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**DECISION**



*J. Necker, P.I.*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-191162

**DATE:** June 14, 1978

**MATTER OF:** Metropolitan Contract Services, Inc.

**DIGEST:**

1. Protest filed within 10 working days of debriefing is timely under 4 C.F.R. § 20.2(b)(2) notwithstanding protester had source selection statement several weeks before debriefing, which contained basis of protest, because statement did not advise as to reasons why action of agency was taken.
2. While protester's best and final offer contained 4-percent cost ceiling to Government on 8-percent Employee Stock Ownership Plan (ESOP), fringe benefit, agency's cost evaluation using 8-percent ESOP cost factor was not improper where there was no assurance Government would receive benefit of cost ceiling due to ability of contractor to renegotiate collective bargaining agreement and shift costs to other fringe benefit.
3. Where offeror makes statement at oral discussions which conflicts with written proposal, such statement creates ambiguity which should have been pointed out by agency prior to submission of best and final offer by offeror. However, resolving doubt in favor of protester does not alter contractor selection of agency.
4. Determinations of technical merits of proposals are only questioned by GAO where there is clear showing of unreasonableness, abuse of discretion or violation of procurement regulations or statutes. Contrary to allegations of protester regarding evaluation of several portions of proposal, GAO finds determinations to have been reasonable.
5. Since procuring activities have broad latitude in determining particular method of proposal evaluation and there is no requirement that proposals be numerically scored, use of adjectival rating system is not objectionable.

Metropolitan Contract Services, Inc. (Metropolitan), has protested the award of a contract to Klate Holt Company under request for proposals (RFP) No. 1-101-5700.0120 issued by the National Aeronautics and Space Administration (NASA).

The RFP was for support services for facility and equipment maintenance at the NASA Langley Research Center, Hampton, Virginia. The major task areas for engineering and maintenance services are refrigeration and air conditioning equipment, electrical and mechanical equipment, building trades services and equipment hauling and rigging. The RFP contemplated a contract for a 2-year base period plus a 1-year priced option and two additional 1-year unpriced options.

Seven proposals were submitted by the August 30, 1977, due date. These proposals were evaluated by the Source Evaluation Board (SEB) against the following evaluation criteria contained in the RFP:

Mission Suitability Score    Maximum Point Allocation-  
1000

Factor I - Management & Operations Plan    50%

1. Initial Staffing  
& Phase-In
2. Technical Operations Plan
3. Continuing Plan
4. Organization
5. Local Facility

Factor II - Key & Critical Personnel    50%

1. Key Personnel

- a. Contract Manager
- b. Foreman, Refrigeration & Air Conditioning
- c. Foreman, Maintenance Electrician
- d. Foreman, Mechanical
- e. Foreman, Building Trades
- f. Foreman, Rigging & Hauling
- g. Supervisor, Engineer

## 2. Critical Personnel

The five subfactors under Factor I were listed in order of decreasing importance. Under Factor II, the Key Personnel were considered more important than the Critical Personnel and carried approximately two-thirds of the total weight of Factor II.

The R/P also advised that the cost and other factors proposal would be evaluated but not scored; however, cost and other factors may be important discriminators in the final selection. The other factors were listed as experience and past performance, financial capability, labor management relations, corporate policies, Equal Employment Opportunity Compliance, safety and health and exceptions to contract terms and conditions.

As a result of the evaluation, three of the seven firms were found to be in the competitive range. On October 13, 1977, discussions were held with these three offerors and best and final offers were submitted on October 25, 1977. Following final evaluation, the three offerors were ranked, as follows, in the area of mission suitability:

<u>Offeror</u>	<u>Adjective Rating</u>
Klate Holt	Good plus
Metropolitan	Good
Mercury Engineers	Good
Mercury (Alternate proposal)	Good

All three offerors were found to be acceptable in the area of other factors. The Government's estimate of probable cost through the first option period showed the following:

<u>Offeror</u>	<u>Cost</u>
Klate Holt	\$13,122,000
Metropolitan	13,162,000
Mercury	13,188,000
Mercury (alternate)	13,229,000

The NASA Source Selection official found cost not to be a significant discriminator in the final selection and on December 19, 1977, chose Klate Holt as the selected offeror for contract negotiations. Award has not been made pending resolution of this protest.

