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DECISION

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

[Protest of Proposal Rejection]

FILE: B-195806 DATE: April 15, 1981

MATTER OF: MAXIMUS

DIGEST:

1. Complaint that award of "cooperative agreement" was improper because agency actually conducted procurement but failed to comply with procurement regulations is without merit where procedures followed were consistent with Federal procurement requirements.

2. Ranking of proposals in lieu of using point scores is not improper since point scores generally are to be used only as guides for award selection. Moreover, proposals, when scored, need not be evaluated by all members of evaluation team.

3. Low cost associated with proposal need not be considered when proposal is technically unacceptable.

MAXIMUS protests the rejection of its proposal under National Endowment for the Arts (NEA) Program Solicitation 79-4 for a cooperative agreement to develop and test models for audience surveys to be conducted by art and cultural institutions. MAXIMUS objects to NEA's selection of the evaluation panel; NEA's decision to abandon the use of numerical scoring during the evaluation and instead to rank proposals in determining which of them would be considered; NEA's alleged failure to give its evaluators adequate guidance or to require that all panel members read all proposals; and the haste with which MAXIMUS says the evaluation was conducted. MAXIMUS also believes that NEA acted arbitrarily by not holding discussions with the firm, and by failing to request that MAXIMUS submit a best and final offer. MAXIMUS argues that these actions violated the Federal Procurement Regulations (FPR).

As explained below, we are of the view that the procedures followed by NEA in this instance were consistent with Federal procurement standards.

However, MAXIMUS' reliance on the FPR to support the complaint presents a threshold problem. NEA's solicitation document is styled as a "program solicitation," the award was termed a "cooperative agreement," and, NEA states that the agency did not apply the FPR because it viewed the solicitation as involving a program rather than a procurement matter. In this respect, a "cooperative agreement" is defined in the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §§ 501 et seq. (Supp. I 1977), essentially as an assistance relationship. Except under special circumstances, this Office has not considered the propriety of assistance awards. Burgos & Associates, Inc., 59 Comp. Gen. 273 (1980), 80-1 CPD 155.

One of those special circumstances is when it is alleged that the agency is using the assistance format to avoid complying with the requirements of Federal procurement laws and regulations. See Burgos & Associates, Inc., 58 Comp. Gen. 785 (1979), 79-2 CPD 194; Bloomsbury West, Inc., B-194229, September 30, 1979, 79-2 CPD 205. MAXIMUS' assertion that NEA's actions violated the FPR reflects MAXIMUS' view that what transpired here in fact essentially involved a procurement, not an assistance matter, and was conducted as such. In this regard, NEA's solicitation document indicated that a contract could be awarded in lieu of a cooperative agreement, invited firms to submit "proposals," and provided that a single awardee would be selected by applying listed evaluation criteria (which we further discuss below).

Moreover, the Federal Grant and Cooperative Agreement Act of 1977 defines a "procurement" as the "acquisition * * * of property or services for the direct benefit of the Government," 41 U.S.C. § 503, and we note that the services to be performed here are to result in the production of a manual or guidebook for NEA which will set out and standardize procedures for conducting audience surveys. Thus, the acquisition of the services arguably involves a procurement as the term is used in the statute, and the complaint thus brings into question whether direct Federal procurement procedures should have been followed.

In any case, however, we think the practices NEA actually followed essentially conformed to sound Federal

procurement practice, or were for other reasons not a cause of any prejudice to MAXIMUS. Consequently, we believe it is academic whether NEA should have viewed this matter as a procurement and the FPR as applicable, and we do not find it necessary to actually decide whether NEA attempted to avoid conducting a procurement in this instance.

First, we do not share MAXIMUS' view that NEA improperly selected its review panel. The basis for complaint in this regard is the inclusion of a demographer and a cultural anthropologist who MAXIMUS suggests may not have had backgrounds adequate to properly evaluate the proposals. However, selection of panel members falls primarily within the discretion of the procuring activity, and thus will not be questioned by our Office absent evidence of actual bias. Fox & Company, B-197272, November 6, 1980, 80-2 CPD 340. NEA has explained that it believed that including persons having diverse backgrounds on the panel was useful in this instance, and the record before us contains no evidence of bias.

