



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Universal Shipping Company, Inc.--
Request for Reconsideration
File: B-223905.3; B-223905.4
Date: August 4, 1987

DIGEST

1. Agency evaluation of offeror's promise in proposal to perform in accordance with solicitation's requirements, which legally bound the offeror to perform as promised, is reasonable.
2. Requirement that agencies generally must conduct "meaningful" negotiations or discussions with all responsible offerors within a competitive range was satisfied when the protester was advised of the two major weaknesses in its initial proposal. An agency is under no obligation to discuss every aspect of the proposal that has received less than the maximum possible score.
3. Where in response to a General Accounting Office (GAO) decision sustaining a protest that the agency has inadequately documented its award selection, the agency furnishes rational support to explain the point scores awarded the protester and the awardee and adequately documents the bases of its award decision, GAO no longer questions the source selection decision.
4. Where GAO concludes that award to other than the protester was proper, the protester was not unreasonably excluded from the competition and therefore is not entitled to recover its proposal preparation costs and the costs of filing and pursuing its protest.

DECISION

Universal Shipping Company, Inc., requests that we reconsider our decision and review the Agency for International Development's (AID) implementation of our recommendations in Universal Shipping Company, Inc., B-223905.2, Apr. 20, 1987, 87-1 C.P.D. ¶ 424. In that

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decision, we denied in part, dismissed in part, and sustained in part, Universal's protest against the award of a contract to Daniel F. Young, Inc., under request for proposals (RFP) No. AID/MS-86-021, issued by AID for international ocean ship booking, chartering and freight forwarding services for the administration and shipment of commodities under certain food donation programs. Universal also requests that it be paid its proposal preparation costs, and the costs associated with filing and pursuing its protest, including attorney's fees.

We deny the request for reconsideration and claim for costs.

BACKGROUND

Proposals under the subject RFP were submitted in August 1986. In November, all of the firms found to be in the competitive range were advised of that fact, were notified of weaknesses in their proposals and were invited to meet with the Technical Evaluation Committee (TEC) to discuss their proposals. The firms in the competitive range then submitted best and final offers by December 1, 1986. The revised proposals were evaluated and point scored by the three voting members of the TEC. The three scores for each offeror's proposal were averaged by the contract negotiator and award was made to Young on December 11 based upon its highest evaluated average point score.

In our prior decision, we denied or dismissed most aspects of Universal's protest. However, we sustained Universal's protest allegation that the award to Young was inadequately supported by documentation showing the relative weaknesses and strengths among the proposals, as required by Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.612(d)(2) (1986). Accordingly, we recommended that the source selection official review the evaluation records to determine whether the scores given to the offerors accurately reflected the relative merits and weaknesses of the proposals. We stated that if AID could document its decision to award to Young, it need not terminate Young's contract; but if AID were to conclude that the award to Young was not supportable, AID should terminate Young's contract and award the contract to the proper party based upon its review of the evaluation records.

By letters dated April 28 and May 8, 1987, Universal requested clarification and reconsideration, respectively, of the April 20 decision. By letter dated May 15, 1987, AID notified our Office that AID reviewed the evaluation process and confirmed the propriety of its contract award to Young, and that it intended to request that Young proceed with its contract. Finally, by letter dated May 29, 1987, Universal

argued that AID's May 15 letter evidences that AID did not follow the recommendations stated in our April 20 decision, and requests our Office to find that the award decision was unreasonable and inadequately supported.

"RESPONSIVENESS" OF YOUNG'S OFFER

In its initial protest, Universal argued that Young was "nonresponsive" to certain RFP requirements that the booking and chartering functions must be performed in the Washington metropolitan area because Young had filed a protest against the restriction (denied--Daniel F. Young, Inc., B-223905, Nov. 19, 1986, 86-2 C.P.D. ¶ 586) and because Young admitted that it was not authorized to conduct business in Washington, D.C., until after Young's initial proposal was submitted. We denied this aspect of Universal's protest because Young's initial and final proposals indicated Young's intention to comply with the requirement and because AID evaluated Young's proposal to confirm the adequacy of Young's proposed facilities.

