

DECISION



PL-1
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

11,003

FILE: B-189573

DATE: August 10, 1979

MATTER OF: WASSKA Technical Systems and
Research Company

DIGEST:

[Protest Alleging Improper Procurement Procedures]

1. GAO's Bid Protest Procedures provide that "interested" parties may have merits of protests considered; this serves to insure diligent participation and adequate presentation of issues. Where, shortly after filing protest, party moves from its offices, lays off its staff, and its president is employed by another firm, but where party maintains that it is interested in receiving award, GAO will resolve doubt in favor of protester and consider issues on merits.
2. Awardee, a wholly Indian-owned firm, proposed using non-Indian consultant. Protester contends that agency's award based on proposed consultant violates preference for Indian subcontractors. Applicable law and implementing regulations require Indian preference "to the greatest extent feasible." This confers broad discretionary authority and determinations made thereunder will not be disturbed by GAO unless arbitrary or unreasonable. After reviewing record GAO has no basis to question agency's determination.
3. Protester contends that its initial proposal was not objectively evaluated and disagrees with agency's technical evaluation of its proposal. GAO will not disturb agency's determination of relative merits of proposals unless shown to be arbitrary or unreasonable. After thorough review of protester's arguments, its proposal, and agency's explanation of its evaluation, GAO has no basis to object to agency's evaluation.

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4. Contention--that agency erroneously credited awardee with experience in working with Region IX grantees--is without merit since awardee's proposal lists such experience.
5. Protester's argument--that discussions were not meaningful because weaknesses found by evaluators were not reflected in questions raised by contracting officer--is without merit since such questions reasonably informed protester about areas of its proposal that need improvement or clarification.
6. Protester's contention that it was not informed that additional information was needed to improve its chance of being selected is without merit. Where, as here, proposal lacked sufficient detail, agency request for clarification, amplification, and discussion regarding specific areas of its proposal was sufficient to place offeror on notice that deficiencies existed in its proposal.
7. Protester argues that additional information revising its proposal should have resulted in greater score than its initial score. First, each evaluation is separate and only results of each evaluation are relative. Second, GAO has reviewed protester's objections, its revised proposal, agency's evaluation report and individual score sheets; there is no basis to conclude that protester was treated unfairly.

I. Introduction

DLG02555 WASSKA Technical Systems and Research Company (WASSKA) protests the Department of Health, Education, and Welfare's (HEW) award of a contract to Tribal American Consulting Corporation (TACC) under request for proposals (RFP) No. 105-77-6003 for training and technical services to certain Indian grantees in Region IX. In essence, WASSKA contends that (1) HEW failed to follow required preference for Indian firms, (2) HEW miscalculated its proposal, and (3) HEW failed

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to observe required procurement procedures. Numerous submissions from WASSKA and HEW's detailed report provide the factual basis for this decision.

Eight proposals were received and they were evaluated by a panel which rated the first four proposals as follows:

| <u>Firm</u> | <u>Score</u> | <u>Technically Acceptable</u> |
|--|--------------|-------------------------------|
| 1. TACC | 68% | Yes |
| 2. WASSKA | 64% | No |
| 3. American Indian Consultants, Inc. (AIC) | 60% | No |
| 4. Associated Native American Contractors (ANAC) | 52% | No |

The contracting officer questioned whether those offerors ranked 2, 3, and 4 were technically unacceptable and he issued clarifying questions to them. HEW believes that in responding to these substantive questions the offerors were required to amend their proposals. After receipt of the responses, the evaluation panel reevaluated the proposals and concluded again that TACC's proposal was the best:

| <u>Firm</u> | <u>Score</u> | <u>Technically Acceptable</u> |
|-------------|--------------|-------------------------------|
| 1. TACC | 76% | Yes |
| 2. WASSKA | 50% | No |
| 3. AIC | 42% | No |
| 4. ANAC | 30% | No |

HEW reports that, shortly thereafter, award was made to TACC.

II. Is WASSKA an "Interested Party"?

Our Bid Protest Procedures, 4 C.F.R. § 20.1(a) (1979), provide that a party must be "interested" in order that its protest might be considered. That requirement serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided. Black Business Association, B-187379, December 22, 1976, 76-2 CPD 524. Generally, in determining whether a party satisfies the "interested" criterion, consideration should be given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242. Even if a firm is initially "interested," from time to time, during the pendency of the protest, the firm may lose its "interested" status because it became ineligible for award. See, e.g., Dynamic International, Inc., B-186520, September 10, 1976, 76-2 CPD 234 (protester was debarred); John Bernard Industries, Inc., B-189104, June 22, 1977, 77-1 CPD 446 (protester was suspended). In other cases, the issues raised become academic when the protester loses interest in the contract. L&M Services, Inc.--Reconsideration, B-190873, March 6, 1978, 78-1 CPD 175. In cases where the protester merely desires to know whether it was "wrong or right" (Hugo New Steel Products, Inc., B-184888, February 24, 1976, 76-1 CPD 127), we generally do not render decisions on the merits of the issues raised.

