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The Comptroller General
of the United States

Washington, D.C. 20548

Carter

Decision

Matter of: New Mexico State University

File: B-230669.2

Date: June 2, 1988

DIGEST

1. General Accounting Office will not object to the composition and qualifications of an agency's technical evaluation panel absent a showing of possible fraud, bad faith, conflict of interest or actual bias.
2. Protest of evaluation of competitor's proposal is denied where the record shows that it was fair and reasonable and consistent with the solicitation's evaluation criteria. Protester's own reevaluation and rescoring of the proposal, which had been furnished to the firm, does not in itself invalidate the judgment of the contracting agency's evaluation panel.

DECISION

The Regents of New Mexico State University (NMSU) protest the Department of Education's selection, under request for proposals (RFP) No. 88-005, of Appalachia Educational Laboratory, Inc. (AEL), to operate a clearinghouse for educational materials. The Department awarded the contract to AEL on January 28, 1988. We deny the protest.

The Department issued this RFP on August 26, 1987, seeking proposals to operate the 16 educational material clearinghouses which support the Department's Educational Resources Information Center (ERIC). The responsibilities of each clearinghouse are delineated by subject area, such as teacher education, urban education, languages and linguistics, etc. The clearinghouses identify, acquire, review, abstract and index educational documents for entry into the ERIC database, which is made available, by various means, to a variety of users. Each of the clearinghouses also prepares periodic reports, digests, synthesis papers, and other documents covering research and practice within its particular topic area, and provides user products and services, such as database searches and workshops.

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In 1986, prior to initiating this procurement, the Department undertook a study to find ways to improve ERIC. As a result of this effort, known as the ERIC redesign study, the Department directed ERIC to shift its focus from an archival function to encompass broader collection efforts and wider dissemination to serve the needs of a far broader educational community, including policymakers, teachers, parents, school boards and the media. In implementing this directive, the RFP stated the Department's intent to establish a new organization, known as ACCESS ERIC, to oversee and coordinate efforts to accomplish a wider dissemination of ERIC products, and proposed the establishment of more specialized adjunct clearinghouses and "ERIC partners," organizations associated with the clearinghouses on a reciprocal basis. The RFP stressed implementation of the redesign study and sought creative ways for clearinghouse contractors to reach a broader audience.

The RFP's scope of work identified six major tasks to be performed by each clearinghouse, for offerors to address in their proposals:

1. Brief the Project Officer
2. Clearinghouse Management, Planning and Evaluation, including the establishment of a national advisory board to assist in defining document collection and to provide guidance for the overall operation of the clearinghouse. Offerors were to provide the names and curricula vitae of proposed advisory board members, including a plan for rotation and replacement, as required.
3. Build, Maintain and Utilize the ERIC Database, including explicit plans and procedures to keep abreast of the current literature in the area. Offerors also were to describe their procedures for acquiring and disseminating the highest quality and most useful research and practitioner literature in the field, as well as keeping ERIC users aware of important research or publications available elsewhere. Timeline flowcharts for document processing were required.
4. Develop and Maintain Effective Dissemination Procedures, including building a network of ERIC Partners and providing a minimum of two "trends and issues" papers and synthesis papers or monographs annually.
5. Provide User Services, such as database searches.

6. Attend meetings and provide reports and other specified deliverables.

The statement of work also stated that "Originality and creativity in developing and implementing effective products and strategies for dissemination are key requirements. . . ." The clearinghouses were encouraged to develop other substantial products for dissemination, but could not substitute them for the required papers unless a good case was made for the substitution.

Offerors were instructed to divide their proposals into five major areas, which would be evaluated for compliance with the RFP using the following weights: general technical approach -- 15 points; discussion of specific tasks -- 25 points; quality of key personnel -- 15 points; management plan -- 20 points; and capability and commitment of the offeror -- 25 points. Technical factors were more important than cost in the evaluation.

AEL and NMSU were offerors for the ERIC Clearinghouse on Rural Education and Small Schools (CRESS). This clearinghouse is responsible for coverage of the economic, cultural, social and other factors related to educational programs and practices for rural residents, rural and urban American Indians/Alaska natives, Mexican Americans and migrants, and outdoor education. NMSU, the incumbent, has operated CRESS for more than 20 years. AEL is one of nine regional educational laboratories which carry out applied research, development and technical assistance for educators, parents and decisionmakers, with the overall goal of improving schools and classrooms.

These two offerors submitted very different proposals. NMSU, the incumbent, treated each of the CRESS scope areas independently, furnished extensive and detailed discussion of the CRESS information collection and cataloguing process, identified a substantial number and variety of educational organizations nationwide that had agreed to become ERIC partners--selected by NMSU on the basis of existing dissemination capabilities--and proposed the production of pamphlets which might be distributed through its ERIC partners. NMSU also identified the members of its national advisory board, including members expert in education of the minority populations falling within the scope of CRESS.

AEL, on the other hand, proposed a unified concept of CRESS which treated all of the CRESS scope areas under the general concept of rural education, discussed AEL's proposed collection and cataloguing efforts in less specific terms, discussed AEL's internal quality assurance efforts, and proposed to establish a representative national advisory board, including

AEL's expectation of its ability to attract minority membership. AEL's proposal emphasized the reorientation of CRESS to make its materials more useful and available to a wider audience. In lieu of one trends and issues paper, for instance, AEL proposed to develop an ERIC/CRESS Parent Resource Guide to assist rural parents with identification of noncommercial, free or inexpensive materials available primarily from the ERIC database, and the bimonthly development of articles for rural news weeklies, based on the resource guide. AEL also proposed the adaptation of a presentation targeted to journalists to promote the idea of ERIC as a source of background material for news stories.

The final evaluation, presented to the Department's approving official for decision, rated AEL slightly higher technically and slightly lower in cost than NMSU. AEL was considered to be particularly strong in its response to the ERIC redesign goal of expanded outreach and had strong experience in providing information and other services to practitioners in rural settings, especially concerning school improvement. The evaluators, however, questioned AEL's expertise in, and ability to serve, scope areas outside of rural and small schools, especially American Indians, Mexican Americans and migrants, and expressed the view that AEL's lack of experience in ERIC database building may have led AEL to underestimate the effort required. NMSU was found to be especially strong in its grasp of the full scope area and established relationships with hard-to-reach special populations, and in its expertise and experience in ERIC functions. The evaluators considered NMSU's lack of creativity and comprehensiveness in responding to the ERIC redesign to be a drawback, as were NMSU's slightly higher costs. The Department's estimated cost was \$270,000. AEL's final estimated cost was \$269,196; NMSU's final cost estimate was \$289,902. The approving official selected AEL for award of the contract.

The Department notified NMSU on January 28, 1988, of the award of the contract to AEL. On February 5, 1988, NMSU requested information from the Department concerning the selection and award of the contract to AEL. On February 10, NMSU filed a "notice of protest" with the Department, with a copy sent to our Office. This letter stated that it was "official notice" that NMSU intended to file a protest within 10 days of the receipt of the information requested in its letter of February 5, which would comprise the basis of NMSU's protest. NMSU filed its protest with our Office on March 14, alleging that the Department's evaluation and acceptance of AEL's were improper because AEL's proposal was not responsive to the RFP in many respects.

Shortly thereafter, NMSU filed an action in the United States District Court for the District of New Mexico, The Regents of New Mexico State University v. United States Department of Education, et al., Civil Action No. 88-0387 SC, seeking to enjoin the Department's transfer of ERIC/CRESS functions to AEL. On April 21, the court enjoined the Department's transfer of the ERIC/CRESS function to AEL pending our consideration of the protest and submission of our decision to the court.

As a threshold matter, we note that there is some discussion in the record presented to the court suggesting a failure by our Office to notify the Department upon receipt of NMSU's "notice of protest," and challenging the consequent failure of the Department to direct AEL to cease performance under the provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (Supp. III 1985). However, the notice requirement that triggers the stay provision of CICA applies only when our Office has received a protest. 31 U.S.C. § 3553(b)(1). NMSU's notice of intent to protest was not addressed to our Office and, moreover, lacked any statement of legal and factual grounds for protest. See 4 C.F.R. § 21.1(c)(4) (1988). Such a letter does not constitute a protest to our Office under CICA, and we therefore had no reason to notify the Department of its receipt.

NMSU contests the composition of the Department's evaluation panel. In this regard, NMSU contends that the panel was not composed of nationally recognized professionals with expertise in all of the CRESS scope areas. In support of this assertion, NMSU points out that none of the evaluators had expertise in American Indian, Mexican American, migrant or outdoor education. The Department contends that the panel was properly composed of people with diverse expertise in rural education appropriate to the evaluation of CRESS proposals, and asserts that there was no requirement for nationally recognized experts.

We will not consider NMSU's objections to the composition of the evaluation panel. The composition of technical evaluation teams is within the contracting agency's discretion and, as such, does not give rise to review by our Office absent a showing of possible bad faith, fraud, conflict of interest or actual bias on the part of evaluators. ACRAN, Inc., B-225654, May 14, 1987, 87-1 CPD ¶ 509; ALM, Inc., B-225589, et al., May 7, 1987, 87-1 CPD ¶ 486. None of these factors is shown or even alleged here.

NMSU also contends that AEL's proposal contained technical and informational deficiencies which rendered it nonresponsive to the RFP and which should have precluded its acceptance. In

this regard, NMSU argues that AEL's focus on rural education and staffing is so pervasive that it excludes largely urban minority populations, such as Mexican Americans, included within CRESS. In support of this assertion, NMSU points to repeated references to "rural minorities" in AEL's proposal without specific recognition of the urban component of the CRESS minority groups. NMSU also contends that AEL's proposal shows that AEL will use the CRESS clearinghouse to supplement and support AEL's regional laboratory functions, and argues that this violates the RFP's requirement for the impartiality and objectivity of the clearinghouse. Further, NMSU alleges, AEL's proposal fails to provide much of the information required by the RFP, such as the names and resumes of proposed national board members and specific procedures for maintaining the ERIC database and performing other functions, and therefore should have been rejected.

The Department responds by noting that AEL's proposal specifically qualified its use of "rural" with explicit recognition that the term did not totally describe the experience of CRESS minority groups, and that AEL devoted several pages specifically to the problems of these groups. The Department also states that the functions of the clearinghouse and AEL rural education laboratory are complementary, and that although AEL may not have discussed some of the requirements in as great a detail as did NMSU, AEL's more general discussion covered all of the requirements and was sufficient to provide a reasonable basis for the Department's evaluation of AEL's proposal.

This protest has been accompanied by expansive--and voluntary--disclosure of documents by the agency to the protester. NMSU's arguments, summarized above, are premised on its own reading and interpretation of the details of AEL's proposal and best and final offer. Contracting agencies, however, have a considerable range of judgment and discretion in conducting technical evaluations, and it therefore is not our function, or that of the protester, to rescore proposals or to make independent judgments as to the scores that should have been assigned. Tichenor & Eiche, B-228325, Dec. 28, 1987, 87-2 CPD ¶ 631. Consequently, we will not object to a technical evaluation that the record shows was fair and reasonable and consistent with the evaluation criteria. Further, where a protest is founded, in part, on allegations of informational deficiencies, we look first at the extent to which the solicitation called for detailed information. Computer Brokers, B-226103.2, Nov. 30, 1987, 87-2 CPD ¶ 526.

Initially, we think NMSU misreads the level of detail stipulated by the RFP to mean that each requirement had to be addressed independently and in detail, an observation we glean at least partially from NMSU's use of the term "responsiveness" and from NMSU's reliance on the requirement for award to "the responsible source whose bid conforms to the solicitation" contained in 41 U.S.C. § 253b(c) (Supp. III 1985). The term "responsiveness," however, and the cited section, pertain to sealed bid procurements rather than negotiated procurements of the type conducted here. See, e.g., Autoquip Corp., B-226014, May 15, 1987, 87-1 CPD ¶ 520; 41 U.S.C. § 253b(d). Negotiated procurements provide inherent flexibility not possible in a sealed bid procurement.

NMSU objects, for instance, to AEL's failure to address all six CRESS scope areas in detail and, impliedly, independently of each other. AEL, as we noted above, elected to treat CRESS under the unified theme of "rural education," rather than treat each scope area independently. AEL's approach was neither prohibited nor required; it was, however, permissible, as was NMSU's independent treatment of requirements.

With regard to the question of AEL's failure to provide the names and resumes of its national advisory board members, the RFP required that an offeror present plans for the establishment and utilization of the board, and "provide the names, addresses and qualifications of proposed advisory board members" and include a plan for their rotation and replacement. (Emphasis in original.) AEL provided the names and a synopsis of the qualifications of the members it proposed and identified organizations from which AEL would seek added representation. In our view, the RFP did not require resumes, and the information which AEL provided satisfied the requirement for the identification of advisory board members. Also, although AEL failed to include a specific plan for the replacement or rotation of national advisory board members, the procedures that AEL employed to obtain representation from various organizations were readily discernable and could serve just as well to obtain replacement members, when required. AEL's failure to point this out was a minor discrepancy, at worst.

We also find no merit in NMSU's contention that AEL's proposal excluded the CRESS urban minorities. As the Department noted, AEL's proposal qualified its use of the term "rural" in this connection and devoted several pages to the problems of these groups.

On the other hand, there do appear to have been omissions from AEL's proposal that may have been overlooked or ignored in the Department's evaluation. AEL for instance, omitted any

discussion of external peer review for publications, as NMSU alleges.

On balance, however, we are persuaded that the strengths and weaknesses stated in the final evaluation summary, discussed above, are sufficiently broad to encompass these omissions as well as NMSU's principal allegations--a purported lack of support for CRESS minority groups and the ERIC database in AEL's proposal. These concerns and strengths were placed before the deciding official without recommendation for either vendor. This official was confronted by the choice between AEL, with a creative and aggressive dissemination program designed to reach rural parents and practitioners directly, but with weaknesses in its ability to support the ERIC database and to serve CRESS minorities, and NMSU, with strengths in its ability to maintain the ERIC database and to serve the CRESS minority community, but with a considerably more limited and conservative dissemination program. Given the emphasis in the ERIC redesign and in this procurement on dissemination activities, we cannot say that the deciding official's selection of AEL was unreasonable.

The protest is denied.

Ronald Berger
fn James F. Hinchman
General Counsel