

DECISION



13722 PL-11
Mr. Vickers
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-197866, B-197949 **DATE:** May 14, 1980

MATTER OF: Roy F. Weston, Inc.

DLG 04621

DIGEST:

1. Protest that inadequate cost analysis was conducted is denied as review by GAO finds analysis was performed in reasonable manner. While two areas of cost could have been considered in more consistent manner, impact of cost change (\$1,095,569) does not affect standing of offerors in view of overall cost difference (\$10,344,948) between protester and awardee.
2. Technical evaluation of proposals, contrary to contention of protester, was performed in accordance with stated evaluation criteria and Technical Evaluation Panel report shows proposals were carefully considered.
3. Where procurement is conducted under Environmental Protection Agency's Source Evaluation & Selection Procedures (PIN 77-15), which provide for limited discussions with offerors until final contractor selection is made, protest that agency did not conduct "meaningful discussions" is denied, since EPA found protester's proposal did not require clarification and, therefore, under PIN 77-15, no discussions need be held.
4. No requirement exists that all evaluators of original proposals must evaluate revised proposals and, therefore, there was nothing improper in only two members of original evaluation panel reviewing revised proposals.
5. Fact that one technical evaluator of proposals is involved in overseeing contract

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[Protest Against Contract Award]

being performed by one of offerors does not preclude evaluator from participating on evaluation panel.

6. There is no requirement that competitive advantage contractor may have by reason of performing similar contract for procuring activity be equalized unless it is shown to result from unfair Government action.

Roy F. Weston, Inc. (Weston), has protested the award of a contract by the Environmental Protection Agency (EPA) to Ecology and Environment, Inc. (E&E) under request for proposals (RFP) No. WA79-C406. *DLGDB1* *AGC00024* *CNGD1317*

The RFP, issued on August 31, 1979, is for field investigations of uncontrolled hazardous waste sites. The primary objective of the contract is the discovery and investigation of waste sites, preparation of enforcement cases and the determination of remedial measures for the sites. Also, the contractor must provide other services including drilling groundwater sampling wells, furnishing expert consultants and designing remedial measures.

The following evaluation criteria were set forth in the RFP:

- | | |
|---------------------------------------|-----------|
| I. Corporate Experience | 15 points |
| A. Demonstrated technical experience | 7 points |
| B. Demonstrated managerial experience | 8 points |
| II. Key Personnel | 30 points |
| A. Program Manager | 15 points |
| (1) Demonstrated technical expertise | 5 points |
| (2) Demonstrated managerial expertise | 10 points |

B.	Team Leaders	15 points
	(1) Demonstrated technical expertise	10 points
	(2) Demonstrated managerial expertise	5 points
III.	Technical Approach	25 points
	A. Preliminary Investigation	8 points
	B. Full Investigation	10 points
	C. Enforcement Case Preparation	7 points
IV.	Management Plan	30 points
	A. Organization & Resources	10 points
	B. Management Control	10 points
	C. Health & Safety Program	10 points

The total possible technical score was 100 points. The RFP also stated that cost was secondary to technical merit and that EPA was primarily seeking technical excellence. The evaluation was to be conducted in accordance with EPA's Procurement Information Notice (PIN) 77-15.

The closing date for receipt of proposals was November 2, 1979, and following receipt of the proposals the technical proposals were evaluated by the Technical Evaluation Panel (TEP) and the cost proposals by the Business Evaluation Panel (BEP).

After the evaluation, the contracting officer, by letter of December 18, 1979, requested additional information from the offerors and permitted the submission of revised proposals until January 11, 1980. On January 25, 1980, the contracting officer issued a telephonic request for best and final offers due January 28, 1980, and all offerors confirmed their January 11, 1980, submissions as their best and final offers.

