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DECISION



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

FILE: B-194388.2

DATE: August 10, 1979

MATTER OF: Applied Financial Analysis, Ltd.

9LG62561

[Protest Alleging Improper Evaluation of Proposals]

DIGEST:

1. Where competing technical proposals are essentially equal, cost may become determinative factor, notwithstanding that in overall evaluation scheme cost was of less importance than other factors. However, agency may not rely on bare conclusionary statements as basis for this determination but must provide factual explanation why proposals are essentially equal.
2. Where low offeror outlines in proposal steps to be taken to establish office in specific geographic area in order to perform contract, RFP requirement is satisfied and question whether office actually established is adequate is matter of contract administration and not for resolution under GAO's Bid Protest Procedures.
3. Since protester's proposal price would still be higher than that of low offeror even if contract specialist had not improperly adjusted protester's price upward, award to low offeror should not be disturbed if proposals were to be found essentially equal in technical merit and price became determinative factor.
4. Since extent to which proposed costs for cost-plus-fixed-fee contract will be examined is generally matter for agency's discretion, GAO will not question determination of cost realism which has reasonable basis.

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Applied Financial Analysis, Ltd. (AFA), protests the award of a contract to Leonard G. Birnbaum and Company (Birnbaum) under request for proposals (RFP) No. ADA-OA-79-0001 issued by the National Institute of Mental Health, Department of Health, Education, and Welfare (HEW). The grounds for AFA's protest are that the agency did not follow the criteria established for the evaluation of proposals, that after it had submitted its best and final offer the agency increased its proposal by \$11,371 for "purposes of comparability," and that Birnbaum's proposal was an attempt to "buy-in."

The RFP solicited proposals to provide financial advisory services for the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA). Specifically, these services are: (1) cost and price analysis of grant applications and contract proposals; (2) pre-award and postaward surveys; (3) indirect cost verifications and (4) postaward reviews, reports and studies. Seven timely proposals were received and a competitive range of four firms was established which included AFA. HEW did not conduct any negotiations with the offeror with the highest technical score, Opalack & Company, because it had learned that the Department of Labor had suspended that firm as a preliminary step in a debarment proceeding. After the submission of best and final offers from the three remaining companies, the proposals were ranked as follows:

<u>Name</u>	<u>Tech. Score</u>	<u>Price</u>
AFA	85.75	\$264,371
Birnbaum	74.0	229,505
Bert W. Smith, Jr. & Assoc.	71.5	278,694

In the opinion of the procurement officials, all three of the offerors were capable of meeting the Government's technical requirements. Because of this, they decided that cost would be the controlling factor for determining which contractor got the award. Thus, since they could not justify that the difference in technical merit between the AFA and Birnbaum proposals

was worth the expenditure of an additional \$34,866, the procurement officials awarded a contract to Birnbaum for the period March 15 to September 30, 1979. A debriefing conference was held on March 29, 1979, and upon learning the facts behind the award, AFA filed a protest with our Office.

AFA points out that the RFP expressly states that "paramount consideration shall be given to the evaluation of technical proposals in the award of a contract, and that proposed cost is secondary to quality in this procurement." In AFA's opinion, therefore, the agency's decision to make an award based on cost was contrary to the RFP's requirements. AFA also points out that the RFP requires the contractor to have, or be prepared to establish, an office within a 30-mile radius of the ADAMHA headquarters in Rockville, Maryland, for all key personnel assigned to the performance of the contract. AFA states that while on two separate occasions HEW sent preaward survey analysts to determine the adequacy of AFA's office facilities, it now appears to disregard this requirement, since it allows Birnbaum to maintain an office which, AFA believes, is no more than a mailing address.

Besides the agency's alleged failure to award a contract in accordance with RFP requirements, AFA also questions the propriety of the agency's decision after the submission of best and final offers to increase the AFA proposal by \$11,371 "for purposes of comparability." AFA also claims that the price offered by Birnbaum is so low as to indicate an attempt to "buy-in"--a practice, says AFA, which our Office discourages.

