

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

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FILE: B-208582**DATE:** September 2, 1983**MATTER OF:** Kirk-Mayer, Inc.**DIGEST:**

1. While agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which will be considered. All that is required is that those aspects not identified be logically and reasonably related to the stated evaluation criteria.
2. Where the RFP, without specifying precise weights, advises that the difference in weight between evaluation factors is not significant and the four factors are assigned weights of 30, 25, 25 and 20, offerors are sufficiently informed of the relative importance of evaluation criteria.
3. GAO will not object to award where solicitation requires offerors to demonstrate availability of facility adequate for contract performance and procuring agency evaluates offeror's proposed facility as adequate but, due to delay in procurement, offeror's option to lease the facility expires before award and, after award, another suitable facility is substituted for the one originally evaluated.
4. Protest that competitor obtained business confidential and proprietary information from protester's employees; that competitor induced protester's employees to breach their employment contracts; and that competitor otherwise fostered conflicts of interest among protester's employees are allegations concerning improper business practices which are not for consideration under GAO Bid Protest Procedures.

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5. Protest alleging that request for proposals contained evaluation criteria prejudicial to the protester that is not filed until after receipt of proposals is untimely.

Kirk-Mayer, Inc. protests award under request for proposals (RFP) No. N0022-82-R-8000 issued by the Naval Supply Center, Oakland, California for the installation and testing of electronic equipment. Kirk-Mayer contends that the Navy evaluated proposals on the basis of a "secret" evaluation plan not disclosed in the solicitation and that the evaluation otherwise was conducted in an unfair and prejudicial manner. We deny the protest.

This solicitation, issued October 14, 1981, sought the services of electricians, sheet metal workers and other technicians needed to install, modify and repair government-furnished electronic equipment aboard ships and to conduct operational tests of the installed systems. The RFP contemplated a time and materials contract with fixed prices for identified labor categories, subject to individual task orders as required by the Navy during the initial contract year and 2 option years. Kirk-Mayer, an incumbent contractor, had provided similar services to the Navy at this location for the 6 preceding years.

Four firms responded by the November 31, 1981 closing date for receipt of proposals. The Navy found that all four proposals were acceptable; conducted written and oral discussions with the firms; requested revised proposals; and reevaluated all four proposals. As a result of this reevaluation, the Navy concluded that the competitive range should be narrowed to the two firms whose proposals were both highest ranked and lowest in cost, Kirk-Mayer and PacOrd, the latter a wholly owned subsidiary of Dynalectron Corporation. Because the Navy considered the lower rated Kirk-Mayer proposal as essentially equal to PacOrd's, the Navy advised both firms that cost would be the most important factor in selection and requested best and final offers on that basis. In reply, PacOrd submitted a best and final offer of \$8,786,230, while Kirk-Mayer proposed \$9,020,968.

The Navy awarded the contract to PacOrd on July 29, 1982 and Kirk-Mayer protested that award to the Navy 2 days later. Following the Navy's August 9, 1982 debriefing, Kirk-Mayer filed its protest with this Office on August 11, 1982.

Kirk-Mayer's first contention, that its proposal was evaluated against secret criteria not disclosed in the RFP, is based on the Navy's use of a detailed evaluation plan which included subcriteria and weights. It is a basic procurement concept, of course, that offerors must be advised of those factors to be used in the evaluation of their proposals, Export Trade Corporation, B-210668, February 25, 1983, 83-1 CPD 189, and that once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme. Genasys Corporation, 56 Comp. Gen. 835 (1977), 77-2 CPD 60. Subcriteria, however, need not be disclosed in the solicitation so long as there is sufficient correlation between the subcriteria and the criteria in the RFP. A. T. Kearney, Inc., B-205025, June 2, 1982, 82-1 CPD 518.; Littleton Research and Engineering Corp., B-191245, June 30, 1978, 78-1 CPD 466.

Here the solicitation identified the evaluation factors as follows:

1. Personnel Qualification
2. Management
3. Past Experience
4. Price

The solicitation stated that the factors were listed "in descending order of importance except management and past experience are of equal importance," but that the difference in weight "between the factors is not significant." In addition, separate paragraphs in the solicitation amplified what was encompassed by each criterion.

We find the evaluation guidelines used by the evaluators were consistent with the solicitation criteria. For example, the guidelines provided for measurement of such thing as the proposed on-site manager's education, technical background, and prior experience (just as the solicitation paragraph on "Management" indicated) and provided weights for each subfactor. They also provided instructions for evaluating personnel, including bases for giving additional credit for personnel whose qualifications exceeded minimum requirements. These guidelines clearly are directly related to the main criteria, and in no area do we find any subfactor which is not reasonably related to the main evaluation factor set forth in the solicitation.

