

DECISION

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

Golden
R-I
30282

FILE#-216076

DATE: January 24, 1985

MATTER OF: Nuclear Assurance Corporation

DIGEST:

1. Federal Procurement Regulations do not apply per se to a cost-type managing and operating prime contractor of the Department of Energy; rather, a prime contractor must conduct procurements according to terms of contract with agency and its own procedures and conform to the federal norm.
2. Where, even assuming validity of protester's allegation that its proposal should have been considered technically acceptable, firm's offer is not low, firm has not been prejudiced by agency determination that its proposal is technically unacceptable since award was made on basis of initial proposals to low cost, technically acceptable offeror.
3. Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Allegation that award to a firm resulted from preselection or preference for the awardee is denied where it is not supported by record.
4. Protester has burden of affirmatively proving that agency's technical evaluation was unreasonable, and protester's disagreement with agency's technical evaluation that proposal met solicitation requirements for a design which minimized potential radiation exposure is not sufficient, in itself, to satisfy this requirement.
5. Allegation that awardee is not capable of performing the contract because it lacks both financial and production capacity concerns matters of responsibility. GAO will not review a Department of Energy operating contractor's affirmative determination of responsibility absent a showing of fraud or bad faith or that definitive responsibility criteria in the solicitation were not applied.

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6. Allegation that protester failed to receive adequate debriefing and that contracting officer awarded contract after receiving notice of protest does not affect the validity of award.

Nuclear Assurance Corporation (NAC) protests the rejection of its proposals under request for proposals (RFP) No. C84-130482, by EG&G Idaho, Inc. (EG&G), the managing and operating contractor for the Department of Energy (DOE) technical integration office at the Three Mile Island (TMI) site and the DOE Idaho National Engineering Laboratory (INEL) in Idaho, and the award of a contract under this RFP to Nuclear Packing Corporation (NUPAC). The RFP solicited shipping casks and transportation for the shipment of nuclear waste from TMI to INEL. NAC submitted one proposal based on casks it owned, and also submitted a joint proposal with National Lead Incorporated (NLI) offering NLI casks. EG&G awarded the contract to NUPAC on the basis of initial proposals without discussions.

NAC contends that EG&G improperly rejected its proposals on the basis of criteria not stated in the RFP and that, based on the stated RFP requirements, NAC's proposals were technically acceptable. NAC further alleges that actions by EG&G and DOE demonstrate that NUPAC was pre-selected for award and, as a result, proper consideration was not given to other offers. NAC also questions the award to NUPAC, arguing this award failed to take into consideration time and safety factors related to the transportation of radioactive nuclear waste and was contrary to RFP radiation exposure level requirements. Also, NAC alleges that EG&G and DOE should have rejected NUPAC because it lacks both the financial and production capability to perform this contract. Finally, NAC contends it was the low offeror under this RFP and properly should have received the award. NAC requests that the contract with NUPAC be terminated and award be made to NAC or, at a minimum, the procurement be reopened and discussions conducted with offerors.

We dismiss the protest in part and deny it in part.

Background

DOE established a research and development program to examine the damaged TMI unit 2 reactor core to enhance understanding of degraded core performance and contribute to nuclear reactor safety. As part of this program, DOE is to arrange for transportation, storage and disposal of the core

material from the TMI unit 2 reactor station. DOE designated EG&G to contract for these supplies and services. In January 1983, DOE requested EG&G to plan the management of the transportation aspects of the TMI-2 core, including shipping, safety analysis, cask lease arrangements and transportation coordination. After EG&G determined the scope of work for core transportation, it submitted the requirements for DOE's approval. In June 1983, DOE authorized EG&G to proceed with an RFP. RFP No. C83-130244 was issued in August 1983, limiting the procurement to truck casks. During the pendency of that procurement, due to new developments, EG&G initiated a study to evaluate the possible use of government-owned rail casks. While government-owned shipping casks apparently were not available, the study showed that commercial alternatives could meet the government's needs. By March 1984, EG&G had initiated evaluation of the proposals and began to negotiate with qualified offerors. However, based on the study, DOE and EG&G determined that the procurement should be expanded to also solicit a rail cask alternative and provide for certain other changes regarding cask requirements.

The original RFP was canceled and a new revised RFP, No. C84-130482, was issued which solicited proposals on separate inner containment vessels for each cask proposed as required by Nuclear Regulatory Commission (NRC) regulations at 10 Code of Federal Regulations § 71.63 (1984) and transportation management services. Offerors were to submit a proposal for a cask with a single level of containment or with an optional inner containment vessel, a "double containment" option. The RFP also solicited transport equipment. The RFP advised that award would be made to the firm whose proposal was determined to be most advantageous to EG&G, price and other factors considered. EG&G reserved the right to award the subcontract at its discretion to any offeror other than the one proposing the lowest price on the basis of its evaluation of the acceptability of the technical proposals, total cost, and offeror's qualifications. The RFP also stated that award could be made without discussions and that proposals should be submitted initially on the most favorable terms of price, technical acceptability, completeness and the stated evaluation criteria. A pre-proposal conference was held which further clarified the RFP.