Metropolitan's first basis of protest is that the SEB failed to consider a 4-percent ceiling which Metropolitan placed on the costs of the Employee Stock Ownership Plan (ESOP) contained as a fringe benefit in the Service Contract Act wage determination applicable to the procurement.

Before proceeding to this contention, Klate Holt has argued, in its submission to our Office as an interested party, that this ground of protest was

untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1977)).

Metropolitan filed its protest with our Office on January 24, 1978, which was 10 working days following its debriefing by NASA on January 10, 1978. Therefore, the protest was timely filed under 4 C.F.R. § 20.2(b)(2) which requires filing within 10 working days after the basis of the protest is known or should have been known, if the date of the debriefing is when Metropolitan learned its basis of protest. Klata Holt argues that the time for filing should run from when Metropolitan was furnished a copy of the selection statement dated December 19, 1977.

The selection statement of December 19, 1977, contained the following regarding the evaluation of the cost proposals:

"\* \* \* The probable costs were derived essentially by standardizing the adjustment for wage and salary escalation for all proposals at 6 percent per annum, and costing the fringe benefit employee stock ownership plan requirement at the 8 percent required by the wage determination for all proposals. \* \* \*"

Klata Holt contends that this was sufficient information upon which Metropolitan could and should have protested to our Office without waiting for the January 10, 1978, debriefing.

We have been advised that the offerors were telephonically notified on December 1, 1977, who the selected contractor was but were given no details as to the evaluation of proposals. On December 2, 1977, Metropolitan wrote the contracting officer and requested a debriefing and by letter of December 6, 1977, the contracting officer scheduled the debriefing for January 10, 1978. Between this time and the debriefing, Metropolitan was furnished a copy of the selection statement of December 19.

Klate Holt cites decisions of our Office which it argues require finding the protest untimely. These cases all stand for the proposition that, where a protester is sufficiently apprised of its basis for protest prior to a debriefing, delay in filing of the protest until after the debriefing is inappropriate as the debriefing would serve no useful purpose.

However, we do not find the cited cases controlling here. In J.A. Reyes Associates Inc., B-189666, December 14, 1977, 77-2 CPD 461, Reyes was contending the winning proposal was not acceptable. The agency advised Reyes that only its proposal would be discussed at the debriefing and, therefore, we found the protest to be untimely, because Reyes knew of any of its bases for protest prior to the debriefing, which would add nothing to its knowledge of the winning proposal.

In Compu-Serv, B-186164, May 9, 1977, 77-1 CPD 327, the protester had been furnished the reasons why its proposal was found unacceptable by letter from the contracting officer. We found that a protest filed after a debriefing more than a month later was untimely as Compu-Serv had sufficient information from the letter to file the protest. Other cases involving similar factual situations cited by Klate Holt are Informatix, Inc., B-188564, April 18, 1977, 77-1 CPD 272; Singer Company, B-186547, December 14, 1976, 76-2 CPD 481; and Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256.

We do not believe the information regarding the evaluation of the ESOP conveyed by the selection statement was sufficient to meet the standards of the above-cited cases. While the statement may have contained the basis of Metropolitan's protest (evaluation of the ESOP at 8 percent), it did not contain the reasons why such a determination was made. Therefore, we find Metropolitan's action in waiting for the scheduled January 10 debriefing to comply with the guideline contained in Compu-Serv, supra:

"\* \* \* a protester may withhold filing a protest with this Office pending an imminent debriefing to learn why its proposal was not favorably considered for award. See Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312. \* \* \*

Accordingly, we will consider this issue on the merits.

Metropolitan's best and final offer, dated October 21, 1977, contained the following advice in the cover letter to the offer:

"\* \* \* Too, although the ESOP costs remain the same as required by the Wage Determination Act of September 22, 1977, we would like to inform the SEB that management has reviewed the impact of amortizing of the ESOP costs over the longer five-year contract period and if Metropolitan is awarded this contract, our costs will be 4%, 4% and 4%, respectively. We are confident these amounts can be negotiated with IBEW Local 1340; however, in the event they cannot, Metropolitan would agree to a ceiling of 4%, 4% and 4%, respectively, for the ESOP costs under this contract. Accordingly, we feel NASA should consider this as a cost savings under Metropolitan's revised proposal. \* \* \*

Metropolitan argues that, if NASA had evaluated its proposed cost using the 4-percent ceiling on ESOP which it contends was proposed above, its evaluated cost would have been \$385,831 less, or \$12,776,169. Because of the closeness of the technical ratings of the Klate Holtand Metropolitan proposals, coupled with certain alleged improprieties in the technical evaluation, which will be discussed infra, this reduction in Metropolitan's estimated cost would have been a significant discriminator in the final selection process.