The revised proposals were reevaluated by two members of the TEP who found that the changes in the proposals were not of the magnitude to require any change in the original technical evaluation scores of the offerors. Thereafter, the Source Evaluation Board reviewed the reports from the TEP and the BEP and made a presentation to the Source Selection Official (SSO). This presentation revealed the following regarding E&E and Weston:

	<u>Technical Rating</u>	<u>Revised Cost Proposal</u>
E&E	79.3	\$33,481,811
Weston	69.0	43,826,759

Various cost analyses performed by EPA resulted in the following cost projections:

	<u>Normalized Cost/Fee</u>	<u>"Should Cost" Cost/Fee</u>
E&E	\$34,644,838	\$29,110,712
Weston	43,382,551	41,594,996

On January 31, 1980, the SSO selected E&E for final negotiations on the basis of technical superiority and the apparent cost advantages. On February 15, 1980, EPA awarded a letter contract to E&E to begin mobilization and is currently proceeding to issue a definitized contract.

Weston was notified of the selection of E&E for final negotiations on February 1, 1980, and was debriefed by EPA on February 7, 1980. The next day, Weston met with the SSO to express its dissatisfaction with the manner in which the technical and cost evaluations were conducted. Before EPA responded to the objections raised by Weston on February 8, 1980, Weston on February 21, 1980, filed its protest with our Office.

On April 3, 1980, Weston filed a civil action in the United States District Court for the Eastern District of Pennsylvania (Roy F. Weston, Inc. v. EPA, et al., No. 80-1330) seeking declaratory and injunctive relief.

The court denied Weston's request for a temporary restraining order and has scheduled a hearing on Weston's request for an injunction for May 21, 1980. While normally our Office would not consider the protest since it is currently before a court of competent jurisdiction, the court has requested our decision on the protest on an expedited basis and, therefore, we will consider the protest on the merits. See 4 C.F.R. § 20.10 (1980) and Bell Helicopter Textron, 59 Comp. Gen. ____ (B-195268(1) December 21, 1979), 79-2 CPD 431.

Initially, Weston contends that EPA's cost analysis of the proposals was unrealistic and inadequate. Weston argues that EPA failed to properly consider the cost realism of the E&E proposal and did not normalize the costs associated with line items left to the discretion of the offerors where there was no common basis for offerors to estimate certain costs and no logical basis for differences.

EPA answers that it performed numerous cost analyses which included verifying that the required level of effort (LOE) hours had been proposed, that travel and direct costs were proposed in accordance with the RFP and that sufficient cost coverage for each site location had been proposed. Further, certain aspects of the cost proposals were normalized and the average hourly direct labor rates were analyzed. Finally, field audits were conducted by the Defense Contract Audit Agency (DCAA) on the offerors and these audits were reviewed by EPA's Washington Cost Advisory Operations.

Weston has cited examples which it contends show the inadequacy of EPA's cost analysis and that the cost differences between E&E and Weston are not as great as stated by EPA.

Weston's first example involves not only the adequacy of the cost analysis but also its contention that it was misled by provisions in the RFP and could not obtain clarification from the contracting officer concerning EPA's intent.

The RFP required each offeror to propose 470,000 direct technical labor hours for the basic contract period and 374,400 for each of the 2 option years. Exhibit B-1 to the RFP entitled "Composition of Technical Assistance Teams" was a staffing plan showing the various scientific disciplines EPA wanted at the 10 regional sites and at the National Enforcement Investigation Center. The total number of employees shown on Exhibit B-1 was 180.

EPA states that Exhibit B-1 was the minimum professional skill mix EPA wanted at each location and that whatever staffing plan an offeror proposed it had to include the distribution in Exhibit B-1.

Weston contends that it read Exhibit B-1 as a maximum of 180 employees of Weston and its subcontractors and when this number (180) was multiplied by the number of direct technical labor hours per man (Weston was permitted to take credit for 1,880 hours per year), the result, 338,400 hours, left Weston with a shortfall in man-hours of over 100,000 hours. Weston states that it made up this difference in its proposal by proposing consultants who are paid a much higher rate than Weston's normal employees. Weston argues that, if this confusion regarding the terms of the RFP had been cleared up prior to best and final offers and Weston had substituted employees for the consultants, its proposed cost would have been lowered by \$2,110,276.

