

A. Gallagher
Proc. I

DECISION



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

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FILE: B-192008

DATE: January 16, 1979

MATTER OF: Moshman Associates, Inc.

DIGEST:

[Protest Concerning Award of HEW Contract to Competitor]

1. Protest against both technical and cost evaluation, filed within 10 working days of receipt of information regarding cost evaluation, is timely as to both grounds of protest, notwithstanding protester had information re technical evaluation previously. Upon receipt of cost information which protester felt was improperly evaluated and narrowed difference in cost between protester's and successful offeror's proposals, such information finalized protester's overall protest posture to allow timely protest.
2. Objection after award that agency erred in requiring offerors to furnish substantiating cost or pricing data for travel costs is untimely, as it is based upon apparent improprieties in RFP and at latest should have been filed by closing date for receipt of best and final offers.
3. Objections in protest after award that agency accepted successful offeror's unreasonably low travel costs, conducted inadequate cost evaluation, and should have normalized portion of offerors' travel costs are timely, since protest was filed fewer than 10 working days after protester first received information on successful offeror's average travel cost.
4. There is merit in protester's contention that offerors' proposed airline fare costs should have been "normalized." Such normalization lessens cost difference between protester's cost and awardee's and in view of lack of

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support in record as to determination that the two proposals were essentially equal, procuring activity should review contractor selection.

Moshman Associates, Inc. (Moshman), has protested to our Office concerning the award of a cost-plus-fixed-fee (CPFF) contract to Analysis, Management and Planning, Inc. (AMPI), under request for proposals (RFP) No. HRA-230-7B-0567, issued by the Department of Health, Education, and Welfare (HEW). The contract at an estimated CPFF of \$286,263, involves conducting 14 conferences and workshops dealing with certain health issues during the period from March 31, 1978, to March 30, 1979 (Phase I), and furnishing reports on these activities. It provides for a 1-year option (Phase II) covering an additional 21 conferences and workshops at an additional CPFF of \$436,448. The protester challenges HEW's evaluation of proposals and selection decision and urges our Office to recommend that HEW terminate AMPI's contract and award the balance of the work to it.

The RFP Scope of Work stated that the contractor would be responsible for all administrative and financial arrangements in organizing the conferences and workshops and would be required to schedule, arrange and pay when necessary for items such as conference facilities (which might be in Federal Government offices or elsewhere) and transportation. The Scope of Work indicated that participants would include HEW personnel from both regional offices and central offices, as well as representatives from States and Territories. It was estimated that, in Phase I, 80 Federal and 200 State/Territorial persons would attend the conferences and 50 Federal and 250 State/Territorial persons would attend the workshops. For Phase II, the estimates were 120 Federal and 300 State/Territorial persons for conferences and 75 Federal and State/Territorial persons for workshops.

In regard to technical proposals, the RFP indicated that offers merely to conduct a program in accordance

with the Government's requirements would be rejected as "nonresponsive." Offerors were told that their technical proposals were to include "unpriced details of labor hours and other direct cost elements" along with a comprehensive discussion of how the conferences and workshops would be developed and a statement of financial responsibility demonstrating the ability to underwrite travel and other expenses.

In regard to the business or cost proposals, the RFP told offerors to assume that the national conferences would be held in the Eastern, Central, Mountain, and Pacific time zones and that the workshops would be held in HEW's 10 regions around the country. Exact locations were not given. (HEW has indicated that during the procurement it did not yet know departure points and destinations for the hundreds of possible travelers.) The RFP also stated that "as a minimum" offerors' cost proposals were to be fully supported by cost or pricing data adequate to establish the reasonableness of the proposed costs and that cost for individual elements of work was to be itemized.

The RFP also established certain criteria for the evaluation of technical proposals:

| | <u>Weights</u> |
|---|----------------|
| Understanding of objectives of contract | 10 |
| Approach and organization of proposal | 30 |
| Financial responsibility | 15 |
| Experience | 30 |
| Personnel | 15 |
| | <hr/> 100 |

In addition, the instructions to offerors stated:

"You are advised that paramount consideration shall be given to the evaluation of technical proposals, as well as price, in the award of a contract."