HEW, on the other hand, contends that AFA has placed unintended emphasis on the need for quality in this procurement. It argues that cost was also an important factor and had to be considered in the evaluation of the proposals. It further notes that both the RFP and Federal Procurement Regulations (FPR) § 1-3.805-2 (1964 ed. circ. 1) caution that in the award of cost-reimbursement contracts the primary consideration is which contractor can perform the contract in a manner most advantageous to the Government. HEW believes, therefore, that the consideration

of cost as well as technical factors was proper. Based on this, the agency argues that the decision to award the contract to Birnbaum was an appropriate exercise of administrative discretion, since Birnbaum is both technically competent and offered to provide more man-hours at a lower cost than AFA. Regarding the RFP requirement for an office within 30 miles of ADAMHA, HEW states that Birnbaum identified no key personnel, but did identify four professionals who would immediately move to the Washington, D.C., area and described intended methods for securing other personnel as needed. The agency contends that this satisfied the requirement.

HEW concedes that errors were made during the process of adjusting AFA's proposal price upward. It notes that the contract specialist should not have requested AFA to increase the number of professional man-years offered to a total of 5 since the RFP clearly described the 5 man-year figure as an estimate. Moreover, the agency also admits that when the contract specialist noticed that AFA had only used \$48,800 for the estimated cost of travel instead of \$50,000 as instructed, he should have made the adjustment on his own, without discussion with AFA, since the conversation which did take place was in effect the reopening of negotiations with only one offeror. However, HEW claims that this irregularity did not prejudice the other offerors since AFA did not receive any competitive advantage. Thus, the agency indicates that, overall, it finds nothing improper with the adjustment of AFA's proposal price.

Regarding AFA's allegation that Birnbaum was "buying in," HEW states that this contention is without merit. It holds that AFA's claim is predicated upon speculation, that there is no prohibition in law or regulation against buying in, and that Government personnel, who are expert in the field, are satisfied with the cost realism of the Birnbaum proposal.

In light of the above, HEW contends that AFA's protest is without merit and should be denied.

As a general rule, unless there is an indication to the contrary, when an RFP does not contain an explicit statement as to the relative importance of cost and technical factors they are accorded substantially equal weight. See University of New Orleans, B-184194, May 26, 1978, 78-1 CPD 401. However, if an RFP clearly provides that the greatest weight will be given to technical factors rather than cost, we have held that it is not proper under these circumstances for an agency to induce an offer which represents the highest quality and then reject it in favor of a materially inferior offeror on the basis of price. Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD 80; Charter Medical Services, Inc., B-188372, September 22, 1977, 77-2 CPD 214. But we have also recognized that even when the RFP assigns greater weight to technical factors, cost may nonetheless become the determinative factor if the proposals are found to be essentially equal technically. William Brill Associates, Inc., B-190967, August 7, 1978, 78-2 CPD 95; Computer Data Systems, Inc.--Reconsideration, B-187892, August 2, 1977, 77-2 CPD 67.

Here, the RFP states explicitly that "paramount consideration" will be given to the evaluation of the technical proposals and that for purposes of this procurement "cost is secondary to quality." Clearly, then, the RFP assigns greater weight to technical factors (quality) than to cost. Under these circumstances, it would not be proper for HEW to reject the technically superior proposal simply because a proposal inferior in quality offers a better price.

However, the agency argues in effect that the AFA and Birnbaum proposals are essentially equal in technical merit so that the lower price offered by Birnbaum becomes the determining factor. The record indicates that after the submission of best and final offers, the technical score for AFA (85.75)--on a scale of 100 points--was only 11.75 points greater than the score given Birnbaum (74.0). AFA's price, on the other hand, was \$34,866 greater than Birnbaum's. The record also indicates that after evaluating the best and final offers,

the members of the review committee sent a memorandum to the contracting officer stating that the difference in the technical scores did not warrant acceptance of the higher priced AFA proposal.

