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DECISION



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

FILE: B-221847 **DATE:** May 19, 1986
MATTER OF: Pharmaceutical Systems, Inc.

DIGEST:

1. Where doubt exists concerning the date the protester became aware of the protest, doubt is resolved in favor of the protester.
2. Protest alleging that contracting officer improperly convened a second source selection board is denied since it is within the contracting officer's discretion to convene a new source selection board where it is determined that such action is necessary to ensure the fair and impartial evaluation of proposals.
3. Determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Allegation that agency's decision to exclude protester from the competitive range was unreasonable is denied where agency determined that protester's proposal was technically unacceptable and had no chance of being selected for award.
4. A technical evaluation must be based on information contained in the proposal and consequently, information contained in a preaward survey is not a substitute for information that should have been included in an offeror's technical proposal.
5. Agency is not required to conduct discussions with an offeror whose proposal is found technically unacceptable and properly excluded from the competitive range.

Pharmaceutical Systems, Inc. (PSI) protests its exclusion from the competitive range under request for proposals (RFP) No. DAMD17-85-R-0090 issued by the United

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States Army Medical Research Acquisition Activity (Army). The RFP was issued to obtain contractor services to facilitate the timely and efficient execution of the Army's drug development program. The contractor is to provide all necessary personnel, facilities and equipment for preparing and assembling claimed investigational exemptions for new drugs (INDs), preparing and assembling new drug applications (NDAs) and for developing and maintaining an IND/NDA data base. PSI contends that the Army's determination excluding the firm was unreasonable and improperly based on a nonexistent conflict of interest of one of its employees. Also, PSI argues that the Army failed to conduct meaningful discussions with the firm.

We deny the protest.

The RFP was issued on May 24, 1985 and specified a closing date of July 8, 1985. Offerors were advised to submit complete information demonstrating their technical competence and understanding of the requirements. The evaluation factors for award were listed in descending order of importance as follows:

- A. Management and Performance
 - 1. Major IND/NDA Experience and Performance
 - 2. Data System Management Experience and Performance
- B. Management Plan
 - 1. Key Management and Support Personnel
 - 2. Integrated Statement of Work Plan
 - 3. Organizational Approach
 - 4. Contractor Interface Plan
- C. Facilities

The RFP indicated that cost was of secondary importance unless two or more proposals were found essentially technically equal in merit.

On August 2, the Army's Source Selection Board (SSB) met to evaluate the proposals. The SSB found PSI's proposal technically acceptable and within the competitive range and, by letter dated August 8, the Army requested PSI to submit

additional clarifying information. At that time, the contracting officer also requested its Project Management Chief for Applied Medical Systems to review the data system management portions of the proposals. As a result of that review, questions were raised concerning the SSB's technical conclusions. On September 12, the SSB reconvened to discuss this matter as well as to evaluate the clarification responses submitted by the offerors. The SSB concluded that there was no change from its initial ranking of the offerors and that PSI's proposal remained technically acceptable. A preaward survey of PSI was initiated shortly thereafter.

An internal review by the Army disclosed that, except for the Chairman of the SSB, the other board members had all worked with a key member of PSI's staff. PSI employed, as a member of its technical staff, a former U.S. Army colonel who had served as the Director of the Army's Division of Experimental Therapeutics at the Walter Reed Institute of Research and in that position had closely worked with or supervised the members of the SSB. Based on this information, the contracting officer decided to disband the current SSB, convene a second board and conduct a new technical evaluation. Members of the second SSB included the same chairman, two other members from the initial SSB and three new board members. That board met on December 3 and all proposals were again evaluated, although the two remaining board members from the initial SSB did not participate in the evaluation of PSI's proposal. PSI's proposal was found technically unacceptable and outside the competitive range. By letter dated January 9, 1986, PSI was advised that it would no longer be considered for award. We note that the competitive range established by the Army based on this evaluation was comprised of more than one offeror and the agency contemplates further discussions.

Initially, the Army argues that PSI's protest is untimely. The Army states that it mailed the letter notifying PSI of its exclusion from the competitive range on January 9 and in view of the close proximity of the agency and the protester, the Army questions PSI's assertion that it did not receive the letter until January 15. Also, because the protest was not filed until January 30, the Army argues that PSI's protest was filed more than 10 working days after PSI's acknowledged date of receipt.

