

27102

DECISION



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

FILE: B-212318

DATE: December 23, 1983

MATTER OF: Culp/Wesner/Culp

DIGEST:

1. Solicitation indicated that technical rating was more important than price. Agency determined that highest technically rated and second technically rated offerors were essentially equal and awarded to second technically rated offeror on the basis of price. Third technically rated offeror (who submitted lowest price) protests that technical difference between all three proposals was insignificant and award should have been made to it on the basis of price. Protest is denied because there was a rational basis for the agency's determination that protester's proposal was not technically equal to other two proposals.

2. Former agency employee assisted awardee in preparation of proposal and will perform as subcontractor for awardee. The project officer indicates that the former employee (former chief of the procuring section) had been asked, prior to departure from agency, to review solicitation package. Solicitation was issued after former employee departed agency. Protester has not shown that award was inconsistent with conflict of interest regulations.

Culp/Wesner/Culp (Culp) protests the award of a contract by the Environmental Protection Agency (EPA) to Hazen and Sawyer, P.C. (Hazen), under request for proposals (RFP) No. WA 82-A129 for the review and evaluation of advanced treatment and combined sewer overflow projects. (The resulting data is to be utilized by EPA to support environmental decisions.) Culp protests that: (1) it should have received the award on the basis of its low price because there was no basis for distinguishing between technical proposals; and (2) Hazen proposes to subcontract to a

027495/123119

former EPA employee who was chief of the EPA section which prepared the solicitation.

The protest is denied.

Initial proposals were submitted by Culp, Hazen and CH2M Hill Southeast, Inc. (CH2M). The proposals were selected for the competitive range. Discussions were conducted and best and final offers submitted.

The RFP contained 12 evaluation subcriteria. CH2M received "excellents" in all 12 areas. Hazen received 11 "excellents" and one "good." Culp received 9 "excellents" and 3 "goods." Under EPA's scoring system, a "good" score entitles an offeror to 75 percent of the possible points and an "excellent" score entitles the offeror to the total possible points. The offerors' prices and final technical scores were as follows:

	<u>Price</u>	<u>Score</u> (100 possible)
Culp	\$2,390,376	92.00
Hazen	2,676,985	98.75
CH2M	3,161,165	100.00

The RFP indicated that technical quality shall be considered more important than price. However, it also indicated that, as proposals become more equal in their technical merit, the evaluated cost would become more important. Although CH2M had the highest technical score, the EPA considered the 1.25-point difference between CH2M and Hazen to be insignificant. In contrast, it considered the 6.75-point difference between Hazen and Culp to be significant. EPA awarded the contract to Hazen because it offered a technically excellent proposal (equivalent to CH2M's) at a lower price. Culp recognizes that technical quality was to be considered more important than price. However, Culp contends that the fact that it received a "good" rather than "excellent" rating in 3 of 12 categories does not justify distinguishing between any of the offerors. Culp contends that the three proposals were substantially equal from a technical standpoint and, therefore, price should have been the determinative award factor.

The technical evaluation criteria required proposals to demonstrate an understanding of the planning and design issues as related to advanced treatment and combined sewer outflow. EPA determined that Culp had not adequately

covered its approach to combined sewer outflow. Although Culp did mention some areas of investigation and listed experience with combined sewer outflow, Culp did not directly discuss the approach to be taken in the review of the projects. Culp received a "good" under this subcriteria and 11.25 out of 15 possible points. Culp does not challenge EPA's evaluation of its proposal under this subcriteria.

The technical evaluation criteria required demonstrated previous corporate automated data processing (ADP) experience relating to water quality modeling or similar modeling in projects of equal size and complexity. EPA determined that Culp's ADP experience lies mainly in a subcontractor which is regarded as only good. Culp received a "good" rating and 3 out of 5 possible points. Culp does not challenge EPA's evaluation of its proposal under this subcriteria.

The technical evaluation criteria required offerors to demonstrate the education of proposed individuals that would be related to fulfilling the statement of work. EPA determined that Culp's proposed personnel did not have sufficient biology and statistical education. Culp's education was evaluated as "good." Culp received 9 out of 12 possible education points. Culp contends that it was entitled to a higher score because its revised proposal included two consultants: a statistician with an M.E. degree from Cornell University in mathematical statistics and operations research and a biologist with a Ph.D degree from Oregon State University on fisheries biology. EPA responds that Culp proposed these individuals for a maximum of only 720 hours out of a maximum contract effort of 45,000 hours. EPA states:

"The panel felt that this amount of biology and statistical effort did not merit raising Culp's score for this subcriterion to a '4' or 'excellent.' Essentially, it was as if Culp still had not proposed persons with the requisite educational background."

EPA indicates that the data generated by the successful contractor is to be utilized by EPA to support those environmental decisions which are frequently challenged in the courts. EPA believes, therefore, that it is essential that the information provided by the contractor be of such a quality as can withstand all types of scrutiny. EPA considers the areas in which Culp was deficient to be, in the aggregate, critical to the successful performance of the contract. (Culp received 23.25 out of 32 possible points in

these three areas.) In contrast, EPA considers the one area (company experience with design of innovative/alternative systems) in which Hazen received a "good" to be a relatively low priority. EPA states:

"The Hazen & Sawyer 'good' arises in the design of I/A [innovative/alternative] Systems technical area. While CH2M Hill has developed innovative alternative processes from concept to construction, Hazen & Sawyer has only designed innovative processes, but has never developed one on their own. However, the development of innovative alternative processes is not a priority for programmatic needs of the AT [advanced treatment] review process. Therefore, the revised technical score difference between the CH2M Hill and Hazen & Sawyer revised technical proposals is not critical to the performance of the programs' requirement. Too, there is only a 1.25 technical point difference between the revised technical scores of these firms. Therefore, the revised technical proposals of CH2M Hill and Hazen & Sawyer are essentially equal technically."

