

**DECISION**

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

27431

**FILE:** B-211857; B-211857.2      **DATE:** February 13, 1984

**MATTER OF:** The Singer Company

**DIGEST:**

1. Allegations that agency should have procured the required services by formal advertising rather than by negotiation and that RFP's should have included the Service Contract Act provisions are untimely since alleged defects were apparent on the face of the RFP's and were not protested before the closing date as required by GAO Bid Protest Procedures. We do not consider issues significant enough to warrant their consideration.
2. Allegations that DOL improperly evaluated cost of protester's proposals in two separate procurements for similar services are without merit. In first procurement, agency's decision to award to high cost, technically superior proposal, instead of protester's low cost proposal was consistent with evaluation criteria and rationally based. In second procurement, award to low cost proposal was proper where proposals were rated substantially equal in technical merit.
3. Omission of "FPR Temp. Reg. 45," concerning compensation levels for professional employees in RFP's, did not prejudice protester, because application of regulation in evaluation of proposals was consistent with regulation, and offerors were otherwise on notice that their proposed compensation levels would be assessed for cost realism.
4. Procuring agency's determination not to point out deficiencies in protester's cost proposal was not prejudicial to protester.

5. GAO need not consider allegation that contracting officers lacked proper contracting authority since procuring agency may cure alleged defect. Validity of contract, therefore, is not affected.
6. Allegation that contracting agency awarded contract after receiving notice of protest does not affect the validity of award.

The Singer Company (Singer) protests the Department of Labor's (DOL) award of two contracts to Minact, Inc. (Minact), under requests for proposals (RFP's) Nos. 82-R-1V-JC-0005 and JC-VII-83-01 for the operation, respectively, of the Batesville Job Corps Center, Batesville, Mississippi, and the Excelsior Springs Job Corps Center, Excelsior Springs, Missouri.

The protest is dismissed in part and denied in part.

#### Untimely Issues

Singer contends that both procurements should have been formally advertised, rather than negotiated, and that the Service Contract Act provisions should have been incorporated into the solicitations.

Both these grounds of protest relate to apparent solicitation defects which should have been made the subject of preclosing date protests, but were not. Moreover, we do not consider either ground of protest to be "significant" under our Bid Protest Procedures, as further alleged by Singer, since similar issues have been previously decided. For example, as we said in Planning Research Corporation, B-196799, August 18, 1980, 80-2 CPD 127.

"In order to invoke our Procedures' 'significant issue' exception, we have held that the subject matter of the protest not only must evidence a principle of widespread interest . . . but must involve a matter which has not been considered on the merits in previous decisions.

"It is unnecessary to discuss the first 'significant issue' criterion stated above, because the matter of SCA applicability to a particular requirement has been addressed

previously on the merits. See 53 Comp. Gen. 412 (1973). Thus, we will not view the issue as 'significant' under our Procedures."

Therefore, we will not consider these issues.

#### Background

Both RFP's advised offerors that the technical proposal (all noncost considerations--worth 90 points) would be most important in the award of the contract; cost was worth 10 points. Also, offerors were informed that the proposals should demonstrate a thorough understanding of the requirements of the regulations.

In Batesville, the evaluation of proposals resulted in Minact receiving the highest score of 84.1 while Singer was second with a score of 80.6. Notwithstanding the slightly lower price (as adjusted by DOL) of the Singer proposal, the evaluating officials recommended award to Minact since Minact's technical proposal was deemed to be "superior to Singer's."

For Excelsior Springs, the evaluation resulted in Minact receiving a weighted average score of 98.25 percent while Singer received a score of 98.14. Because both proposals were considered substantially equal, the evaluating officials recommended award to Minact since, even after transition costs were added to the Minact proposal, it was still lower in cost than Singer's proposal, and Minact's cost was considered reasonable.

#### Evaluation Factors

Singer argues that the evaluation factors were not followed in either procurement.

