

# DECISION



27923

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

FILE: 212820

DATE: April 9, 1984

MATTER OF: Global Associates

## DIGEST:

1. Protester bears the burden of affirmatively establishing its case. Bias and improper motives will not be attributed to contracting personnel based merely on inference or supposition.
2. Assertion that incumbent was improperly permitted to benefit from labor agreement reducing wages below wages specified in wage determination is denied because agency used correct labor cost in evaluating the proposal and protester was not prejudiced.
3. Use of government prepared alternative incentive fee plan furnished only to incumbent did not improperly benefit that firm where plan played no part in the selection of the incumbent for award.
4. Use of scoring technique which assigned scores in five point increments on a scale of 1,000 possible points is not objectionable since scoring is used only as a guide to decision making and is not controlling in determining award.
5. Contention that awardee should not have been selected because it deemphasized the use of minority, disadvantaged and small business subcontractors is denied. Record does not show that agency's evaluation and approval of subcontracting plan was improper.
6. A protest based on alleged improprieties in a Request for Proposals filed after the

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closing date for receipt of proposals is untimely.

7. To the extent protester first raises a basis of protest in response to the agency's report, but learned of the basis of protest at its debriefing several months earlier, the protest is untimely. To be timely, protest must be filed within 10 working days after the basis of protest is known or should have been known.

Global Associates, on behalf of itself, B&W Services, Inc. and Harrison Ford and Associates Construction Services, protests the selection of Pan American World Services, Inc. for award of a contract under National Aeronautics and Space Administration (NASA) request for proposals (RFP) RFP-13-NSTL-P-83-1. The RFP is for the procurement of facility operations services at the National Space Technology Laboratories (NSTL) to support Space Shuttle rocket engine static testing and certification and other NSTL activities. We dismiss the protest in part and deny it in part.

As its basis for protest, Global contends that personnel at NSTL were biased in favor of Pan Am; that there has been a violation of the Service Contract Act by Pan Am; that the procurement was conducted unfairly because the existence of a union agreement lowering certain wages was negotiated by Pan Am and was not made known to either the competition or the Department of Labor (DOL); that NASA improperly furnished Pan Am with an incentive fee plan during final negotiations; that the scoring method used in the evaluation of technical proposals was improper; that Pan Am's selection violates the law and the policies of the United States because Pan Am's proposal deemphasized the use of minority and small business contractors; and that Global's proposal was unfairly evaluated with respect to key personnel and certain cost aspects. We will treat these allegations separately.

At the outset we note that NASA has furnished a copy of a letter from B&W Services, Inc. to Global in which B&W states that it did not file or authorize Global to file a protest in this matter. NASA also states that to its knowledge, Harrison Ford and Associates Construction Services' only interest in the procurement is as a potential subcontractor. Global has furnished no evidence that either firm has authorized a protest to be filed on its behalf; nor has either firm filed any expression of interest in the protest directly with our Office. Therefore, we view Global's protest simply as one on its own behalf.

#### Background

The procurement was conducted under NASA Procurement Regulations (NASA-PR), 41 C.F.R. Ch. 18, pt. 3, subpt. 1 and 8 (1983). As provided by NASA-PR § 3.804-3, a Source Evaluation Board (SEB) was empaneled which reported to a source selection official. The RFP advised offerors that proposals would be evaluated in accordance with NASA's SEB Manual and the portions of the NASA-PR which apply to the award of cost-reimbursement contracts.

Under these procedures, discussions are held with offerors in the competitive range to point out ambiguities, uncertainties, and instances in which some aspect of the proposal fails to include substantiation for a proposed approach. Offerors are then permitted to revise their proposals and a successful offeror is selected for the final negotiation of a contract.

Seven proposals were received. After evaluation, three including Global's proposal were included in the competitive range. Discussions were conducted with these firms and they were afforded an opportunity to make revisions. Following evaluation of the revised proposals, the source selection official chose Pan Am for final contract negotiations. Global, notified of this decision as provided in NASA-PR § 3.804-3(b)(7), requested and obtained a debriefing and thereafter protested to our Office.

NASA has furnished detailed reports in which it responds to each of Global's allegations. Generally, it is

NASA's position that Global's assertions are wholly unsupported and untrue, and that several of the issues Global has raised are untimely. For brevity, we discuss NASA's defense of the protest only as necessary in disposing of each of Global's contentions.

### Bias

A good deal of Global's protest is concerned with what Global perceives as a pervading bias in favor of Pan Am. Global accuses NASA's Director at NSTL of "carrying out a well orchestrated plan to bring about the selection of Pan Am to succeed itself at NSTL." Global contends that the Director altered the award fee ratings which Pan Am earned for the prior contract to assure that it received very favorable ratings notwithstanding that its performance has been unsatisfactory. Global also says that the SEB was influenced by prejudicial statements made by the Director to the effect that it would be better to keep Pan Am than to change contractors.