DOE reports that eight proposals were received containing designs intended to meet the double containment requirement. Although, apparently, the option of conducting

written discussions was considered, EG&G decided to award to NUPAC because it was the only offeror considered technically acceptable and its price was the lowest offered. DOE reports that EG&G determined that discussions were inadvisable because "the danger of technical transfusion would be unavoidable."

Application of Federal Acquisition Regulation (FAR) to this procurement

Initially, NAC asserts that because of alleged extensive involvement by DOE in the conduct of this procurement, EG&G was in effect DOE's purchasing agent and, accordingly, the FAR is applicable to this procurement. DOE concedes that EG&G conducted this procurement "for" DOE and, accordingly, GAO has jurisdiction to review this procurement under our decision in Optimum Systems, Incorporated - Subcontract Protest, B-183039, Mar. 19, 1975, 75-1 C.P.D. ¶ 166. See also J. F. Small & Co., Inc.--Reconsideration, B-207681.3, July 14, 1983, 83-2 C.P.D. ¶ 89. However, DOE asserts that EG&G was not DOE's purchasing agent and DOE did not participate directly in the award selection process.

Referring to our decision in J. F. Small & Co., Inc.--Reconsideration, B-207681.3, supra, DOE contends that the procurement generally is not subject to the statutory and regulatory requirements, such as FAR, which govern direct DOE procurements. DOE states that our review should be limited to ensuring that EG&G adhered to the "Federal Norm," that is, that the prime contractor complied with fundamental principles of federal procurement. See Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 C.P.D. ¶ 10 at p. 9.

The record shows that EG&G prepared the RFP and evaluated proposals. Under these circumstances, where DOE's involvement is essentially limited to approval of EG&G's award, we have consistently recognized that a DOE contract manager, such as EG&G, is not a purchasing agent for the government. J. F. Small & Co., Inc.--Reconsideration, B-207681.3, supra; see also United States v. New Mexico et al., 455 U.S. 720 (1982). Thus, we conclude that federal norm standards apply here.

Propriety of award without discussions

With regard to the propriety of the award to NUPAC, an award may be made on the basis of initial proposals without

discussions, where it can be demonstrated clearly from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions and provided that award is in fact made without discussions. Emerson Electric Co., B-213382, Feb. 23, 1984, 84-1 C.P.D. ¶ 233.

With regard to the prices offered, NUPAC's cost for the purchase of two rail casks with NRC certification and two rail cars and auxiliary equipment is \$2,191,028. NAC's proposed cost of \$1.9 million had to be adjusted to provide for the cost of two rail cars required under the RFP which NAC did not offer. Based on its survey of rail car costs, EG&G determined that the ultimate cost of NAC's purchase proposal, adjusted for rail car costs, would be \$2.3 million.

With regard to NAC/NLI's proposal, the agency reports that NAC/NLI's proposal, in addition to being considered technically unacceptable, provided for a price of \$25,632,400, which EG&G considered unacceptable. The record shows that both the NAC proposal and the NAC/NLI offer were priced higher than NUPAC's purchase offer. Under these circumstances, even if NAC is correct concerning the improper rejection of either of its offers, and its casks were technically acceptable, NUPAC's offer remains the most favorable price offered. Thus, if award to NUPAC was otherwise proper, NAC was not prejudiced by EG&G's finding that its two proposals were technically unacceptable since award was based on lowest price. See Centennial Computer Products, Inc., B-211645, May 18, 1984, 84-1 C.P.D. ¶ 528.

Allegation of improper preference for awardee

The protester alleges that NUPAC was "preselected." DOE correctly points out that a showing of bad faith or bias requires undeniable or irrefutable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. Further, we will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. CMI Corporation, B-209938, Sept. 2, 1983, 83-2 C.P.D. ¶ 292. Thus, even if it is assumed that the agency had a bias against NAC in favor of NUPAC, it must be shown that it was translated into action which affected NAC's competitive position. See Optimum Systems, Inc., 56 Comp. Gen. 934 (1977), 77-2 C.P.D. ¶ 165.

In our view, NAC has not submitted evidence meeting the heavy burden of proof imposed on any party alleging bad faith, bias or arbitrary action by an agency. For example, NAC alleges the solicitation called for a "time-is-of-the-essence" clause in the contract, and that this requirement was omitted from NUPAC's contract and, thus, shows an unfair preference to award to NUPAC. However, an addendum to the RFP, based on the preproposal conference meeting notes, clearly shows that a requirement for such a clause was not to be part of the contract. Thus, all offerors were on notice that this was not a requirement and all offerors were to submit offers on this basis.

Also, NAC claims that a selection of NUPAC was made by DOE and EG&G on March 30, 1984, and that NUPAC was visited in April 1984 to discuss lease arrangements under this RFP. DOE explains that a preliminary selection of NUPAC was made under the prior RFP, No. C83-130244, and negotiations initiated with NUPAC as one of two technically acceptable vendors. However, as noted previously, EG&G canceled the initial RFP because the scope of supply was broadened to include rail casks. The RFP which is the subject of this project was issued on May 9, 1984, and NUPAC submitted a "revised proposal" which included a rail cask proposal. NAC has not shown how these events show a preselection of NUPAC.