Singer states that DOL "considered Singer's price advantage as counting for nothing in the Batesville procurement." Singer contends that this evaluation ignored price advantage as a listed evaluation factor. Singer believes the price advantage of its lower cost proposal should have offset the technical advantage scored by Minact. Also, Singer states that DOL improperly awarded technical points to the Minact proposal for quantity of staff instead of quality of staff. As far as the Excelsior Springs procurement is concerned, Singer notes that the Minact proposal's \$330,346 price advantage resulted only in a slightly greater total

score; therefore, Singer argues that its technical proposal must have been far superior and should have been selected.

The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment, and it is not our function nor practice to conduct a de novo review of proposals or to make an independent determination of their relative merits. We will question the procuring agency's evaluation only if the protester shows the evaluation was clearly unreasonable. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

Furthermore, in a negotiated procurement, there is no requirement that award be made on the basis of lowest cost. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. The judgment of the procuring agency concerning the significance of the difference in the technical merit of offers is accorded great weight. Asset Incorporated, B-207045, February 14, 1983, 83-1 CPD 150. We have consistently upheld awards to offerors with higher technical scores and higher costs so long as the result is consistent with the evaluation criteria and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference.

In Batesville, award to a higher cost, higher technically rated offeror was consistent with the evaluation criteria stated in the RFP. Cost was worth only 10 points on a 100-point scale, and the RFP clearly advised offerors that the technical proposal would be the most important factor in making the award. Moreover, DOL states that some of Singer's costs were considered "unrealistic." Even though cost realism was not expressly stated as an evaluation factor, the establishment of "price advantage" as an evaluation factor reasonably allowed DOL to consider cost realism in evaluating offers for a cost-reimbursement-type contract.

Singer's allegation that DOL ignored cost in the evaluation of Minact's proposal is without merit, as is the allegation that DOL awarded the Minact proposal points for quantity of staff. First of all, we cannot question DOL's position that in Batesville it did properly weigh cost in

making "cost-technical" evaluations of the proposals and that its evaluation properly showed that Minact had submitted the superior proposal. Secondly, DOL did not assign points for staff numbers, as such, but, rather, it examined an offeror's proposal to determine if its proposed staff was supported by adequate "staff dollars."

DOL also properly awarded the Excelsior Springs contract. The evaluating officials regarded the technical proposals of Minact and Singer as essentially equal and not only was the Minact proposal lower in cost, but Minact's score was higher than Singer's, as noted above. Where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration in making an award notwithstanding that in the overall evaluation scheme, cost was of less importance than other evaluation criteria. See Vibra-Tech Engineers Incorporated, B-209541.2, May 23, 1983, 83-1 CPD 550.

#### OTHER ISSUES

Singer has raised other issues about the handling of these procurements. Singer alleges: (1) offerors' proposals should have been evaluated on the degree of minority subcontracting proposed; (2) DOL improperly used "FPR Temp. Reg. 45," concerning compensation levels for professional employees, to raise Singer's staff costs in the Batesville procurement without discussing this adjustment with Singer during negotiations; (3) the contracts are improper either because the contracting officers lacked authority or DOL's alleged attempts to revoke the contracting officer's authority were improper; and (4) the Excelsior Springs contract was awarded too hastily.

#### Minority Subcontracting

Singer alleges that DOL did not evaluate offerors' commitments to minority subcontracting. To the extent that Singer contends that a minority subcontracting criterion should have been listed in the RFP as an evaluation factor, the issue is untimely raised. See 4 C.F.R. § 21.2(b)(1) (1983). To the extent that Singer is insisting that DOL should now evaluate proposals under this criterion, we point out that it would be improper to so evaluate when this supposed criterion was not described in the RFP; moreover, we agree with DOL's argument that its own regulation (see 20 C.F.R. § 684.22(b) (1983)) does not mandate the use of a minority subcriterion for every procurement, but only permits DOL to use the criterion "as appropriate."

