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DECISION



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

FILE: B-219675 **DATE:** December 20, 1985
MATTER OF: Wickman Spacecraft & Propulsion Company

DIGEST:

1. Certificate of Competency (COC) procedures do not apply when a small business firm's offer in a negotiated procurement pertaining to scientific research is found deficient under technical evaluation criteria relating to experience and past performance, since the COC program is reserved for reviewing nonresponsibility matters, not the comparative evaluation of technical proposals.
2. Agency's failure to include protester's proposal in the competitive range, based on agency's evaluation of the proposal regarding mission suitability, cost, company experience and past performance, is not arbitrary or in violation of applicable statutes and regulations when, compared with another offeror, the protester was reasonably found deficient in these areas.
3. Allegation that agency harassed protester to withdraw its protest does not affect the merits of the protest or the validity of the agency's protested procurement action.
4. Pressure to withdraw a protest exerted by a company related to a proposed subcontractor of another offeror does not constitute a violation of the other offeror's Certificate of Independent Price Determination, and in the absence of evidence of possible collusion, the procuring agency is not required to consider allegations of such pressure in determining the other offeror's responsibility.

Wickman Spacecraft & Propulsion Company protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 9-BE4-25-5-104P, issued by the National Aeronautics and Space Administration (NASA), Johnson Space Center, Houston, Texas on April 11, 1985.

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The solicitation was for a fixed-price, level of effort contract for a study of propulsion systems to be used in support of a lunar surface base. The study will focus on the development of propellant sources either in lunar orbit or on the moon's surface in order to avoid bringing propellants from the earth to fuel return trips.

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

Background

The RFP provided for evaluation of proposals in four areas: mission suitability, cost, company experience/past performance, and other factors such as acceptance of contract provisions. Only the mission suitability area was to be point-scored. The criteria listed for evaluating mission suitability were as follows, in descending order of importance: Comprehension of Objective; Understanding of Principal Technical Problems; Program Structure and Schedule; Management Plan; Key Personnel; and Facilities. Mission suitability and cost were considered the most important evaluation factors and were of equal value; experience and past performance were of somewhat less importance; and other factors were considered least important. 1/

NASA received proposals from two firms, Wickman and Astronautics Corporation of America. At the time of proposal submission, John Wickman, the president of the Wickman firm, was a full-time employee of Aerojet Strategic Propulsion Company. Astronautics proposed an affiliated company, Aerojet Techsystems Company, as a subcontractor.

On July 10, 1985, NASA determined that the Wickman proposal was outside the competitive range because major weaknesses in its proposal were not correctable. Wickman's technical score for the mission suitability factor (421 out a possible 1000 points) was substantially lower than Astronautics' score (598), and its proposed price was 10 percent higher.

1/ The NASA Source Evaluation Plan for the procurement provided that each area would receive one of five adjective ratings, from "excellent" through "unsatisfactory", depending upon the number and ratio of strengths and weaknesses identified in that area. Numerical ranges equivalent to the adjective ratings were established for the mission suitability criteria. For example, a proposal rated as "excellent" would receive between 91 and 100 percent of the points available for that criterion.

In its August 13, 1985 protest to our Office, Wickman contends that, in excluding its proposal from the competitive range, NASA was biased and prejudiced in evaluating the firm's capability to perform the contract and should have referred the matter to the Small Business Administration (SBA) under certificate of competency (COC) procedures. Wickman alleges that NASA did not fairly evaluate the technical aspects of its proposal. The protester also charges that NASA harassed the president of the firm by causing Aerojet, at that time his employer, to pressure him to withdraw this protest. In a September 4 submission to our Office, Wickman makes two additional allegations: that Astronautics' Certificate of Independent Price Determination was violated by Aerojet's pressure on Wickman to withdraw the protest, and that Aerojet's actions constituted an antitrust violation.

Referral to SBA

Initially, Wickman asserts that those portions of its proposal addressing company experience and past performance concern responsibility and may not be evaluated by NASA. Rather, since it is a small business, Wickman believes NASA should have followed COC procedures.

