

DECISION



13557 PL-I  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

*[Protest of Agency Refusal To Provide Requested Information]*

FILE: B-196274

DATE: April 25, 1980

MATTER OF: Macro Systems, Inc.

DIGEST:

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DL604487  
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1. Protest alleging impropriety in RFP (failure of RFP to indicate level of effort required in ten subject areas) filed after date set for submission of initial proposals is untimely filed and will not be considered on merits.
2. Protest against agency's refusal to provide information concerning incumbent contractor's meeting commitments filed with contracting agency within 10 working days of refusal and with GAO within 10 working days after denial by contracting agency is timely.
3. Protester was not prejudiced and incumbent contractor gained no competitive advantage by contracting agency's refusal to furnish information as to "carry-over" commitments made by incumbent contractor, since RFP made no reference to "carry-over" commitments, there was nothing in RFP binding successful offeror to commitments and absence of information from RFP was not important as it had no effect on outcome of evaluation of proposals.
4. Downgrading of protester's technical proposal for failure to provide "detailed delineation of duties" in management plan and lack of detail in matching staff members to technical assistance to mental health facilities was not unreasonable where RFP listed "technical approach" and "management plan" in evaluation criteria, deficiencies were pointed out to protester during negotiations but remained in best and final offer,

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technical review panel's evaluation was confirmed by independent evaluator selected by contracting officer, and GAO review shows strict adherence to evaluation criteria by evaluators.

5. Allegation that contracting activity and technical evaluation panel were biased against protester and in favor of awardee, which is first raised in protester's response to agency report on protest, but which was known to protester well before time provided for filing protest, is untimely and will not be considered on merits.
6. Protest alleging that contracting agency failed to notify protester that protest filed with contracting agency was denied or that award was made is denied where record establishes that written notification of both events was sent to protester by contracting agency.
7. Protest alleging that contracting agency "leaked" protester's price to awardee before best and final offers were due is denied where record contains no evidence of any impropriety in conduct of negotiations by agency officials. Burden is on protester to substantiate its case. In carrying out protest function, GAO will not conduct investigation to establish validity of protester's speculative allegation.

Macro Systems, Inc. (Macro), protests award of contract No. 130-79-12 to Applied Management Sciences (AMS) pursuant to request for proposals (RFP) No. ASD-5-79 issued by the Department of Health, Education, and Welfare (HEW).

The contract calls for AMS to provide technical assistance services in program management to individual community mental health centers and State mental health

authorities throughout HEW Region III on a cost-plus-fixed-fee basis. The purpose of the contract is to establish and maintain a technical assistance center (TAC) from which the individual mental health centers can obtain assistance to solve their specific program management problems.

Among other things, the contractor is to assist mental health centers in solving their problems by putting them in touch with private consultants and consultants from other mental health programs who have particular expertise in the problem area of the requesting center. The contractor has to compile and maintain a list of resources from which assistance may be obtained. While the TAC contractor may use its own staff consultants to assist mental health authorities in particular areas of need, most of the consultations are to be performed on a center-to-center basis. Thus, while a mental health center may request assistance in solving problems in one area, that same mental health center might have the expertise to provide assistance to another center in a different problem area. The TAC contractor receives requests for assistance in the form of task orders from HEW and locates the consultant with expertise in that field to assist the requestor. The TAC contractor then arranges for a conference between the requestor and the consultant so that assistance can be provided.

Macro alleges certain improprieties which it believes justify cancellation of the contract with AMS and award of the contract to Macro. The protest is dismissed in part and denied in part.

Macro alleges that the RFP was defective because it provided that technical assistance would be required in 10 subject areas on a cost-plus-fixed-fee basis but did not indicate the level of effort in each subject area upon which proposals were to be based. Macro raised this issue for the first time in its initial protest letter which was filed in our Office on October 1, 1979. The RFP indicated that initial offers were to be submitted to HEW by August 27, 1979. Therefore, since this basis for Macro's protest was apparent from the solicitation itself, we consider this protest issue to be untimely

filed in accordance with section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1979), which requires that a protest alleging an impropriety in a solicitation be filed prior to the date specified for submission of initial proposals. Somervell & Associates, Ltd., B-192426, August 18, 1978, 78-2 CPD 132.