The determination of the relative merits of proposals is the responsibility of the procuring agency since it must bear the burden of any difficulties incurred by reason of a defective evaluation. In light of this, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals. The determination of the desirability is largely subjective and not subject to objection by our Office unless shown to be unreasonable. Ecology and Environment, Inc., B-209516, August 23, 1983, 83-2 CPD 229; RCA Service Company, B-208871, August 22, 1983, 83-2 CPD 221. We have also stated that technical point ratings are useful as guides for intelligent decisionmaking in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. Ecology and Environment, Inc., supra; Management Services Inc., 55 Comp. Gen. 715, 720-21 (1975), 76-1 CPD 74.

We find a rational basis for the EPA's determination to award Culp 9 out of 12 education points because Culp's consultants would work a low number of hours. Compare Science Management Corporation, B-193256, April 5, 1979, 79-1 CPD

237, regarding evaluation of best and final offers' reduction in staff hours. (As we have noted, Culp does not contest the EPA's evaluation of Culp's approach to combined sewer outflow and corporate ADP experience.) We also find a rational basis for the EPA's determination that the difference between Hazen and CH2M's proposal was insignificant while Culp's deficiency in three areas, in the aggregate, was critical to the performance of the contract. The EPA's determination in this case involves exactly the kind of decisionmaking which is vested within the discretion of selection officials, and we find no basis to object to it here.

Culp protests that the award to Hazen violates EPA procurement rules regarding conflicts of interest because Hazen proposes to subcontract to Robert J. Foxen and Associates. Mr. Foxen was the former chairman of the Advanced Treatment Task Force and the Chief of the EPA Engineering Policy Section of the Facilities Requirement Division. Mr. Foxen was also the supervisor for Ms. Perez, the EPA Project Officer (contract administrator) on Hazen's prior contract and new contract. Mr. Foxen left EPA in March 1982 prior to the issuance of the RFP in late June 1982. However, Ms. Perez states that, prior to Mr. Foxen's departure, he was asked to review the procurement package for this solicitation. Mr. Foxen does not recall doing so. Mr. Foxen assisted Hazen in the preparation of the technical approach portion of its proposal and will work on the advanced treatment review portion of its contract. EPA states that this constitutes 8 percent of the total contractor work.

EPA regulations, 41 C.F.R. § 15-1.5503 (1983), provide as follows:

"Treatment of competitive contracts.

"(a) Contract awards based on competition must not involve violation of 18 U.S.C. 205, 18 U.S.C. 207, 18 U.S.C. 208, or 41 CFR 1-1.302-3 and must not be based on improper influence or favoritism arising out of an EPA employee's current or former EPA employment.

"(b) When any part of the disclosure required under § 15.1.5505 is affirmative, or when the contracting officer has reason to believe that an award may be prohibited

by this subpart, no award may be made without written approval of an official at a level above that of the Head of the Procuring Activity (see § 15-1.206) indicating that award would be consistent with § 15-1.5503(a). The official will consult with the Designated Agency Ethics Official before making such a determination."

The procuring activity failed to obtain the required written approval before award. EPA nevertheless contends that the contracting officer investigated the matter before awarding the contract and determined that there was no evidence that Mr. Foxen's participation in preparing Hazen's proposal provided Hazen with any benefit of inside agency information. EPA indicates that Foxen and Associates did not subcontract with Hazen until after Mr. Foxen left EPA. Moreover, EPA has, because of this protest, obtained the postaward written concurrence of the EPA Designated Ethics Official and the approval of the Director, Office of Fiscal and Contracts Management, that the award of the contract to Hazen does not violate 18 U.S.C. §§ 205, 207, 208 (1982) or 41 C.F.R. § 1-1.302-3 (1982) and is not based on improper influence or favoritism arising out of Mr. Foxen's former EPA employment. The Director, Office and Fiscal and Contracts Management, is the individual above the level of the head of the procuring activity referred to in subdivision (b) of § 15-1.5503 who is to approve such contracts prior to award.

The responsibility for determining whether a firm has a conflict of interest and to what extent the firm should be excluded from competition rests with the procuring agency and we will overturn such a determination only when it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD 94; see Western Engineering and Sales Co., B-205464, September 27, 1982, 82-2 CPD 277; National Service Corporation, B-205629, July 26, 1982, 82-2 CPD 76.

On the basis of the record before us, we cannot conclude the EPA's determination that an award to Hazen was consistent with subdivision (a) of § 15-1.5503 has no rational basis. Mere inferences of actual or potential conflict of interest do not afford a basis for disturbing a contract award; there must be "hard facts" showing an actual conflict of interest. See CACI, Inc.-Federal v. United States, Appeals No. 83-742, decided October 28, 1983 (Court of Appeals for the Federal Circuit). With regard to EPA's

failure to obtain prior written approval of someone above the head of the procuring activity as required by subdivision (b) of the section, the appropriate official (as well as the Designated Ethics Official) has ratified the contracting officer's determination that there is no conflict of interest. We regard the fact that the approval was obtained subsequent rather than prior to award to be a procedural irregularity which does not affect the propriety of the award.

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