Eleven proposals were received. In the technical evaluation, Moshman's proposal received the highest score (92.2) and AMPI's was second (82.4). These proposals and those of the next two highest-scored offerors

(77.6 and 75.4) were judged to be within the competitive range. Negotiations were conducted and the four offerors submitted best and final offerors. AMPI's CPFF was lowest and Moshman's second lowest:

| | <u>Phase I</u> | <u>Phase II</u> | <u>Total</u> |
|---------------------|----------------|-----------------|--------------|
| AMPI | \$286,263 | \$436,448 | \$722,711 |
| Moshman | 311,612 | 484,526 | 796,138 |
| Government estimate | 356,421 | 535,974 | 892,395 |

HEW's "Summary of Negotiations and Recommendation for Award," dated March 20, 1978, noted the following points, among others, in concluding that award should be made to AMPI: (1) as a result of the negotiations, each offeror displayed basically or identically the same degree of technical excellence; (2) the Project Officer believed AMPI's travel costs might be underestimated by about \$30,000 due to underestimated per diem and/or airfares; (3) the difference in (total) CPFF between AMPI and Moshman was \$73,427 and even with a \$30,000 underestimation AMPI's CPFF was still \$43,427 lower than Moshman's; and (4) AMPI's costs were determined to be fair and reasonable.

AMPI was awarded a contract for Phase I on March 31, 1978.

By letter dated April 5, 1978, Moshman made a request under the Freedom of Information Act (FOIA) for certain information from HEW, including (1) the AMPI technical proposal; (2) portions of the AMPI cost proposal including the number of hours of direct labor, number of trips, cost per trip, per diem, and other data; (3) the record of HEW's evaluation of Moshman's and AMPI's proposals; (4) the applicable departmental regulations indicating the manner in which technical ratings and price were combined; and (5) the contract. Also, Moshman states that on April 25, 1978, it received a debriefing which consisted only of a brief telephone conversation. Moshman states it requested at that time, but was not given, AMPI's average travel cost figure.

Moshman received HEW's response to its FOIA request on May 3, 1978. Apparently, Moshman received substantially all the information it requested, but not AMPI's average travel cost figure. The protester ultimately received this item of information orally from HEW on May 10 and filed its protest with our Office on May 23, 1978.

While the protester has presented a number of contentions, we believe they can be accurately summarized into the following two general areas:

1. The RFP stated that nonmonetary considerations would be paramount. However, HEW unlawfully ignored the clear technical superiority of the Moshman proposal in awarding the contract to AMPI. The Moshman technical proposal was scored 9.8 points higher than AMPI's on a 100-point scale (92.2 vs. 82.4). Also, the technical evaluation narrative reflected Moshman's superiority. In contrast, doubtful aspects of AMPI's technical proposal included the adequacy of its personnel and word processing system as well as a proposed level of effort for the first year substantially below HEW's man-hour estimate. There was no numerical rescoring of the best and final offers, nor does the record provide any tenable basis to conclude that any real reevaluation was conducted or that the Moshman and AMPI technical proposals were ever judged "substantially equal." Under HEW Procurement Regulations § 3-3.5107(c) (41 C.F.R. § 3-3.5107(c) (1977)), price or cost becomes the controlling factor only if there is no substantial basis for distinguishing between the technical excellence of proposals. This and other applicable procurement regulations were violated by HEW.

HEW's response, briefly, is that, in the opinion of the contracting officer, the RFP indicated that technical considerations and cost were equally important; that the 9.8-point differential is less significant when viewed in the context that it was the first of two technical evaluations; that, although there was no numerical rescoring, in the second evaluation the two technical proposals were judged substantially equal; and that, in the circumstances, none of the regulations cited by the protester were violated.

2. HEW erred in its cost evaluation. The single most significant direct cost factor is airline fares for the non-Federal conference and workshop participants. The parties chosen to attend the conferences and the travel distances involved are factors wholly within the Government's control. Standard airline fares are fixed and cannot vary from one offeror to another. During the negotiations, HEW said nothing in regard to Moshman's assumptions concerning travel costs, except to repeatedly assure Moshman that its travel cost estimate was reasonable. Moshman reasonably believed HEW was "normalizing" airline fare costs. However, HEW erroneously required offerors to submit cost or pricing data on travel costs notwithstanding the prohibition of Federal Procurement Regulations (FPR) § 1-3.807-3(f) (1964 ed. amend. 124) that cost or pricing data shall not be requested when prices are set by law or regulation. HEW never developed its own estimate of airline fare costs and failed to normalize such costs. That AMPI's average travel cost of \$195 was unreasonably low is shown by the fact that it was 24 percent lower than Moshman's statistically determined average travel cost figure of \$255 and the fact that the record clearly shows HEW's Project Officer believed AMPI had underestimated travel costs.

