

DECISION



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

28910

FILE: B-213434

DATE: August 1, 1984

MATTER OF: National Council for Urban Economic
Development, Inc.

DIGEST:

1. Protest alleging a defect in the RFP must be filed prior to the closing date for receipt of proposals.
2. Inclusion of an option price in the evaluation of proposals is proper where the RFP provides for it.
3. Although RFP states that options would not be exercised at the time of award, protester was not prejudiced by the exercise at award, since RFP provided for evaluation of options with base price and RFP contemplated that options would be awarded to the contractor.
4. Absent showing of fraud or allegations of conflict of interest, GAO will not become involved in examining the qualifications of an agency's technical evaluation panel members.
5. Where there is an irreconcilable conflict between a protester and an agency on a factual matter, the protester has failed to meet its burden of proof.
6. Contracting agency enjoys a reasonable range of discretion in evaluating proposals. Mere difference in judgment over a technical evaluation between the protester and the contracting agency is not sufficient in itself to show that the agency's exercise of judgment was unreasonable.

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The National Council for Urban Economic Development, Inc. (CUED), protests on several grounds the Small Business Administration (SBA) award of a contract to Match Institution (Match) under request for proposals (RFP) No. 83-23-TNS to help communities expand the use of community development block grant funds for economic and small business development.

The protest is dismissed in part and denied in part.

Use of CUED Material

CUED protests that the RFP was improper in that it utilized without CUED's authorization material CUED furnished to the government prior to the issuance of the RFP.

Offerors are on constructive notice of our bid protest procedures since they are published in the Federal Register and Code of Federal Regulations. Holmes Ambulance Service Corp., B-213743, Feb. 2, 1984, 84-1 C.P.D. ¶ 143. Our procedures require that a protest alleging a defect in the RFP be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984); Willa J. Miller; Wanda F. Wheatley, B-214721, Apr. 16, 1984, 84-1 C.P.D. ¶ 420. Since CUED failed to protest until after the award of the contract, this issue is untimely and will not be considered.

Alleged Knowledge of CUED's Pricing

CUED protests that the RFP made a mockery of the competitive procurement process because, prior to the issuance of the RFP, it furnished the government a detailed statement of costs for the project and the statement could have been obtained by interested offerors prior to submitting offers.

This protest issue, like the prior protest issue, goes to the propriety of the RFP. It is untimely under the bid protest procedures because it was not raised until after the award of the contract. Willa J. Miller et al., B-214721, supra.

Use of Options in Evaluating Offers

CUED protests that SBA's decision to exercise the option in the RFP to cover 20 additional communities was

improper because the statement of work addressed only 30 communities and the RFP stated that options cannot be exercised at the time of award of the initial contract.

While the statement of work may have addressed 30 communities, the RFP stated specifically in section A-38 that "the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." Further, section "G" of the RFP contains a sample evaluation which shows that the option price will be included in the evaluation. Thus, SBA properly included the option price in the evaluation of proposals.

It is true that the RFP stated "the options cannot be exercised at the time of award of the initial contract." This was, as the RFP indicated, because it was expected that funds for the options would be unavailable at that time. The RFP stated further that "[t]here is a reasonable certainty that funds will be available thereafter to permit exercise of the options." However, funds became available by the time of award and SBA decided to exercise the options then. The decision to exercise the options at that time was not prejudicial to CUED. First, as indicated above, the RFP provided for the evaluation of the options with the base price. Further, the RFP contemplated at section E-13 that the options would be awarded to the contractor. In these circumstances, the award of the options at the time of the award of the contract is not a material deviation.

Technical Evaluation Panel

CUED contends that the technical evaluation panel should have been staffed with more expert members. In this regard, we have held that, absent a showing of fraud or allegations of conflict of interest, our Office will not become involved in examining the qualifications of an agency's technical evaluation panel members. University of New Orleans, B-184194, May 26, 1978, 78-1 C.P.D. ¶ 401. No fraud or conflict of interest has been shown in this case.

Coaching/Coercion to Change Initial Proposal

CUED contends that during negotiations, it was improperly coached and coerced into raising the price in its initial proposal under the threat of being found financially nonresponsible if it did not do so. SBA denies the charge. SBA says that the percentage rates quoted by CUED for fringe, overhead and G&A were so low that it told CUED that it would require a certification that CUED could afford the

loss if it were the successful offeror. CUED disagrees. CUED contends that SBA told CUED that the certification would not be acceptable and CUED, therefore, raised its price.

Where, as here, there is an irreconcilable conflict between a protester and an agency on a factual matter, the protest has not met its burden of proof and we accept the agency's position, that there was no coaching or coercion. Elrich Construction Co., Inc., B-212040.3, Oct. 12, 1983, 83-2 C.P.D. ¶ 455.

Awardee Nonresponsibility and/or Nonresponsiveness

CUED points out that the technical evaluation plan in the RFP placed a high premium (60 points) on organizational qualifications. CUED contends that Match should have been rejected as nonresponsible and/or nonresponsive because it does not have the experience or the network of local economic development practitioners needed to perform the contract.

Although organizational qualifications may bear on responsibility, they may be considered as part of a technical evaluation when negotiation procedures are used. R. H. Ritchey, B-205602, July 7, 1982, 82-2 C.P.D. ¶ 28. When used as an element of proposal evaluation, they become matters of technical acceptability rather than responsibility. Id. Further, we have observed that the concept of responsiveness is not directly applicable to negotiated procurements. Engineered Systems, Inc., B-184098, Mar. 2, 1976, 76-1 C.P.D. ¶ 144.

With respect to technical evaluation, it is not the function of our Office to evaluate technical proposals or resolve disputes over the scoring of technical proposals. Contracting agencies enjoy a reasonable range of discretion in evaluating proposals. Contracting agency determinations will not be questioned by our Office unless there is a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of the procurement statutes and regulations. Logistical Support, Inc.; Jets Services, Inc., B-208722 et al., Aug. 12, 1983, 83-2 C.P.D. ¶ 202.

In this case, the contracting agency considers that Match's organizational qualifications are satisfactory to perform the contract. CUED's bare assertion that Match is inexperienced and lacks expertise amounts to nothing more than a difference in judgment. A mere disagreement between

a protester and an agency over a technical evaluation is not sufficient in itself to show that the agency's exercise of judgment was unreasonable. Sogitec, Incorporated, B-196158, Jan. 24, 1980, 80-1 C.P.D. ¶ 70.

for *Milton J. Aorlan*
Comptroller General
of the United States