EPA states that the manner in which Weston proposed to staff the contract (i.e., utilizing consultants) was a management decision by Weston and did not result from a misleading RFP. It would have been improper for EPA to tell Weston how to staff-up in answer to its inquiries of the contracting officer. On each occasion Weston inquired, the contracting officer, according to EPA, stated that the intent of the mandatory LOE was the delivery of the number of specified hours within the contract period.

However, EPA did a reanalysis following the debriefing of offerors because of the possibility of a potential shortfall in both E&E and Weston's proposals.

This analysis was done to reconfirm the SSO selection of E&E. The result of the analysis showed a potential increase of \$1,042,898 in E&E's proposed cost and \$1,569,102 in Weston's cost. Therefore, EPA concluded that the original selection of E&E was justified.

Finally, EPA states that, even if Weston's staffing was the result of a misreading of the RFP, the cost reduction is not of the magnitude cited by Weston. EPA has computed the reduction in Weston's cost proposal to be \$954,574 based on the reduced number of consulting hours Weston proposed in its January 11, 1980, revised proposal rather than the amount in Weston's original proposal and on the applicable burden costs (fringe benefits, overhead, and general and administrative (G&A)) associated with the use of employees.

There does appear to have been confusion surrounding the LOE hours required and how the requirement was to be computed. In the February 8 meeting between Weston and the SSO, the SSO stated that 2,080 labor hours per year should have been utilized in the computations rather than the 1,880 hours. Therefore, since it appears EPA was confused as to the method of computing LOE hours, we find that Weston could also have been misled by the RFP provisions and that its proposed cost in this area should have been reduced by EPA's figure of \$954,574. Further, we believe there would have been nothing improper in the contracting officer giving a more specific answer to Weston about what was meant by Exhibit B-1 (i.e., minimum or maximum). This would not have told Weston how to staff-up. Once Weston knew the 180 employees was a minimum, it still would have been Weston's decision how to makeup the shortfall.

Weston contends that its use of consultants also had an impact on EPA's comparison of the average hourly direct labor rate which EPA computed for each offeror. For E&E and Weston, these averages were:

Cost per LOE hour

E&E

Prime only	\$ 9.17
Prime, Sub, and Consultant	\$ 9.87

Weston

Prime Only	\$11.19
Prime, Sub, and Consultant	\$13.41

EPA agrees that the consultants proposed by Weston to make up the shortfall in LOE hours were used in the above computations and, also, contrary to the assertion of Weston, both firms' costs were computed on the same basis (loaded rates, including fringe benefits, rather than raw costs).

Since we have stated above that Weston's total costs should have been reduced, we view this comparison as irrelevant to the final ranking of offerors. Moreover, we note that for "Prime only," which did not include the excessive consultants, Weston is still over \$2 per hour higher than E&E.

Weston also objects to the manner in which EPA evaluated the costs associated with relocation of personnel. E&E proposed relocating 60 people while Weston initially proposed relocating 105. In Weston's revised proposal, it reduced the 105 to 59 people; however, Weston alleges that it was evaluated based on the 105 figure. EPA responds that it did not just accept the figures given by the offerors but reviewed the revised and original proposals to see if the reduction would occur.

EPA found E&E's figure of 60 to be justified based on its staffing plan and prior experience regarding relocations. In the case of Weston, EPA did not find adequate justification for reducing Weston's figure to 59 as Weston in its revised proposal stated that it would utilize possible personnel from another subcontractor but did not have any items for that subcontractor in the cost proposal. However, EPA did reduce Weston's proposed cost by \$195,000, the amount allocated for relocation in the option years, because EPA felt this was an overstatement. We find EPA's handling of the relocation costs to have been reasonable.

We believe EPA could have been more consistent in its cost analysis of the offerors' proposed cost for leased office space. Both E&E and Weston proposed 175 square feet per person in their original proposals.