According to Global, members of the SEB and their counsel were also biased. Global states that Pan Am permits free or reduced price air travel to employees and their families after 3 years of employment, contends that the families of NASA personnel work for Pan Am, and asserts, therefore, that board members had an interest in assuring that Pan Am was selected.

The burden of affirmatively establishing bias is borne by the protester; improper motives will not be attributed to individuals on the basis of inference or supposition. Alan-Craig, Inc., B-202432, September 29, 1981, 81-2 CPD 263. The critical test for determining bias in an agency's evaluation of proposals is whether all offerors were treated fairly or equally. Pioneer Contract Services, Inc., B-197245, February 19, 1981, 81-1 CPD 107.

In our view, NASA has fully answered Global's contentions, which appear to us to be based on nothing more than speculation. For example, although Global accuses the Director at NSTL of tampering with Pan Am's award fee ratings and of attempting to influence the board through

improper statements, there has been no credible showing that the Director favored the incumbent, much less that he tampered with ratings or tried to or succeeded in imposing his views on the SEB or source selection official. The Director has denied he ever made a statement in the presence of the board or the source selection official indicating a preference for the incumbent. Members of the board state that they have no recollection of any such statement. The Director played only a limited role in the selection process, NASA indicates, and was not involved in the final selection decision. Moreover, the Director specifically notified NASA personnel at NSTL that the board was to be independent and autonomous, and all board members were required to familiarize themselves with applicable NASA standards of conduct which required that they avoid any appearance of impropriety. They were also prohibited from revealing any information concerning the evaluation to anyone, including their superiors.

The unsupported nature of Global's accusations also is indicated in its charge that the board was biased because family members employed at NSTL would lose benefits, in particular free air travel, if Pan Am were displaced by another contractor. What the record shows is that NASA screened all board members and advisory personnel before allowing them to enter upon their duties. NASA reports that one member was married to a person who once worked for Pan Am, but who resigned before their marriage. Two advisors to the board had children who worked for Pan Am in the past but were no longer employees and were ineligible for any flight benefits. One employee was dismissed from participating once it was determined that a member of his family, who had been a summer employee of Pan Am, might be reemployed.

We recognize that much of Global's argument concerning bias is driven by its belief that there exists almost universal dissatisfaction at NASA with Pan Am's past performance and that Pan Am's selection must have had some malevolent cause. Our review of the record, however, indicates that Global's belief is not supported and is not shared by NASA headquarters personnel.

Rather, the record shows Global was treated fairly. Global's proposal was highly rated by NASA, and ranked second after best and final offers. Pan Am's proposal was rated higher, particularly in areas such as key personnel which made up a substantial portion of the score assigned for the mission suitability evaluation factor, the predominant consideration in selecting a source. The high score Pan Am received for mission suitability may have reflected in part the natural benefit Pan Am gained by virtue of its incumbency, since Pan Am could propose personnel and a management approach tailored to the situation at NSTL. The government, however, is not required to equalize competition, but only to evaluate proposals fairly. See Fox & Company, B-197272, November 6, 1980, 80-2 CPD 340. We find no merit to the unsupported allegation of bias.

#### The Service Contract Act

Global also contends that Pan Am is ineligible for award because Pan Am violated the Service Contract Act, 41 U.S.C. § 351 (1976). Global states that Pan Am, as the incumbent contractor at NSTL, used its incumbency to negotiate a labor agreement with the International Association of Machinists and Aerospace Workers (IAMAW) which provided that in the event of award, new workers would be paid at a wage rate less than that required by the wage determination issued by the Department of Labor (DOL) for this procurement. Global characterizes Pan Am's action as illegal and insists that Pan Am did not agree to be bound by the wage determination, as required by law and the RFP.

Global also complains that the procurement was not conducted fairly because it and other offerors were not informed of the existence of the Pan Am/IAMAW agreement, were bound by the higher rates set by the DOL wage determination, and, consequently, could not compete with Pan Am on an equal basis. Global also argues that the SEB was aware of the possibility of Pan Am's proposing reduced wage rates and believes that Pan Am received credit for lower cost as a result.

Global relies on paragraph 21 of the RFP, which states that:

"The successful Contractor and subcontractors (if applicable) will be required to compensate the employees engaged in performance of this Contract at wage rates (including fringe benefits) at least equal to the rates prescribed in the attached Department of Labor Wage Determination (See Exhibit 'D' of Part VI Proposed Contract Schedule). Failure to comply fully with the above will render your proposal unacceptable and ineligible for possible contract award consideration."

