

DECISION



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

[Protest Alleging Improper and Unfair Evaluation of Proposal]

FILE: B-199120

DATE: September 23, 1980

MATTER OF: Sheldon G. Kall

DIGEST:

1. Allegation of deficiencies in technical evaluation process is not supported by record which shows that evaluation was conducted in accordance with evaluation scheme set forth in RFP and was based on reasoned judgment of evaluators.
2. Although agencies have broad discretion to determine how they will point-score price proposals, reliance on approach that might produce misleading results, such as where points are allocated to low-priced proposal with relatively very low technical score, could be inappropriate. GAO will not object to award, however, where scoring approach does not produce a distorted result.
3. GAO has no authority under FOIA to determine what information must be disclosed by Government agencies.
4. Allegation that agency refused to provide protester with adequate information concerning proposal evaluation is without merit. Merely because protester might independently evaluate his proposal and disagree with agency's evaluation would not provide any basis for GAO to disturb agency evaluation. In addition, factors used by agency in evaluating proposals were adequately set forth in RFP.
5. Allegation that agency failed to conduct discussions with protester, first raised in protester's comments on agency report, is

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untimely filed. Separate grounds of protest asserted after a protest has been filed must independently satisfy timeliness requirements of Bid Protest Procedures which require that protests be filed no later than 10 days after basis of protest is known or should have been known.

6. GAO will not conduct investigation pursuant to its Bid Protest Procedures.

Sheldon G. Kall protests the award of a cost-type contract to Raven Management Associates, Inc. (Raven) under request for proposals (RFP) No. SBA-7j-MSB-80-2, issued by the Small Business Administration (SBA). The RFP was issued as a total small business set-aside for a contractor to provide technical and management assistance to individuals or enterprises eligible for assistance under sections 7(i) and 7(j) of the Small Business Act, as amended, 15 U.S.C. §§ 636(i),(j) (1976 and Supp. III 1979).

Mr. Kall's primary allegations are that his proposal was improperly and unfairly evaluated, that the use of experience in Government contracts as a subcriterion of each of the technical evaluation criteria gives an unfair advantage to prior successful bidders, and that SBA has refused to provide him with adequate information concerning how his proposal was evaluated.

The RFP provided that each proposal would be evaluated on a point system with respect to (1) the quality, experience and capability of the offeror's staff; (2) the previous experience and effectiveness of the offeror in performing services, and (3) total contract price including travel and per diem. For evaluated areas (1) and (2) a maximum point score of 35 each was available, while for area (3) the maximum possible score was 30.

Mr. Kall questions the evaluation of his proposal from both a technical and a cost standpoint. Mr. Kall asserts that he is as well qualified as Raven to perform the required services and that since Raven bid a higher price, he should have received the contract award.

The record indicates that Raven received the highest technical score (68) and the highest total evaluated score (91.6). Although Mr. Kall did receive a higher score for price (24.6 compared to Raven's 23.6), his technical score (41) was lower than Raven's and as a result, his total evaluated score was lower. In fact, eight proposals, including Raven's, received higher overall scores than Mr. Kall's proposal. We also note that while Mr. Kall at least initially assumed that his offer was the lowest offer received, the record shows this assumption to be incorrect.

(Regarding the technical evaluation, it is neither the function nor practice of this Office to conduct a de novo review of technical proposals and make an independent determination of their acceptability or relative merit. We will question contracting officials' assessments of the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. A.T. Kearney, Inc., B-196499, April 23, 1980, 80-1 CPD 289; E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192.

Further, it is well established in negotiated procurements that awards are not required to be made solely on the basis of lowest price. First Ann Arbor Corporation, B-194519, March 4, 1980, 80-1 CPD 170; General Exhibits, Inc., 56 Comp. Gen. 882 at 887 (1977), 77-2 CPD 101. Section 1-3.805-1 of the Federal Procurement Regulations (FPR) cited by the protester is not to the contrary, and in fact states that award of a contract properly may be influenced by the proposal which provides the greatest value to the Government in such terms as possible performance and ultimate producibility.