In its request for reconsideration, Universal states that it learned for the first time, through our April 20 decision, that the AID "TEC evaluated Young's proposed facilities in Washington and found them to be satisfactory." Universal contends that Young did not have any facilities in the Washington, D.C., area which could have been evaluated and argues that paragraph M.2 of the RFP requires the preaward existence of a Washington, D.C., facility.

Universal's arguments are without merit. Although clause M.2 of the RFP requires that the "booking and chartering functions must be performed in the Washington metropolitan area," the clause does not require the preaward establishment of the facilities. Our prior decision found that the TEC considered (not necessarily visited) the facilities mentioned in Young's proposal, and found them to be acceptable. Contrary to Universal's assertions, site visits were not required to evaluate Young's proposal in this regard. Although Young stated that its Washington facilities existed at the time of the award, the existence of the facilities at that time was not an RFP requirement. Therefore, since Young proposed specific Washington, D.C., facilities, it is legally bound by its offer to perform the booking and chartering functions in the Washington area. Therefore, AID's evaluation in this area was reasonable.

ACTIONS OF THE TECHNICAL EVALUATION COMMITTEE

In our prior decision, we dismissed Universal's protest that AID committed "violations of the evaluation process and AID regulations by having the contract negotiator institute

meetings between offerors and the TEC." Universal's protest contention, raised 5 weeks after the protest was filed, was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986). In this regard, since Universal met with members of the TEC in November 1986, and was aware of the identity of the TEC members by the time Universal filed its protest in December 1986 (because in its protest Universal complained about the composition of the TEC), this protest basis, founded upon the belief of Universal's president that the TEC met with other offerors, could have been raised when Universal first filed its protest. Little Susitna Co., 65 Comp. Gen. 651 (1986), 86-1 C.P.D. ¶ 560. Since the protest was not filed within 10 working days after the protest was known or should have been known, it was dismissed as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986).

In its request for reconsideration, Universal argues that this issue was not untimely filed. Universal states that it was not until February 9, 1987, the date when it filed its comments on the agency report on the original protest, "that responsible Universal officials suspected that similar ex parte discussions were held with other offerors."

We find no merit to Universal's argument that this protest basis was timely filed. Universal's protest against the TEC conducting meetings with other offerors (based on Universal's "suspicion") should have been filed within 10 working days of when Universal realized that it was meeting with TEC members. Universal admittedly knew both the identity of the TEC and that Universal allegedly had improper ex parte communications with the TEC by the December 22 date, when it complained about the TEC's composition. Consequently, Universal's protest of its suspicions that the TEC conducted meetings with other offerors should have been filed no later than 10 days after December 22, 1986. Therefore, this protest basis filed more than 5 weeks after December 22 was untimely.

Universal requests that if we conclude that this aspect of its protest was untimely, we nonetheless consider the merits of this contention under the "significant issue" exception to our timeliness rules. 4 C.F.R. § 21.2(c) (1986). However, since the protest does not raise issues of wide-spread interest to the procurement community which have not previously been decided, it is not significant within the meaning of our regulations and therefore will not be considered. A. C. Clayton & Associates, B-225886, Dec. 19, 1986, 86-2 C.P.D. ¶ 694; Bell Atlanticom Systems, Inc., B-222601.2, June 30, 1986, 86-2 C.P.D. ¶ 19.

MEANINGFUL DISCUSSIONS

In our prior decision, we denied Universal's protest that AID failed to conduct meaningful discussions with it, since the only two areas of its initial proposal that were identified as weaknesses in the technical evaluator's worksheets were discussed with Universal. Universal argues that these discussions were not meaningful because, as our April 20 decision reflects, only two problem areas were pointed out to Universal during negotiations, but, in the final scoring, Universal lost some points under additional evaluation criteria.

Universal's argument is without merit. Although Universal correctly states that it lost some points in the final scoring, this does not indicate that AID failed to conduct meaningful discussions with it. While procuring agencies must notify offerors in the competitive range of the central weaknesses in their proposals, the agencies are under no obligation to discuss every aspect of the proposal that has received less than the maximum possible scores. Comarco, Inc., B-225504, B-225504.2, Mar. 18, 1987, 87-1 C.P.D. ¶ 305; Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 C.P.D. ¶ 380.

