

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

27432

FILE: B-213347
MATTER OF: EG&G Ortec**DATE:** February 13, 1984**DIGEST:**

1. While technical point ratings are useful as guides for intelligent decisionmaking in the procurement process, selection officials are not bound by the scores and whether one proposal is superior to another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the selection official.
2. Where competing technical proposals are essentially equal, cost may become the determinative factor even though cost was ranked as the least important evaluation factor in the solicitation.
3. Protest against the applicability of the Trade Agreement Act of 1979 to the procurement, where an amendment to the solicitation stated that the Trade Agreement Act was applicable to the procurement, is untimely and not for consideration, since the issue was not raised prior to the submission of initial proposals. Each individual basis of protest must independently satisfy the timeliness standards established in GAO's Bid Protest Procedures.

EG&G Ortec (Ortec) protests the award of a contract under request for proposals (RFP) No. NIH-CL-83-02, issued by the National Institutes of Health (NIH), Department of Health & Human Services, to Nucletronix/Scandatronix (Nucletronix) for a positron emission tomography (PET) scanner system.

Ortec contends that its technical proposal was significantly superior to Nucletronix's proposal and that NIH acted improperly in adding extra points to Nucletronix's

technical score while leaving Ortec's score unchanged after the original technical evaluation and receipt of best and final offers. Ortec also argues that NIH did not follow the evaluation criteria as stated in the solicitation by over-emphasizing the price criterion. Ortec further alleges that the provisions of the Trade Agreement Act of 1979 should not have been applied to this solicitation.

The protest is denied in part and dismissed in part.

NIH issued this solicitation "to obtain a state-of-the-art scanner optimized for brain studies that will represent a step in performance beyond currently available scanners." The RFP stated that proposals were to be evaluated using the following criteria:

1.	Feasibility of Design	30 points
2.	Performance Specifications	30 points
3.	Company Expertise/Qualifications	15 points
4.	Demonstrated Track Record	15 points
5.	Price	<u>10 points</u>
	Total	100 points

The RFP further stated:

"You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price. It is pointed out, however, that should technical competence between offerors be considered approximately the same, then cost or price could become paramount."

Six firms submitted proposals. The technical evaluation conducted by five PET experts resulted in Ortec and Nucletronix receiving the two highest scores, as follows:

	<u>Ortec</u>	<u>Nucletronix</u>
Criterion 1	27.2	22.4
Criterion 2	26.2	25.0
Criterion 3	14.6	12.2
Criterion 4	<u>14.4</u>	<u>12.4</u>
Totals	82.4	72.0

The contracting officer determined that only the proposals of Ortec and Nucletronix were in the competitive range. NIH conducted further negotiations with both offerors leading to best and final offers. From these offers, the project officer determined that Ortec's technical score should remain unchanged, but that Nucletronix's technical score should be raised to 81.0, as follows:

	<u>Nucletronix</u>
Criterion 1	22.4 + 5.0 = 27.4
Criterion 2	25.0 + 3.0 = 28.0
Criterion 3	12.2 + 1.0 = 13.2
Criterion 4	12.4 + 0.0 = 12.4
Totals	72.0 + 9.0 = 81.0

In addition to the scores, the project officer reported to the contracting officer that:

"Based upon a careful technical evaluation of all material submitted by these offers, I now judge both proposals to be approximately the same technically. EG&G Ortec offers a conservative 'brute force' technique, while Nucletronix/Scandatronix offers an innovative but practical method of coupling dissimilar crystals and using more reliable electronics; both firms offer approaches that would result in a highly acceptable product. The institute will be satisfied with either offer; our goal is now to save money."

Thus, even without regard to the scores, the project officer was satisfied from a review of the proposals submitted by both offerors that the proposals were approximately the same technically. Although the contracting officer then applied the price formula set forth in the RFP to Ortec's price of \$3,727,448 and Nucletronix's price of \$2,863,870 and determined that the total evaluated score for Ortec was 89.4 and for Nucletronix was 91.0, the contracting officer noted that the project officer had determined that each offer was essentially equal technically even though the individual approaches were different. In the circumstances, the award was made to Nucletronix. Shortly thereafter, Ortec entered a timely protest here.

Ortec contends that its technical proposal was superior to Nucletronix's proposal under all four technical criteria.

