DECISION

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

FILE: B-205464 DATE: September 27, 1982

MATTER OF: Western Engineering and Sales Co.

DIGEST:

1. Allegation that former Government employee violated Ethics in Government Act of 1978 by accepting award of contract from agency with which he was previously employed is not considered by GAO since questions under § 207 must be resolved by the agency under applicable regulations, and those under § 205, a criminal statute--do not come within GAO bid protest jurisdiction.

2. GAO is unable to conclude that agency acted improperly based on protester's contentions that makeup of technical evaluation panel, technical score given protester's proposal, and alleged use of Government facilities by awardee to prepare his proposal reflected agency bias in favor of awardee where agency denies bias and only evidence presented in support of protester's contentions are unsupported allegations.

3. Protester's contention that awardee's proposal should have been downgraded because it offered a low level of effort and failed to provide for computer analysis or for special facilities are not supported by record where awardee's proposed level of effort was greater than protester's, the RFP did not require computer usage and the technical evaluators did not find awardee's lack of special facilities to be a significant shortcoming.

4. RFP provision under which contractor certifies non-duplicative nature of costs incurred under contract does not impose any informational requirement on offerors prior to award.

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Western Engineering and Sales Co. protests the award of a contract to George W. Haydon to develop planning principles and evaluate planning methods for high frequency broadcasting services for the National Telecommunications and Information Administration (NTIA) of the Department of Commerce under request for proposals (RFP) No. SA-81-RSA-0013.

Western contests the propriety of the award on two major grounds. First, Western contends the award is tainted because of a conflict of interest resulting from Mr. Haydon's status as a former NTIA employee and because Mr. Haydon participated in a pre-proposal meeting with Western's owner where the protester discussed its plans and ideas for its proposal in anticipation of Mr. Haydon's working with Western on the project. Second, Western argues that the lower technical score it received could only be the result of the agency's failure to evaluate proposals on a common basis. We see no merit in either of these positions and deny the protest.

Of the four firms responding to the solicitation, three, including Mr. Haydon and Western, were determined to be within the competitive range and eligible for discussions. While the evaluation of the initial proposals indicated that Mr. Haydon with a technical score of 76.2 and Western with a score of 73.7 were acceptable, the agency clearly believed that a third firm, Telecommunications Systems with a score of 90, submitted the best technical proposal. The technical scores of the offerors remained essentially the same after discussions and evaluation of best and final offers. Despite the higher technical rating given Telecommunications, the award was made to Mr. Haydon based on the agency's determination that Mr. Haydon's price of $84,300 "more than offset the higher technical rating" of Telecommunications. Telecommunications' price was $21,369 greater than Mr. Haydon's while the protester's price was $14,919 above Mr. Haydon's price.

Western first contends that the award to Mr. Haydon constituted a violation of the Ethics in Government Act of 1978, as amended, 18 U.S.C. § 207 (Supp. IV 1980) and 18 U.S.C. § 205 (1976), because Mr. Haydon was a former employee of NTIA and a current employee of Commerce's National Oceanic and Atmospheric Administration (NOAA).

The agency reports that Mr. Haydon retired from an NTIA predecessor agency and later served NTIA as a rehired annuitant from January 5, 1977 through January 4, 1981. The agency further reports that Mr. Haydon currently is not employed by NOAA but has been employed by a contractor performing computer services at Commerce's Institute for Telecommunication Sciences (ITS).

Under these reported circumstances we cannot conclude that the award per se to Mr. Haydon was improper. We note here that Mr. Haydon did not submit his proposal until after his direct Government employment had ended, and that that there is no Government-wide regulation which prohibits the award of contracts to retired Government employees. See Edward R. Jereb, 60 Comp. Gen. 298 (1981), 81-1 CPD 178. The question of whether Mr. Haydon's actions violated the Ethics in Government Act, which forbids former Government employees from representing others before the Government in connection with matters in which the former employee participated as a Government employee, is not for consideration under our protest procedures, but must be resolved by the agency under the regulations issued by the Office of Government Ethics. 5 C.F.R. § 737.1(c)(6) (1982); J.L. Associates, Inc. B-201331.2, February 1, 1982, 82-1 CPD 99. Also, since Mr. Haydon was not a current Government employee at the time of award, 18 U.S.C. § 205, a criminal statute which prohibits conflicts of interests by current Government employees, would not be applicable. In any event, enforcement of criminal laws also is not encompassed by our protest jurisdiction. Riggins & Williamson Machine Co. Inc., B-186723, December 6, 1976, 76-2 CPD 463.

Second, Western contends that various aspects of the evaluation process reflect an agency bias in favor of Mr. Haydon. Specifically, Western asserts that (1) the composition of the evaluation panel--three out of the four members were NTIA employees while other agencies with an interest in the project were not represented, (2) the panel's evaluation of Mr. Haydon's proposal as technically superior to that of Western, especially one panel member's low scoring of Western's proposal under the factor of organizational experience, along with the agency's permitting Mr. Haydon the use of Government facilities in preparing his proposal, clearly shows that the agency was biased towards Mr. Haydon.