Contracting officers evaluate prospective contractors to determine their responsibility, that is, their capability to perform the work. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1984). COC referrals to SBA are only required where contracting officers find small businesses to be nonresponsible. In this case, the agency did not find the firm nonresponsible, but considered its proposal technically deficient under the evaluation factors listed in the solicitation.

With regard to these factors, it is not improper in a negotiated procurement to include traditional responsibility factors among the technical evaluation criteria. Anderson Engineering and Testing Co., B-208632, Jan. 31, 1983, 83-1 CPD ¶ 99. Such factors may include experience, available facilities and personnel qualifications. See Andover Data Services, Inc., B-209243, May 2, 1983, 83-1 CPD ¶ 465; Numax Electronics, Inc., B-210266, May 3, 1983, 83-1 CPD ¶ 470. As long as the factors are limited to areas which, when evaluated comparatively, can provide an appropriate basis for a selection that will be in the government's best interest, COC procedures do not apply to a technical proposal deficient in those areas. In our

opinion, the evaluation factors used here, company experience and past performance, were appropriate for comparative evaluation in a negotiated procurement pertaining to scientific research. Accordingly, COC procedures were inapplicable to NASA's rating of Wickman's proposal in those areas, and we deny the protest on this basis.

Proposal Evaluation

The protester next alleges that in excluding its proposal from the competitive range, NASA unfairly evaluated the proposal. Wickman challenges virtually every weakness in its proposal cited by the NASA source evaluation committee and argues that Astronautics' proposal was not held to the same standards.

The evaluation of technical proposals and the resulting determination as to whether an offeror is in the competitive range is a matter within the reasonable discretion of the contracting agency, since the agency is responsible for defining its needs and the best method of accommodating them. Generally, offers that are technically unacceptable as submitted and would require major revisions to become acceptable are not required to be included in the competitive range. Rice Services, B-218001.2, Apr. 8, 1985, 85-1 CPD ¶ 400. In reviewing an agency's technical evaluation, we will not evaluate the proposal de novo, but instead will only examine the agency's evaluation to ensure that it was not arbitrary or in violation of the procurement laws and regulations. Robert Wehrli, B-216789, Jan. 16, 1985, 85-1 CPD ¶ 43. In addition, the protester bears the burden of showing that the agency's evaluation was unreasonable.

A. Company Experience and Past Performance

The Wickman proposal was rated "unsatisfactory" for company experience because, as a new firm, it did not have directly related corporate experience in particular or sufficient contract management experience in general. The proposal was rated "fair" for past performance because Wickman reported only one prior contract for \$4,500, a significantly smaller contract than the estimated \$95,000 contract at issue. As for Astronautics' proposal, the evaluation committee rated it as "poor" in company experience because, as an aircraft and space vehicle instrumentation and display firm, it did not have directly related experience. Astronautics' past performance was rated

"good" based upon its record on a large number of contracts.

Wickman alleges that it was penalized for being a one-employee company or small business; that Astronautics does not have related company experience either; and that NASA should have considered Mr. Wickman's personal experience. We find that Wickman was not penalized for its size or number of employees, but that NASA reasonably considered the firm's lack of experience, which is, in part, related to its size. As noted above, NASA recognized that Astronautics lacked experience directly related to a study of lunar propulsion systems. However, NASA's rating of "poor" rather than "unsatisfactory" reasonably took into consideration Astronautics' comparable experience in terms of job complexity and contract size. Also, the evaluation committee properly did not take into account Mr. Wickman's personal experience in evaluating the Wickman proposal for company experience, since the RFP specifically ruled out consideration of the experience of key personnel. In sum, we find that NASA's ratings of Wickman's and Astronautics' proposals for experience and past performance have a reasonable basis.

B. Mission Suitability Factors

The Wickman proposal received a low score in the area of Understanding of Principal Technical Problems because, according to the evaluators, it did not identify the principal technical problems associated with lunar material availability or production methods, and did not suggest means of solving such problems. The evaluators also noted that Wickman did not discuss propulsion system practical design issues such as propellant handling, propellant storage, and current and future technology.