NASA states that Pan Am's proposal indicated that the pay rate reduction plan for new hires set out in the labor agreement could only be implemented in the second contract year, and that the proposal was evaluated on that basis. The wage determination included in the RFP covered only the first contract year, NASA points out. For subsequent years, NASA contends, any firm could have proposed to negotiate reduced rates with the IAMAW. In any event, NASA adds, technical merit rather than cost was the controlling factor in Pan Am's selection.

Following Pan Am's selection for final contract negotiations, NASA submitted the Pan Am/IAMAW agreement to DOL, which approved the wage reductions as Wage Determination No. 81-887 (Rev. 3). These developments have led Global also to contend that NASA knew or should have known that the original wage determination--the one which was contained in the RFP--would be altered shortly after award and that other offerors should have been made aware of this. Additionally, Global filed a protest with DOL challenging the validity of Rev.-3 and alleging violation of the Service Contract Act on the grounds outlined above.

In resolving this portion of the protest, we initially point out that the RFP language which Global cites does not make an offeror ineligible for award merely because it shows in its proposal that a basis may exist for revisions to a wage determination, since it is bound in the event of

award to abide by the existing wage determination. The language quoted from the RFP only speaks to the obligation which an offeror must assume at the time of award. Although Pan Am submitted a copy of the labor agreement to NASA, our review of Pan Am's proposal discloses no intent to avoid paying its employees as required by the Service Contract Act provisions.<sup>1</sup>

In any event we agree with NASA that cost, and particularly these costs, had no impact on Pan Am's selection. Technical considerations were the predominant basis for Pan Am's selection. As NASA points out, the reduced wages were not taken into account. Even if they had been, however, the Pan Am/IAMAW agreement would have relatively little effect on total operating costs at NSTL because it applies only to new workers; most of the employees are not new.

This portion of the protest is denied.

#### Improper Negotiations

Global complains that NASA improperly furnished an alternative incentive fee plan to Pan Am during final contract negotiations. Global says it is convinced that Pan Am did not propose an acceptable plan. By offering Pan Am a government prepared plan during negotiations, Global contends, NASA enabled Pan Am to correct the "nonresponsiveness" of its proposal. Global also believes that Pan Am, because it was furnished a NASA plan, was given an unfair advantage.

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<sup>1</sup>NASA has not released Pan Am's proposal (or the source selection board's findings to Global), and consequently, we have reviewed the record in camera. See Alcoa Marine Corporation, B-196721, May 9, 1980, 80-1 CPD 335; Systems Consultants, Inc., B-197872, September 18, 1980, 80-2 CPD 203.



NASA concedes that it did prepare and present such a plan to Pan Am during the final negotiation of the contract. However, NASA insists that its action was entirely proper and that Global has ignored the context in which the action was taken. NASA explains that the operating service contract at NSTL has been a cost-plus-award-fee contract since 1967. Seeking a way to reduce cost, the RFP encouraged offerors to submit their ideas concerning the use of incentive fee arrangements. The seven plans received were not scored or graded; all of the plans were viewed as somewhat flawed. Thus, in the course of the examination of the plans submitted, NASA says, it developed a plan of its own to be used as a basis for negotiation of final contract terms with whichever vendor was selected. NASA states that no information concerning its plan was provided to Pan Am prior to that firm's selection and that the plans as submitted were not a factor in selecting the successful offeror.

Initially, we point out that Pan Am's proposal could not be viewed as unacceptable, had it contained no alternate incentive fee plan. This is because, although the RFP permitted offerors to propose such plans, there was not a requirement that they do so; in fact, the RFP states that any such plan was to be presented in the form of an alternate proposal.

Moreover, the NASA plan was developed in the context of the NASA procurement procedure outlined earlier and was first presented to Pan Am during final negotiations. NASA-PR § 2.804-5(a) requires that before conducting final negotiations the contracting officer develop a prenegotiation position memorandum, which in this instance included the alternative incentive fee plan. The plan was not discussed with Pan Am prior to its selection, and thus, had no bearing on its selection for final negotiation. This portion of the protest is denied.

#### Scoring Method

Global also states that the chairman of the SEB holds the opinion that point scoring of proposals should be structured so as to create an artificial separation between

them which exaggerates differences between proposals. Global says the chairman's views were imposed on the board, and that this was improper and produced a distorted technical evaluation.

While Global is evidently complaining of the use of an incremented, expanded scoring scale to differentiate between proposals (NASA scored proposals on a 1,000 point scale and assigned scores in 5 point blocks), we have approved the use of similar scoring systems. For example, in Fox & Company, supra, we considered a complaint concerning a scoring system in which only a discrete score of 10, 8, 5, 2 or 0 points was allowed for each evaluation sub-factor. As here, total possible score was 1,000 points. The protester contended that such a system would tend to exaggerate the differences in proposals if two proposals were nearly equal with respect to one of the evaluation factors, but did not receive the same number of points. Our decision noted that a system which included possible scores of 1, 3, 4, 6, 7 and 9 might reduce unintended distortion in the final scores. However, we pointed out that while numerical point scores, when used for proposal evaluation, are useful as guides to intelligent decision making, they are not themselves controlling in determining award, since these scores at best only reflect the disparate, largely subjective judgments of the evaluators.