HEW's main response is that the arguments concerning normalization are untimely because the protester failed to raise this during the negotiations. Also, the agency maintains, among other things, that it extensively examined offerors' cost data and that the comparison of Moshman's \$255 average travel cost figure with AMPI's \$195 figure is misleading because the former includes the average participant's cost for both airfare and ground transportation while the latter represents average airfare only.

Both HEW and AMPI have questioned the timeliness of the protest. In this regard, section 20.2 of our Bid Protest Procedures (4 C.F.R. Part 20 (1978)) imposes certain requirements as to the time within which protests must be filed. Protests based upon apparent improprieties in an RFP must be filed prior to the closing date for receipt of proposals. In cases not involving apparent solicitation improprieties, protests must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier.

HEW's position is that Moshman, through receipt on May 3, 1978, of the documentation regarding the selection process, possessed all the information concerning the technical evaluation of the competing proposals that it would obtain and, therefore, the "selection" issue should have been protested within 10 working days of May 3. The advice, AMPI's average travel cost figure, which Moshman received on May 10, 1978, added nothing to Moshman's understanding of the technical evaluation of the proposals.

We do not agree with this reasoning. On May 3, 1978, upon receipt of the FOIA information, Moshman viewed the situation from the standpoint that an award had been made to a firm whose proposed cost was \$73,427, or approximately 10 percent less than its proposed cost, notwithstanding that Moshman's proposal had been scored 9.8 points higher technically. However, upon learning of the travel figure utilized by AMPI, the realistic cost differential, as argued by Moshman, became much less and Moshman's technical superiority should have controlled the award decision.

Moshman's protest is directed toward the alleged erroneous selection by HEW of AMPI through improper technical and cost evaluations, the total effect of which resulted in the award of a contract that was not the most advantageous to the Government. We do not believe Moshman's overall protest posture was finalized until the receipt of the cost information and, therefore, we find the protest to be timely filed with the exception of one issue which will be discussed infra. Ohio Medical Indemnity, Inc., B-190312, November 29, 1978, 78-2 CPD 373.

Regarding HEW's technical evaluation of the Moshman and AMPI proposals, it is not the function of our Office to evaluate technical proposals. Reza Seyyidin Art and Film Production, B-191470, August 21, 1978, 78-2 CPD 138. Moreover, we have agreed with the exercise of the administrative discretion involved--in the absence of a clear showing that the exercised discretion was not rationally founded--as to whether a given technical point spread between competitive range offerors showed that the higher-scored proposal was technically superior.

While Moshman's proposal was rated initially 9.8 points higher than AMPI's, HEW argues, as noted above, that this difference is misleading because after the submission of best and final offers, the two proposals were reevaluated and found to be essentially equal. Therefore, cost became the determining factor in the award selection.

The best and final offers were not numerically scored during the reevaluation. The recommendation for award of the contract to AMPI merely states that following negotiations each offeror displayed basically or identically the same degree of technical excellence to successfully perform and complete the contract. Also, in a memorandum from the project officer, following best and final offers, the statement is made that from a technical viewpoint, all four proposals in the competitive range are considered capable of performing the requirement.

Based upon these bare conclusionary statements, our Office is unable to determine if the decision that the proposals of AMPI and Moshman were essentially equal was rationally founded. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253.

There are also some timeliness problems with Moshman's contentions on the cost evaluation issues insofar as the protester objects to the fact that the RFP required offerors to submit cost or pricing data dealing with travel costs. As noted above, the RFP was explicit in stating that the contractor would be responsible for transportation expenses and in requiring offerors to propose travel costs along with substantiating cost or pricing data. The gist of the protester's position, as we understand it, is that it reasonably assumed the data on travel costs was "for information only" or for the sole purpose of shedding light on the offeror's technical understanding of the work because (1) HEW repeatedly told it during negotiations that its travel cost was reasonable and (2) HEW did not negotiate on this subject.

As the RFP requirements concerning cost or pricing data were clear and there is no indication in the record

that HEW ever told Moshman the requirements were being changed or waived, we believe the protester's assumption was unreasonable. Protests based upon apparent improprieties in an RFP must be filed prior to the closing date for receipt of proposals. Section 20.2 (b)(1), Bid Protest Procedures. In view of Moshman's unreasonable assumption during the negotiations, the protest on this issue should have been filed at the latest by the closing date for receipt of best and final offers. Cf. Kappa Systems, Inc., 56 Comp. Gen. 675, 688-689 (1977), 77-1 CPD 412.