Weston reduced this to 150 square feet in its revised proposal, which EPA accepted and used in its cost analysis. However, EPA, or more correctly the DCAA auditors, thought E&E's proposal of 175 square feet was excessive and instead utilized the General Services Administration's (GSA) recommended standard of 125 square feet. Weston contends that, if its space had been reduced to 125 square feet, its proposed cost would have been lowered by \$678,898.

EPA should have reduced Weston's space to the same standard as it unilaterally reduced E&E's in order to treat the offerors on a common basis. However, the cost reduction is not as great as claimed by Weston. Weston arrived at the above figure assuming EPA evaluated its proposal at 175 square feet, when EPA actually used its revised figure of 150 square feet and computed its cost based on the rental rate in its original proposal instead of the lower rate stated in its revised proposal. EPA has computed the reduction in Weston's cost proposal to be \$140,995, using the GSA-recommended standard which we find to be correct.

The normalization of computer costs has also been raised by Weston based on Weston's assumption that such costs were deleted from E&E's proposal but retained in Weston's cost proposal. EPA states that costs for computer terminals were deleted from only one other offeror's proposal, not from Weston's or E&E's, and our review of the cost analysis verifies this fact. In the same vein, Weston contends that the \$600,000 it proposed as "miscellaneous costs" should have been deleted in EPA's "should cost" analysis, which EPA states was done.

Regarding Weston's allegation that EPA permitted E&E to allocate the costs on an indirect basis of the National Project Management Office (NPMO) to other than this contract as direct costs, we have reviewed E&E's cost proposal and find the NPMO costs have been allocated as a direct cost on its Contract Pricing Proposal (Optional Form 60).

Therefore, based on our review of all the documents furnished our Office including those not available to

Weston, with the exception of the handling of the mandatory LOE hours and leased space, we find that EPA's cost analysis was conducted in a reasonable manner. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. With regard to the two above-noted items, Weston's cost proposal would have been reduced \$1,095,569 (\$954,574 + \$140,995), not a sufficient amount to change the relative standing of E&E and Weston.

Weston's second major basis of protest is that EPA's technical evaluation was not conducted in accordance with the criteria set forth in the RFP and lacked a reasonable basis.

The RFP contained the following regarding evaluation of key personnel:

"II. Key Personnel

"Your technical proposal should include a description of the project group proposed for the accomplishment of the objectives of this RFP. The information provided should include a discussion of the composition of the project group, the position of the group within your overall organization, and the general qualifications and recent experience with similar programs, of the individuals you propose.

"The technical proposal should specify those direct technical supervisors and other technical personnel considered key to the successful accomplishment of the Statement of Work objectives and designated for work should you be awarded a contract. You should also indicate the percentage of the total time each individual will be available for this program. It is essential that resumes be included for each of the key personnel describing their education, background, recent experience and scientific or technical accomplishments. You should

also include the experience these people have had in resolving the kinds of problems that can be expected under this contract.

"As a minimum, the government considers the national project manager and each team leader to be key personnel. You may include others with an explanation of why you consider them to be 'key' to the performance of the contract. Other 'key' personnel proposed will be grouped with the TAT leaders for evaluation. You should indicate which of these key personnel are employees of your company, which are proposed new hires, and which will be provided through subcontracts.

"You should also provide a clear demonstration that the key people proposed are/will be available to work on the contract if your company is selected for award. An 'intention to hire,' in and of itself, is not sufficient. We need evidence demonstrating that the people you propose are committed to the program if you get the contract. Since personnel continuity is important, you should demonstrate the likelihood of the people you propose staying with the program. In addition, you should provide reference for those key people you propose."

Statements made by EPA at the preproposal conference also stressed the importance of the availability and continuity of key personnel and the fact that the burden was on the offerors to convince EPA that the people proposed would be hired following award and would remain with the program.

Weston argues that, notwithstanding the above, EPA did not point-score the availability of key personnel under the criteria for key personnel (30 points) but included that consideration under the Organization and Resources subcategory of the Management Plan, which was worth only 10 points, thereby reducing the importance of availability.