Our Office has held that it is the responsibility of the contracting agency to determine the relative merits of proposals and that we will not disturb such a determination unless shown to be arbitrary or in violation of a procurement statute or regulation. Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206. Here, HEW has indicated that before accepting the proposal offering a somewhat lower technical score, but also a lower price, it had first determined that the difference between the technical merits of the two proposals in question was so slight as to make them equal. As noted above, such circumstances generally allow cost to become the determining factor even though the RFP assigns greater weight to technical factors. William Brill Associates, Inc., supra; Computer Data Systems Inc.--Reconsideration, supra. However, the record which HEW has submitted to our Office provides no factual explanation why the members of the review committee concluded that a difference of 11.75 points between the two proposals rendered the proposals essentially equal in technical merit. Based upon nothing more than bare conclusionary statements, our Office cannot determine whether the decision that these two proposals were essentially equal was rationally founded. See Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23.

As to whether Birnbaum's proposal met the RFP requirement for an office within a 30-mile radius of ADAMHA, this requirement only specifies that if an offeror does not already have an office within the necessary geographic area, it be ready to establish one upon award of the contract. In its proposal, Birnbaum addressed this matter explaining the steps it would take to establish and staff a suitable office in the Washington, D.C., area. HEW found that these assurances adequately met the requirement and we see no basis to dispute this conclusion. If, as AFA indicates, Birnbaum's office and staff are presently inadequate, it is a matter of contract

administration which is a function and responsibility of the procuring agency and not for resolution under our Bid Protest Procedures, 4 C.F.R. part 20 (1979). See, e.g., School Transportation Co., Inc., B-192799, January 10, 1979, 79-1 CPD 12.

Concerning the propriety of HEW's upward adjustment of AFA's proposal price, we agree with the agency that the contracting specialist acted improperly in this situation. However, if AFA's original proposal price (\$253,000) was increased by only \$1,200 rather than \$11,371 in order to bring its estimate for travel costs up to the \$50,000 figure all offerors were instructed to use, it is still \$24,695 more than Birnbaum's price. Thus, the action of the contract specialist did not prejudice AFA, since, if price were still the determining factor between the two bids, Birnbaum's price would nevertheless be substantially lower than AFA's.

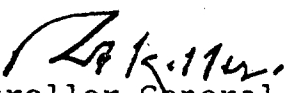
Finally, in regard to AFA's allegation that Birnbaum's proposal is an attempt to "buy-in," we have held that the determination of the realism of proposed costs for a cost-plus-fixed-fee contract is a matter for the judgment of the procuring officials and will not be subject to objection from our Office unless there is no rational basis therefor. D&P Transportation Company, Inc., B-190735, July 14, 1978, 78-2 CPD 37. The record indicates that the review committee analyzed Birnbaum's proposed costs and concluded that they were reasonable. Our Office will not question a determination of cost realism which relies as its basis on information contained in the proposal rather than on some independent method of verification, since we have recognized that the extent to which proposed costs will be examined is generally a matter for the agency's discretion. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Therefore, on the record presented, we find no basis to object to HEW's determination regarding the cost realism of Birnbaum's proposal.

As noted above, we are unable to determine whether the decision that the AFA and Birnbaum proposals were essentially equal technically was rationally

founded. However, it would be useless to require a justification at this time, since in a companion decision involving the same procurement--Opalack & Company, B-194388--we have indicated that we believe that negotiations should be reopened, but have not required it, since the contract is due to expire on September 30, 1979. If negotiations were reopened, it could conceivably change the standing of offerors and render meaningless the prior determination to award to Birnbaum. When the competitive range determination was made prior to negotiations, from which we have concluded Opalack was wrongfully excluded, Opalack was rated 89.5 on the technical proposal and had the lowest estimated cost proposal.

Although, in the circumstances, we are not going behind the conclusion that the proposals of AFA and Birnbaum were equal, we are advising the Secretary of HEW by letter of today that in future procurements the contract files should be documented with factual analyses establishing the basis for the conclusion.

Protest denied.


Acting Comptroller General
of the United States