

DECISION

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

26327

FILE: B-208214

DATE: September 23, 1983

MATTER OF: National Biomedical Research Foundation

DIGEST:

1. Protest of technical evaluation of proposals is denied where the protester has not shown that the evaluation was arbitrary or unreasonable.
2. While an agency is required to identify in the solicitation, and adhere to, the major evaluation criteria applicable to the procurement, it also may apply factors not specifically identified as evaluation criteria so long as they are reasonably related to the stated criteria.
3. Comments by the technical evaluators expressing doubt that an offeror will relinquish its copyrights to data, even though the offeror's proposal appears to agree to satisfy the requirement, is of no consequence in the evaluation where the record indicates that the proposal was not downgraded based on the comment, and that other unrelated considerations were the primary cause for the downgrading of the proposal.
4. The mere fact that an offeror has not entered into a firm agreement with a proposed subcontractor at the time of the evaluation does not render the evaluation inadequate where the offeror's proposal included a proposal by the subcontractor and the record shows the subcontractor's capabilities were evaluated in terms of the stated evaluation criteria.
5. Where the solicitation requires offerors to identify in their proposals a single principal investigator to head up the project and a proposal names two co-principal

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investigators, the proposal is not deficient where it also designates one individual the project manager and that individual is found to possess the stated qualifications for the principal investigator. Under these circumstances, it is not improper for the agency to further upgrade the proposal based on the qualifications of the second co-principal investigator.

6. The awardee's proposed use of a Government computer system did not constitute an unfair competitive advantage where the agency did not consider the awardee's use of this system in either the technical or cost evaluation.
7. Agency's apparent failure to evaluate the cost of the awardee's proposed use of an on-line computer communications network did not prejudice the protester where the solicitation provided that technical capability, not cost, would be the primary consideration in the award decision, and the cost of using the communications network does not appear to be so great as to offset the significant technical advantage enjoyed by the awardee.

National Biomedical Research Foundation protests the award of a contract to Bolt, Beranek and Newman under request for proposals (RFP) No. NIH-GM-81-06, issued by the National Institutes of Health (NIH), Department of Health and Human Services. The RFP called for the development, maintenance and distribution of a nucleic acid sequence data bank under a cost-plus-fixed-fee contract. National challenges numerous aspects of the proposal evaluations. For the reasons below, we deny the protest.

Offerors were to submit separate technical and cost proposals containing information specified in the RFP. Attachment 1 to the RFP advised offerors that "paramount consideration shall be given to the evaluation of technical proposals rather than cost or price," although cost could become paramount if the technical proposals were considered equal. The technical considerations to be

evaluated were divided into three categories, each assigned a number of points representing the maximum score a proposal could receive. The categories were as follows:

1. General and specific qualifications of the Principal Investigator 20 points
2. General and specific qualifications of staff 20 points
3. Technical Approach 60 points

Under each category more detailed factors were listed. Under the first category, for example, was the requirement that the principal investigator be "familiar with molecular biology, especially those aspects relevant to this project."

Three proposals were received by the March 1, 1982 closing date. They initially were evaluated by an external review panel, which scored them as follows:

	<u>Score</u>	<u>Proposed Cost</u>
National	88.00	\$3,785,187
Bolt (3 alter- nate cost pro- posals)	84.17	3,794,072 3,647,260 3,941,032
Intelligenetics	60.17	3,429,377

The initial evaluation panel, consisting of members chosen from outside NIH, determined that National and Bolt were within the competitive range. Despite the difference in the scores assigned each proposal, the evaluators considered the two proposals to be "essentially equal." Negotiations were held with the offerors and both submitted best and final offers prior to the June 9 cutoff date. A second evaluation panel consisting of NIH staff members evaluated these final proposals and advised the contracting officer of the following result:

	<u>Score</u>	<u>Proposed Cost</u>
Bolt (three alternate cost proposals)	91.8	\$3,475,058 3,329,581 3,620,683
National	82.4	3,283,002

National's reduced score is attributed by NIH primarily to National's failure to adequately deal with the first evaluation panel's concerns. Bolt's score increased because its final proposal was found to adequately address the problems found by the first panel. On June 23, the contracting officer selected Bolt for award based on his view that Bolt's proposal was technically superior to that of National. The relatively small difference in the cost estimate of the two offerors was not a factor in the selection. The agency awarded Bolt the contract on June 30.