While Mr. Kall takes issue with the evaluation he received, the record is devoid of any evidence that the evaluation was not conducted in accordance with the evaluation scheme set forth in the RFP or was based on anything other than the reasoned judgment of the evaluators. The record shows that the evaluators found Mr. Kall's proposal specifically lacking in the area of experience, an area in which Mr. Kall admits his proposal was deficient. In this regard, we note that while Mr. Kall asserts that he could not be too detailed in stating his experience

and effectiveness in performing services due to his confidential relationship with his clients as a certified public accountant and attorney, the burden is on the offeror to clearly demonstrate the merits of its proposal, or run the risk of having the proposal rejected. Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218.

With respect to the cost evaluation, Mr. Kall asserts that the evaluation scheme employed by SBA is defective. He argues that the low priced offer should receive the full 30 points available for price and all higher priced offers should receive a score of 0. The record shows that points were actually allocated on the basis of all prices received, the score being determined by awarding the lowest price 30 points and dividing each of the other prices into the lower price and multiplying the result by 30.

In Francis & Jackson Associates, Inc., 57 Comp. Gen. 244 (1978), 78-1 CPD 79, we recognized that agencies have broad discretion to determine how and to what extent they will point-score price proposals and that one generally accepted approach is that used here where the lowest price is awarded the maximum possible point score and proportionately fewer points are awarded to increasingly higher-priced proposals. We pointed out, nonetheless, that reliance on any particular approach could be inappropriate if it would produce a misleading result, such as where the evaluation encompasses a very low proposed price associated with a technically unacceptable proposal. 57 Comp. Gen. at 250. Accordingly, we have suggested that agencies, including SBA, using the same scoring system employed here be aware of the possible misleading results which can flow from downgrading all other prices on the basis of a low price submitted by an offeror with a relatively very low technical score. First Ann Arbor Corporation, supra; Design Concepts, Inc., B-186125, October 27, 1976, 76-2 CPD 365.

Here, the low offer which served as the basis for the point allocation received a technical score of only 26 and was found "not qualified" by the evaluators. As indicated in First Ann Arbor Corporation, supra, we do not believe any purpose is served by point-scoring proposals on price when these proposals have no reasonable chance of being

accepted and the inclusion of their lower priced proposals in the price scoring could distort the evaluation results.

We cannot conclude, however, that the price evaluation scheme used in this case produced a distorted result. Even if the low-priced but relatively low-scored proposal had been eliminated from the price scoring, Mr. Kall's overall score would still have been significantly less than Raven's. Moreover, while Raven's proposed price was only four percent greater than Mr. Kall's, its technical score was more than 65 percent higher than Mr. Kall's score.

Further, we note that under the price evaluation scheme proposed by Mr. Kall, where the low-priced proposal receives 30 points and all other price proposals receive 0, Mr. Kall's proposal as well as Raven's would have received a score of 0 for price. In addition, we question the rationality of using such a scheme where, as here, technical factors have been determined to be of more importance than price, since an offer priced even slightly higher than the low-priced offer would receive no points for price and could as a result be passed over for award even though it might in fact represent the greatest value to the Government in terms of performance. We find no merit to these contentions.

Mr. Kall's second basis of protest concerns SBA's use of experience in Government contracts as a subcriterion of each of the evaluation criteria not related to price. Mr. Kall contends that this gives an unfair advantage to prior successful bidders and creates a Catch-22 situation where he cannot get a Government contract because he has never before gotten one.

SBA responds that only 10 percent of the total points available were related to prior experience in Government contracts. Thus, SBA concludes that Mr. Kall's lack of Government contracts experience would not necessarily disqualify him. Mr. Kall, however, argues that due to the use of this subcriterion, he could never win. The apparent basis for this argument is that of the total possible technical points, he could at best only get a score of 60 while Raven could get 70.

