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DECISION



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

FILE: B-198840

DATE: November 10, 1980

MATTER OF: Jack Faucett Associates

DIGEST:

1. Agency evaluation of protester's proposal and determination of technical unacceptability is upheld where record supports reasonableness of agency's assessment of proposal deficiencies.
2. Procuring agency is not required to consider relative cost effectiveness of proposals in determining technical acceptability.
3. Issue concerning alleged organizational conflict of interest was filed with GAO more than 10 days after protester should have been aware of basis of protest; consequently, issue is untimely under § 20.2(b)(2) of GAO's Bid Protest Procedures (4 C.F.R. part 20 (1980)) and will not be considered.
4. Agency contracting officer did not violate agency procedure by consulting with technical evaluation committee prior to final decision on competitive range composition.

Jack Faucett Associates (JFA) protests the exclusion of its proposal from the competitive range of a procurement conducted by the United States Department of the Interior, Bureau of Mines (BOM). Based on our review of the record, we deny the protest in part and dismiss the protest in part.

The request for proposals (RFP) in question was issued on February 4, 1980, for research and development of data which would assist the Mine Safety and

[Protest Against Proposal Exclusion]

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Health Administration (MSHA) in evaluating the current methane-hazard classification system for metal/nonmetal (M/NM) mines leading to a possible revision of the classification system. The RFP anticipated that a cost-reimbursement-type contract would be used for the proposed procurement and contained the following "Award Factors":

"1. Understanding all elements of the Statement of Work and demonstrating the understanding by the thoroughness, soundness, and comprehension of the approach contained in the technical proposal.

"2. Qualifications and commitment of personnel, facilities, and overall capabilities of the proposer for the work to be accomplished.

"3. Quantitative comprehension of the work to be accomplished as evidenced by the proposed level of effort and management plan.

"4. Contractor's past performance on Bureau contracts."

Fourteen firms submitted proposals on or before the March 13, 1980, closing date for receipt of proposals. On May 5, 1980, BOM advised JFA by letter of the deficiencies which BOM had found in JFA's technical proposal and of JFA's exclusion from the competitive range. BOM cited the following deficiencies: (1) major technical errors; (2) failure to grasp scope of work; and (3) inadequate mining experience of JFA personnel, especially as shown in work assignments.

After this exclusion, BOM evaluated proposals and thereafter awarded a contract to Golder Associates, whose best and final offer was the lowest in cost of the technically acceptable firms.

The protester challenges the technical evaluation of its proposal. Additionally, the protester alleges: (1) BOM failed to give weight to the cost effectiveness of the protester's proposal; (2) a potential conflict of interest exists under the contract awarded to the successful offeror, Golder; and (3) internal agency procedures were violated. We will address each of these questions separately.

Agency Technical Evaluation

Our decisions have consistently held that determinations of technical acceptability are the responsibility of the agency concerned and are questioned by our Office only upon a clear showing of unreasonableness. RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. A technical evaluation will not be regarded as unreasonable merely because there exists some disagreement between the procuring agency and the offeror. For an evaluation to be deemed unreasonable, it must clearly appear from the record that there is no rational basis for the agency's determination. Joanell Laboratories, Inc., 56 Comp. Gen. 291 (1977), 77-1 CPD 51. Further, the protester has the burden of affirmatively proving its case. C.L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD 448. These principles are applicable to review of competitive range determinations.

A. Major Technical Errors

JFA's proposal was criticized for a number of informational deficiencies. JFA attempts to explain its position on some of these issues, and simply disagrees with BOM on others. However, after careful consideration of the record, we cannot say that BOM's criticisms were unreasonable. While each deficiency in itself may have been insufficient to warrant exclusion, the deficiencies taken as a whole were substantial enough to support the agency's determination of technical inadequacy. See Decilog, B-198614, September 3, 1980, 80-2 CPD 169.

For example, FJA's proposal states that there are 12 M/NM mines classified as gassy; BOM points

out that MSHA classifies 18 M/NM mines as gassy. JFA explains that it wrote this statement to reflect circumstances which existed shortly after the Louisiana salt mine explosion; it did not reflect MSHA reclassification of nine M/NM mines as a result of that explosion. However, we note that the Louisiana mine explosion occurred in June 1979, and JFA's proposal was submitted in March 1980. If JFA intended to use statistics as of a date other than the date of its proposal, it had a duty to make that clear. An offeror must demonstrate the merits of its proposal clearly and runs the risk of rejection for failure to do so. Atlanta Construction & Maintenance Corporation, B-197245, September 9, 1980, 80-2 CPD. We cannot, therefore, take issue with BOM's reading of the above statement as indicative of an informational deficiency in the proposal.

Similarly, JFA states in the proposal that "three other gassy M/NM mines are salt mines located on the Gulf Coast Basin." There are actually four gassy salt mines in Louisiana, not three. JFA explains that its use of the word "other" was meant to imply three salt mines in addition to the Louisiana salt mine in which the explosion occurred. We cannot agree with this explanation. The statement appears in the proposal after a discussion of gassy salt mines in other areas of the country (JFA proposal, at page 9). There is no preceding reference to the Louisiana mine which would support JFA's explanation. Again, the protester must bear the risk of its unclear statements. Atlanta Construction, supra.

