DECISION

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

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FILE: B-184194 DATE: January 14,1976

MATTER OF: University of New Orleans

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DIGEST:

1. Major modifications to RFP Scope of Work must be accomplished by written amendment. Where RFP sought scientific study covering several "environmental media" (such as air, water, soil, etc.), amendment to RFP indicated water was of primary importance, and agency evaluated proposals on basis whether equal emphasis was placed on all media, offerors whose proposals emphasized study of water were prejudiced. Protest is therefore sustained. GAO recommends that EPA issue another amendment to RFP rescinding amendment which attached primary importance to study of water, and that competition be renewed among all offerors.

2. Whether offeror has outstanding qualifications to conduct scientific study is not determining factor in selection of contractor. Qualifications must be demonstrated in proposal submitted in response to specific RFP requirements. Also, basis for evaluation of proposals and selection of contractor is established by criteria set forth in RFP. Where RFP allocates one-half of technical points to qualifications and one-half to understanding of problem as shown in proposal, fact that protester received highest number of points for qualifications is not decisive, since establishing competitive range and selecting awardee are accomplished with reference to overall technical scoring and consideration of price.

3. Allegation that EPA improperly used protester's proprietary data in formulating RFP and suggestion that protester was entitled to award of sole-source contract are untimely under GAO Bid Protest Procedures. Protests alleging improprieties which are apparent in RFP as originally issued must be filed prior to closing date for receipt of initial proposals. Protester knew or should have known grounds for protest upon receipt and examination of RFP and did not file protest until after its proposal was eliminated from competitive range.

4. Since GAO decision sustains protest and recommends corrective action (giving protester additional opportunity to compete for award), question of whether additional RFP's issued by EPA

during consideration of protest duplicate or diminish scope of work being procured under protested RFP is viewed as premature issue. In event agency attempts to cancel protested RFP and protester believes sufficient justification for such action is lacking, issue can be timely raised and considered at that time.

The University of New Orleans (UNO) has protested to our Office under request for proposals (RFP) No. WA 75-R148, issued by the United States Environmental Protection Agency (EPA). The protest is directed at the exclusion of UNO's proposal from the competitive range and at the procedures followed by EPA in conducting the procurement.

For the reasons which follow, the protest is sustained and certain corrective action described in detail infra is recommended to the EPA Administrator.

The RFP contemplated the award of a contract for scientific research on a cost-plus-fixed-fee basis. The research involves identification and determination of air, water, soil, tissue, and sediment levels of halogenated organic substances in the environment. According to the RFP Statement of Work (SOW), the contractor is to perform four tasks: (1) select sampling sites in the United States; (2) concurrently with task (1), determine the sources of the halogenated organic substances at the sites through industrial surveys and chemical monitoring activities; (3) concurrently with tasks (1) and (2), determine the levels of halogenated organic compounds in the tissues of human populations; and (4) conduct comparative statistical analyses of the data developed and provide detailed discussion of their significance.

UNO and five other offerors submitted initial proposals by the closing date of January 28, 1975. After initial evaluation, two offerors' proposals were rejected as technically unacceptable. UNO's and the remaining three offerors' proposals were considered to be within the competitive range. Discussions were held with the offerors within the competitive range, and revised proposals were submitted and evaluated. UNO's proposal was then rejected as technically unacceptable. The three other offerors' proposals remained within the competitive range, and EPA is withholding an award to one of these offerors pending resolution of the protest.

While UNO raises a number of allegations relating to the contents of the RFP, the evaluation of its proposal, and the evaluation of other

proposals, we believe the decisive point in the protest concerns amendment No. 1 to the RFP. This amendment was effective as of January 15, 1975, and provided in pertinent part:

> "QUESTION: Should the study be directed at the exposure of people to halogenated organics from the total environment, or should it concentrate on the exposure via drinking water?
>
> "ANSWER: Primary emphasis should be placed on drinking water."

In this regard, statements in the record by the EPA technical evaluators repeatedly emphasize that one of the basic purposes of the contemplated contract was to analyze the effect of halogenated organics in the several "environmental media"--i.e., air, water, soil, sediment, and so on. Excluding the above statement in amendment No. 1, a reading of the remainder of the RFP supports this view. Moreover, it appears that the technical evaluators proceeded to evaluate the proposals on the basis of whether they offered a balanced "multimedia" approach. The evaluators apparently rated proposals in terms of whether they offered equal emphasis on each of the environmental media. One result was that UNO's proposal was downgraded because EPA judged that it placed too much emphasis on the study of drinking water. Another offeror's initial proposal, which was rejected as technically unacceptable without any opportunity for discussions, was downgraded because it emphasized the study of water "almost exclusively." As to this offeror, an EPA evaluator noted that its proposal could probably be "turned around," because the offeror's major area of expertise was air rather than water.

