established, only those offerors within the competitive range should be sent the amendment. However, no matter at what stage the procurement is in, if a change or modification is so substantial as to warrant a complete revision of a solicitation, ASPR provides that the original should be cancelled and a new solicitation issued. Since this ASPR negotiation procedure emanates from the same underlying principles and establishes a procedure which is essentially fair and practical, we feel it may be used as a guide here.

The question in this case, then, is whether the changes in the performance times are so substantial as to warrant a complete revision of the solicitation. Generally, time for performance is a material factor under Government contracts and any changes should be reflected in the solicitation. However, where, as here, the protester is not considered to be within the competitive range and such changes are not directly related to the cause for rejection, we believe that a resolicitation from Iroquois would not have served any useful purpose.

For the reasons stated, Iroquois' protest is denied.

With regard to Iroquois' claim for proposal preparation costs, the courts have recognized that offerors are entitled to have their proposals considered fairly and honestly and that recovery of preparation costs is possible if it can be shown that proposals were not so considered. However, lack of good faith, arbitrariness or capriciousness must be established as a prerequisite to recovery.

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See Heyer Products v. United States, 177 F. Supp. 251 (C & Cl, 1959); and Keco Industries, Inc. v. United States, 428 F.2d 1233 (C & Cl 1970). In our opinion the record shows that proposals were solicited and evaluated in good faith.

Accordingly, the claim is denied.


Deputy Comptroller General
of the United States