EPA has stated that while availability was not point-scored per se, the availability of personnel was carefully considered and E&E had letters of commitment from all prospective employees regarding future employment. While Weston states that most of its proposed key personnel were already full-time Weston employees and, therefore, it was entitled to a higher score than E&E, we do not find that one manner of fulfilling the staffing requirements is entitled to a higher preference than the other. An offeror should not be downgraded merely because its proposed employees have not been hired prior to award. Field Maintenance Services Corporation, B-185399, May 28, 1976, 76-1 CPD 350.

Finally, EPA contends that it considered the availability of key personnel under the Management Plan in view of its impact on the management of the program in failing to secure the key personnel proposed. Our Office has noted that, where there is sufficient correlation between additional subcriteria and the generalized criteria contained in the RFP so that offerors are on reasonable notice of the evaluation criteria to be applied to their proposals, we have no objection to the use of the subcriteria. Littleton Research & Engineering Corp., B-191245, June 30, 1978, 78-1 CPD 466. We believe such a correlation exists here and once EPA determined that personnel were committed to the contract, the fact that they were prospective hires versus current employees is irrelevant.

Weston also contends that EPA did not evaluate other persons it had designated in its proposal as key personnel as EPA was required by the RFP to do. We note that certain personnel in Weston's organizational chart were designated key personnel (with an asterisk), since they would act as Technical Assistance Team Leaders (TATL) in the absence of the TATL's. While the RFP did provide for the evaluation of additional personnel if it was explained why they were considered key personnel, we find Weston's explanation to fall short of this requirement. Also, if Weston's explanation were to be considered acceptable as to additional key personnel, then E&E, which made the same statement in the body of its technical proposal regarding its Assistant TATL's, would be entitled to have those personnel evaluated

as key personnel. Therefore, we find no impropriety or prejudice to Weston on this point.

The allegation has been made by Weston that a significant number of the key personnel proposed by E&E have failed to materialize following the award. However, EPA and E&E have advised our Office that E&E has hired 11 of the 14 key personnel proposed.

Concerning the evaluation of subcontractors, Weston argues that while it proposed extensive use of subcontractors, its proposed subcontractors were only evaluated under the Management Plan criteria. E&E proposed to turn certain of the region offices completely over to subcontractors which were to provide complete Technical Assistance Teams and, therefore, E&E's subcontractors were considered under other parts of the evaluation criteria.

We have reviewed the technical evaluation report from the TEP and find the treatment of proposed subcontractors to have been logical and reasonable. Subcontractors were evaluated under the criteria which applied to their contributions to the contract, with the exception of the Corporate Experience factor, which was restricted to only the prime's experience. The TEP stated that Weston had proposed an excellent plan for utilizing subcontractors and where Weston proposed a subcontractor to provide health and safety support, that subcontractor was evaluated under the appropriate criteria. Failure to evaluate subcontractors where appropriate, such as evaluating E&E's subcontractor under Team Leaders where the subcontractor was furnishing TATL's for a specific region, would have resulted in a distorted picture of an offeror's ability to perform the contract.

The National Program Manager proposed by Weston did not receive the full 10 points allotted to the managerial experience evaluation criteria because, according to the TEP report, his record did not indicate experience in managing large multilocation service contracts. Weston contends that the candidate proposed by Weston ran a prestigious multilocation laboratory for EPA in the past and Weston's proposal so indicated.

Moreover, Weston included in the proposal numerous references regarding the individual's past experience, as requested in the RFP, but EPA failed to check with the references listed to verify the managerial experience.

EPA has responded that the TEP was aware of the past experience cited by Weston in its proposal and the TEP report indicates that the individual possessed adequate experience and met the requirements of the RFP. However, EPA states that it had a rational basis for concluding the past experience cited (managing a multilocation lab) was not as relevant as similar experience in managing a multilocation service contract. This type contract requires coordination not only among the remote units of the organization but also integration of the contractor's activities with the activities of the agency being served (EPA).

