

30954

**DECISION**



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

**FILE:** B-215042 **DATE:** April 12, 1985  
**MATTER OF:** The Liberty Consortium

**DIGEST:**

1. GAO will consider a protest involving a procurement funded with donations to the National Park Service for renovating certain national monuments because donations placed in special accounts pursuant to statutory authority constitute appropriated funds subject to GAO's authority.
2. GAO dismisses as untimely a protest alleging that the method of procurement is improper and procurement should have been set aside for small business, where the protest was not filed until after the closing date for receipt of initial proposals.
3. GAO denies a protest alleging that an agency improperly evaluated proposals on the basis of criteria not set forth in the solicitation where the record shows that evaluation criteria were followed.
4. GAO will not disturb an agency's decision to exclude a protester from the competitive range on grounds that it had no reasonable chance of being selected for award where the agency considered the relative superiority of the six other offerors determined in the competitive range, each of whom received significantly higher technical scores.

The Liberty Consortium protests the award of a contract to the Liberty/Ellis Island Collaborative by the National Park Service, Department of the Interior, under solicitation No. CX-2000-4-0020. The contract covers the furnishing of professional services in connection with exhibits for a 1-year period, with an additional 1-year

031766

option; it is part of the National Park Service project to renovate the Statue of Liberty National Monument and Ellis Island. <sup>1/</sup>

Liberty alleges that Interior used an improper method of procurement that was not in the government's best interest and was discriminatory to small businesses. Specifically, Liberty alleges that this procurement should have been set aside for small business and that proposals should not have been point-scored. Liberty further alleges that Interior improperly evaluated its proposal on the basis of criteria not set out in the solicitation, used a predetermined score in order to establish the competitive range, and improperly excluded Liberty from the competitive range.

We dismiss the protest in part and deny the remainder.

#### Jurisdiction

Interior argues that our Office does not have jurisdiction to consider this protest under our Bid Protest Procedures because the subject procurement is to be funded with donated funds rather than appropriated funds.

Funding for this project comes entirely from private donations to the National Park Service, which administers all national monuments. These funds are collected pursuant to a memorandum of understanding between the Secretary of the Interior and the Statue of Liberty-Ellis Island Foundation, a private entity. The Foundation is the primary fundraiser for this project; it then transfers donations to the National Park Service. The funds are placed in a special account and are used exclusively for the restoration and preservation of the two landmarks.

---

<sup>1/</sup>Under authority granted to the president in 1906, Calvin Coolidge designated the Statue of Liberty as a national monument in 1924. See 16 U.S.C. § 431, (1982); Presidential Proclamation No. 1713 (1924), reprinted in 16 U.S.C. § 431 note (1982) and in 43 Stat. 1968 (1924). Ellis Island was made part of this national monument in 1965.

We consider this protest, filed in April 1984, under authority of 31 U.S.C. § 3526 (1982).<sup>2/</sup> That statute authorizes our Office to adjust and settle appropriated fund accounts of the United States. We have legal authority to take exception to awards of contracts that involve the direct expenditure of appropriated funds, and we consider bid protests against such awards. See Fast Food Y.K., B-215104, Aug. 14, 1984, 84-2 CPD ¶ 176.

Appropriated funds are not limited to those appropriated to agencies from the general fund of the Treasury. Rather, funds available to agencies are considered appropriated, regardless of their source, if they are made available for collection and expenditure pursuant to specific statutory authority. See 50 Comp. Gen. 323 (1970). For example, in Fortec Constructors--Reconsideration, 57 Comp. Gen. 311 (1978), 78-1 CPD ¶ 153, we determined that surcharge funds which are collected from commissary customers and placed in a special account are appropriated funds, since the collection of the surcharges and the specific use of these funds are authorized by statute. Therefore, we considered a bid protest involving a procurement funded by these moneys. Further, in Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD ¶ 349, we decided to consider protests of procurements funded from the Foreign Military Sales Trust Fund, which is funded by foreign customers' payments, because they involve "appropriated funds, even though they are not annually appropriated by Congress."

Similarly, the donations to be used to fund the subject procurement are appropriated moneys. See Procurement Involving Foreign Military Sales, 58 Comp. Gen., supra at 86. In this regard, the Secretary

---

<sup>2/</sup>The Competition in Contracting Act of 1984, Pub. L. No. 98-389, Title VII, 98 Stat. 1199-1203 (1984), authorizes the Comptroller General to decide bid protests concerning alleged violations of procurement statutes and regulations by federal agencies. Since the procurement was conducted by the Department of the Interior, a federal agency, it appears that if the protest had been filed after the effective date of this legislation, January 15, 1985, we would also have jurisdiction, regardless of the source of funds.

of the Interior is authorized to accept donations of money for public purposes involving the national park and monument system. 16 U.S.C. § 6 (1982). These moneys are to be deposited in the National Park Service Trust Fund and amounts accruing to this Fund are appropriated to be disbursed in compliance with the terms of the Trust. 31 U.S.C. §§ 1321(a)(17), 1321(b) (1982). Accordingly, this protest is within the purview of our bid protest jurisdiction.

#### Background

The competition for the contract was open to all organizations and 16 proposals (including Liberty's) were submitted by the closing date for receipt of proposals, March 16, 1984.

The offerors received technical scores ranging from 86.9 to 34.6; Liberty was the 11th-ranked offeror with a score of 57.1. The top six proposals, with scores ranging from 86.9 to 76.8, were determined to be in the competitive range. Discussions were then held with these six firms and best and final offers received. Interior awarded the contract to the Liberty/Ellis Collaborative on September 12, 1984, and debriefed Liberty as to the reasons for the rejection of its proposal on September 25, 1984.

#### Untimely Issues

Liberty's allegations that Interior used an improper method of procurement are untimely and will not be considered. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require that protests based upon alleged improprieties that were apparent in a solicitation must be filed before the closing date for receipt of initial proposals. The method of procurement, evaluation criteria, and the fact that proposals were to be point-scored were evident from the solicitation. However, Liberty only first raised these grounds of protest in its submission filed with this Office on April 25, 1984--more than a month after the closing date for receipt of initial proposals. Similarly, Liberty's contention that this procurement should have been set aside for small business, made in the April 25 submission, is also untimely. Objections to an agency's failure to set aside a particular procurement must be filed before the closing

date for receipt of initial proposals. GMI Industries, Inc., B-215778, July 20, 1984, 84-2 CPD ¶ 77. Therefore, the foregoing protest bases are dismissed.

### Evaluation of Liberty's Proposal

Liberty contends that Interior improperly evaluated its proposal on the basis of criteria that were not specified in the solicitation. In support of this contention, Liberty cites the following specific reasons that it was told caused its proposal to be downgraded: (1) Liberty failed to demonstrate how prior experience related directly to the project; (2) Liberty's proposal failed to include a discussion of a specific approach to the project; and (3) Liberty failed to show how it would approach problems encountered during performance of the contract. Liberty contends that none of these factors was specified as a formal evaluation criterion.

It is a well-established principle of federal procurement law that once evaluation criteria are set forth in a solicitation, the agency must adhere to these criteria or inform all offerors of any significant changes and give them an opportunity to revise their offers. York Industries, Inc., B-210756.2, Apr. 24, 1984, 84-1 CPD ¶ 463. Agencies, however, are required to identify only the major evaluation factors applicable to a procurement and need not explicitly identify the various aspects of each major factor that might be taken into account. All that is required is that unidentified factors or subfactors be logically and reasonably related to or encompassed by the stated evaluation factors. Arltec Hotel Group, B-213788, Apr. 4, 1984, 84-1 CPD ¶ 381.

The request for proposals in this case set forth the following evaluation criteria:

- "1. Ability to manage this project.  
Evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts, the proposed contract management plan, and evidence of corporate resources.

- "2. Ability to perform historical research for exhibits. The evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts.
- "3. Ability to produce conceptual design solutions that reflect interpretive goals/objectives. The evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts.
- "4. Ability to provide technical expertise required to translate conceptual designs into drawings and specific instructions necessary for fabrication and installation. The evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts.
- "5. Ability to fabricate, install, and maintain exhibits including computer/video and other electronic/audiovisual hardware. The evaluation of ability will be based on the demonstrated past performance of key personnel and adequacy of shop facilities, equipment, and process capabilities.
- "6. Ability to locate and procure appropriate artifacts and graphics and provide conservation treatment of objects, as necessary, prior to exhibition. The evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts.
- "7. Ability in interactive computer/video system design, implementation, and software maintenance in exhibit environments. The evaluation of ability will be based on education and demonstrated past performance of key personnel in related efforts."

From our review of the record, we conclude that Liberty's allegation has no merit. The individual rating sheets indicate that the evaluators considered only the specified evaluation criteria. The three reasons cited by Liberty as Interior's basis for rejection of its proposal are clearly encompassed by the stated criteria. The first--that the protester failed to demonstrate how its experience related directly to the project--is implicit in all the evaluation criteria. The other two examples concerning Liberty's failure to provide specific information as to how it would approach the project and solve any problems encountered also relate directly to the stated criteria. These general comments concern Liberty's evaluated response to each of the evaluation criteria. Accordingly, this basis of the protest is denied.

Liberty's Exclusion from the Competitive Range

Liberty also alleges that Interior improperly compared each offeror's score with a predetermined score in order to establish the competitive range. This allegation is without merit. The record demonstrates that Interior established the competitive range by comparing the relative scores earned by each offeror. In doing so, Interior included in the competitive range six offers that were within 10.1 points of the highest rated proposal.

As for Liberty's contention that Interior improperly excluded its proposal from the competitive range, Interior states that the proposal had no reasonable chance of being selected for award. We have approved this "relative" approach to determining the competitive range based upon the array of scores actually obtained by other offerors. See, e.g., Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 CPD ¶ 299. Consequently, even if Liberty's proposal was technically acceptable or capable of being made so--which we do not find--Liberty's proposal need not necessarily have been included in the competitive range. JDR Systems Corp., B-214639, Sept. 19, 1984, 84-2 CPD ¶ 325.

Here, Liberty's proposal received a significantly lower technical score than any of those included in the competitive range. Given this disparity and the fact that six offerors were included in the competitive range, we see no basis for questioning Interior's determination to eliminate Liberty from further consideration.

B-215042

For the foregoing reasons, the protest is dismissed in part and denied in part.

*Harry R. Van Cleve*  
Harry R. Van Cleve  
General Counsel