There is also disagreement regarding JFA's use of a BOM publication as its guide in evaluating methane concentration. JFA proposed to conduct tests in a nongassy trona mine and a gassy iron mine; BOM states that neither exists in the United States according to MSHA classifications. We must agree with BOM on this point because the RFP specifically calls for MSHA classification criteria, and because JFA makes no mention of the BOM publication in its proposal. Failure to use the proper classification system is a material error in view of the purpose of this study.

Given the foregoing, we cannot conclude that BOM unreasonably determined that JFA did not fully understand certain technical aspects of the proposed study.

B. Failure to Grasp Scope of Work

BOM argues that the main part of JFA's technical proposal discussion dealt with how methane gas is formed rather than the primary subject area of the RFP--M/NM mine classification systems.

In reply, JFA defends its discussion of methane gas by arguing that the number of mine classification systems of foreign countries to be studied should depend on the extent of methane hazards which, in turn, depends on the presence of unique geologic conditions in those countries.

Unquestionably, much attention is given to the discussion of methane formation in ores and rocks in JFA's proposal. Since the stated purpose of the contract was to study the current classification system, we cannot conclude that JFA has shown BOM's position to be arbitrary.

C. Inadequate Mining Experience--Work Assignments

BOM argues that the mining backgrounds of JFA's proposed personnel are far too limited to successfully accomplish this research and that JFA's proposed work assignments also show this deficiency. BOM also notes that the four offerors who were considered technically acceptable had substantially more mining background in their project teams.

In reply, JFA argues that the RFP does not require mining engineers to be part of the project team and that the research, data-gathering, and analysis involved do not require extensive participation of mining engineers; moreover, JFA argues that its proposed work assignments reveal a proper level of experience.

We agree that the RFP did not require a specified level of work-hours from experienced mining engineers. Nevertheless, it is clear from the record that JFA proposed drastically fewer mining engineer work-hours than did the four firms judged to be in the competitive range. Moreover, even JFA acknowledged that the contribution of mining engineers would be necessary to do the work by proposing over 200 work-hours from a mining engineer. Therefore, and since this particular issue merely evidences a disagreement as to the extent of work-hours required, we cannot conclude JFA has shown BOM's position to be arbitrary.

Conclusion

In sum, the arguments offered by the protester are insufficient for us to question BOM's determination that JFA's proposal was properly excluded from the competitive range. They fail to establish that BOM acted in an unreasonable or arbitrary manner.

Cost Effectiveness

JFA contends that its technical proposal should not have been rejected without considering the merits of its cost proposal.

We have specifically rejected a similar contention. See, 52 Comp. Gen. 382, 388 (1972), where we said:

"* * * we do not believe * * *
that price must be considered in all
instances in determining what proposals
are in a competitive range. To accord
such interpretation to the law would
place procurement officials in the
unreasonable position of having to
consider the price proposals of all
offerors, no matter how deficient or
unacceptable the accompanying technical
proposals might be. * * *"

Conflict of Interests

JFA also argues that the contract award was improper because of the potential conflict of interest existing in a firm closely associated with the mining industry. Principally, its contention is aimed at Golder's relationships with its mining clients. JFA argues that whether a mine is regulated as gassy or nongassy has a significant impact upon production costs. The protester claims this creates a potential conflict for Golder between the proprietary interests of its clients and its research for BOM.

This issue was specifically raised by JFA in a letter dated September 8, 1980, which contained a detailed list of Golder's clients (14 in all) who allegedly may be affected by any new classification system resulting from the contract.

In our view, there is no apparent reason why JFA could not have raised this specific issue at a much earlier date after the company learned of the award to Golder in June 1980. Therefore, this issue is untimely filed with our Office under § 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 20 (1980)) which provides:

"* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Thus, we will not consider this aspect of the protest. We will, however, bring the matter to the attention of the Secretary of Interior with a recommendation that the allegation be investigated.

Procedure

Finally, the protester assails the method used to set the competitive range. Specifically, JFA argues that BOM's contracting procedures were violated because the contracting officer participated in setting the competitive range, rather than allowing the competitive range to be set solely by the Technical Evaluation

Committee. The protester argues that cost "played a role in setting the technical range" because the contracting officer "was the only individual with knowledge of both each firm's bid and technical score."

BOM's method was not inconsistent with its contracting procedure. That procedure, as explained by a BOM representative, requires that:

"Once the Technical Evaluation Committee has scored each interested firm on their technical merits, the results are sent to the contracting officer along with a recommendation as to which firms are technically acceptable and why."

Thus, under BOM's procedure, it is clear that the committee only recommends--not finally determines--the composition of the competitive range. Since the procedure only calls for a recommendation--not a final decision--the contracting officer is not prevented from consulting with the committee on the final decision of the firms in the competitive range, as apparently happened here.

In any event, there is no evidence that the contracting officer improperly allowed cost considerations to influence the final decision.

For the foregoing reasons, the protest is denied in part and dismissed in part.

Harry R. Van Cleave
For the Comptroller General
of the United States