As background, NASA states that all three offerors in the competitive range proposed different methods of handling the ESOP costs in their best and final offers. Metropolitan's position was stated above. Klate Holt stated that it had approached the labor union involved with a view to negotiating down the 8-percent ESOP costs in return for an increase in the pension plan already contained in the collective bargaining agreement. However, no agreement was reached and in its final cost proposal Klate Holt included the full 8-percent ESOP costs. Mercury advised that it did not have an ESOP but would substitute a cash equivalent in conformance with the wage determination. Mercury anticipated negotiating with the union to eliminate the ESOP in consideration for a labor rate increase significantly lower than the 8-percent contribution rate.

Based on the above, the contracting officer's statement on the protest contained the following reasons why the proposed cost ceiling was not evaluated.

First, the Service Contract Act wage determination applicable to the proposed contract contained the ESOP at 8 percent as a legitimate fringe benefit and had to be so considered by the SEB because the follow-on contractor would be liable to pay this benefit at the 8-percent level.

Second, NASA argues that, as only Metropolitan of the three offerors had an ESOP, Metropolitan was the only offeror in a position to manipulate the cost level or contribution rate of the ESOP because, according to NASA's counsel, the Metropolitan Board of Directors could unilaterally change the plan at any time. Also, as the wage determination required an 8-percent ESOP or its equivalent, if Metropolitan unilaterally reduced its ESOP costs to 4-percent, it would be required to provide some additional fringe benefit, which, when coupled with the 4-percent ESOP, would yield the equivalent of 8-percent ESOP costs.

Thus, while ESOP costs were reduced to 4 percent, the total fringe benefit package costs would remain unchanged.

Next, since the Government is liable to reimburse a contractor for all legitimate fringe benefits, NASA believed it would be unconscionable for the Government to accept a ceiling on the costs of such benefits.

Finally, NASA contends that the ceiling offer was contingent on the outcome of negotiations with the union and, therefore, clearly conditional.

Upon our review of the entire record, for the reason stated below, we cannot say that the evaluation by NASA of all cost proposals with an 8-percent ESOP cost factor was improper.

We do disagree that the offer of the 4-percent ceiling was conditional on the outcome of negotiations with the union. The statement in Metropolitan's best and final offer regarding the ESOP advised that Metropolitan was confident it could negotiate a lower rate, but, even if it could not, it would agree to a 4-percent ceiling. Therefore, whether through negotiations with the union or through the cost ceiling, NASA was assured of paying no more than 4-percent ESOP costs under a contract with Metropolitan.

However, as noted by NASA, altering the 8-percent ESOP would most likely require raising another fringe benefit. NASA was given no protection regarding other fringe benefit costs. It is clear from Metropolitan's best and final offer that the 4-percent ceiling only applied to the ESOP. If the ESOP contribution was reduced or the ESOP abolished altogether and an equivalent increase given the employees in another portion of the wage determination, NASA would not receive any of the cost savings Metropolitan attributes to its 4-percent ceiling. In passing, we note that Metropolitan has renegotiated its labor agreement with the union involved and, effective July 1978, the ESOP has been deleted and

a 7-percent increase made in the pension fund for employees. Therefore, there will be no ESOP to which to apply a ceiling and NASA would have to reimburse the full 7-percent pension fund cost.

Accordingly, we find nothing improper in NASA's cost evaluation method to attempt to arrive at realistic cost projections for the offerors.

Metropolitan also argues that NASA did not evaluate its proposal in the same manner in which Klate Holt's proposal was evaluated.

In the area of contract manager backup, Metropolitan contends that the SEB treated Klate Holt more favorably than itself. The selection statement noted that under the evaluation factor "Continuing Plan" Metropolitan had a weak backup approach for the contract manager. At the debriefing, NASA advised Metropolitan that its proposal had been downgraded for failing to specify a single individual as a backup for the contract manager. This conclusion appears to be based on statements made at the oral discussion held with Metropolitan, because both NASA and Metropolitan agree that Metropolitan's original written proposal listed one individual as backup for contract manager and its best and final offer did not contain any change in the area.