Ortec argues that the NIH contracting staff acted improperly by awarding Ortec zero points after best and final offers for its nine technical answers submitted in response to a list of questions on technical deficiencies from NIH while increasing Nucletronix's score by 12.5 percent. Ortec claims that the original technical evaluation conducted by a committee of five unbiased PET experts which determined Ortec's proposal to be technically superior to Nucletronix's proposal by a score of 82.4 to 72.0 showed the clear superiority of Ortec's proposal. Further, Ortec alleges that the NIH contracting staff changed the technical scores in a manner inconsistent with the original technical evaluation because the NIH staff became price conscious and, thus, sought to justify award to Nucletronix. Finally, Ortec argues that, while the intent of the RFP was to procure the highest performance scanner system with no constraint on price, NIH, in the end result, traded off performance for price.

The main thrust of Ortec's protest is the technical evaluation of the best and final offers of Ortec and Nucletronix where Ortec's technical score remained unchanged, Nucletronix's technical score was increased by nine points, and NIH determined that the proposals were essentially equal technically.

The record shows that Nucletronix was awarded nine extra points for providing information and material with its best and final offer that was not provided with its initial proposal, while Ortec was awarded zero points for the nine technical responses included in its best and final offer. Specifically, NIH awarded Nucletronix five extra points under criterion 1 for providing information about coupling dissimilar crystals, three extra points under criterion 2 for providing supporting documentation for its performance specifications, and one extra point under criterion 3 for better demonstrating the experience required to produce the proposed scanner. NIH awarded Ortec zero points because it determined that Ortec's nine technical proposals merely "firmed up" its original technical proposal. We find no reason to question NIH's determination that the additional information and material provided by Nucletronix enhanced its technical proposal, while Ortec's technical responses merely "firmed up" its technical proposal. In any case, regardless, of the points assigned or that allegedly should have been assigned, it was the considered opinion of the project officer, endorsed by the contracting officer, that

the proposals were substantially equal technically. This conclusion was based upon the project officer's determination that the approaches in both proposals would result in highly acceptable products. The RFP advised that, if technical proposals were found to be approximately the same, price could become paramount.

Furthermore, we have held that where competing proposals are essentially equal technically, cost may become a determinative factor, notwithstanding the fact that, in the overall evaluation scheme, cost was of less importance than other factors. Applied Financial Analysis, Ltd., B-194388.2, August 10, 1979, 79-2 CPD 113. Therefore, we cannot conclude in the circumstances that NIH did not follow the evaluation criteria as stated in the solicitation by emphasizing the price criterion.

The fact that cost was ranked least in importance in the solicitation does not require that NIH ignore the difference in the cost of the two proposals. Ortec's proposed price was \$863,578 or 30 percent higher than Nucletronix's proposed price. Even if Ortec's technical score had also been increased, and its score could not have been increased to more than 90, since that was the maximum allowable under the evaluation criteria, there would be a difference of 11 percent in the increased Ortec and Nucletronix scores. If an award were made to Ortec on that basis, it would mean that NIH would pay 30 percent more for at most an 11-percent technical advantage. Such an award would not be advantageous to the government. See Ares, Inc., supra. In that regard, we note that, while the RFP provided for evaluation of proposals based on a specific number of points for established criteria, the RFP also stated that the evaluation would be based on the reasonableness of the costs in relation to the work to be done.

Regarding the applicability of the Trade Agreement Act to this procurement, Ortec did not raise this issue of protest until its final submission which was filed in our Office on January 16, 1984. Our Bid Protest Procedures require that protests based upon alleged improprieties apparent prior to the submission of initial proposals must be filed prior to the submission of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983). Further, where a protest incorporates multiple bases, we have held that each individual basis of protest must independently satisfy the timeliness standards established in our Procedures and that

new and independent contentions which do not satisfy these criteria will not be considered except to the extent they might provide additional support for earlier timely raised objections. Tracor Jitco, Inc., B-208476, January 31, 1983, 83-1 CPD 98.

Here, an amendment to the RFP stated that the provisions of the Trade Agreement Act were applicable to the procurement, and the due date for the submission of initial proposals was June 27, 1983. Thus, the impropriety Ortec alleges was apparent prior to June 27, and we therefore conclude that Ortec did not timely raise this issue of protest.

Milton J. Fowler
for Comptroller General
of the United States