National principally contends that the NIH staff improperly downgraded its final proposal based on considerations not encompassed by the evaluation criteria set forth in the solicitation. National also argues that the agency evaluators improperly upgraded or failed to downgrade Bolt's proposal and accorded Bolt an improper competitive advantage by permitting it to use Government resources.

It is neither our function nor practice to determine independently the acceptability or relative technical merit of proposals. Our review of an agency's technical evaluation is limited to considering whether the evaluation was fair and reasonable and consistent with the evaluation criteria. Holmes and Narver, Inc., B-206138, January 11, 1983, 83-1 CPD 27. Also, while technical evaluations must be based on the stated evaluation criteria, the interpretation and application of such criteria often involve some subjective judgments. We thus will not object to the use of evaluation factors not specifically stated in the RFP where they are reasonably related to the specified criteria. See Diversified Data Corporation, B-204969, August 18, 1982, 82-2 CPD 146. Our concern in considering whether such a reasonable relationship exists is whether the correlation was sufficient to put offerors on notice of the additional criteria to be applied. See Interactive Sciences Corporation, B-192807, February 23, 1979, 79-1 CPD 128. Applying these standards, we find no basis for objecting to NIH's evaluation of the Bolt and National proposals.

Evaluation of National's Proposal

This aspect of National's protest is based largely on the evaluators' written comments regarding National's final proposal, which National claims reflect the evaluators' consideration of factors not included in the evaluation criteria in the RFP. National objects to comments that: (1) its proposed staff lacks expertise in "modern database management"; (2) the principal investigator "lacks sensitivity to the needs of the scientific community"; and (3) National's existing database "is not particularly innovative." While there were no factors expressly set forth in the RFP regarding sensitivity to the scientific community or database innovation and database management was not listed as a factor to be considered in evaluating an offeror's staff, we do not believe the evaluators improperly considered these matters.

The RFP provided that the evaluation of technical approach would include the areas of data collection, database organization and database distribution. According to NIH, these three areas are functions of database management. Under the staff qualifications category, the RFP provided that the staff "must have experience in data collection, competence in computer programming, and familiarity with molecular biology." Since the required staff experience included two areas (data collection and computer programming) having some relationship to database management, we do not think it was improper for the evaluators to consider the staff's database management expertise. Nor do we believe it would be reasonable, under these circumstances, for an offeror to believe its staff's database management skills would not be considered by the evaluators. Further, the staff's expertise in this regard was particularly relevant, we believe, in view of the evaluators' finding that National's principal investigator lacked modern database management expertise. The evaluation criteria required the principal investigator to be "experienced in and knowledgeable about computerized database management."

With respect to the investigator's sensitivity to the needs of the scientific community, the "technical approach" section of the evaluation criteria stated that the offerors' plans for insuring the completeness and accuracy of the data collected "should reflect knowledge of the needs and interests of the scientific community." This factor reflected the following requirement in Part III of the RFP:

"The nucleic acid sequence data bank is expected to be a resource that will evolve with and adapt to changing scientific needs and knowledge. Thus, * * * the contractor must maintain ties with and respond to the research community; demonstrated capability to do this will be one key evaluation criterion." (Emphasis added.)

Proposed contract provision 1.3.3 contained similar language:

"In order to keep the data base useful to as wide a segment of the research community as possible, the Contractor shall establish and maintain contact with the user community. The Contractor shall remain aware of and responsive to the needs of current research by encouraging comments and suggestions from users as well as informing users of changes or new features in the data base." (Emphasis added.)

While neither the evaluation criteria nor the cited RFP provisions refer to "sensitivity" to the needs of the scientific community, the requirement for awareness and responsiveness to those interests and needs is clear. The evaluators' reference to the principal investigator's "lack of sensitivity" was consistent with this requirement.

