

**DOCUMENT RESUME**

C2074 - [A1172159]

[Quality and Impartiality of Evaluation of Bids]. P-187585.  
April 22, 1977. 8 pp.

Decision re: Antoine Predock; by Robert P. Keller, Deputy  
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law II.  
Budget Function: General Government: Other General Government  
(806).

Organization Concerned: Burns/Peters AIA Architects/Planners;  
Forest Service.

Authority: Brooks Bill (40 U.S.C. 541 et seq. (Supp. V)). 4  
C.F.R. 20.2(b) (1). F.P.R. 1-4.1004-2. F.P.E. 1-16.803 (2d.  
ed.). B-183355 (1975). B-182104 (1974). B-184606 (1976). 52  
Comp. Gen. 686. 52 Comp. Gen. 690. 52 Comp. Gen. 738. 52  
Comp. Gen. 747. 54 Comp. Gen. 896. 55 Comp. Gen. 717. 46  
Comp. Gen. 885. 46 Comp. Gen. 889.

The protesters objected to a contract award for the design of a nursery facility and solar heated greenhouse. The protesting firms questioned the quality and impartiality of the evaluation of bids conducted by the procuring agency. Industrial and Systems Engineering, Inc., also protested the alleged misuse of confidential materials and the Forest Service's failure to make a sole source award to it. None of the protests were upheld. (SC)

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**DECISION**



Marc Bosan  
Proc. II  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-187585**

**DATE: April 22, 1977**

**MATTER OF: Industrial and Systems Engineering, Inc.;  
Cottrell/Vaughan & Associates, Inc.; and  
Antoine Predock**

**DIGEST:**

1. Where protester knew, prior to submission of its proposal, of the criteria upon which evaluation would be based, subsequent protest against use of criteria is untimely under 4 C.F.R. § 20.2(b)(1) (1976) when filed after receipt and evaluation of proposals.
2. Protest alleging arbitrariness in evaluation based on comments of advisory panel is without merit where comments were prepared to assist in discussions relating to source selection and appear to be relevant to the areas of evaluation and reasonably related to the scores assigned.
3. Source selection official's decision to revalue score based on advice of technical advisor is consistent with evaluation scheme and provides no basis for interfering with award.
4. Final source selection based on factors other than numerical ranking is not arbitrary or capricious when based on reasonable exercise of procuring agency's discretion in applying evaluation criteria.
5. Protest against participation of technical evaluation team's chairman in proposal evaluation based on his receipt of an allegedly prejudicial letter is denied where letter was sent nine months prior to individual's selection to participate in evaluation. Moreover, chairman's scoring of protesting firms was either higher than or closely aligned with the scores of other team members.
6. Protest against release of "company confidential" report prepared under earlier contract with procuring agency is untimely under 4 C.F.R. § 20.2(b)(1) when filed after

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receipt of initial proposals, though apparent prior to that time. Moreover, matter is not for consideration in connection with bid protest where material discussed was not proprietary and where protester fails to show how its competitive position under instant RFP was prejudiced.

7. Protester's allegation that contract should have been awarded on sole-source basis is denied where statute, 40 U.S.C. § 541 et seq. (Supp. V, 1975), specifically requires that discussions shall be held with at least three firms.

Industrial and Systems Engineering, Inc. (I.S.E.), Cottrell/Vaughan & Associates, Inc. (Cottrell) and Antoine Predock (Predock) protest the award to Burns/Peters AIA Architects/Planners (Burns) of an architectural and engineering (A&E) contract for the design of a nursery facility and solar heated greenhouse under a request for proposals issued by the U. S. Forest Service, Department of Agriculture. The protesting firms have questioned the quality and impartiality of the evaluation conducted by the Forest Service. I.S.E. also protests, among other issues, the alleged misuse of confidential materials and the Forest Service's failure to make a sole-source award to I.S.E.

The statutory framework for the Government's procurement of A&E services is provided by the Brooks Bill, 40 U.S.C. § 541 et seq. (Supp. V, 1975). Section 542 states:

"The congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

Section 543 requires, in part:

"The agency head, for each proposed project shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct

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discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required."

Finally, section 544 provides, in part:

"(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. \* \* \*

"(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

In the instant case, a notice of intention to contract for A&E services was published in the Commerce Business Daily on May 17, 1976. Nineteen firms responded by submitting updated statements of their qualifications, Standard Form (SF) 254, "Architect-Engineer and Related Services Questionnaire." See Federal Procurement Regulations (FPR) §§ 1-4.1004-2 and 1-16.803 (2d. Ed. June 1975). Following evaluation of these forms, the Forest Service invited eight firms to submit proposals and to interview for award based on evaluation criteria and weighted factors published in a letter of August 17, 1976. Seven of the eight firms responded by submitting proposals and participating in the oral presentations which were conducted by a three-member Board of Contract Awards, assisted by a five-member Technical Evaluation Team. Following each presentation, the firm was numerically scored by each member of the Board and Team.