Concerning the failure to contact the references listed, EPA argues that the RFP did not state that references would be used to solicit oral evaluations of proposed personnel but that EPA had requested the information to validate information regarding years of experience, etc., presented in the proposal.

We have held that it is not the function of our Office to evaluate proposals and that we will not substitute our judgment for that of the contracting officials by making an independent judgment as to the precise numerical scores assigned each proposal. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. Here, we find EPA has reasonably justified its rationale in evaluating Weston's candidate as it did.

Regarding the failure to contact the listed references, there was no duty on the contracting officer to contact these people, especially since the TEP was convinced of the accuracy of the statements in the proposal concerning the candidate's experience.

In view of the critical nature of the TATL, Weston argues it was improper for the TEP to consider an offeror's proposed TATL's as a group but that they

should have been considered individually. However, we note that EPA and the TEP treated all offerors similarly and evaluated all proposals in the same manner. For E&E, the TEP report states:

"E&E's proposed Technical Assistance Team Leaders meet EPA's requirements when evaluated as a group. The individuals proposed vary in experience level from region to region, but the group, as a whole, meets the requirements of the RFP."

For Weston, the following comment was made:

"With the exception of NEIC [National Enforcement Investigation Center] the technical expertise of the regional TATL's range from good to superior. Most are engineers with good environmental project experience. The TATL for NEIC, however, is deficient. The proposal failed to demonstrate sufficient technical background in the kind of analytical chemistry the job requires."

Both comments recognize that a range existed in the individuals proposed and we find nothing improper in EPA treating the TATL's as a group. Moreover, we note Weston received 8 points for this evaluation factor notwithstanding that the TEP found one of the TATL's deficient in a certain aspect, while E&E received 6 points. Therefore, we find no prejudice to Weston by the treatment accorded the TATL's.

As noted earlier, this procurement was conducted under PIN 77-15, which is EPA's regulation regarding "Source Evaluation and Selection Procedures." The procedure utilized is similar to the four-step procurement procedures employed by the National Aeronautics and Space Administration and the Department of Defense. These procedures, which involve a limited use of discussions until the final contractor selection is made, have been considered and approved in the past by our Office. See 51 Comp. Gen. 621 (1972) and AiResearch Manufacturing Co. of Arizona, 56 Comp. Gen. 989 (1977), 77-2 CPD 229.

Weston states that EPA never conducted "meaningful discussions" with Weston regarding weaknesses and excesses in its proposal which it had the right to expect. The only discussions held were when the contracting officer requested additional information from the offerors by a form letter prior to the submission of revised proposals.

E&E, as an interested party to the protest, has made the allegation that, since the RFP advised offerors of the manner in which discussions would be conducted, this basis of protest is untimely filed since it was apparent from the solicitation (i.e., an impropriety in a solicitation). See 4 C.F.R. § 20.2(b)(1) (1980).

It is unnecessary to resolve the timeliness issue since, even if the protest is untimely, it is our policy to decide the merits of an untimely protest when the matter is before a court and that court has expressed an interest in our decision. Allis-Chalmers Corporation, B-195311, December 7, 1979, 79-2 CPD 397.

Weston states that EPA's report notes that Weston's proposal was the only one found not to have deficiencies and that during its debriefing the chairman of the TEP pointed out to Weston the weaknesses in its proposal. Weston argues that these weaknesses should have been pointed out during discussions, not at the debriefing, so that Weston could have improved its proposal.

PIN 77-15 sets out the following procedure which EPA observed in this procurement regarding evaluation of proposals:

"b. Scoring Plan. The scoring of offers must be done through the application of a predetermined scoring plan consisting of numerical values. These values are applied against the weight assigned to each subelement of the evaluation criteria set forth in the solicitation. The values are on a scale of zero through five; consequently, each value, except zero, represents 20% of the maximum rating that a subelement may receive. For example, an

assigned value of four means that within a particular subelement the offer has been evaluated and found to contain 80% of the elements of the scoring plan. The following scoring plan shall be used in conjunction with numerical weights to arrive at scores for each element and subelement.