However, the protest is timely insofar as it is based on the contentions that regardless of what the RFP required, HEW accepted an unreasonably low \$195 average travel cost figure from AMPI, conducted an inadequate cost evaluation in this respect, and failed to normalize travel costs (i.e., given the RFP requirement that offerors propose travel costs and submit substantiating cost or pricing data, HEW should nonetheless have recognized during the cost evaluation that AMPI's travel cost was unreasonably low and should have normalized offerors' travel costs). It is undisputed that the protester did not receive the AMPI travel cost figure until May 10, 1978, fewer than 10 working days before it filed its protest, and we cannot say on the record that Moshman reasonably should have known these grounds for protest prior to May 10.

FPR § 1-3.807-2(a) (1964 ed. amend. 103) requires generally that cost analysis shall be performed when cost or pricing data is required to be submitted. Cost analysis is described in FPR § 1-3.807-2(c) as the review and evaluation of cost or pricing data and of the judgmental factors applied in projecting from the data to the estimated costs in order to form an opinion on the degree to which proposed costs represent what performance of the contract should cost.

Our Office has often pointed out the importance of analyzing proposed costs in terms of their realism, since, regardless of the offerors' proposed costs, the Government will be obligated under a cost-reimbursement-type contract to reimburse to the contractor its allowable costs. See generally Dynalectron Corporation, et al.,

54 Comp. Gen. 562 (1975), 75-1 CPD 17, affirmed, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341. We have also noted that conducting a cost realism evaluation is a function of the contracting agency, whose determinations will not be disturbed by our Office unless they clearly lack a reasonable basis. Management Services, Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD 74.

An agency may adjust an offeror's proposed cost upwards if a lack of cost realism indicates the ultimate cost to the Government will be greater than the proposed cost. Scott Services, Incorporated, B-181075, October 30, 1974, 74-2 CPD 232. In this connection, normalization (in the sense that the term is being used in the present case) was described as follows in Dynalectron Corporation, supra, 54 Comp. Gen. at 574:

"Normalization is a technique sometimes used within the cost adjustment process in an attempt to arrive at a greater degree of cost realism. It involves the measurement of at least two offerors against the same cost standard or baseline in circumstances where there is no logical basis for differences in approach, or in situations where insufficient information is provided with proposals, leading to the establishment of common 'should have bid' estimates by the agency. * * *"

We further stated at 575:

"The proper goal in both instructing offerors as to proposal preparation and in conducting the probable cost evaluation itself is to segregate cost factors which are 'company unique'--dependent on variables resulting from dissimilar company policies--from those which are generally applicable to all offerors and therefore subject to normalization.* * *"

For example, in Lockheed Propulsion Company, et al., 53 Comp. Gen. 977 (1974), 74-1 CPD 339, we concluded that the National Aeronautics and Space Administration (NASA) should have normalized both offerors' prices for a component substance of rocket motors to the lower price estimate in the successful offeror's cost proposal (with the result that the protester's costs would be adjusted substantially downwards). We noted that either offeror "* * *" would predictably have to purchase essentially the same quantities, from the same sources under the same relationships, at the same location, at the same price, * * * in the same periods of time" and that the lack of an RFP estimate was a factor leading the protester to propose an approach (building a new plant) involving substantially higher costs than the successful offeror's approach. We rejected NASA's view that the protester's plant site decision represented a company-unique approach and was therefore a valid cost discriminator. In contrast, in Dynalectron, supra, we question NASA's normalization of certain direct labor costs in a situation where the RFP appeared to contemplate that offerors propose individual approaches for site support services and it was difficult to conceive that some individuality in acceptable technical approaches, with consequent variations in individual offerors' labor costs, was not possible.

As these cases indicate, whether normalization is appropriate or inappropriate will depend on the facts of the particular procurement. In the present case, the relevant information furnished in the RFP (which was apparently the maximum information HEW possessed at the time the procurement was being conducted) consisted only of the estimated number of non-Federal participants and the approximate locations of the conferences and workshops. In this situation, to the extent that all non-Federal participants' transportation would involve airline travel and all offerors were proposing on that basis, we agree with the protester that normalizing airfare costs makes sense, because the costs do not depend on variables resulting from dissimilar company policies.