Here, shortly after filing its protest, WASSKA moved from its offices, laid off its staff, and its president was employed by another firm. Naturally, the question arises as to whether WASSKA is still eligible for award and still "interested" in the matter. In response, WASSKA contends that it still maintains a low level of contract work with Indian groups, that the firm still exists, and, in effect, that, if possible, it would still be interested in receiving the protested award.

Our policy is that a party should be considered as interested in the absence of objective evidence to the contrary. Enterprise Roofing Service, B-184430, January 2, 1976, 76-1 CPD 5. While WASSKA's continued

viability, and thus eligibility, for award is a matter not entirely free from doubt, we will consider WASSKA as an interested party and resolve the questions raised on the merits.

III. Evaluation of Initial Proposals

A. Indian Preference

WASSKA alleges that HEW violated requirements for Indian preference in contracting and subcontracting by accepting TACC's proposal. WASSKA's initial protest stated that it was not aware of the awardee's Indian status and later WASSKA challenged the awardee's proposed use of a consultant on the basis that TACC was subcontracting without regard to the required Indian preference.

In response, HEW reports that its regulations implementing section 7(b) of Public Law No. 93-638, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b)(2) (1976), provide that any contract or subcontract for the benefit of Indians shall require "to the greatest extent feasible" preference in the award of contracts and subcontracts. HEW further reports that its procuring activities have discretion in applying the requirement. HEW contends that TACC, a wholly Indian-owned economic enterprise, proposed the use of a certain non-Indian consultant as an integral part of its program and HEW's acceptance of that proposal in effect constitutes a determination that additional Indian preference in subcontracting was unfeasible. HEW concludes that such determination is not an abuse of discretion.

In the matter of Department of the Interior-- request for advance decision, 58 Comp. Gen. 160 (1978), 78-2 CPD 432, we held that the language "to the greatest extent feasible" in 25 U.S.C. § 450e(b)(2) confers broad discretionary authority and, therefore, Public Law 93-638 does not require award of contracts or subcontracts to Indian-owned firms. Further, when our Office reviews agency determinations made pursuant to such authority, we will not disturb them unless they are arbitrary, unreasonable, or violative of law or

regulation. See Department of the Interior--request for advance decision, B-188888, December 12, 1977, 77-2 CPD 454. Here, TACC is a wholly Indian-owned firm and so the award to it would be clearly within the Indian preference requirement. After reviewing the record, we have no basis to question HEW's approval of TACC's use of a non-Indian consultant in the circumstances.

B. Substantive Technical Aspects of WASSKA's Proposal

WASSKA states that its proposal was downgraded because: (1) letters of commitment from consultants were not provided; (2) its distinction between program directors and managers was not explained; (3) one of its proposed staff was then currently employed in another program; (4) proposed "cluster sessions" did not provide for HEW or grantee concurrence; (5) a schedule of activities for the Capacity Building was not provided; and (6) its "man-loading" chart confused the evaluators. WASSKA explains that it provided all the information required by the RFP and WASSKA contends that HEW did not objectively evaluate its proposal.

Determinations by procuring agencies 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 and regulations. Automatic Informational Retrieval Systems, Inc., B-188550, August 4, 1972, 77-2 CPD 80, and Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. The fact that protester does not agree with the agency's evaluation does not render the evaluation arbitrary or illegal. Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87; K-MCC, Inc. Consultants, B-190358, March 10, 1978, 78-1 CPD 194.

Further, as we have frequently stated, it is not the function of this Office to evaluate proposals in order to determine which should have been selected for award; the determination of the relative merits of proposals is the responsibility of the contracting agency and must not be disturbed unless shown to be arbitrary or in violation of procurement statute or regulation. Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386; Pharos, Inc., B-188454, July 13, 1977, 77-2 CPD 19; First Harlem Management Corporation, B-188454, July 7, 1977, 77-2 CPD 12; Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206.

Here, we are presented with a sharp disagreement between HEW and WASSKA concerning the technical evaluation of WASSKA's proposal. We have thoroughly considered WASSKA's arguments and HEW's well-documented explanation of its initial evaluation against our standard of review as outlined above and we have no basis to object to HEW's evaluation.

C. The Requirement for Experience with Region IX Grantees

WASSKA contends that in evaluating TACC's proposal HEW overlooked the RFP's requirement for experience in working with Region IX grantees. WASSKA argues that TACC has no experience with similar projects within Region IX, whereas WASSKA does, and TACC did not indicate in its proposal that it had any technical assistance experience.

In response, HEW reports that the RFP required offerors to demonstrate experience with and knowledge of Native American programs (particularly in the geographical area). We have reviewed both offerors' proposals and easily conclude that WASSKA, as the incumbent contractor in Region IX, clearly demonstrated the required experience; however, our review further reflects that TACC's proposal indicates experience in Region IX also and extensive experience in Region V. Therefore, this basis of WASSKA's protest is without merit.