The evaluation documents reveal that as a result of discussions Universal improved its average score to nearly a perfect score and that the discussions exposed AID's major concerns with Universal's proposal. Under the circumstances, the fact that Universal did not receive a perfect score does not indicate that discussions were inadequate. Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, supra. Consequently, Universal has not shown that the discussions held with it were inadequate or not meaningful.

RATIONALE FOR AWARD DECISION

We sustained Universal's protest that the evaluation committee failed to adequately support its findings with rationale and that the source selection decision to award to Young was inadequately supported by documentation showing the relative weaknesses and strengths among the proposals as required by FAR, 48 C.F.R. § 15.612(d)(2). Although there was only a one-point average difference between Young's and Universal's proposals, there was inadequate documentation to support the point scores given to the offerors and we could not conclude that the source selection decision, apparently based only upon the point scores, was a reasoned one. See Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 C.P.D. ¶ 253.

Accordingly, we recommended that the source selection official review the evaluation records to determine whether the scores given to the offerors accurately reflected the relative merits of the proposals. We suggested that the source selection official should ascertain why points were deducted from the offerors in certain areas. We concluded that if AID could document its decision to award to Young, it need not terminate Young's contract. However, if AID concluded that the award to Young was not supportable, AID should terminate Young's contract and award the contract to the proper party based on the above recommended review.

In response to our decision, AID advised our Office why points were deducted from Universal. The three technical evaluators, whose point scores were totaled and then averaged for each offeror, provided memoranda to the AID source selection official explaining why points were added or deducted in the various evaluation areas. As a result, the apparent inconsistencies between the point scores and the narratives were explained, indicating that the point scores accurately reflected the evaluation of the proposals.

For example, evaluator "A" states that he deducted points in each of the four general evaluation categories (program management, program support capability, personnel qualifications and offeror's qualifications) because Universal's proposal indicated to him that Universal did "not have the broad base of management, personnel, and business experience" essential to handle shipments for AID's program. Similarly, evaluator "B" explained that he deducted 5 points from Universal's best and final offer under the area of program management since he was concerned about the ability of Universal's overseas agents to timely respond to the government's requirements based on the proposal description of Universal's subcontractor's document distribution system. Finally, evaluator "C" states that the points awarded by him are justified by his remarks on the "strengths and weaknesses" sheets attached to the point scoring sheets. (We note that in our initial review and upon reconsideration we did not find any inconsistencies between evaluator "C's" point scores and his narratives.)

Universal complains that it was not provided with the above mentioned narrative statements of the evaluators and requests that we make these documents available to Universal "in the interest of fairness and proper protest resolution."

To the extent that Universal's complaint relates to AID's duty to furnish documents under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), the contracting agency determined that the documents in question

were not subject to release because they would give one or more parties a competitive advantage or the parties are not authorized by law to receive the documents. In this regard, the contracting agency has the initial responsibility for determining whether documents are subject to release. Triad Research Inc., B-225793, July 6, 1987, 87-2 C.P.D. ¶ _____. To the extent, Universal is requesting information under the Freedom of Information Act, 5 U.S.C. § 552 (1982), the contracting agency has the authority to decide what information the agency must disclose. Id. Nevertheless, AID has submitted a complete report on the reevaluation, including detailed statements by its evaluators. Consistent with our practice, we have reviewed in camera the entire record, not merely those portions that have been provided to Universal, in reaching our decision. S&Q Corp., B-219420, Oct. 28, 1985, 85-2 C.P.D. ¶ 471.

Universal contends that AID "selectively" failed to follow our recommendations by allegedly only reviewing the scores given to Universal rather than reviewing the proposals and scores of all offerors. However, contrary to Universal's allegation that AID only reviewed Universal's proposal and score "in isolation," our examination of AID's implementation of our recommendations indicates that AID reviewed the proposals and scores of both Young and Universal. Moreover, to the extent that Universal is arguing that AID should have reevaluated the proposals and scores of a third or additional parties (which could displace both Young and Universal as the awardee), Universal is not an interested party under our Bid Protest Regulations because Universal lacks a direct economic interest to raise this argument. 4 C.F.R. §§ 21.0(a) and 21.1(a) (1986); Starwin Industries, Inc., B-216380, Dec. 4, 1984, 85-1 C.P.D. ¶ 71.

Universal complains about the way in which AID implemented our recommendations contained in the prior decision. Universal argues that our prior decision recommended that AID only review the existing preaward record to ascertain whether there was a reasonable basis for the award selection. Universal argues that instead AID has improperly "'created,' five months after its award decision a record of this procurement . . . in an attempt to justify its otherwise unsupported award decision." We disagree.

In our April 20 decision, we stated that the source selection official should reconcile the inconsistencies between the point scores and narrative descriptions identified in the decision and ascertain why points were deducted from Universal's score in certain areas. In making this recommendation, we contemplated that proper implementation would involve the review of all relevant evaluation

documentation relied upon for the selection of Young, and discussion with the TEC to the extent necessary to reconcile the inconsistencies outlined above. See T.V. Travel Inc.; World Travel Advisors, Inc., 65 Comp. Gen. 699 (1986), 86-2 C.P.D. ¶ 27, where a similar recommendation was implemented.

AID has implemented our recommendation just as we contemplated it should. Each TEC member explained why points were deducted from Universal's score, or why what appeared to be an inconsistency between a point score and a narrative description was nothing more than the result of a less than fully detailed narrative description. Our review shows that AID has fully resolved what had appeared to be inconsistencies between the point scores and certain narratives. In addition, the TEC has fully explained why points were deducted from Universal's technical score under various criteria. Finally, nothing in the record now supports the allegation that the award to Young was arbitrary, unreasonable, or in violation of procurement laws or regulations.

Since AID's award selection was based upon the TEC's point scores, its conclusion, that the award to Young was proper, is supported by the TEC's justification for the point scores. Consequently, we have no further objection to the award to Young. See T.V. Travel, Inc.; World Travel Advisors, Inc., 65 Comp. Gen. 699, supra.

RECOVERY OF PROPOSAL PREPARATION AND PROTEST FILING COSTS

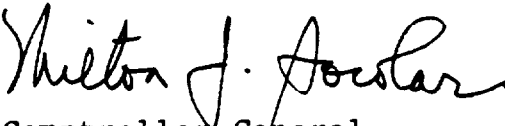
Universal argues that because its initial protest was sustained, in part, our Office should award it both the costs of preparing its proposal and the costs of filing and pursuing its protest, including reasonable attorneys' fees. We disagree.

We will allow a protester to recover its bid preparation costs only where the protester had a substantial chance of receiving the award, but was unreasonably excluded from the procurement, and the remedy recommended is not one delineated in 4 C.F.R. § 21.6(a)(2-5) (1986). See Tel-Med Information Systems, B-225655, June 2, 1987, 87-1 C.P.D. ¶ ____; Edgewater Machine & Fabricators, Inc., 65 Comp. Gen. 488 (1986), 86-1 C.P.D. ¶ 359. Our regulations also only permit recovery of the costs of filing and pursuing a protest in situations where the protester is unreasonably excluded from the procurement. 4 C.F.R. § 21.6(e); Tel-Med Information Systems, B-225655, supra; Edgewater Machine & Fabricators, Inc., 65 Comp. Gen. 488, supra.

We sustained, in part, Universal's initial protest because the source selection decision appeared to be inadequately

supported by documentation as required by FAR, 48 C.F.R. § 15.612(d)(2). However, we now conclude that the source selection decision is adequately documented and that the award to Young was reasonable. Therefore, since Universal was not unreasonably excluded from the procurement, it is not entitled to its costs. Tel-Med Information Systems, B-225655, supra; Edgewater Machine & Fabricators, Inc., 65 Comp. Gen. 488, supra.

The request for reconsideration and claim for costs are denied.

for 
Comptroller General
of the United States