Application of "FPR Temp. Reg. 45" and alleged Lack of Discussion

Singer notes that this regulation was not included in the RFP. Notwithstanding this fact, Singer alleges that DOL improperly applied this regulation to raise the price in its proposal of employee wages and fringe benefits--especially by not discussing these wages and benefits prior to DOL's adjustment. Singer contends that DOL has not published guidelines for the application of this regulation.

DOL responds that even though the regulation was not incorporated in either RFP, it was properly applied in both procurements based on DOL's experience.

Although the specific incorporation of the provisions of Temp. Reg. 45 into the RFP was required by the regulation, the absence of the provisions did not render the evaluation of proposals defective.

FPR Temp. Reg. 45 provides:

"In establishing compensation levels for professional employees, the total compensation (both salaries and fringe benefits) proposed shall reflect a clear understanding of the requirements of the work to be accomplished and the suitability of the proposed compensation. . . . Offerors are cautioned that instances of lowered compensation for essentially the same professional work may be considered a lack of sound management judgment in addition to indicating a lack of understanding of the requirement."

DOL's application of the regulation was consistent with the mandate in the regulation given DOL's finding that some of Singer's costs were unrealistically low. Moreover, we reject Singer's argument that the adjustment was improper absent the publication of procedures to implement the temporary regulation since the regulation provides only that the clause, quoted above, be placed in a solicitation. Although the clause was not in the RFP, offerors must be held to have been charged with notice, as discussed above, that offerors' proposed costs, including proposed wages, would be assessed for realism. Therefore, the absence of the clause in the RFP was not prejudicial to Singer.

As to Singer's allegation that DOL did not discuss Singer's proposed wages prior to making the adjustments, and assuming that DOL would otherwise have been obligated during competitive discussions to have mentioned this concern to Singer, we conclude that DOL's supposed omission did not prejudice Singer. The fact remains that Minact's proposal was selected because of its technical superiority; moreover, "price advantage," as noted above, was not predominant in the overall selection process.

As to Singer's further assertion that Minact may have improperly been given a chance to submit a second best and final offer, we regard this assertion as speculation only.

#### Contracting Officer's Alleged Lack of Authority

Singer has made a number of arguments to the effect that the contracts in question are improper either because the contracting officers for the contracts lacked authority or because DOL's alleged attempts to revoke the contracting officers' authority were improper. Singer says this argument is based on "Job Corps Order No. 82-2" and a "DOL memorandum dated May 2, 1982."

We consider these arguments to be academic. Even if we assume, for the purpose of discussion, that the contracting officers lacked authority to award the contracts, the contracts were otherwise properly awarded. Consequently, the DOL may cure any lack of authority under Federal Procurement Regulations § 1-1.405 (1964 ed. amend. 137), which provides for ratification of an "otherwise proper contract made by individuals without contracting authority." Since the DOL may cure any lack of authority, we see no need to discuss the issue since the allegation does not affect the validity of the contract. As to Singer's argument that DOL could not properly revoke the contracting officer's authority, this argument concedes that the contracts were awarded by properly authorized individuals.

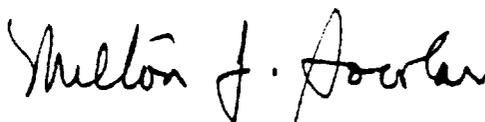
#### Hasty Award

Finally, Singer alleges that the Excelsior Springs contracting officer rushed to award the contract for that center after Singer notified DOL about the intent to file this protest in our Office. In contrast, DOL reports that Singer initially raised the possibility of filing a protest after the contracting officer informed Singer that Minact had won the award. Even if we assume that Singer is correct

and that it had filed a protest before the award, a deficiency of this type is a procedural one which does not affect the validity of an otherwise proper award. Martin Tool and Die Incorporated, B-208796, January 19, 1983, 83-1 CPD 70.

Conclusion

The protest is denied.

*for*   
Comptroller General  
of the United States