Second, we do not agree with MAXIMUS' concern regarding NEA's decision to abandon point-scoring the proposals received and to substitute a system of ranking them. Proposals were point-scored initially in accordance with the evaluation criteria (Understanding of the Project--40 points; Personnel--30 points; and Management Plan--30 points) of the solicitation document. The agency then ranked each of the 28 proposals received according to the scores assigned. Although the proposals initially were reviewed and points assigned by only some of the 12 evaluators, all proposals then were discussed by the full evaluation panel, starting from the lowest ranked. The discussion, NEA reports, included consideration of the relative strengths and weaknesses of each proposal.

MAXIMUS suggests that the ranking of proposals magnified small differences in evaluation scores, e.g., a 1-2-3 ranking of proposals scored 95, 94 and 93 allegedly distorts the fact that all three are essential equal.

However, we have indicated that although a point scoring systems may be useful as a guide to intelligent decision-making, the scoring method is not controlling

in determining which competitor should receive an award precisely because scores can only reflect the disparate judgments of the evaluators and thus a difference in scores may not reflect an actual difference in merit. See Fox & Company, supra. Ranking proposals may be a more direct and meaningful method if ranking permits the contracting activity to gain a clearer understanding of the relative merits of the proposals.

In any event, as stated above, even the lowest ranked proposals were discussed by NEA's evaluation panel. Moreover, NEA allowed each evaluator the option of selecting any one proposal for reading by the entire panel if, for example, an evaluator felt that the best proposal he had read was improperly ranked. MAXIMUS' proposal was selected under that procedure for consideration by the full panel and was read by all panel members before being rejected. Accordingly, we do not see how MAXIMUS was prejudiced by the procedure used.

MAXIMUS also complains that NEA's evaluators were not given adequate guidance or sufficient time to complete their work, but has not offered any substantive evidence to refute NEA's response that the evaluators were fully advised of the criteria and procedure to be applied and were given as much time as they deemed necessary. Moreover, although MAXIMUS believes all of the proposals should have been reviewed initially by each of the 12 panel members, NEA found it impractical to do so in view of the number of proposals (28) received. In reviewing Federal procurements, we have indicated that the procedure used or time required for a proper evaluation are matters requiring the exercise of the agency's judgment, which we will not question absent clear evidence of abuse, and that where a large number of proposals must be considered, it is not improper or arbitrary to divide them among panel members for evaluation. See Design Concepts, Inc., B-186125, October 27, 1976, 76-2 CPD 365.

Regarding whether NEA should have discussed MAXIMUS' proposal with the firm and requested a best and final proposal, as stated above MAXIMUS' proposal was rejected by the full evaluation panel which concluded that there

was no possibility that MAXIMUS could receive award. (The panel reserved three proposals for discussions.) Our decisions recognize that proposals may be rejected after initial evaluation where the agency concludes that they are not susceptible of being made acceptable without extensive revision. See, e.g., A. T. Kearney, Inc., B-196499, April 23, 1980, 80-1 CPD 289; Broomall Industries, Inc., B-193166, June 28, 1979, 79-1 CPD 467.

Although MAXIMUS says its proposal was arbitrarily rejected, it is not the function of this Office to evaluate proposals. Rather, the determination of the relative merits of proposals is the responsibility of the contracting activity, and often requires weighing competing subjective considerations and the exercise of sound discretion by contracting officials. See, e.g., WASSKA Technical Systems and Research Co., B-189573, August 10, 1979, 79-2 CPD 110, and cases cited therein. MAXIMUS has proffered no evidence to show that its proposal was arbitrarily or unreasonably rejected.

MAXIMUS also argues that the evaluation panel failed to take into consideration the low cost of its proposal. However, to the extent that a proposal is not technically acceptable it is not relevant that its cost is lower than the cost of other acceptable proposals. National Designers, Inc., B-181741, December 6, 1974, 74-2 CPD 316. We note, moreover, that the solicitation minimized the importance of price as an evaluation factor in this instance since it indicated that technical quality would be the principal measure of a proposal's value for purposes of selecting an awardee.

Since the procedures followed here by NEA would have been proper in the context of a direct Federal procurement, the suggestion inherent in MAXIMUS's complaint, i.e., that a direct procurement under the FPR should have been conducted, is academic, and we find the protest to be without merit.

Milton J. Socolar

Acting Comptroller General
of the United States