At the oral discussions, the SEB asked whether the individual named in the proposal, who in his normal capacity as engineering supervisor is located offsite, would move onsite in the absence of the contract manager. In responding, the contract manager stated that, in the past and the way it was proposed to be handled in the future, administrative matters pass to one individual and technical matters are handled by the person proposed as the contract manager backup. It was this split in authority which caused the SEB to downgrade Metropolitan in the "Continuing Plan" evaluation criterion.

Metropolitan contends that under its written proposal it was obligated to furnish a single contract manager and that it was improper for NASA to construe the comments at the orals as changing the written proposal, especially since NASA did not advise Metropolitan that it considered the backup plan as a weakness or deficiency.

NASA responds to the above by citing the NASA Source Evaluation Handbook (NHB 5103.6A, Page 4-13, 407(1)) which reads as follows:

"After coordination of all committee reports, information received from offerors through plant visits, written and oral discussions, and revised proposals, if any, and all information received from other sources, the Board shall finally score proposals from a mission suitability standpoint."

Therefore, NASA concludes it could not ignore the statement made at the orals in evaluating Metropolitan's proposal. NASA argues that as nothing was mentioned in Metropolitan's best and final offer regarding contract manager backup and nothing from its original proposal concerning the backup was resubmitted, its proposal was modified by the oral statement.

NASA did not have to advise Metropolitan that it considered the split responsibility a deficiency. See NASA Procurement Directive 70-15 and Management Services, Inc., 55 Comp. Gen. 715, 729, (1976), 76-1 CPD 74. However, we believe that when there is a clear conflict between an offeror's written proposal and a statement made at the offeror's oral presentation, this situation gives rise to an ambiguity as to the offeror's intention which should be clarified. The SEB should have pointed out this ambiguity to Metropolitan when it arose so that the matter could have been resolved before the final evaluation of the proposals.

While we are unable to say which approach Metropolitan would have taken in its best and final offer, if the matter had been brought to its attention, even assuming it would have chosen the single backup for the contract manager, favored by NASA, we do not find that this would have altered the selection made by NASA. In its initial evaluation, the SEB gave Metropolitan 200 points out of a possible 250 points under the "Continuing Plan" factor. In the final evaluation, following the orals, the criticism of the split authority is made by the SEB and Metropolitan is given 175 points, a reduction of 25 points. Adding the 25 points to Metropolitan's final evaluation has the effect of raising its weighted score for Factors I and II from 830 points to 842-1/2 points. Klate Holt remains the highest technically rated offeror with 856 points.

While Metropolitan argues that Klate Holt did not propose an individual for contract manager backup, our review of its proposal shows that the supervisor of engineering services was so designated.

Metropolitan also protests the fact that it was downgraded for item 5 under evaluation Factor I, "Local Facility." The source selection statement noted that, in the above category, Metropolitan was rated satisfactory since the facility description and plans for maintaining operational capability of its offsite facility were lacking. Klate Holt was rated satisfactory plus because proof of lease was provided but Klate Holt did not provide a facility description or plans for maintaining operational capability.

Metropolitan argues that it was downgraded solely because it failed to provide a copy of its lease with its proposal and that NASA should have requested this information from Metropolitan. NASA responds that the difference in the scoring of the two proposals was because Metropolitan's lease expired March 31, 1980

(the end of the basic contract period), while Klate Holt's lease expired March 31, 1981 (the basic contract period plus the 1-year priced option period). Klate Holt did not submit a copy of its lease with its proposal either.

We believe the scoring under this evaluation factor to be reasonable and, since neither offeror submitted a copy of its lease for offsite facilities, we find no prejudice to Metropolitan because NASA did not request a copy of its lease.

The evaluation by the SEB of the contract managers proposed by Metropolitan and Klate Holt was inconsistent according to Metropolitan's following arguments.

Klate Holt's proposed contract manager was rated good plus based on 21 years of plant engineering experience, an excellent educational background, good supervisory experience and excellent experience with computerized maintenance programs. He was criticized for not having experience with Government contracts. Metropolitan proposed its incumbent contract manager who was rated good, based on good supervisory and Government contract experience with the SEB's major criticism being a weak background in maintenance-type work.