Several of Macro's protest issues are based on the fact that AMS was the incumbent contractor on the initial contract for HEW Region III technical assistance. Macro states that, in an attempt to get background information necessary to prepare its technical proposal, Macro staff members met with HEW officials on August 23, 1979, and reviewed materials requested under the Freedom of Information Act. During that review, Macro learned that AMS, in its position as incumbent contractor, was in the process of scheduling conferences to provide technical assistance near the end of the contract period and that at least one meeting was scheduled beyond the expiration date of the incumbent contract. When Macro officials asked about the commitments, an HEW official present at the August 23 meeting stated that the awardee under the follow-on contract would be expected to fulfill any commitments so scheduled. Macro requested any information relevant to meetings scheduled by AMS but was told on August 24 that such information could not be made available prior to the August 27 proposal submission date.

Macro submitted its proposal to HEW on August 27, 1979, and filed a protest with the contracting officer on September 4. Macro alleged two bases for its protest to HEW. First, the RFP made no reference to "carry over" commitments made by the incumbent beyond the current contract. Second, AMS had been given an unfair competitive advantage over Macro by virtue of its incumbency and the fact that it had knowledge of the prescheduled conferences which was not available to Macro.

This aspect of the protest is timely. Macro is not contending that there is an impropriety in the RFP. It is protesting against the agency's refusal to provide the information requested on August 24. Macro protested to HEW within 10 working days of the oral representations as provided by section 20.2(b)(2)

of the Bid Protest Procedures. The subsequent protest to our Office on October 1, 1979, following the HEW denial on September 28, 1979, was within 10 days of adverse agency action as provided in section 20.2(a) of the Bid Protest Procedures.

As Macro indicates, the RFP made no reference to "carry-over" commitments. However, we do not believe the lack of this information in the RFP or the failure of the agency to advise Macro of the information gave the incumbent an unfair advantage. First, there was nothing in the RFP binding the successful offeror to the "carry-over" commitments. Second, the absence of "carry-over" information from the RFP was not important, since it had no effect on the outcome of the evaluation of proposals. (See discussion of this point infra.) Therefore, Macro was not prejudiced by HEW's refusal to furnish the information.

Macro also contends that the technical evaluation was conducted in an improper manner resulting in a higher technical rating for AMS because the technical review committee evaluated factors other than the evaluation criteria set forth in the RFP. Specifically, Macro alleges that AMS received a higher technical rating because AMS was able to be more specific than Macro in its technical proposal because AMS knew where and when it had scheduled meetings beyond the end of the initial contract period. Since the evaluation criteria contained in the RFP made no reference to meetings scheduled by the incumbent contractor under the initial contract, Macro contends that consideration of AMS's superior knowledge of prescheduled meetings was a departure from the stated RFP evaluation criteria.

HEW argues that the technical evaluation was conducted in strict compliance with the RFP's evaluation criteria. HEW reports that neither AMS nor Macro was scored any differently because of the degree of specificity of its technical proposal regarding scheduling of technical assistance. HEW also reports that neither AMS nor Macro listed specific times or places for scheduled consultations nor was knowledge of the one prescheduled consultation used in the AMS proposal.

We point out that it is neither our function nor practice to conduct a de novo review of technical proposals and make an independent determination of their acceptability or relative merit. The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

The subject RFP listed the following evaluation criteria and respective weights for each:

<u>"Criteria</u>	<u>Weighting</u>
"1. <u>Technical approach</u>	25
The offeror must demonstrate a good understanding of the scope, complexity and ramifications of the TA task and offer a realistic approach which is consistent with the RFP.	
"2. <u>Management Plan</u>	45
The offeror must detail a plan which is realistic and structures quality control. The methods of managing numerous consultants to deliver the requirements of the RFP must be explicit.	
"3. <u>Organizational Qualifications</u>	30
The qualifications of the offeror must detail his organization structure and the qualification	

of project manager and other key personnel. Experience with mental health delivery systems and similar health/welfare systems must be noted."

On September 4, 1979, the technical proposals submitted by AMS and Macro were reviewed by the technical review panel. The panel was made up of three evaluators who reviewed each proposal independently in each of the three categories enumerated as evaluation criteria in the RFP. On September 7, the panel reported that the evaluators' ratings averaged a total of 88.3 for AMS and 77.3 for Macro. Both technical proposals were found to be technically acceptable. However, Macro's weaknesses were: (1) vagueness in the technical approach area, (2) lack of specificity in the management plan, and (3) minimal community mental health center (CMHC) experience. Macro was advised of these perceived weaknesses on September 19. Specifically, Macro was advised, among other things, that the proposal needed "a more detailed delineation of duties" in the management plan, that the panel perceived minimal CMHC experience in its staffing, and that the panel felt that there was not enough focus on how assistance would be provided in specific program management areas.