EPA's position on this matter is that amendment No. 1 merely provided a minor clarification to the offerors, that it had no effect on the procurement, and thus that it has no relevance to the issues in the protest. We believe this position is without any reasonable basis. The statements of EPA's own technical evaluators make clear that they were deeply concerned over the inconsistency between amendment No. 1 and the remainder of the RFP. One evaluator commented that he was dumbfounded to discover the existence of amendment No. 1, since he regarded it as "* * * fundamentally at odds with the raison d'etre of this effort * * *." The same evaluator did comment that, as to UNO's proposal, the effect of amendment No. 1 could be discounted for two reasons--first, that the amendment was issued shortly before initial proposals were due and therefore was probably too late to influence the drafting of UNO's proposal, and second, that a question posed

by EPA in the written discussions had the effect of countermanding the amendment.

Neither of these points is persuasive. The first is entirely speculative; moreover, even if the amendment did not cause UNO to shift the emphasis of its proposal to water, it is a reasonable inference that it confirmed UNO in the belief that primary emphasis on water was the proper approach to take. Further, after reviewing the record of the discussions, we do not see how the questions posed by EPA had the effect of correcting the misleading impression created by amendment No. 1. The written questions posed by EPA made several references to a multimedia approach. These, however, would not necessarily be inconsistent with amendment No. 1's statement that primary emphasis be placed on water. In other words, an offeror could reasonably believe that all of the environmental media were important but that water was the most important. As far as the record shows, EPA did not state in the discussions that amendment No. 1 was rescinded, nor did it call to the offerors' attention that equal emphasis should be placed on each of the environmental media. Moreover, even if the discussions could be regarded as "countermanding" amendment No. 1, it must be noted that two offerors' initial proposals were rejected without any opportunity for discussions. As noted supra, one of these offerors' proposals emphasized the study of drinking water.

Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. circ. 1) requires that 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 work or statement of requirements, the change or modification shall be made in writing as an amendment to the RFP. In the present case, we believe it is clear that the RFP considered as a whole (including amendment No. 1) contained a latent inconsistency going to the essence of the contemplated contract. The RFP and amendment No. 1 reasonably indicated that of the several environmental media, primary emphasis should be placed on water, whereas EPA's actual intent was that equal emphasis should be placed on each of the media. The failure to clarify the requirements by issuing a written amendment after receipt of initial proposals must be viewed as having resulted in material prejudice to at least two of the offerors.

Accordingly, by letter of today to the Administrator of EPA, we are recommending the following corrective action. An amendment to the RFP should be issued which specifically rescinds that portion of amendment No. 1 which is quoted supra. The amendment should be furnished to all six offerors involved in this procurement, along with advice that the competition is being reopened. The precise steps to

be followed in the renewal of competition are matters primarily within the judgment and discretion of responsible EPA officials, as guided by applicable procurement regulations. Since UNO and other offerors which were excluded from the competitive range are being given an opportunity to participate again in the competition, an outline of an appropriate procedure would be to first solicit revised proposals from the six offerors. After evaluating the responses, a new competitive range can be established. Best and final offers can then be requested from the offerors in the competitive range and an award made.

While our disposition of the protest renders other allegations raised by UNO largely academic, several are worthy of comment since they have some bearing on the proper negotiated procurement procedures which are required to be followed both generally as well as in the renewal of competition in this case.

We think it a fair summary of UNO's overall position to say that the protester considers itself the outstanding expert in this area of research. It appears from the record that UNO scientists were the first to discover the presence of certain potentially harmful organic substances in the New Orleans drinking water and the blood of New Orleans residents. These findings were brought to EPA's attention in mid 1974 and were the subject of considerable publicity in the news media shortly thereafter. The thrust of UNO's protest, then, is that it is a truly anomalous result when the leading experts in the field are deemed technically unacceptable by EPA.

We must note, however, that EPA has not taken issue with the experience or competence of UNO's staff. It was not UNO's expert staff, but rather the proposal prepared by that staff, which EPA deemed technically unacceptable under the particular circumstances of this procurement.

The fact that an offeror has outstanding qualifications does not automatically confer legal entitlement to an award, whether in a procurement of scientific research or in any other negotiated procurement. The offeror must demonstrate its qualifications in the proposal submitted in response to specific RFP requirements. Where an experienced offeror fails to translate its latest capabilities into its proposal, it may be eliminated from the competitive range, notwithstanding allegations that the proposal deficiencies were merely "informational" in nature. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35, and decisions cited therein.

More importantly, regardless of how well an offeror's qualifications are demonstrated in its proposal, the bases for evaluation and award in a particular procurement are established by the criteria set forth in the RFP. It is within this framework and under the applicable procurement law and regulations that the selection of an offeror for award is to be made. For a contracting agency to depart from the RFP evaluation criteria--by giving one or several of them a weight which is out of proportion to the established evaluation scheme, or by considering criteria which were not stated in the RFP--is clearly improper. See, generally, Willamette-Western Corporation et al., 54 Comp. Gen. 375 (1974), 74-2 CPD 259.