The record does not support the allegation of bias. First, the agency explains that the evaluators came from NTIA and the Voice of America, which are two of the three agencies having a major interest in the project. The other interested agency was not represented, Commerce reports, because its chief engineer was a proposed employee of one of the offerors. Commerce further reports that although Mr. Haydon was known to the NTIA evaluators, he had not supervised nor was supervised by any evaluators nor did any evaluator have a personal relationship with him.

Second, we do not understand how one evaluator's assignment of a low score to Western under the category of organizational experience shows that the entire evaluation process was biased. Although the score does appear to be low in relation to that given the other firms by this evaluator under the organizational experience factor, and to all the other firms by the other evaluators, we have long recognized that it is not unusual for individual evaluators to reach disparate conclusions when judging competing proposals since both objective and subjective judgments are involved. See, e.g., Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD 427, affirmed B-187645, August 17, 1977, 77-2 CPD 124. Here, there is no evidence that the evaluator's scoring reflects other than his reasoned judgment as to the merits of that aspect of Western's proposal.

In any event, it is significant to note that a third firm, Telecommunications, received a much higher technical score than either Western or Mr. Haydon and that Mr. Haydon's price was significantly lower than both Western's and Telecommunications' prices. In fact, it appears from the record that Western's proposal did not play an important role in the agency's final award selection, but that Mr. Haydon was chosen over Telecommunications only because of his low price. In short, even if Western had received more points under the organization experience evaluation criterion, its proposal still would have been rated much lower than that of Telecommunications. Thus, it does not appear that revised scoring of Western's proposal for this factor would affect the final award selection.

Third, Commerce states that while Mr. Haydon was provided space for his work with the contractor, he was not permitted to use Government facilities to prepare his proposal. Although Western insists that Mr. Haydon did in fact use Government facilities, the record falls short of establishing that fact.

Western's other complaint regarding the evaluation is that its relatively low technical score was the result of the agency's failure to evaluate proposals on a common basis. In this connection, Western argues that the agency should have downgraded the Haydon proposal because it offered a low level of effort, and failed to provide for a computer analysis or for special facilities. Western also faults the agency for permitting Mr. Haydon to include in his proposal subcontract work at the University of Colorado "after the due date" and contends that such a subcontract effort could not be properly evaluated.

It is not the function of this Office to determine the relative merits of technical proposals. This is primarily the function of the agency evaluators and they have considerable discretion in making that determination. Thus, we will not question an agency's technical evaluation unless the protester shows the agency's judgment lacked a reasonable basis, was an abuse of discretion, or otherwise was in violation of procurement statutes or regulations. Earth Environmental Consultants, Inc., B-204866, January 19, 1982, 82-1 CPD 43.

We see nothing improper or unreasonable in the agency's evaluation of Mr. Haydon's proposal. The record shows that Mr. Haydon, in his best and final offer, proposed a level of effort, including subcontractor effort, of 2,160 hours, a figure greater than that proposed by the protester. Further, it is clear from Mr. Haydon's initial proposal that he intended to subcontract some of the effort to the University of Colorado, and his best and final offer merely further clarified that effort. Although Western seems to argue that the subcontracted effort could not be properly evaluated, the RFP did not prohibit subcontractor arrangements and the evaluators, whose task it was to analyze the proposals, concluded that Mr. Haydon's clarification of that aspect of its offer was satisfactory. As far as Mr. Haydon's failure to include computer usage in his

proposed approach is concerned, we note that there was no requirement in the RFP for computer usage, and we see no reason why Mr. Haydon's proposal should necessarily be downgraded for using or relying on a methodology different from that adopted by Western. Again, although Western insists that Mr. Haydon's proposal should have been downgraded because of his alleged lack of special facilities, the evaluators did not agree that this was a significant shortcoming in Mr. Haydon's proposed approach to the project. We have no basis to dispute the agency's judgment in this matter.

Western also complains that Mr. Haydon did not disclose other directly related work as required by the Duplication of Effort clause in the RFP. That clause provides that "the Contractor hereby certifies that costs for work to be performed under this contract * * * are not duplicative of any costs charged against any other Government contract * * * or * * * source." This provision does not appear to impose any requirement on offerors prior to award, but rather is a contractor certification related to performance costs for which the contractor, after award, seeks reimbursement under the cost-type contract awarded here. Thus, Mr. Haydon's failure to provide information in response to this clause, even if he had been involved in work directly related to the work called for by this solicitation, a matter denied by the agency, is not contrary to any RFP requirement.

Finally, with respect to Western's allegation that Mr. Haydon improperly used its ideas in his proposal, that is a matter to be settled between the parties and is not a proper subject for consideration under our protest procedures. See Telemechanics, Inc., B-203428, B-203643, B-204354, October 9, 1981, 81-2 CPD 294.

The protest is denied.

Harry R. Van Cleve

Comptroller General
of the United States