

*Agreement*

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**DECISION**



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

B-218538

**FILE:**

**DATE:** June 26, 1985

Battelle Memorial Institute

**MATTER OF:**

**DIGEST:**

1. Protest alleging that award to higher technically rated, higher cost offeror was not justified is denied where that result is consistent with the evaluation criteria stated in the solicitation and where procuring agency makes reasonable determination that difference in technical merit is sufficiently significant to justify cost difference.
2. Protest that award to selected contractor will create an organizational conflict of interest is denied where alleged conflicts concern potential review by the awardee of its past performance but, because of the different scope of work under the contracts, awardee will not be reviewing the usefulness of its past work in a manner which would impair its objectivity under the current contract.
3. Allegation that agency failed to formally document its decision concerning alleged organizational conflict of interest is a procedural irregularity which does not affect the validity of the award.
4. Protests based upon alleged solicitation improprieties which do not exist in initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date for receipt of proposals.

Battelle Memorial Institute (Battelle) protests the award of a contract to CH2M Hill Southeast, Inc. (CH2M Hill), under request for proposals (RFP) No. WA84-H063

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issued by the Environmental Protection Agency (EPA). The solicitation was issued to obtain assistance in the development of technical policies and guidance in implementing the statutory requirements of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)--commonly known as the "Superfund" Act. Battelle contends that EPA improperly applied the RFP's evaluation criteria and that the award to CH2M Hill creates an improper organizational conflict of interest. In addition, Battelle complains that EPA's multiple requests for best and final offers were improper and that the agency changed the contract type from a fixed-price contract to a cost-plus-fixed-fee contract without justification.

The protest is denied in part and dismissed in part.

The solicitation was issued on March 9, 1984, and EPA received five proposals. The proposals were evaluated and a competitive range consisting of Battelle, CH2M Hill and two other offerors was established. On August 17, EPA conducted written discussions with these offerors and revised proposals were submitted on August 30, 1984. A revised Technical Evaluation Panel (TEP) report was prepared and the competitive range was narrowed by eliminating one additional offeror. Further technical discussions were conducted and second best and final offers were received on December 17, 1984.

Thereafter, EPA determined that the proposed fixed-price-type contract would not be in the government's best interests. Accordingly, on January 23, 1985, offerors were advised to submit a revised cost proposal by January 28, 1985, basing costs on a cost-plus-fixed-fee-type contract. The competitive range was then narrowed to Battelle and CH2M Hill and additional discussions were conducted. Although Battelle's offered price was \$943,123 lower than CH2M Hill's, the source selection official determined that the technical superiority of CH2M Hill's proposal justified the additional cost. The contract was awarded to CH2M Hill on March 26, 1985.

CERCLA provides for the cleanup of the nation's uncontrolled hazardous waste sites and the solicitation was issued to obtain analytical support to be used by EPA in the development of general policy and guidance to be applied at the national level in implementing CERCLA. The RFP instructed offerors to focus on general methodologies in the areas of economics, engineering, public health and

environmental science and the formulation of technical options which could be adopted by EPA to specific site problems. The contractor would be required to summarize technical data from ongoing and past cleanup actions, facilitate coordination with other EPA offices and other federal and state agencies, assist EPA in developing technical policies, strategies and plans for CERCLA response activities and the preparation of issue papers, technical assessments and analysis regarding specific technical tasks as assigned.

The RFP advised offerors that "technical quality was more important than cost or price." Under the evaluation scheme, proposals were evaluated and scored in four main areas. The areas evaluated and the corresponding scores assigned to each proposal were as follows:

	<u>Battelle</u>	<u>CH2M Hill</u>	<u>Maximum</u>
A. Corporate Experience	219.5	250	250
B. Personnel	307.56	321.2	350
C. Management Plan	145	150	150
D. Sample Work Assignment	215.4	250	250
Total	887.46	971.2	1000
Final Cost	\$9,716,540	\$10,659,663	

EPA states that CH2M Hill submitted a superior technical proposal which demonstrated a thorough understanding of all aspects of CERCLA and other laws and regulations which impact on Superfund policies. Although Battelle's proposal was considered good, EPA determined that it lacked an in-depth knowledge of CERCLA policies. EPA states that the technical superiority of CH2M Hill's proposal justified the additional cost and that the selection of CH2M Hill was therefore proper.

Battelle contends that the difference in technical merit between the two proposals was not significant and that, in view of the price differential, Battelle should have been selected for award. Battelle argues that its proposal clearly satisfied EPA's minimum needs and did so at a much lower cost. Battelle contends that under the RFP's evaluation criteria, EPA should have placed greater emphasis on Battelle's lower cost and that EPA has not established a sufficient basis to justify the award to the higher priced proposal submitted by CH2M Hill.

Battelle also argues that the award to CH2M Hill creates an organizational conflict of interest because CH2M Hill is an EPA "zone contractor" responsible for major portions of hazardous waste cleanup actions under CERCLA. Under the zone contract, awarded to CH2M Hill in 1982, CH2M

Hill provides technical support to EPA regional offices in field investigations, enforcement activities, community relation plans and remedial planning activities at hazardous waste sites. Battelle contends that in developing the general policy and guidance on CERCLA implementation under the present contract, CH2M Hill is put in the position of evaluating its past performance as an EPA zone contractor and, as a result, CH2M Hill will be in a position to determine its eligibility for a greater award fee under the zone contract. Battelle argues that the statement of work (SOW) for the current contract includes evaluation of past performance in implementing CERCLA and that there is a potential for bias or lack of objectivity where a contractor is asked to evaluate its own work or make recommendations concerning the effectiveness of a particular solution or work method which was proposed.

In addition, Battelle complains that the contracting officer failed to adequately document the determination that there is not inherent conflict between the zone contractors and the current SOW. Battelle states that the TEP recognized the potential conflict which could arise in a memorandum dated June 20, 1984, and there is no evidence that any additional action was taken by EPA to address this problem. Battelle argues that section 9.504(d) of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.504(d) (1984), requires that the contracting officer formally document any decision regarding a substantive conflict of interest issue and that there is no evidence that the contracting officer ever formally resolved this matter prior to the filing of this protest. Battelle contends that because of CH2M Hill's extensive involvement as an EPA zone contractor, EPA should have totally excluded CH2M Hill from competing on the contract.

The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment, and it is not our function nor practice to conduct a de novo review of proposals or to make an independent determination of their relative merits. We will question the procuring agency's evaluation only if the protester shows the evaluation was clearly unreasonable. The Singer Company, B-211857, B-211857.2, Feb. 13, 1984, 84-1 CPD ¶ 177.

Furthermore, in a negotiated procurement, there is no requirement that award be made on the basis of lowest cost. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be

sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. The judgment of the procuring agency concerning the significance of the difference in the technical merit of offers is accorded great weight. Asset Inc., B-207045, Feb. 14, 1983, 83-1 CPD ¶ 150. We have consistently upheld awards to offerors with higher technical scores and higher costs so long as the result is consistent with the evaluation criteria and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Bank Street College of Education, B-213209, June 8, 1984, 84-1 CPD ¶ 607; Tally Educational Services, Inc., B-211936, Feb. 14, 1984, 84-1 CPD ¶ 188; The Singer Company, B-211857, B-211857.2, supra.

Here, we find that EPA has provided a reasonable basis justifying the award to CH2M Hill at the higher cost. The record shows that EPA thoroughly evaluated the proposals submitted by both offerors and, in every major evaluation area, CH2M Hill's proposal was judged technically superior. EPA found that Battelle's corporate experience was inadequate since the firm had little experience in critical phases of the CERCLA remedial action process and that its experience was not sufficient for an EPA policy contract. Also, EPA concluded that Battelle's response to the sample work assignment was deficient and further evidenced a lack of in-depth knowledge of CERCLA and CERCLA-related policies. Although EPA considered Battelle's proposed personnel and its proposed management plan to be good, CH2M Hill was evaluated as technically superior in these areas as well. While Battelle complains that there is a very low probability of any proposal receiving the maximum score in three of four areas, we are unable to conclude that the scoring was the result of anything other than the reasonable judgment of EPA's technical evaluators.<sup>1/</sup> ALM, Incorporated, Technology Inc., B-217284, B-217284.2, Apr. 16, 1985, 85-1 CPD ¶ 433.

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<sup>1/</sup> Battelle has also complained that to the extent CH2M Hill's perfect scores could be attributed to its other contracts with EPA, an organizational conflict of interest exists. We disagree. The fact that CH2M Hill may have had a competitive advantage by virtue of the firm's prior experience in implementing CERCLA and in dealing with EPA is not an unfair advantage which must be eliminated. See Rolm Corp., B-214052, Sept. 11, 1984, 84-2 CPD ¶ 280; Systems Engineering Associates Corp., B-208439, Jan. 21, 1983, 83-1 CPD ¶ 97.

The solicitation advised offerors that technical merit was more important than cost or price. While we recognize that Battelle has not had access to CH2M Hill's proposal, our review of the proposals and EPA's evaluation show that the agency's evaluation conformed to the listed evaluation criteria and that a reasonable basis exists for EPA's technical conclusions. EPA weighed the technical difference between the two proposals and the difference in their proposed costs and determined that it was in the government's best interest to accept CH2M Hill's technical superior proposal. We cannot conclude that this determination lacked a reasonable basis.

With respect to Battelle's argument that the award to CH2M Hill creates an organizational conflict of interest, we note that the responsibility for determining whether a firm has a conflict of interest if a firm is awarded a particular contract and to what extent a firm should be excluded from competition rests with the procuring agency and we will not overturn such a determination unless it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94. The procuring agency activity bears the responsibility for balancing the competing interests in (1) preventing bias in the performance of certain contracts which would result in a conflict of interest, and (2) awarding a contract that will best serve the government's needs to the most qualified firm. Systems Engineering and Associates Corp., B-208439, Jan. 31, 1983, 83-1 CPD ¶ 97.

EPA states that it considered whether any conflict of interest existed in allowing CH2M Hill to compete for the requirement and concluded that since the scope of work under the zone contract is fundamentally different from the work required under the current contract, there was no reason to exclude CH2M Hill. EPA argues that CH2M Hill will not be evaluating its own past performance, but rather EPA implementation of CERCLA from an overall perspective. EPA indicates that it is not interested in reviewing individual contractor performance and, under the current contract, CH2M Hill will focus on the development of improved procedures and technological advances that can be utilized by EPA on a national level. The contracting officer notes that a conflict of interest provision in the solicitation required CH2M Hill to warrant that no conflicts currently exist and that appropriate action will be taken if a subsequent conflict arises.

We are unable to find EPA's determination in this regard unreasonable. There clearly is no requirement under the current contract for CH2M Hill to review and assess the adequacy of its performance as a zone contractor, nor do we find that CH2M Hill has been placed in the position of determining its eligibility for a greater award fee under the zone contract. In addition, we agree with EPA that the scope of work under the two contracts differs. Under the zone contract, CH2M Hill is primarily responsible for technical analyses and remedial support at specific sites and, under the current contract, CH2M Hill will be providing technical support to EPA in the development of general policy and guidance at the national level. In these circumstances, we do not find that CH2M Hill will be reviewing the usefulness of its past work in a manner which would impair the firm's objectivity under the current contract. Despite Battelle's disagreement with EPA on this matter, we are unable to conclude that EPA acted unreasonably in allowing CH2M Hill to compete for this requirement.

Concerning EPA's alleged failure to formally document its decision concerning the potential conflict of interest, we note that section 9.504(d) of the FAR, 48 C.F.R. § 9.504(d), states that a contracting officer's judgment need be formally documented only when a substantive conflict issue is found to exist. Although the TEP, in its June 20 memorandum, acknowledged that a potential conflict could arise if a firm was required to review its own work, the contracting officer states that because of the differing requirements under the two contracts, it was decided that no conflicts existed which required formal resolution. In any event, subsequent documentation addressing this issue was prepared by EPA and we consider any failure to formally resolve this matter at an earlier time to be a procedural irregularity which does not affect the propriety of the award. Culp Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17.

Finally, we find Battelle's allegations concerning EPA's multiple requests for best and final offers and EPA's change of the contract type to be untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), protests concerning alleged solicitation improprieties that are apparent prior to the closing date for receipt of proposals must be filed before that date and alleged improprieties which do not exist in the initial solicitation that are subsequently incorporated must be protested no later than the next closing date. Accordingly, Battelle's allegation concerning EPA's multiple requests for best and final

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offers should have been raised prior to the closing date for the receipt of Battelle's final best and final offer and its protest concerning the change in contract type should have been filed prior to the closing date for the receipt of Battelle's offer changing its contract type to a cost-plus-fixed-fee contract. See Crown Point Coachworks and R&D Composite Structures; North American Racing Co., B-207694, B-208694.2, Sept. 29, 1983, 83-2 CPD ¶ 386; Logus Mfg. Corp., B-216775, Jan. 8, 1985, 85-1 CPD ¶ 25.

The protest is denied in part and dismissed in part.

*for* *Seymour Efron*  
Harry R. Van Cleve  
General Counsel