Regarding Klate Holt's manager's lack of Government contract experience, Metropolitan argues that in another past procurement at Langley for rigging and hauling, a proposed contract manager with the same deficiency was only rated satisfactory, not good plus, as here. We do not view what occurred in other procurements as relevant here. The critical test is that all offerors in a certain competition are treated fairly and equally.

Here, NASA contends that the other strengths of Klate Holt's manager far outweighed the deficiency in Government contract experience. In answer to a further allegation by Metropolitan that the SEB should

have reviewed the Award Fee Board's reports on current contract performance, NASA states that it did review these records in evaluating Metropolitan's manager. However, NASA, upon review of Metropolitan's manager's past performance, resume and personal reference checks, found him to be doing a good job, not the superior job which Metropolitan contends is evidenced by the award fee determinations. Our Office has recognized that an Award Fee Board's views of performance by a contractor do not prevent an SEB from arriving at a different rating for source selection. Wackenhut Services, Inc., B-187299, March 22, 1977, 77-1 CPD 198.

As we have often stated, it is not the function of this Office to evaluate proposals or to make independent judgments as to the scores or ratings which should have been assigned to proposals. Therefore, determinations by procuring activities regarding the technical merits of proposals will be questioned by this Office only upon a clear showing of unreasonableness, abuse of discretion or a violation of the procurement statutes or regulations. Automatic Informational Retrieval Systems, Inc., B-180550, August 4, 1977, 77-2 CPD 80. We find NASA's evaluation of the two contract managers to be reasonable and we will not substitute our judgment for that of the procuring activity.

Metropolitan also challenges the rating its proposed electrical foreman received. The foreman, who was rated satisfactory plus, had an excellent experience background but was downgraded for past performance on the current contract on which he was the incumbent electrical foreman. Metropolitan argues that this action was unfair as the foreman was only recently placed on the contract and was downgraded for work attributable to another person, who is no longer employed by Metropolitan. NASA states that the foreman has been working on the incumbent contract since May 19, 1975. Based on this information, we see no reason why the foreman's past 2 years of performance should not be considered.

Because of the above findings that there was nothing improper in the evaluation of the proposals, we find it unnecessary to respond to the Metropolitan contention that the chairman of the SEB was biased in the selection process.

Finally, Metropolitan challenges the use by NASA of the adjectival rating system. Under the evaluation plan for this procurement, the SEB sought to reach a consensus in terms of adjective ratings. Each adjective rating was for a certain range in point scores of an evaluation factor. (Excellent-1,000 to 900; good plus 800-900; good 700-800, etc.). The evaluation plan contained the following as to how the proposals would be evaluated:

"5.3 Upon completion of 5.2, the board will convene and collectively review in depth each remaining technical/management proposal. As a minimum, the board will use elements outlined in Attachment 1 for evaluating the criteria for each factor. Adjective ratings and strong and weak points will be discussed for each offeror for the same criteria to highlight discriminators and assure that adjective ratings reflect comparative strengths and weaknesses. This process shall be repeated for each criterion under each factor. A board consensus adjective rating will be developed for each subfactor within each factor, and the strong and weak points substantiating the rating documented. The adjective rating shall then be converted to a numerical rating, and the board shall review the numerical rating to ensure that the numerical rating is the consensus of the board. Lack of a consensus and/or minority opinion will also be documented."

Metropolitan argues that this process masks the decision-making process and offerors are never provided with the rationale employed in making the award decision.

In Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79, we made the following observations regarding the evaluation of proposals:

"Procuring activities have broad latitude in determining the particular method of proposal evaluation to be utilized. Augmentation, Inc., B-186614, September 10, 1976, 76-2 CPD 235; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237. The only requirements are that the method provide a rational basis for source selection and that the evaluation itself be conducted in good faith and in accordance with the announced evaluation criteria. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325; Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253 and 55 Comp. Gen. 499 (1975), 75-2 CPD 344; EPSCO, Incorporated, B-183816 November 21, 1975, 75-2 CPD 338. Agencies generally utilize numerical point ratings in 'an attempt to quantify what is essentially a subjective judgment.' 52 Comp. Gen. 198, 209 (1972). \* \* \*"

Further, neither our Office nor the procurement regulations require that proposals be evaluated on the basis of numerical scores computed through a mathematical formula. B-178345, November 19, 1973.

Accordingly, our Office has no objection to the adjectival rating system employed by NASA here.

The protest is denied.

  
Acting Comptroller General  
of the United States