A potential difficulty with normalization (which does not exist in the present case) would occur if

offerors proposed substantially different technical approaches to transportation--e.g., if one offeror proposed transporting a large number of participants by methods other than air travel as a cost-cutting measure while others proposed that all participants travel by air. The RFP in this regard did not state that all participants would be traveling by air; it simply required offerors to propose transportation costs. In addition, a potential complication which the parties have not addressed is the recent efforts to deregulate or lessen the regulation of the airline industry and the possibility of future variations in airfares over the same routes. However, we believe there is merit in the protester's position to the extent that HEW should at least have made an attempt to normalize airfare costs under the circumstances of this case.

As for the possible effect of normalization in the present case, we note that, even if both offerors' transportation costs for non-Federal participants are normalized at the Moshman proposed amount, AMPI's CPFF for both Phase I and Phase II remains lowest. In this regard, the protester's comparison of its \$255 figure and AMPI's \$195 figure is inapposite. The bulk of the \$255 figure represents airfare, but it also apparently includes an amount for participants' transportation on the ground (presumably the travel to and from airports). The protester has stated in this regard that airfare comprises \$239 of its \$255 figure. AMPI's \$195 figure, on the other hand, represents airfare only; the AMPI proposal stated ground transportation separately.

If AMPI's proposed costs for non-Federal participants' air and ground transportation are removed from its proposal and Moshman's corresponding costs inserted, AMPI's CPFF for Phase I becomes \$309,027.85 (versus Moshman's \$311,612), for Phase II, \$470,593.68 (versus \$484,526) and for both Phases, \$779,621.53 (versus \$796,138).

In addition, HEW developed an estimate prior to the procurement for combined transportation and per diem costs. If both offerors' costs in these areas are normalized at the level of this estimate, AMPI's

CPFF (Phase I and Total) is lowest. Also, as previously noted, the HEW Project Officer expressed the view that AMPI's cost for Phase I and Phase II might be underestimated by \$30,000 due to underestimated airfares and/or per diem. If AMPI's proposed costs in these areas are increased by \$30,000 and both proposals are normalized at that level, AMPI's CPFF remains lowest. Finally, while HEW apparently did not have a separate estimate for airfare, the Project Officer stated in a March 8, 1978, memorandum that AMPI's \$195 average Phase I airfare was too low and that he believed airfare would be about \$250 per person, per trip. If the airfare component of both offerors' Phase I transportation costs is normalized at this amount, the relative standing is again unchanged.

A summary of the results under the foregoing alternatives follows: 1. normalization of both proposals at Moshman's Phase I and II proposed transportation costs; 2. at the Government's estimated Phase I and II transportation and per diem costs; 3. at AMPI's combined Phase I and II transportation and per diem costs plus \$30,000; and 4. at an average airfare of \$250 in Phase I:

| <u>Alternative</u> | <u>CPFF</u> | | |
|--------------------|----------------|-----------------|--------------|
| | <u>Phase I</u> | <u>Phase II</u> | <u>Total</u> |
| 1. AMPI | \$309,027.85 | \$470,593.68 | \$779,621.53 |
| Moshman | 311,612.00 | 484,526.00 | 796,138.00 |
| 2. AMPI | 292,254.10 | 431,055.55 | 723,309.65 |
| Moshman | 293,748.72 | 430,934.75 | 724,683.47 |
| 3. AMPI | - | - | 754,661.13 |
| Moshman | - | - | 758,072.05 |
| 4. AMPI | 312,622.23 | - | - |
| Moshman | 317,226.66 | - | - |

These results are basically consistent with the result envisioned by HEW's Project Officer when he noted prior to award that AMPI's travel costs might be underestimated, i.e., that even if AMPI's costs

were adjusted upwards to correct the possible under-estimation its CPFF would still be lower than Moshman's. At the same time, the results reflect a considerable narrowing in the gap between the protester's and AMPI's CPFF and create doubt about what the outcome of the evaluation would have been if HEW had attempted to develop a separate estimate for airfare costs and had normalized these costs.

When this doubt is combined with the absence in the record of support for the determination that the two competing proposals were essentially equal, we believe it is necessary to recommend that HEW review the proposals to be certain that the award to AMPI was the most advantageous to the Government. Accordingly, we are requesting the Secretary of HEW by letter of today to ascertain the reasons behind the conclusion that the two proposals were essentially equal and also to reconsider the award selection in view of the above cost discussion. If this review fails to justify the award to AMPI, the Phase II option under the AMPI contract should not be exercised.


Deputy Comptroller General
of the United States