Whether a given point spread between competing offers indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement, not on the particular scoring method used. While technical scores must of course be considered by source selection officials, it is ultimately the source selection official's responsibility to determine what if any significance should be attached to the scores tallied by the SEB. Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427. Our review of the record discloses no basis to believe that NASA used the scores improperly in this instance.

Subcontracting Plan

Global asserts that Pan Am's selection violates the law and policy of the United States because Pan Am deemphasized the use of minority, disadvantaged and small business subcontractors. We believe that these contentions reflect a misunderstanding of the RFP and law in this area.

Global seems to believe that the law requires award to it if it proposed more minority, disadvantaged or small business subcontracting opportunities than did Pan Am. That is not the case. Section 8(d) of the Small Business Act (15 U.S.C. § 637(d)(4)(B) (1982)) states that before the award of any contract which offers subcontracting possibilities, the apparent successful offeror shall negotiate a subcontracting plan, and 15 U.S.C. § 637(d)(4)(D) provides:

"No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of the contract.

We have interpreted this language as indicating that Congress intended contractors, insofar as their approach to the work would permit, to provide an equitable basis for small business and disadvantaged small business firms to compete for work which they are qualified to perform. See Columbia Research Corporation, 61 Comp. Gen. 194 (1982), 82-1 CPD 8 (recognizing that the act does not require that a firm create subcontracting opportunities simply to provide minority, disadvantaged or small business opportunities).

We find no impropriety in NASA's handling of this matter. The RFP provided that summary subcontracting plans were to be evaluated but not scored; Pan Am's proposal made provision for substantial minority, disadvantaged and small business subcontracting opportunities. NASA evaluated Pan

Am's proposed plan and found it to be acceptable. We see no basis for concluding that NASA acted arbitrarily or contrary to statutory or regulatory requirements in approving Pan Am's subcontracting approach.

Untimely issues

Global asserts that proposals were improperly evaluated. For example, Global maintains it was unfairly penalized in the evaluation of its proposed key personnel because NASA required written commitments from personnel whom an offeror planned to hire after award. Global proposed to hire several key people who are presently employed at NSTL by Pan Am, but Global complains, Pan Am prevented those employees from signing commitments with Global. Global asserts that it was told during its debriefing that NASA believed it would be able to hire these people. Nevertheless, Global complains, it was not given full credit for them.

Concerning the evaluation of cost, Global contends that Pan Am's proposal was improperly evaluated because no escalation factors were applied to Pan Am's proposed direct labor rates for the 9-month period from January 4, 1984, through the end of fiscal year 1984. Global's proposal included a 4-1/2 percent escalation factor for this period, Global states, and insists that it was unfair to include an escalation factor in calculating the probable cost of its proposal if a similar factor was not included in evaluating the cost of Pan Am's proposal.

First, we agree with the argument advanced by NASA that, to the extent Global is maintaining that the RFP unfairly required written commitments from proposed key personnel whom an offeror planned to hire after award, its protest is untimely. Section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. § 21.2(b)(1) (1983)) requires that any protest based on an alleged impropriety which is apparent in a solicitation must be filed prior to the closing date for receipt of proposals. Fairchild Weston Systems Inc., B-211650, September 20, 1983, 83-2 CPD 347. Since

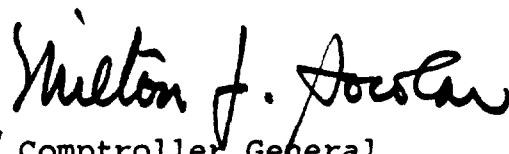
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Global's protest was not filed until after it learned of Pan Am's selection, which was long after the closing date, this portion of the protest is dismissed.

Further, we agree with NASA that the portion of Global's protest concerning the fairness of the evaluation of key personnel, along with its objections to the computation of labor cost escalation factors, are untimely because Global knew of these bases of protest by the date of its debriefing, September 14, 1983, but did not include them in the protest until November 21, 1983, when it filed its comments on NASA's initial report to our Office. Under § 21.2(b)(2) of our Bid Protest Procedures, we have required that each basis of protest must be independently asserted within 10 working days after it was known or should have been known. Air Tech Industries--Reconsideration, B-211252.2, June 28, 1983, 83-2 CPD 37. This portion of the protest is therefore also dismissed.

In light of our decision on these issues, Global's further complaint that while the protest was pending Pan Am has been permitted to implement changes at NSTL which were to be in effect only after the new contract was awarded is academic and need not be considered.

Global's protest is dismissed in part and denied in part.

*for*   
Comptroller General  
of the United States