After best and final offers were submitted to and reviewed by the evaluation panel, Macro's proposal was upgraded to 78.3 while AMS remained at 88.3. Since a protest had been filed by Macro, the proposals were submitted by the contracting officer to an independent HEW technical reviewer who reported his findings on September 27. This reviewer rated AMS slightly higher overall (87 for AMS and 83 for Macro). His primary criticism was that Macro's proposal could have been more detailed in matching Macro staff members to technical assistance needs. While he rated AMS slightly higher, he stated that this difference was insignificant and that the final decision on award could be based on the soundness of the business proposals. Since AMS proposed a best and final price of \$102,812, which the contracting officer determined to be realistic, and Macro proposed a best and final price of \$108,478, award was made to AMS, the higher rated technically, on September 28, 1979.

In response to the allegation that the evaluation criteria were not followed, we have carefully reviewed the technical evaluation panel's reports (including the individual evaluators' scoresheets for each proposal), the independent HEW evaluator's report, and the technical proposals submitted by both Macro and AMS. This review leads us to the conclusion that the evaluations of both proposals were conducted in strict conformity with the criteria set forth in the RFP. There is no evidence that AMS received a higher score in any technical area because of its knowledge that a meeting had been tentatively scheduled by it in the beginning of the follow-on contract period. In fact, the AMS proposal made no reference to that specific meeting nor to any other prescheduled meetings for consultation. Those areas in which Macro was found deficient were clearly within the evaluation criteria of the RFP. Moreover, the perceived deficiencies were pointed out to Macro before best and final offers were due. Upon reevaluation by the technical evaluation panel, Macro's proposal was upgraded slightly in the area of "organizational qualifications" but remained the same in the categories of "technical approach" and "management plan." Lack of detail in the management plan was again cited by the final independent reviewer as a reason for confirming the technical evaluation panel's lower evaluation of Macro. "Technical approach" and "management plan" amounted to a total of 70 of the 100 points for the evaluation, and we cannot find that the downgrading of Macro's proposal for lack of specificity in these areas was inconsistent with the stated criteria of the RFP.

Moreover, it is not significant that there was no change in the AMS score between the original and best and final offer. There was a substantial reduction in the AMS price from \$175,225 to \$102,812 because the contracting agency pointed out during negotiations that the AMS cost proposal was based on a level of effort higher than that provided in the RFP. However, the evaluation of the technical approach in the proposals was directed exclusively to the method by which technical assistance would be given. Therefore, the number of man-days for which technical assistance would be provided, while impacting upon the cost of



performance, had no bearing upon the method of performance and it is understandable why the AMS score remained unchanged.

In these circumstances, we conclude that the technical evaluations were conducted in a fair and reasonable manner and in accordance with the provisions of the RFP. Accordingly, we will not question the contracting officials' determinations regarding the technical evaluations, and this protest issue is denied.

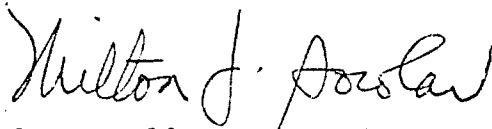
On January 7, 1980, Macro submitted comments on the HEW report. Macro claims that the contracting activity and the technical evaluation panel were biased against Macro and in favor of AMS. In support of this allegation, Macro cites several examples of prior procurements (dating as far back as 1977) to show that competition was limited in reality if not in form. We will not consider this element of Macro's protest on the merits because section 20.2(b)(2) of our Bid Protest Procedures requires bid protests to be filed within 10 days after the basis of the protest is known or should have been known. Macro's own submission shows that this basis for the protest was known to Macro well before the time provided for filing by our Procedures. Our Procedures do not contemplate the unwarranted piecemeal development of protest issues. See AIL West, B-190239, January 17, 1978, 78-1 CPD 38.

Macro also alleges that it was never notified in writing that the protest to HEW was denied nor that award was made to AMS without resolution of the protest to HEW. This issue is denied because the record shows that HEW by letter dated September 28, 1979, sent written notification to Macro stating that its protest was denied, indicating the reasons for denial, and that award was made to AMS.

In addition, Macro contends that someone in HEW must have told AMS what Macro's proposed price was at some time before best and final offers were due. Macro draws this conclusion because the AMS initial price was significantly above the Macro initial price, but the AMS final price was lower than the Macro final price. However, as previously shown, AMS reduced its price as a

result of its reduction in the number of man-days proposed. Macro has not submitted any evidence in support of its allegation and the record contains no evidence of any impropriety in the conduct of negotiations by HEW. We have held that the burden is on the protester to substantiate its case and that we will not conduct investigations as part of our bid protest function to determine whether the protester's speculative statements are valid. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Therefore, this issue is also denied.

The protest is dismissed in part and denied in part.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General  
of the United States