In the present case, the RFP prescribed a numerical scoring of technical proposals totaling 1,000 points. The 1,000-point scale was broken down into two technical review categories (500 points each)--company qualificatons and "problem understanding and approach." These two categories were further broken down into subcriteria. The RFP also stated:

> "* * * In presenting the work plan in the proposal, the contractor must take special care to see that he adequately describes how he intends to obtain or conduct the program according to those requirements outlined in the scope of work * * *." (Emphasis in original.)

In short, offerors' qualifications represented only one-half of the technical scoring criteria. UNO received the highest number of points in this cateogry. However, the determination of the competitive range was properly to be based upon the overall technical scoring and consideration of offerors' prices. Further discussion of the evaluation is unnecessary except to indicate that in view of these considerations, the suggestion implicit in UNO's protest that it should receive the award simply because of its qualifications is without merit.

We must also note that much of UNO's protest appears to be directed at urging our Office to review the proposals submitted and to render our own judgment as to their desirability. This position reflects a misapprehension of our Office's role. In considering protests such as this, it is not our function to evaluate the proposals; rather, we review the record of the agency's evaluation in order to determine if the findings are shown to be without any

reasonable basis. See Julie Research Laboratories, Inc., B-183288, October 14, 1975, 55 Comp. Gen. ____, 75-2 CPD 232; Emventions Inc., B-183216, June 16, 1975, 75-1 CPD 368; and decisions cited therein.

UNO has also called attention to EPA's findings in the evaluation that other offerors had shortcomings in available personnel, and that the offerors would have to rectify these shortcomings. UNO questions why it should not also have the prerogative of modifying its proposal in the same manner. We believe the only answer to this contention which is required at this point is that UNO will have the opportunity to revise its proposal in the renewal of competition being recommended in this decision. UNO also questions whether it is not in the best interest of the Government to make an award to the offeror with the technical personnel and experience capable of accomplishing the project rather than to an offeror which, in UNO's words, "will be required to build a competent team." In this regard, we believe our discussion supra concerning the RFP evaluation criteria indicates that proper basis upon which the evaluation and selection should be accomplished. The qualifications and competence of an offeror's personnel represent only some of the considerations which are pertinent in the evaluation and selection process.

UNO also contends that it has "almost a proprietary right" to this contract because EPA developed its RFP by improperly making use of proprietary information which UNO furnished to EPA in 1974. UNO also alleges that EPA discussed with it during 1974 the possibility of awarding UNO a sole-source contract for this work.

EPA denies that it misused any proprietary information and denies that it discussed awarding a sole-source contract to UNO. EPA points out that the proper design to be used in the study is not specified in the RFP, but rather will be developed by the contractor selected, and that it anticipates that proven epidemiological and analytical methods will be used.

We note that UNO has failed to specifically identify the information it believes to be proprietary, has not stated in what sense it is proprietary, and has not shown in detail how the information was misused by EPA in formulating the RFP. In any event, the proper time for such objections to have been made was prior to the receipt of initial proposals under the RFP. UNO should have been in a position to know its objections upon receiving and examining the RFP in December 1974. Also, since the RFP obviously contemplated a competitive procurement, UNO also knew in December 1974 that the contract was not being sole-sourced. Under our bid protest procedures in 4 C.F.R.

part 20 (1974) and 40 Fed. Reg. 17979 (1975), protests against improprieties which are apparent in an RFP as originally issued must be protested prior to the closing date for receipt of initial proposals. UNO's allegations on these points, first made to our Office by its protest filed on June 16, 1975, are clearly untimely and not for consideration.

UNO has also alleged that three RFP's issued by EPA between September 4 and October 20, 1975--Nos. WA 76-R022, WA 76-R020 and WA 76-X031--duplicate or diminish the scope of work under the protested RFP. UNO's concern is apparently based upon the belief that the work being procured under these three RFP's may eliminate the need for the work to be obtained under the protested RFP.

In this regard, we are unaware of any provision of procurement law which specifically precludes a contracting agency from procuring work similar to the work which is being sought under a protested solicitation. Also, we believe UNO's objection concerning the possible effect of the three RFP's is premature. The appropriate time for UNO to raise this objection would be in the event that EPA attempts to cancel the protested RFP for reasons which UNO believes are unjustified.

UNO has also raised a question concerning EPA's use of an outside consultant to assist its technical evaluation team. UNO states that if there was no outside review, the evaluation was deficient in this respect, and that if there was some outside review, the propriety of such a procedure in a competitive negotiated procurement is questionable. In this regard, EPA's reports indicate that while an outside consultant rendered services to EPA in an advisory capacity over a period of time, he did not take an active role in evaluating the proposals in the present procurement.

We see nothing improper per se in the agency's obtaining assistance from an outside consultant. On the other hand, we are unaware of any legal requirement to use a consultant. Cf. Emventions Inc., supra. In light of the facts as reported by EPA, UNO's allegations do not demonstrate any impropriety in the evaluation process.

UNO has raised other allegations and objections which we have taken into consideration in reaching this decision. However, we believe that the issues already discussed are dispositive of this matter and that further detailed analysis of UNO's arguments is unnecessary.

The protest is sustained.

Paul G. Dembling

Acting Comptroller General
of the United States