NAC also alleges that EG&G's acceptance of NUPAC's proposal was based on the fact that NUPAC offered more than the RFP required. However, since NUPAC's purchase proposal cost was low, even if the allegation is correct, NAC was not prejudiced since low cost was the basis of award.

NAC also points out that in the preproposal minutes incorporated into the RFP by amendment, EG&G stated its preference for leasing. NAC alleges that in making the award, EG&G disregarded this preference, and that since NAC's lease cost was lower than NUPAC's, the circumstances show a predisposition towards NUPAC.

We note that the complete minutes regarding this issue read as follows:

"Question 8: Is there any preference for lease versus purchase?"

"Answer: Because of the uncertainty in shipping schedule, a flexible lease arrangement would be preferred."

The conference minutes show that EG&G did not necessarily exclude the purchase option, and the RFP clearly solicited purchase costs. In this connection, DOE points out that the awardee's purchase price of its cask is less than the NAC lease cost; the purchase price of NUPAC's cask is lower than NUPAC's lease price, and NUPAC's purchase price was less than the purchase price of both NAC's proposed casks. Under these circumstances, the agency's decision to award to NUPAC for the purchase of casks was reasonable and permissible under the terms of the RFP.

In short, none of these allegations provide evidence of preselection of NUPAC or biased conduct by EG&G in favor of NUPAC as alleged.

Allegation concerning acceptability of NUPAC's proposal

NAC challenges award to NUPAC on the grounds that "ALARA" (as low as reasonably achievable) principles for radiation exposure levels were not considered as required by the RFP. The protester contends that the selected cask design does not provide for a radiation exposure level lower than those offered by NAC and, thus, award to NUPAC violated ALARA regulations. Accordingly, NAC argues the award should be terminated and the procurement reopened.

Concerning the technical evaluation of proposals, the same standard of review applicable to direct federal procurements applies in this instance. Piasecki Aircraft Corporation, B-190178, supra, at p. 10. In this connection, we have stated that it is not the function of our Office to make determinations as to the acceptability or relative merits of technical proposals. Rather, we will examine the record and determine whether the judgment of the contracting agency was clearly without a reasonable basis. Unless such a finding is made, or there is an abuse of discretion, or a violation of procurement statutes or regulations, that judgment will not be disturbed. See Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458, and cases cited therein; Struthers Electronics Corporation, B-186002, Sept. 10, 1976, 76-2 C.P.D. ¶ 231.

EG&G reports that NUPAC's proposal met the ALARA requirements. EG&G advises that 10 C.F.R. § 20.1(c) states that the term "as low as reasonably achievable" means as low as reasonably achievable taking into account the state of technology, the costs of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations in relation to the utilization of atomic energy in the public interest. EG&G determined

that the cask design chosen minimizes exposure of radiation to workers during the loading of the canisters into the cask and during the essential decontamination and leak testing operations and also provides for protection of transportation personnel and the public during transport. The protester merely disagrees with EG&G's technical judgment. The protester has the burden of affirmatively proving its case, and a protester's technical disagreement with the evaluation of a proposal does not, in itself, satisfy this requirement. A.B. Dick Company, B-211119.3, Sept. 22, 1983, 83-2 C.P.D. ¶ 360.

Allegation concerning awardee's capability

NAC also contends that EG&G failed to consider time and safety in its award decision, which was contrary to the RFP, and, thus, NUPAC's proposal should have been rejected. Specifically, NAC alleges that NUPAC is not capable of producing a safe NRC-certified cask within the long-established time schedule for the TMI project at the cost proposed. This is not an issue for our consideration.

Essentially, an offeror's ability to satisfactorily perform at its proposed price is a matter of responsibility. EG&G found NUPAC responsible at the time of award. Because a decision concerning responsibility involves the exercise of considerable discretion and judgment, our Office generally will not review an affirmative determination of responsibility absent a showing of fraud or bad faith, or that definitive responsibility criteria in the solicitation were not applied. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. Neither exception applied here.

Similarly, the protester's contention that the awardee lacks the requisite financial capability concerns the firm's responsibility, that is, whether it has the ability to meet the contract's requirements. See AAA Engineering and Drafting, Inc., B-213108, Oct. 11, 1983, 83-2 C.P.D. ¶ 442. EG&G did find NUPAC financially responsible on July 25, 1984, and, subsequently, awarded NUPAC the contract. As stated above, we will not review an affirmative determination of responsibility except under circumstances not applicable here. AAA Engineering and Drafting, Inc., B-213108, supra.

Allegation of procedural irregularities concerning
award

NAC also alleges that EG&G awarded the contract after NAC had filed its protest in violation of the FAR. Even if we assume NAC is correct in its contention that NAC 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. The Singer Company, B-211857; B-211857.2, Feb. 13, 1984, 84-1 C.P.D. ¶ 177.

Similarly, with regard to NAC's contention that it received an inadequate debriefing, even if this were the case, it does not affect the propriety of the award.

The protest is dismissed in part and denied in part.

for Milton J. Rowles
Comptroller General
of the United States