IV. Discussions & Evaluation of Revised Proposals

HEW reports that since the contracting officer prepared questions in writing regarding substantive technical aspects of the top four offerors' proposals, this constituted written discussions with four offerors in the competitive range. HEW also reports that subsequent to the receipt of responses to the questions, proposals were reevaluated, resulting in a determination that only TACC's proposal was acceptable. HEW concludes that while the actions of the contracting officer were irregular from a procedural standpoint, they are in keeping with the spirit of procurement regulations and decisions of this Office.

WASSKA contends that the questions did not correspond to the weaknesses noted in the evaluators' report. WASSKA states that it was not informed that its proposal was rated low and that additional information was needed to increase its score. WASSKA also states that in the debriefing HEW stated that pricing was not considered in the award decision, yet WASSKA was required to respond to three pricing questions. In this regard, we note that proposed cost was not considered in the technical evaluation and HEW's determination to exclude WASSKA from the competitive range.

Noting that WASSKA's score decreased after it clarified its proposal, while TACC's increased, WASSKA believes that HEW requested additional information solely to downgrade its proposal and justify the selection of TACC. Finally, WASSKA notes that HEW's time/date stamp shows that HEW received TACC's revised proposal at 4 p.m. on the day the selection was made. WASSKA questions how HEW could have reevaluated TACC's revised proposal and made the selection in such a short time. On the latter point, we note that the record shows that HEW did reevaluate the revised proposals.

In reply, HEW reports that (1) WASSKA erroneously assumed that the submission of additional material must enhance the technical quality of a proposal, and (2) the two sets of evaluation scores, when placed in context, are evidence of HEW's good-faith efforts to ensure fair evaluation.

A. Were the Discussions "Meaningful"?

Meaningful discussions, either oral or written, are a requirement in negotiated Federal procurements. The Government must usually furnish information to offerors concerning the areas of deficiency in their proposals, so that offerors are given an opportunity to satisfy the requirements of the solicitation. Joseph Legat Architects, supra. The context and extent of discussions needed to satisfy the requirement for meaningful discussions is a matter primarily for determination by the contracting entity, whose judgment will not be disturbed

unless clearly without a reasonable basis. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61.

First, the record shows that the evaluation panel identified several deficiencies in WASSKA's proposal and the record contains the questions raised by the contracting officer to WASSKA in an effort to obtain additional information regarding WASSKA's proposal. After thoroughly considering the matter, we must conclude that the questions reasonably related to the identified deficiencies, thus WASSKA was informed by HEW about the areas of its proposal that needed improvement or clarification.

Second, WASSKA's contention that it was not informed that additional information was needed to improve its chance of being selected is without merit. We have held that where, as here, a proposal lacks sufficient detail, a request for additional clarification, amplification, and discussion regarding specific areas of its proposal is sufficient to place the offeror on notice that deficiencies exist in its proposal. Telex Computer Products, Inc., B-190794, July 31, 1978, 78-2 CPD 78, and decisions cited therein.

Third, from our review of the record, we cannot determine whether HEW established a common cutoff date and time for receipt of revised proposals, as required by procurement regulation. That information should have been included with the questions to offerors. The record does not fully explain how the responses to the questions, necessitating revised proposals, could have been received and evaluated beginning on June 23 and how TACC's responses could have been time/date stamped as being received June 29. For future procurements, HEW is reminded not only of the necessity to establish the common cutoff date regarding the receipt of revised proposals, but to ensure that the information is retained in the contract file and, when appropriate, forwarded to our Office with the agency report on the bid protest.

B. Evaluation of Revised Proposals

At the outset, we note that WASSKA's belief that additional information should not have reduced its score is based in part on its misunderstanding of proposal evaluation. Each evaluation is separate and only the results of each evaluation are relative.

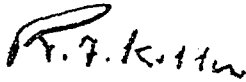
Here, HEW's evaluation panel initially established a competitive range of one--which was subsequently revised to four by the contracting officer--and then, following discussions, HEW reevaluated the first four proposals and determined that only TACC's proposal was in the revised competitive range. Our Office reviews such determinations very scrupulously since Federal procurement laws and regulations require maximum practical competition.

We have reviewed the detailed memorandum, related to the second evaluation, outlining the deficiencies in WASSKA's revised proposal. Further, HEW provided the individual evaluator's scoresheets and comments for our review. These documents state, in part, that (1) WASSKA's approach was "undesirable and ineffective," (2) WASSKA's methodology "raises serious problems," (3) WASSKA "fails to respond to HEW's new direction (per RFP)," and (4) WASSKA did not clarify how the staff would be used. Based on HEW's detailed evaluation, we cannot conclude that WASSKA was unfairly treated.

V. Conclusion and Recommendation

WASSKA's protest is denied.

However, as stated above, by letter of today to the Secretary of HEW, we are recommending that HEW remind its contracting personnel not only of the necessity of establishing a common cutoff date but to ensure that such information is retained in the contract file and, when appropriate, forwarded to our Office with the agency's report on the bid protest.


Acting Comptroller General
of the United States