In a related allegation, Kirk-Mayer contends that the Navy secretly directed the evaluators to rescore proposals in a manner that was inconsistent with the evaluation criteria. In this regard, the Navy did direct evaluators to rescore proposals because they originally scored on the basis of personnel meeting minimum requirements only. Since the solicitation itself stated that additional credit would be given for experience and training in excess of the required minimum, we cannot agree that the rescoring was inconsistent with the evaluation criteria or otherwise improper. In any event, the relative position of the proposals was not altered by the rescoring, so no prejudice accrued to the protester as a result of the rescoring.

Kirk-Mayer also argues that the solicitation failed to convey the relative importance of the evaluation factors, because the Navy gave personnel qualification 50 percent more weight than cost even though the solicitation stated that the difference in weight between factors "is not significant." The record shows that personnel qualification was given a weight of 30 while price was weighted at 20. While the protester is correct that 30 is 50 percent more than 20, we do not agree that the calculation of the percentage by which the weight assigned one factor exceeds the weight of another factor is a meaningful analysis; rather, what must be measured is the comparison of weights assigned individual factors to the total weight for all factors, 100 points in this case. Given that the solicitation informed offerors that the factors were listed in decreasing order of importance (management and past experience each were given a weight of 25), we cannot agree that the differences in weights were inconsistent with what was stated in the solicitation.

Kirk-Mayer also complains that the Navy's evaluation of past experience was predicated upon secret unilateral ratings of its contract performance unknown to it and which it had no opportunity to rebut. The Navy admits that it did take Kirk-Mayer's performance as incumbent contractor into account, but argues that such action was proper.

We agree. The instructions for preparing proposals, under the section dealing with experience, required offerors to furnish the name, address and telephone number of the contracting officer and the technical point of contact for all contracts listed. We believe that this language indicates that the Navy might well contact some or all of the individuals listed to ascertain whether the

offeror performed the contract in question satisfactorily. We therefore cannot agree that Kirk-Mayer was unaware of the possibility that its performance as incumbent would be assessed during evaluation and, in any event, we take no objection to a procuring agency checking an offeror's performance under past Government contracts during evaluation. See Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260.

Kirk-Mayer next contends that the Navy deliberately tried to avoid the advantage of Kirk-Mayer's incumbency by evaluating the offeror's experience on a minimum of four similar contracts and by limiting credit for experience to the past 3 years. Because Kirk-Mayer had only one major service contract of this type during this period, it argues that it was prejudiced by this experience requirement. Kirk-Mayer also points out that an incumbent contractor is entitled to the competitive advantages it enjoys by virtue of incumbency.

Our Bid Protest Procedures require that protest of an alleged solicitation impropriety apparent prior to the closing date for receipt of proposals be filed prior to the closing time, either with the procuring agency or this Office. 4 C.F.R. § 21.2(a) (1983). Here, the evaluation criterion entitled "experience" clearly states that proposals which fail to list at least four comparable contracts "will be downgraded" and the solicitation's proposal preparation instructions limits qualifying contracts to those awarded the preceding 3 years. Thus, the concern should have been raised prior to the closing time. Since it was not, this aspect of the protest is untimely and not for consideration.

Kirk-Mayer further contends that the Navy impaired the integrity of the procurement process by favorably rating PacOrd's proposed management and technical personnel despite the fact that they were then in the employ of Kirk-Mayer, thereby fostering conflicts of interest, breaches of employment contracts and unfair competition. In this regard, Kirk-Mayer identifies a number of ex-employees that PacOrd allegedly contacted to obtain Kirk-Mayer pricing and other business confidential information, to Kirk-Mayer's detriment in the competition.

The Navy replies that of the 22 resumes submitted by PacOrd for evaluation, only one indicated that the individual was in Kirk-Mayer's employ. Further, the Navy argues that questions such as these involving alleged breaches of

employment contracts are for resolution by the private parties involved, through the courts if necessary, rather than through consideration as an element of the procurement process. We agree. Basically, Kirk-Mayer is alleging private improper business practices on PacOrd's part, a matter that will not be considered under our Bid Protest Procedures, Johnson Controls, Inc., B-206141, February 17, 1982, 82-1 CPD 142, and we see nothing improper in how the Navy handled this aspect of the evaluation.