Wickman argues that it did address lunar material availability and propulsion system practical design issues. While Wickman's proposal arguably touched upon these subjects, we find NASA's view that the subjects were not sufficiently discussed to justify a higher score to be reasonable. The proposal contained little or no discussion of the availability and supply of lunar materials, their ease of extraction, their relative merits, storage and handling, production processes, or effects on system design.

While Wickman contends that additional suggestions for solving technical problems should be made during contract performance and not in proposals, we believe that Wickman is in essence disagreeing with NASA's judgment that the lack of discussion of technical problems and their possible solutions in the proposal reflected a poor understanding of those problems. Such unsupported disagreement is insufficient to meet the protester's burden of establishing that the NASA evaluation was unreasonable. See Information Network Systems, B-208009, Mar. 17, 1983, 83-1 CPD ¶ 272.

In its comments upon the agency's administrative report, Wickman questions an additional finding of a minor weakness in the area of Understanding of Principal Technical Problems. NASA found that Wickman had misused and incorrectly stated a mathematical equation. The protester, citing two examples, argues that its use of the equation followed the published practices of NASA scientists. Wickman's protest on this basis appears to have been based upon information learned during its debriefing on August 1, and may, for that reason be untimely, since it was not filed with our Office until September 30. See 4 C.F.R. § 21.2(a)(2) (1985). In any event, the cited weakness was relatively minor, and NASA considered it to be correctable. The agency found several other major and minor weaknesses in this portion of Wickman's proposal that it believed would require essentially a new proposal to correct. Consequently, even if Wickman is correct regarding its use of the equation, elimination of this weakness from consideration would not materially change the rating of the proposal under Understanding of Principal Technical Problems.

In the evaluation of Wickman's Management Plan, NASA considered a minor weakness to be the lack of commitment from and direct control of three consultants proposed as key personnel, since two of them were employed by another company. Also, in evaluating Key Personnel, NASA believed that the fact that the proposed principal investigator, Mr. Wickman, was employed full-time by Aerojet constituted a major weakness correctable during discussions, since it was unclear that Mr. Wickman would be able to devote 100 percent of his time to the contract as proposed.

The RFP specified that the resources available to the contract manager would be evaluated in determining whether the proposed program management approach and structure would lead to the accomplishment of the study in a cost

effective and timely manner. In our opinion, since Wickman did not present either commitment letters from its consultants or evidence of how their duties under the contract would be consistent with their other employment, it was not unreasonable for NASA to consider the Management Plan to be weak.

As for Mr. Wickman, it is true that at the time of proposal evaluation he was employed full-time by Aerojet, and there was no statement or letter of commitment in the proposal or in Mr. Wickman's resume indicating that he would resign if awarded the contract. However, Wickman's proposal stated that Mr. Wickman was the president of the company and would be the sole employee, devoting 100 percent of his time to the contract. In addition, Mr. Wickman signed the proposal. Offerors need not in every instance have a contractual relationship with key employees for them to be considered in the evaluation of the offeror's proposal, although the agency must be reasonably sure that they are firmly committed to the offeror. Government Sales Consultants, Inc., B-193477, Aug. 9, 1979, 79-2 CPD ¶ 103. The RFP did not require commitment letters for key personnel, and here we do not believe that Wickman's failure to submit one from Mr. Wickman could reasonably constitute a major weakness in its proposal.

Although we therefore do not agree with NASA's conclusion that the lack of a commitment letter from Mr. Wickman was a major weakness, we do not believe that correction of this error would substantially change Wickman's standing. NASA gave the proposal an "unsatisfactory" rating for the Key Personnel criterion because it had major weaknesses with only a minor strength. A major weakness that NASA considered not correctable--the fact that proposed personnel had little or no experience with lunar resources and with practical vehicle propulsion system conceptual design--would require a continued rating of "unsatisfactory."^{2/} Giving Wickman the maximum score available for this criterion with a continued "unsatisfactory" rating would increase its score by only 6 points out of a total 1000 points for Mission Suitability.

