

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 2054861000
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FILE: B-184402

DATE: June 16, 1976

MATTER OF: Houston Films, Inc. (Reconsideration)

DIGEST:

1. GAO consideration of bid protests is based on written record established primarily through submissions by parties to protest and not through independent GAO investigation. In reviewing record, GAO does not evaluate proposals, but considers whether procuring agency evaluation was reasonable and consistent with evaluation factors.
2. Where cost type contract is to be awarded, protester's claim that source selection decision was materially affected by a misunderstanding which prevented it from offering estimated costs below those of successful offeror is of doubtful validity since award was not to be made to low offeror, proposed costs of competing offerors would have been less than 1 percent apart, and successful offeror was evaluated as substantially superior in non-cost areas.

Houston Films, Incorporated (HFI) has requested reconsideration of our decision of December 22, 1975, B-184402, 75-2 CPD 404, where we denied HFI's protest against the selection of another offeror by the National Aeronautics and Space Administration's (NASA) Johnson Space Center (JSC), Houston, Texas, for award of a cost-plus-fixed fee contract for motion picture production work.

HFI alleges that the decision contains "flagrant errors" of fact and law, and that this Office's handling of the protest was a "grossly negligent" method of disposing of HFI's plea for an independent investigation and resulted in "frustrating and nullifying the legislative intent" of Congress by "abrogating our responsibility to adjudge * * * evaluations and by "failing to establish clear and fair standards for the procurement policies of administrative agencies * * *."

The protest was directed primarily against NASA's evaluation of proposals, particularly NASA's finding of defects or weaknesses in several areas of HFI's proposal. HFI claims that in reaching our decision we ignored "NASA's own admissions" which HFI sees as

"further evidence of NASA's technical incompetence in the field of motion pictures" and merely accepted NASA's arguments "to be facts, without consideration for the truth * * *."

It appears that HFI misunderstands both the scope of this Office's function under our Bid Protest Procedures and precisely what we did in reviewing this protest initially. When a bid protest is filed with this Office, we do not undertake full-scale independent investigations. Rather, as is clearly spelled out in the Bid Protest Procedures, see 4 C.F.R. Part 20 (1976), we review agency actions on the basis of a written record, which consists primarily of submissions from the protester, the agency, and other interested parties. In reviewing this record, we do not evaluate proposals, which is a function vested solely in the procuring agency. We also do not generally impose standards with respect to the selection of evaluation criteria and their relative weights, since that is primarily for the determination of the agency, which is in the best position to adjudge its needs. We do, however, consider whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. The fact that an offeror disagrees with the evaluation of its proposal does not mean that the evaluation was unreasonable. What must be shown, as part of the written record, is that there is no reasonable basis for the agency's evaluation.

In reviewing the HFI protest record, we considered the HFI and NASA submissions in their entirety. We did not "ignore" any portion of those submissions; neither did we accept "verbatim" NASA's arguments. After considering the matter, we found that NASA had shown, "with considerable specificity," that it had a reasonable basis for the evaluation, while HFI had established only its strong disagreement with that evaluation. We therefore held that the record did not permit the conclusion that the evaluation was improper or invalid.

Although HFI has not brought to our attention any factors bearing on the evaluation which we did not previously consider, we have again carefully reviewed the entire record in this case, including those portions of it that HFI believes were ignored in our first review. We again find that the record permits but one conclusion--that the evaluation has not been shown to be "improper or unfair or that NASA was arbitrary in evaluating the proposals as it did."

HFI also takes issue with our decision in certain other respects. First, HFI asserts that we "ignore or condone" NASA's deviations from the regulations and practices of other

Federal agencies with regard to the agency's duty to discuss weaknesses and deficiencies in an offeror's proposal so as to provide an opportunity for meaningful revision of the proposal. HFI claims that NASA did not point out or even suggest any area of weakness in the HFI proposal and that the discussion session that was held was "a meaningless ritual."

NASA conducted negotiations in accordance with NASA Procurement Regulation Directive (PRD) 70-15 (revised) (1972), which provided that in cost-reimbursement type contracts (such as herein involved) the contracting officer shall point out instances in which the meaning of some aspect of a proposal is not clear or fails to include substantiation for a proposed approach, solution or cost estimate, but shall not point out weaknesses where the meaning of a proposal is clear and the Source Evaluation Board has enough information to assess its validity. We pointed out in the decision that the provisions of NASA PRD 70-15 were not contrary to the statutory requirement for meaningful written and oral discussions since in many instances the pointing out of weaknesses or deficiencies is not required for discussions to be meaningful. We also reviewed the record of the discussion session and found that NASA's conduct of discussions in this case satisfied the statutory mandate and was not subject to legal objection. Although HFI obviously disagrees with that conclusion, we remain of the view that the discussions were adequate and were not merely "a meaningless ritual."

Next, HFI contends that we erred in concluding that NASA's source selection decision was not materially affected by an HFI misunderstanding with respect to the necessity for voice tracks on certain film clips. HFI erroneously believed that NASA wanted the voice tracks and calculated that this would add some \$20,000 per year onto its estimated costs. Rather than increase its proposed costs, however, HFI absorbed this voice track expense by foregoing the G&A portion of its officer salaries that had been budgeted for "after hours" overhead work. In response to HFI's assertion that while it did not have to increase its price, it was precluded from offering a more favorable best and final price, we held that HFI was not prejudiced by its misunderstanding because it appeared "that even if HFI's best and final offer had been reduced by the full \$20,000 * * * its proposed cost would still be in excess of" the successful offeror's. HFI claims that our "arithmetic * * * is inaccurate" because HFI's estimated costs of \$401,976 for the first 12 months of the contract, if

reduced by \$20,000, would have been lower than the successful contractor's offer of \$384,000. HFI further contends that if it "had had a fair chance," it would have offered a best and final figure of \$381,976.

The solicitation in this case contemplated a 3-year performance period, consisting of one 1-year basic period and two 1-year option periods, and required offerors to prepare cost proposal summaries (in annual breakdowns) for the full 3-year period. HFI's 3-year totals of final proposed costs were more than \$100,000 higher than the successful offeror's. It was on that basis that we concluded that even if HFI's proposed cost had been reduced \$20,000 for each year, its standing with respect to cost vis-a-vis the successful offeror would not have been altered.

In any event, we point out that the subject RFP contemplated a cost-plus-fixed-fee contract, and the costs offered were only estimates of ultimate cost rather than firm fixed prices. In this regard, our Office has recognized that cost reimbursement procurements may place premium on innovation, creativity and technical superiority, with the result that an award may be made to other than the offeror with the lowest estimated costs. See, e.g., Riggins & Williamson Machine Company, Inc., et. al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; B-169928(1), August 18, 1970; B-174096, November 4, 1971. Here, in view of the successful offeror's substantial evaluated superiority in non-cost areas, we consider it doubtful that the less than 1 percent difference in first year costs that would have resulted from a \$20,000 reduction in HFI's proposed cost would have materially affected the source selection decision.

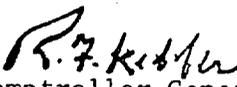
Finally, HFI objects to the manner in which we treated HFI's contention that the successful offeror lacked the requisite "moral integrity" to qualify as a "responsible" contractor for this procurement. The specific charge related to alleged improper use by that firm of Government-furnished equipment (under prior contracts) for private commercial use. HFI complains that rather than undertake an independent investigation of this purported criminal violation, our Office merely forwarded HFI's "confidential letter" on the subject to NASA, with the consequence that the 3-year statute of limitations has now expired. HFI also questions how this Office could acquiesce in an award to an offeror whose "moral integrity" was in doubt.

At a conference conducted at our Office prior to resolution of the protest, HFI was advised that this Office's function is to determine whether or not the award or proposed award of a

contract is in accord with applicable procurement statutes and regulations, and not to conduct criminal investigations. HFI was further advised that if it wished to pursue the matter, it should do so through the U.S. Attorney's Office. We did, however, send HFI's letter to NASA for consideration in determining the successful offeror's responsibility. NASA, which had rated that offeror "excellent" in the area of past performance, also found the firm to be a "responsible" prospective contractor.

As indicated in the decision, the record did not establish that NASA acted unreasonably in arriving at the excellent rating for past performance notwithstanding the allegations regarding misuse of Government property. With regard to the affirmative determination of responsibility, this Office does not review such matters except in circumstances not applicable here. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. There was, therefore, no basis for our objecting to either the excellent rating or the responsibility determination.

Our prior decision is affirmed.


Deputy Comptroller General
of the United States