Kirk-Mayer additionally contends that the Navy gave PacOrd greater credit than it did Kirk-Mayer in evaluating an individual that both firms proposed. The Navy replies that the individual was proposed for different management positions and, hence, was rated differently by the Navy for each firm. The record shows that Kirk-Mayer proposed this individual as general manager while PacOrd proposed him as an assistant manager. Moreover, because this individual had served as an assistant manager for many years, but for only a short time as a manager, the Navy considered the individual's greater experience when evaluating him as an assistant manager. Accordingly, we believe that the Navy had a reasonable basis for giving this individual a higher rating under PacOrd's proposal than he was given under Kirk-Mayer's proposal.

Kirk-Mayer also alleges that the Navy unlawfully provided PacOrd with Kirk-Mayer's labor rates. Kirk-Mayer bases this allegation on a statement in the Navy business clearance memorandum that "it appears * * * PacOrd has ascertained Kirk-Mayer's rates and has merely slightly under-bid them."

The Navy explains that PacOrd obtained a copy of Kirk-Mayer's prior contract under the Freedom of Information Act, which, being a labor hour type contract, contained Kirk-Mayer's prior rates and may account for the similarity of PacOrd's rates in the present competition. In any event, the protester has not provided any probative evidence of the Navy's improper disclosure of Kirk-Mayer's labor rates, and therefore has not met its burden of proof on this issue. Energy and Resource Consultants, Inc., B-205636, September 22, 1982, 82-2 CPD 258.

Kirk-Mayer contends that PacOrd did not satisfy the solicitation requirement for proposing an acceptable facility for the work, either at the time of negotiation or of award. Consequently, Kirk-Mayer urges, because PacOrd did not satisfy a mandatory requirement, it was not entitled to award.

According to the Navy, PacOrd proposed a facility which was evaluated as acceptable after initial discussions revealed that it had adequate outside storage space. PacOrd had obtained an option on this facility for the period December 1, 1981 through April 1, 1982, which would have covered the entire procurement through contract award, with 30 days to spare, had the Navy met its schedule of March 1 for commencement of work under the new contract. However, the procurement was delayed and best and final offers were not obtained until June 29 and award was postponed until July 29. Whether the Navy's evaluators knew that PacOrd's option had expired at the time of final evaluation of offers and award is not clear from the record, but once award was made PacOrd offered another facility which was also evaluated as acceptable to the Navy. The Navy notes that the solicitation provided that the contractor's facility need not be available until 30 days after award, and that PacOrd satisfied this requirement with its substituted facility.

The record indicates that the Navy adhered to the evaluation criteria when it originally concluded that PacOrd satisfied the minimum facility criteria. Then, because the Navy had previously determined that the PacOrd and Kirk-Mayer proposals were essentially equal technically, the best and final offers solicited from the two firms were evaluated on price alone. Facilities were not further evaluated prior to award. However, had the Navy realized that PacOrd's option on the original facility had expired, we think it likely that the Navy would not have rejected PacOrd's highly competitive proposal, but instead would have reopened discussions to allow PacOrd to update its proposal with respect to facilities since it was the delay in the procurement process and not PacOrd's deliberate design that led to the expiration of its option. Consequently, we do not believe that Kirk-Mayer was prejudiced by the Navy's failure to note the expiration of PacOrd's option.

Kirk-Mayer also contends that the Navy's evaluation should be disqualified because of a conflict of interest of a member of the evaluation panel. In summary, Kirk-Mayer alleges that an individual who Kirk-Mayer had employed for a short period as quality assurance manager and who PacOrd then proposed for that position had a brief, informal conversation with a member of the evaluation panel during which that individual's employment by Kirk-Mayer was discussed.

The Navy denies that this conversation took place. In any event, we fail to see how such a conversation would

have caused a conflict of interest, since there is no indication that the member of the evaluation panel stood to gain anything even if the conversation occurred as Kirk-Mayer suggests. Accordingly, Kirk-Mayer has not satisfied the burden of proof necessary to show conflict of interest and we will not consider this ground for protest on the merits. See Louis Berger & Associates, Inc., B-208502, March 1, 1983, 83-1 CPD 195.

Finally, Kirk-Mayer contends that the wage determination included with the solicitation was defective because it covered only two of the smaller categories of work performed under the contract. Because this alleged deficiency was apparent on the face of the solicitation, this aspect of the protest is untimely. 4 C.F.R. § 21.2(a).

The protest is dismissed in part and denied in part.

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