We resolve doubt surrounding the timeliness of a protest in favor of the protester. Bancroft Investors, B-219915, Nov. 18, 1985, 85-2 CPD ¶ 564. Although the Army questions whether PSI received the Army's letter at an earlier date, the Army has submitted no evidence which

contradicts PSI's statement. We do not consider the 6-day mailing period unreasonable, and in the absence of any further evidence, we have no basis to question PSI's assertion that the letter was not received until January 15. Furthermore, since January 20 was a federal holiday, PSI's protest was timely filed within 10 working days. System Development Corp., B-213726, June 6, 1984, 84-1 CPD ¶ 605. Accordingly, we will consider the merits of the protest.

PSI alleges that it was excluded from the competitive range because the Army erroneously concluded that the former Army colonel, now employed by PSI, was prohibited from working on this project because of post-employment restrictions on former government employees. PSI contends that the employee is only a member of PSI's research staff, that no conflict of interest exists and that the Army's exclusion of PSI's proposal on this basis was therefore improper.

In addition, PSI argues that there is no evidence that the first SSB was biased in favor of PSI's proposal. PSI contends that the members of the first SSB were all well qualified to evaluate proposals concerning drug development and that the initial evaluation of its proposal as technically acceptable was proper. PSI argues that a presumption exists that a government official will disqualify himself from a decision-making function if he has a bias or a conflict of interest problem and that the official is subject to sanctions if he does not do so. PSI contends that the fact that the Army did not seek any administrative remedies against the initial board members shows that they did nothing wrong. As a result, PSI argues that the initial SSB's conclusions regarding PSI's proposal should not have been questioned and that a second SSB should not have been convened. In addition, PSI contends that the clarification request issued after the initial technical evaluation failed to satisfy the Army's obligation to conduct meaningful discussions.

PSI also questions the evaluation of its proposal by the second SSB. PSI's data management capacity was found to be limited and PSI argues that a request for clarification would have provided a completely satisfactory response to any areas of concern to the board. PSI notes that the preaward survey team concluded that PSI had adequate data management capacity and that this information was readily available to the second board but not utilized. Also, PSI's use of consultants was questioned and PSI argues that its consultants were all ready and available to work with PSI and that this fact was also verified by the preaward survey team. PSI indicates that the preaward survey team found

that PSI had assembled an impressive professional staff with expertise in drug research and that the determination that PSI's proposal is technically unacceptable is without any rational basis.

The Army argues that disbanding the original SSB and convening a new board was an appropriate exercise of discretion. The contracting officer states that members of the initial board had made comments which indicated that they believed that only their former supervisor was qualified to do this work for the agency. The contracting officer indicates that he believed the board to be incapable of rendering an impartial recommendation because of their past relationship with this individual and that the convening of a new board was necessary to ensure a fair and impartial evaluation of the proposals.

In addition, the Army argues that the second evaluation was properly conducted and that PSI's proposal was evaluated in strict conformance with the evaluation criteria. The Army indicates that the potential conflict of interest was not considered during the evaluation and was not a factor in PSI's exclusion from the competitive range. Although a detailed debriefing has not been provided because of the ongoing procurement, the Army indicates that PSI's management and performance was not sufficiently experienced in drug regulatory affairs and that its proposed management plan for executing the effort was equally deficient. The Army contends that PSI's proposal stood no chance of receiving an award and that it was properly excluded from the competitive range.

We have recognized that it is within the contracting officer's discretion to convene a new SSB where the contracting officer, in good faith, determines that such action is necessary to ensure the fair and impartial evaluation of proposals. Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153; General Research Corp., B-192090, Dec. 14, 1978, 78-2 CPD ¶ 414. Here, the contracting officer believed that the members of the first board were incapable of rendering an impartial decision because of their past working relationship with a key employee of PSI's technical staff. We note that PSI has not disputed this past relationship and, in addition, the contracting officer was provided an independent analysis of a portion of the technical proposals which disagreed with the board's conclusions regarding the data system management experience and capabilities of the offerors.