SCORING PLAN

<u>Value</u>	<u>Descriptive Statement</u>
0	Not addressed in the offer.
1	Addressed, but totally deficient.
2a	Deficient, but appears to be capable of improvements to adequate or better without adopting a new approach.
2b	Appears to be deficient; however, final scores will be determined subsequent to answers to written questions and/or oral questions.
3	Adequate; overall it meets the specifications.
4	Good; has some superior features.
5	Generally superior in most features.

"The relationship of the scoring plan to written or oral discussions and to subsequent negotiations is as follows:

"(1) Value of '0,' '1,' or '2a' - The element or subelement clearly is deficient and is not to be questioned or discussed during written or oral discussions. Such values are solely for the purposes of scoring, ranking, and determination of the

competitive range. If, however, the offer attains an overall score, because of other factors, that places it in a sufficiently high position to be selected for negotiations, the offeror shall be allowed to correct these deficiencies during negotiations.

"(2) Value of '2b' - The element or subelement contains uncertainties which must be resolved before the offer is fully understood. Such uncertainties are to be resolved during written or oral discussions, and the offer is to be given a final score that is based on the offeror's clarifications.

"(3) Values of '3,' '4,' or '5' - The element or subelement is fully understood and there is no need for clarification by the offeror. However, discussions involving any such elements or subelements are not precluded."

The TEP rated Weston's proposal in connection with the stated evaluation factors and subfactors as 3, 4 or 5 in all categories. Therefore, under the PIN 77-15 standard, there was no requirement for discussions or clarifications. While Weston contends that the items brought to its attention at the debriefing were "weaknesses," we think a more accurate description would be that they were the differences in the relative merits of the proposals, as viewed by the TEP. If they were truly weaknesses or deficiencies, then there would have been an obligation on the part of EPA to discuss the areas with Weston, assuming no danger of technical transfusion, notwithstanding PIN 77-15. See, in this regard, 51 Comp. Gen. 621 at 622 (1972).

Here, we find that all offerors were treated equally (same letter requesting additional information and opportunity to submit a revised proposal). While Weston contends that it expected weaknesses to be discussed, the RFP advised offerors that deficiencies would not be discussed but only uncertainties would be clarified or substantiated. Weston's proposal had

no uncertainties as is evidenced by a review of the TEP report. Moreover, we have recognized that an agency may limit the amount and type of discussions to be conducted and that such determination will not be questioned by our Office unless it is clearly arbitrary or without a reasonable basis. 51 Comp. Gen. 621 (1972). Accordingly, we have no objection to the manner in which EPA dealt with the discussions here.

E&E's proposal, even as revised, according to Weston, was technically unacceptable for failing to meet the Government's minimum requirements. Weston is referring to that portion of E&E's proposal concerning the qualification of the proposed TATL's in the managerial area.

The TEP report states the following regarding E&E's proposal:

"E&E's proposal was defective because the resumes provided did not clearly demonstrate either the nature or the length of relevant supervisory/managerial experience for the TAT leaders."

Weston advances the position that since the E&E proposal was defective or deficient and this deficiency could not be cured through discussions under the procedures here utilized, E&E's proposal was not eligible for final selection.

This portion of E&E's proposal was rated 2a in the initial evaluation which, under PIN 77-15, meant "Deficient, but appears to be capable of improvements to adequate or better without adopting a new approach." Also, PIN 77-15 continues that 2a-type deficiencies are not to be discussed but, if the offeror attains an overall score that places it in a position to be selected for final negotiation, the offeror may correct the deficiency during those negotiations. Here, EPA found the resumes lacking in information, but contends that during final negotiations E&E supplemented the information without substituting or replacing any personnel proposed and the matter was satisfactorily resolved.

Therefore, this was consistent with the ground rules of the procurement and no personnel were replaced, thereby negating Weston's argument that such action would distort the scoring in other areas.

Weston challenges the manner in which the revised proposals were evaluated since only two members of the TEP conducted the reevaluation rather than reconvening the entire TEP as required by the RFP.