The evaluators' concern with the innovativeness of National's database also was consistent with the evaluation criteria. Under the "technical approach" section of the criteria, the proposed database organization was to be reviewed in terms of "the versatility and flexibility of the proposed scheme and its adaptability to future needs." The evaluators' comments indicate that these were precisely the factors considered:

"The concern of the technical merit [initial] review panel about the lack of innovation of the database remains a major problem. Given the lack of experience in modern database management techniques on the part of both the PI [principal investigator] and staff, it is not

surprising that their database is not particularly innovative. However, if the size of the database expands at the rate predicted, the question arises whether this database will be adaptable enough to meet future needs. While adequate at this point, little thought has been given to increasing the efficiency of data collection and dissemination, and this could result in problems of meeting the proposed timetable in future years. * * *

The evaluators' reference to innovation was made in the context of, and thus was reasonably related to, the adaptability of the database to future needs, a stated criterion.

National also maintains that the evaluators' comments indicate that they drew incorrect conclusions from portions of its proposal. The protester claims, for example, that the comment that National had given "little thought" to increasing the efficiency of data collection and dissemination, ignores the fact that its initial proposal included five pages covering this area. NIH responds that in fact only two pages of National's proposal dealt with this specific concern and that the discussion provided was considered deficient. It points out that large portions of the pages referred to by National were not primarily concerned with the efficiency of data collection and dissemination, and that the discussion provided was not structured as National contends. We have reviewed National's proposal and while there appears to be some discussion of data collection on several pages, we find no specific reference to increasing efficiency. Pages 44 and 47 of National's initial proposal do address the need for implementation of new computer programs to reduce the cost of operating the database in the future, but we find no basis to conclude that the evaluators should not have deemed this rather limited discussion deficient. National's mere disagreement with NIH on this point does not satisfy its burden of establishing that NIH's conclusion is incorrect or unreasonable. See Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107.

National next contends that its proposal was improperly downgraded based on the evaluators' speculation that

National would not place the database in the public domain upon completion of the contract, as required. National agreed in its best and final offer to cease copyrighting the database and to turn over to NIH all programs developed under the contract, but the evaluators expressed concern that National might try to retain rights to some data through a "loophole" in the contract. Although NIH believes its concern was justified, it reports that National's proposal was not downgraded based on these comments. Rather, the comments were intended only to call the contracting officer's attention to the need for precise contract language for this requirement in the event National received the award.

We find no basis for questioning NIH's explanation; nothing in the record indicates that National's proposal, in fact, lost points based on copyright considerations. The record does seem to show, at minimum, that the evaluators' copyright concerns did not significantly affect the rating of National's proposal. In this regard, the evaluators' comments summarizing their review of National's technical approach (the section under which copyright is discussed), state that "primarily based on concerns about the efficiency, flexibility and adaptability of the database, the technical approach was rated 47.60 out of 60." Further, there is no reference to this matter in the contracting officer's source selection determination. The copyright question thus does not seem to have been a significant consideration in the evaluation of National's proposal or in the contracting officer's final selection of Bolt. In any event, we do not believe that it was improper for the evaluator to have been concerned about copyright matters as such matters clearly related to the distribution of the database, an evaluation factor listed in the RFP.

We thus find no basis for questioning NIH's evaluation of National's proposal.

Evaluation of Bolt's Proposal

National alleges the existence of several deficiencies in Bolt's proposal which NIH failed to take into account during the evaluation. One deficiency National claims NIH overlooked was the listing in Bolt's proposal of two co-principal investigators. The RFP stated that even though there may be co-investigators, offerors were

to identify "the one and only Principal Investigator/Project Director who will be responsible for the overall implementation" of the contract. National believes Bolt's co-principal investigators were evaluated as a team, and that neither individual, alone, could qualify as the principal investigator.