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Thereafter, Team and Board members conferred to explain their scoring to each other. Revised scores were then assigned. The three firms receiving the highest numerical scores, by both Board and Team, were selected for possible contract negotiations under 40 U.S.C. § 544. On October 4, the Board authorized the contracting officer to conduct negotiations with Burns, Predock and Cottrell and in that order of priority. Award was made to Burns on December 15, 1976.

I. S. E. contends that the Forest Service did not follow GSA guidelines in evaluating A&E firms. However, I. S. E. does not indicate in what respect the Forest Service deviated from the procedures established by the Brooks Bill and the FPR. We note that the initial evaluation of A&E firms was based on the SF 254, as contemplated by FPR §§ 1-4.1004-2 and 1-18, 803, *supra* and that final evaluation was based on criteria sent to all parties invited to submit proposals, see 40 U.S.C. § 543. To the extent that I. S. E. may be objecting to the use of these criteria, we note that it did not protest until October 3, 1976, after proposals were received and evaluated. Our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976), require that "protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals." Therefore, a protest concerning the use of the published evaluation criteria would be untimely and not for consideration on the merits.

I. S. E. also argues that the evaluation portion of the score sheets prepared by members of the Technical Evaluation Team reflect a lack of uniformity in the application of evaluation criteria and a disregard for suggested point allocation guidelines. The protester contends that this rendered the selection arbitrary and capricious. We cannot agree. All Team members evaluated all proposals in the same five areas: project proposal, organization, design ability, experience, and special consideration. Points were allocated to each of these areas based on their relative importance. Numerical scores were given by each Team and Board member, based on an individual analysis of the offeror's presentation and proposal. Team members also wrote comments on their score sheets relating to the salient characteristics of the offeror's proposal, ostensibly to assist in subsequent discussions with Board members. Our examination of the comments indicates that, in general, they are relevant to the area of evaluation and are related to the scores given. Furthermore, we note that

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the preparation of these scoring forms by the Technical Evaluation Team was preliminary to discussions with the Board, which had ultimate responsibility for selection of the top three firms. In Boyle Engineering Corporation, B183355, June 10, 1975, 75-1 CPD 354, we stated the applicable standard for review as follows:

"It is not our function to evaluate the qualifications of each firm to determine which should have been selected for the award. Source selection is the responsibility of the contracting agency which must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis. Therefore, it is our view that the agency's judgment in these matters is entitled to great weight and should be disturbed only if shown to be arbitrary."

In our view, I. S. E.'s allegation regarding the diversity in the Team's comments, when considered in the context of the overall evaluation criteria and scheme, does not establish arbitrariness in the A&E selection procedure employed by the Forest Service.

Cottrell protests the decision of the Board chairman to amend his score in accordance with the recommendation of the Technical Evaluation Team. The record indicates that the Board's preliminary ratings gave Cottrell the highest numerical score. Following discussions with the Team members, however, the Board chairman lowered his earlier scoring of Cottrell, convinced that he had attached undue weight to a particular feature of the firm's presentation relating to a viewing of nursery facilities. As a result, Cottrell was displaced by Predock as having the highest numerical score. Cottrell protests this "downgrading" because it was the only firm whose preliminary score underwent change in arriving at the Board's numerical rating.

In our view, the protested change was consistent with the Team's responsibility to advise the Board. The Board chairman's decision to reevaluate a proposal based on the Team's advice does not represent arbitrary or capricious Board action. Moreover, Cottrell was not prejudiced by the scoring change because numerical scores were only used to establish the final group of three firms with whom negotiations would be authorized under 40 U.S.C. § 544 and Cottrell was within this group both before and after the scoring change.

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We note that the procedure of gradually narrowing the field of eligible firms was characteristic of the entire source selection employed by the Forest Service. The original competition was opened to all firms qualifying under the terms of the Commerce Business Daily announcement. Evaluation of the nineteen SF 254's submitted, limited the field to the eight firms invited to submit proposals. Of the seven firms who actually submitted proposals, three were chosen for possible contract negotiations under 40 U.S.C. § 544. A final set of Team Board discussions relating solely to the relative strength of these three firms resulted in the ranking of Burns ahead of Cottrell and Predock based on the Board's acceptance of the Team's conclusion that Burns "had the best soils and agriculture expertise" and "could also handle all other phases of the project," matters which were proper subjects of evaluation under the "project proposal" category of the published criteria."