However, the RFP stated that "the revised proposal will be reevaluated and scored in accordance with the solicitation evaluation criteria." This does not require the entire TEP to reevaluate the revised proposals and our Office has recognized that all of the original evaluators need not rescore the revised proposals. Cheechi and Company, B-187982, April 4, 1977, 77-1 CPD 232, and Columbia Research Corporation, B-193154, May 15, 1979, 79-1 CPD 353.

Weston also protests that E&E had an unfair competitive advantage in this competition by virtue of E&E being the contractor under EPA contract No. 68-01-5158. That contract is for the technical, engineering, scientific and management services in support of EPA's Oil and Hazardous Substances Spill Prevention and Environmental Emergency Response Program (Oil Spills contract). The organization of that contract is the same as envisioned by the instant RFP (i.e., a National Program Office and 11 Technical Assistance Teams). Also, under the contract, E&E is to develop operating procedures and safety plans for investigating hazardous waste sites.

Weston argues that E&E scored very high in the technical evaluation of proposals in the areas where the present RFP covered the same areas of performance as the Oil Spills contract and that, in effect, the development of the proposal of E&E was subsidized by EPA's contract payments under the Oil Spills contract. Further, Weston alleges that E&E may have been provided critical information not made available to other offerors.

Our Office has recognized that a contractor may enjoy a certain advantage by virtue of its incumbency or performance of other Government contracts. However,

there is no requirement that this advantage be equalized unless it is shown to result from preference or unfair Government action. Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130. We do not find such a showing to have been made here. Whatever experience or advantage was gained by E&E in the performance of the Oil Spills contract was a natural consequence of its position and no proof has been presented that any critical information was improperly made available to E&E for the purpose of bettering its proposal.

Weston also argues that a potential conflict of interest existed because a member of the TEP was the Project Officer on the Oil Spills contract currently held by E&E and, therefore, should have disqualified himself.

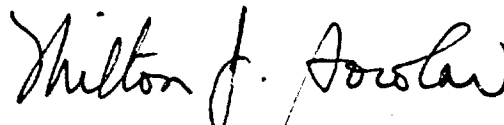
EPA has responded that the individual involved was not the Project Officer but was involved in oversight of the Oil Spills contract and did not issue task orders under the contract.

We know of no rule which precludes an employee of an agency from participating as a member of a panel for the evaluation of proposals which requires the evaluation of an offer from a contractor whose current contract the agency employee is overseeing. Also, the mere allegation of bias, as here, without a showing of actual bias is not sufficient to disqualify an evaluation team member. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176.

Finally, Weston contends that EPA violated the Federal Procurement Regulations (FPR) § 1-2.407-8(b)(4) (1964 ed. amend. 68) by awarding the letter contract to E&E after Weston had filed a protest with the contracting officer on February 8, 1980. The regulation requires that, if an award is made notwithstanding a protest filed prior to award, the contracting officer shall make certain determinations and findings (D&F) and give written notice to the protester of the decision to proceed with the award. Here, award was made on February 15, 1980, and Weston was notified on March 7, 1980. The contracting officer did not specifically comply with FPR § 1-2.407-8(b)(4) by making the D&F required.

However, we observe that on February 15, 1980, the contracting officer made a D&F to support the issuance of a letter contract under FPR § 1-3.408 (1964 ed. circ. 1) based on urgency in order to effect staffing requirements in a timely manner. As urgency is one of the reasons for making an award notwithstanding the pendency of a protest under the procurement regulations, there was substantial compliance with FPR § 1-2.407-8(b)(4). In any event, we have recognized that the regulations concerning award pending protest are purely procedural and, even though the award action may be contrary to those regulations, it does not affect the legality and validity of the award. Kleen-Rite Corporation, B-193731, May 11, 1979, 79-1 CPD 337.

Accordingly, the protest is denied.

A handwritten signature in dark ink, reading "Milton J. Fowler". The signature is written in a cursive, flowing style with a large initial "M".

Acting Comptroller General
of the United States