Our review indicates that Bolt listed two co-principal investigators in the body of its proposal, but designated one of these individuals "project manager" and also named this individual as the principal investigator on the cover sheet of its proposal. It thus was clear that Bolt was proposing a single individual to head up the project, as NIH desired. It also does not appear that NIH evaluated the co-principal investigators as a team. Although the evaluators' comments indicate that they did consider both individuals in terms of the principal investigator criteria, NIH reports that only the designated project manager was evaluated as the proposed head of the project. In this connection, NIH directs our attention to portions of Bolt's proposal which pertain to each of the stated criteria for the principal investigator. Since, based on this information, NIH found the project manager qualified to administer all aspects of the project (NIH's reason for requiring a single principal investigator), we find nothing objectionable in NIH also upgrading its scoring of Bolt's proposal based on the qualifications and experience of the second co-principal investigator.

National also contends that Bolt's data collection capability could not have been properly evaluated since Los Alamos Scientific Laboratory was to perform this function for Bolt under subcontract, but no such subcontract had actually been entered into at the time of evaluation. We do not believe an offeror proposing the performance of contract functions by a subcontractor should be downgraded merely because it has not yet entered into a binding agreement with the subcontractor. Instead, where the evaluators have no reason to doubt the subcontractor's availability, the only appropriate concern is the manner in which it will perform under the proposed arrangement. Cf. Roy F. Weston, Inc., B-197866, B-197949, May 14, 1980, 80-1 CPD 340 (offeror should not be downgraded merely because proposed employees have not been hired prior to award). Here, Bolt submitted as part of its proposal a detailed technical and business proposal prepared by Los Alamos. The record indicates that the Los Alamos portion of the proposal was evaluated by NIH in accordance with the stated criteria.

National raises additional allegations concerning the use by Bolt of NIH's PROPHET computer system to perform this contract.¹ The protester argues that Bolt's use of the NIH PROPHET system constituted an unfair advantage in that much of the cost of the system would be borne by NIH. In this regard, National maintains that if NIH wished to make its PROPHET program available for this project it should have so informed all offerors.

Bolt developed the PROPHET program on NIH computers under an existing contract. It proposed using PROPHET on its own computers in developing the nucleic acid sequence database here, but also proposed as an alternate, cost-saving measure, the use of NIH's own PROPHET computers. NIH reports, and the record shows, that Bolt's proposal was evaluated based on the use of Bolt's own computer system and that it was decided to use the NIH computers (a measure which NIH determined would save the Government as much as \$145,000) only after Bolt was chosen as the prospective awardee. Since the evaluators did not consider Bolt's use of NIH's PROPHET system from either a cost or technical standpoint, Bolt did not obtain any competitive advantage over offerors such as National during the evaluation or award selection. Under these circumstances, NIH had no obligation to offer the use of its PROPHET system to all offerors.

National also argues that Bolt will use resources from its existing PROPHET contract to support its performance under this contract. There is absolutely no support in the record for this argument, and we thus will not consider it further. See Holmes and Narver, Inc., supra.

National next maintains that Bolt's proposal is based on other Government "subsidies"--the use of the Los Alamos facility and use of the ARPANET on-line computer network--the cost of which are not reflected in Bolt's business proposal, and which should have been, but were not, made

¹Bolt's contract provides that NIH's computers shall be used unless "program needs" dictate a transition to Bolt's computers.

available to other offerors. As already discussed, the record indicates that use of the Los Alamos labs (a Government-owned, contractor-operated facility) was fully accounted for in Bolt's proposal. It does appear that NIH may have failed to evaluate the cost of Bolt's proposed use of ARPANET. Nothing in the record indicates, however, that the cost of ARPANET would be so great as to offset the significant technical advantage (11.4 percent) Bolt enjoyed over National. (We note that Bolt's proposal included as an option TELENET, a similar computer access network, at a cost of \$100,000, representing only about 3.1 percent of Bolt's total projected cost.)

National raises several other allegations challenging the decision to award to Bolt. We find all to be without merit. In short, while National strongly disagrees with both the substance of the relative assessment that was made and the propriety of the evaluators considering certain aspects of the proposals, it has not established any basis for us to take legal objection to what NIH did here, since we find what was considered was reasonably related to the evaluation criteria and what was concluded was rationally supportable from the evaluation record and therefore within the discretionary judgment of the agency.

The protest is denied.

for Milton J. Aroslan
Comptroller General
of the United States