Our examination of the record shows that SBA used "Government Contracts" as a subcriterion of the two technical evaluation criteria "Experience and Capability of Staff" and "Previous Experience and Effectiveness in Performing Services." Contrary to Mr. Kall's apparent assumption, this subcriterion was not related to the offeror's having previously held Government contracts. Rather, it was related to the tasks required of the contractor in providing management and technical assistance to eligible small business clients and specifically to the task set forth on page 6, item D of the RFP, "providing guidance in the matter of seeking and executing Federal Government contracts." The evaluators were unanimously agreed that Mr. Kall's proposal did not demonstrate any experience in providing this type of guidance. We find no basis to object to the scoring of this subcriterion.

Mr. Kall's third basis of protest concerns the alleged refusal of SBA to provide him with adequate information concerning the proposal evaluation process. Mr. Kall contends that without this information, he is unable to comment fully on SBA's report to this Office. The information in question was apparently requested of SBA under the Freedom of Information Act (FOIA). SBA has responded to Mr. Kall's request by denying it in part.

Our Office has no authority under FOIA to determine what information must be disclosed by Government agencies. The protester's recourse in such situations is to pursue its disclosure remedy under the procedures provided by FOIA. Robinson Industries, Inc.--Request for Reconsideration, B-194157.2, March 14, 1980, 80-1 CPD 197; INTASA, B-191877, November 15, 1978, 78-2 CPD 347. We note that SBA has advised Mr. Kall that the partial denial of his request can be appealed, and supplied the name and address of the official to whom such appeal should be addressed. This portion of the protest is therefore dismissed.

In addition, we find no merit to Mr. Kall's allegation that he was unable to fully comment on SBA's report to this Office. The primary concern stated by Mr. Kall is that he is unable to independently determine whether the evaluation of the proposals, and particularly his own, was correct. This inability is allegedly due to SBA's refusal to supply

Mr. Kall with the rating sheets for all offerors, and complete information on the criteria and procedures used in evaluating the technical proposals.

At the outset, we note that the fact that a protester does not agree with an agency's evaluation does not render the evaluation arbitrary or illegal. Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107. Therefore, merely because Mr. Kall might independently evaluate his own proposal and as a result disagree with SBA's evaluation would not provide any basis for our Office to disturb the agency's evaluation.

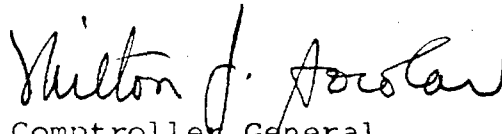
In addition, since the factors used by SBA in evaluating the proposals were sufficiently set forth in the RFP, we cannot conclude that Mr. Kall was denied information concerning the criteria actually applied. While Mr. Kall apparently assumes that some further guidelines or standards for evaluation (other than the subcriteria) must exist, SBA advises that this is not the case. We find nothing objectionable in this. We have recognized that where, as here, a numerical scoring scheme is utilized to evaluate proposals, technical factors are traditionally scored on the basis of the extent to which the evaluators, in the exercise of their good faith subjective judgments, believe proposals merit perfect or less than perfect numerical ratings. Francis & Jackson Associates, supra.

In his comments on SBA's report to this Office, Mr. Kall raised as an additional basis of protest the allegation that no oral or written discussions were held with him, as required by section 1-3.805-1 of the FPR. We consider this allegation untimely.

Separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of our Bid Protest Procedures. These procedures require that protests be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 20.2(b)(2) (1980). We believe that Mr. Kall knew or should have known of this basis of protest upon learning of the contract award to Raven, which was sometime prior to June 2, 1980.

Mr. Kall also alleges that he has variously been informed that his proposal was rated 13 out of 19, 9 out of 18 and 7 out of 19. Mr. Kall requests that GAO investigate this apparent discrepancy and determine what other discrepancies exist. We are unable to comply with this request. It is not our function to conduct investigations pursuant to our Bid Protest Procedures. MRCA, Inc., B-194275, August 8, 1979, 79-2 CPD 96. In any event, we do not perceive how such an alleged discrepancy prejudiced Mr. Kall inasmuch as it is clear that his proposal's ranking was such that award was unlikely.

The protest is denied in part and dismissed in part.

A handwritten signature in dark ink, appearing to read "Milton J. Fowler". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

For the Comptroller General
of the United States