Predock contends that the most highly qualified firm should have been determined solely on the basis of the final numerical scores given by the Board at the time the field was narrowed from 7 to 3 firms. At that time Predock was 2.4 points ahead of Cottrell and 3.1 points ahead of Burns (out of a possible 100 points). In this regard our Office has consistently stated that technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. 52 Comp. Gen. 686, 690 (1973); 53 id. 738, 747 (1973); ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301; Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975); 75-1 CPD 253; Management Services, Incorporated, B-184806, February 5, 1976, 55 Comp. Gen. 717, 76-1 CPD 74. In the instant case, it was reasonable for source selection officials to make this final determination based on the finer distinctions which could be made by direct comparison of the most highly-qualified firms, rather than on the basis of a point system which was intended to, and did, explicate general levels of competency. In view of the fact that the Board was not legally bound to the numerical scores and because it based its ultimate recommendation on factors closely related to the object of the procurement, as reflected in the evaluation criteria, we cannot say that its determination was either arbitrary or an abuse of discretion. See Boyle Engineering Corporation, supra.

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A final basis for questioning the evaluation of proposals under the instant contract is the allegation by I. S. E., joined by Predock and Cottrell, that the Team's capacity to objectively assist the Board in contractor selection was compromised by a copy of a letter which was sent by a former employee of I. S. E. to, among others, the chairman of the Team. This letter was addressed to I. S. E.'s president and constituted formal notification that the employee was terminating his employment with I. S. E. I. S. E. contends that this letter was intended to damage I. S. E. and assist the letter's author in future business dealings. The author was a member of the design team proposed by Burns. The letter was dated January 13, 1976. The procurement was not advertised in the Commerce Business Daily until May 17, 1976. The team was selected September 27, 1976.

In our view, the Team chairman's receipt of this allegedly prejudicial letter nine months prior to his participation in an advisory capacity on the instant procurement is not, by itself, a sufficient basis for implying prejudice here. Moreover, we have examined the Team member's score sheets and note that as to I. S. E., Predock and Cottrell, the Team chairman's scoring was either higher than, or closely aligned with the scores of other team members. Consequently, we find no basis for objecting to the evaluation on the basis of the allegedly prejudicial letter.

I. S. E. also protests the release of a report entitled "Feasibility Study and Preliminary Design for a Solar Heated Greenhouse for Production of Containerized Conifer Seedlings" to prospective offerors under the instant RFP. The report was prepared under an earlier fixed-price contract between I. S. E. and the Forest Service and was distributed to the eight firms which were invited to submit proposals. Each page of the report was marked "Company Confidential" by I. S. E., notwithstanding a "Government Rights (Unlimited)" clause in the underlying contract, which gave the Government, "unlimited rights, for the benefit of the Government, in all drawings, designs, specifications, notes and other work developed in the performance of this contract \* \* \*."

I. S. E. contends that acceptance of the report, as marked, constituted a waiver of the Government's rights under the cited clause and that its release to other offerors was improper. However, I. S. E. did not protest until October 8, after receipt of initial proposals, though it states that it knew on August 17 that the feasibility study was being distributed to those offerors invited to submit proposals. Thus, under 4 C.F.R. § 20.2(b)(1), supra, this basis for protest is untimely filed. See also, 46 Comp.

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Gen. 885, 889 (1967). It is significant that I. S. E. does not contend that the study contains proprietary information; nor does the protester show how it was prejudiced in the instant procurement by release of the study. Therefore, the sole basis for its protest derives from the alleged breach of an earlier, unrelated contract and would not merit consideration in connection with our examination of the propriety of award under the instant RFP.

I. S. E. next contends that its extensive involvement with the Forest Service in the development of this procurement between September 1975 and May 1976, entitled it to the contract award on a sole-source basis. In view of the fact that 40 U. S. C. § 543 requires that, in A&E contracts, discussions shall be held with no less than three firms; a sole-source award would have violated a statutory requirement for competition. Furthermore, I. S. E. knew that a competitive procurement was being conducted by the Forest Service, on May 17, 1976, when the procurement was announced in the Commerce Business Daily. Yet, I. S. E. did not file a protest until October 6, after interviews were conducted and initial proposals received. Under the circumstances, this basis for protest is untimely under our Bid Protest Procedures, 4 C. F. R. § 20.2(b)(1), supra.

Finally, I. S. E. contends that its proposed civil engineering subcontractor, who was also proposed by another unsuccessful contractor, failed to adequately represent the protester during its presentation before the Board and relayed confidential information to its competitor. I. S. E. also maintains that it has a patent pending for the Forest Service's proposed greenhouse design. As neither of these issues relates to the propriety of the Forest Service's negotiation procedures or its decision to make award to Burns, these issues are not for resolution by our Office in connection with the instant bid protest.

Deputy

  
Comptroller General  
of the United States