Based on this, the contracting officer clearly had a sufficient basis to question the initial evaluation. Although the record contains no evidence of overt bias, we do not believe that the contracting officer's determination to convene a new board must be based on "hard facts" of actual wrongdoing, as suggested by PSI. Our review of the record provides no evidence which indicates that this determination was not made in good faith or that it was made with the specific intent of changing PSI's technical ranking or avoiding an award to PSI. Sperry Corp., B-219596, Oct. 16, 1985, 85-2 CPD ¶ 415. Accordingly, we will not object to the Army's determination to convene a new SSB.

Furthermore, we consider PSI's allegation that the clarification requests issued by the Army after the initial evaluation did not constitute meaningful discussions to be academic in view of the Army's determination to disband the initial SSB. The technical conclusions by this board and its determination that PSI's proposal was within the competitive range are no longer being considered and whether the Army properly advised offerors of the significant deficiencies which were identified during this evaluation is, in our view, no longer relevant. Therefore, the sole remaining issue is whether the evaluation of PSI's proposal as technically unacceptable by the second SSB and its exclusion from the competitive range which was thereafter established was reasonable and in accord with the RFP's evaluation criteria.

In reviewing complaints about the reasonableness of the evaluation of a technical proposal, and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of procurement laws and regulations. Joule Engineering Corp.--Reconsideration, B-217072.2, May 23, 1985, 85-1 CPD ¶ 589.

Although PSI bears the burden of affirmatively proving its case, the Army has only disclosed limited information to the protester because the agency is withholding contractor selection pending our decision on this protest. Consistent

with our practice in such situations, we have examined the record in camera to determine whether the evaluation had a reasonable basis. B&B Records Center, Inc., B-215232, Mar. 27, 1985, 85-1 CPD ¶ 354.

At the outset, we note that we see no evidence that PSI was excluded because of any potential conflict of interest arising from the employment of a former government official. The record supports the Army's assertion that this issue was not a factor in the decision to exclude PSI from the competitive range. With respect to PSI's proposal, the second SSB agreed with the initial board that its strongest point was the utilization of the former Director of Experimental Therapeutics at the Walter Reed Institute of Research. However, even his experience in the preparation of NDAs was considered limited. With the exception of this one individual, the experience of the remaining staff was considered weak. PSI's data management capacity was deemed weak, and PSI's on-site expert was found to have little experience.

Also, concerning PSI's assertion that the SSB should have utilized information contained in the preaward survey, we point out that information contained therein is not a substitute for information that should have been included in the technical proposal. A technical evaluation must be based on information contained in the proposal, and an offeror risks being excluded from the competition if it does not submit an adequately written proposal. Thus, the Army reasonably limited its technical evaluation to the information provided in PSI's proposal. Joseph L. DeClerk and Assocs., Inc., B-220142, Nov. 19, 1985, 85-2 CPD ¶ 567. Furthermore, the preaward survey team was not conducting a technical evaluation, and we do not consider its assessment of PSI's staff as an evaluation of their capabilities and experience in accordance with the evaluation criteria specified in the RFP.

Overall, PSI's proposal was found technically unacceptable by the Board and was so deficient that it stood no chance of receiving an award.^{1/} Although PSI may

^{1/} PSI has also questioned the technical qualifications of the members of the second board. The composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object in the absence of evidence of fraud, bad faith or conflict of interest. CBM Electronic Systems, Inc., B-215679, Jan. 2, 1985, 85-1 CPD ¶ 7.

disagree with this determination, our review of the record provides no basis to conclude that the evaluation lacked a reasonable basis. Contracting officers have broad discretion in determining whether to place a proposal within the competitive range and we are unable to find the Army's determination excluding PSI to be arbitrary or unreasonable. ALM, Inc. et al., B-217284 et al., Apr. 16, 1985, 85-1 CPD ¶ 433. In addition, as noted above, more than one offeror remained in the competition after PSI's exclusion.

Finally, to the extent PSI is arguing that the Army should have conducted discussions with PSI, we point out that there is no requirement that an agency conduct discussions with a firm properly excluded from the competitive range. Logistic Services International, Inc., B-218570, Aug. 15, 1985, 85-2 CPD ¶ 173.

The protest is denied.

for *Seymour Efron*
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General Counsel