^{2/} The NASA Source Evaluation Plan provided that areas of proposals with major weaknesses and no strengths or minor strengths would be rated "unsatisfactory" and receive no more than 30 percent of the available points for that area.

Wickman further complains that, during the debriefing, the contracting officer said that a commitment letter for Mr. Wickman was necessary, but then refused to accept one when offered. The contracting officer did not err in refusing to accept Mr. Wickman's letter of commitment at the time of the debriefing, since the protester had already been excluded from the competitive range and no additional information from an unsuccessful offeror could be accepted. FAR, 48 C.F.R. § 15.1001(b)(2).

Wickman contends that since its proposal received a rating of "fair" in some areas where it had both strengths and weaknesses, the proposal should have received a higher rating for its Program Structure and Schedule, a criterion for which NASA identified minor strength and no weakness. NASA applied a rating of "good" where major strengths outweighed weaknesses and a rating of "fair" where strengths generally balanced weaknesses. The use of such adjective ratings is necessarily imprecise, and two areas of a proposal which are not precisely equal in quality may receive equal ratings. In this case, NASA's conclusion that Wickman should have been given a "fair" rating for its Program Structure and Schedule even though it had a minor strength in that area was consistent with the evaluation scheme, and we cannot say that it was unreasonable.

Wickman has not met its burden of establishing that the agency's evaluation of its proposal was arbitrary or in violation of applicable statutes or regulations, and we deny its protest on this basis.

Harassment and Antitrust Violations

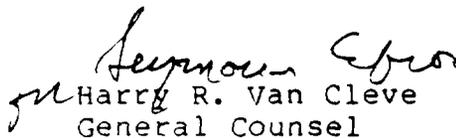
Mr. Wickman reports that his employment with Aerojet was terminated on August 23, when he refused the company's request that he withdraw this bid protest. He states that Aerojet's request resulted from a NASA report about the protest to a senior Aerojet executive during a meeting to discuss a major NASA procurement, and asserts that this was improper harassment on the part of NASA officials. These allegations, even if true, do not affect the merits of the protest or the validity of NASA's determination that Wickman's proposal was not within the competitive range. We note that the protester states that this matter is under investigation by NASA's Office of Inspector General, and we have referred the matter to our Fraud Prevention Group.

Wickman characterizes Aerojet's actions as violations of the Certificate of Independent Price Determination included in Astronautics' proposal. This certificate states that no effort will be made to induce another offeror not to submit an offer for the purpose of restricting competition. Wickman would attribute Astronautics' obligations in its certification to Aerojet, his former employer, since an affiliated company, Aerojet Techsystems, was proposed as a subcontractor to Astronautics. Also, the protester contends that withdrawing a protest against exclusion from the competitive range is tantamount to not submitting an offer, so that pressure to do so would violate the certification. Additionally, Wickman claims that Aerojet's actions constitute a violation of the antitrust laws.

Violation of a Certificate of Independent Price Determination is a matter of honesty and integrity relating to the responsibility of the offeror, in this case Astronautics. Oceanside Moving and Storage, B-218025.2, May 23, 1985, 85-1 CPD ¶ 591. We do not share the protester's view that Astronautics' certification extends to the alleged actions of Aerojet. Wickman does not claim that Astronautics itself was aware of Aerojet's actions or even that Aerojet was motivated by an interest in the subcontract with Astronautics. Rather, Wickman states that his employer was concerned about maintaining a good relationship with NASA because of a large future procurement. Consequently, even assuming that Wickman's factual allegations are correct, we do not believe that they show possible collusion on the part of Aerojet and Astronautics. In the absence of additional evidence relating Astronautics to Aerojet's alleged actions, we do not believe that the contracting officer is required to consider the matter in determining Astronautics' responsibility or that failure to do so would constitute fraud or bad faith. We deny Wickman's protest on this basis.

As for the antitrust allegation, violation of the antitrust laws properly must be considered by the Department of Justice. Therefore, any evidence that the protester has in this regard should be referred to that Department. See Terry, Inc., B-213792, Jan. 25, 1984, 84-1 CPD ¶ 119. This portion of the protest is dismissed.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel