



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Transportation Research Corporation

File: B-231914

Date: September 27, 1988

DIGEST

1. Third lowest offeror, which protests the evaluation of its and the awardee's proposals, is an interested party under GAO Bid Protest Regulations since it may be in line for award if the protest concerning the evaluation of its own proposal is sustained.
2. The determination of the merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness or that the agency violated procurement statutes or regulations.
3. Where the RFP does not indicate in relative terms the importance of cost and technical factors, it must be presumed that each will be considered approximately equal in weight.
4. Where selection official reasonably regards technical proposals as essentially equal, cost or price may become the determinative selection factor.
5. The General Accounting Office does not review an agency's affirmative determination of responsibility absent a showing of possible agency fraud or bad faith or misapplication of definitive responsibility criteria.

DECISION

Transportation Research Corporation (TRC) protests the award of a contract to Center for Applied Research (CAR), under request for proposals (RFP) No. DTFH61-88-R-00048, issued by the Federal Highway Administration (FHWA). TRC contends that FHWA improperly evaluated CAR's proposal, and that the technical superiority of TRC's proposal outweighs CAR's lower cost, so that the award to CAR was unreasonable and inconsistent with the selection criteria listed in the RFP.

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

The RFP sought proposals on a cost-plus-fixed-fee basis for a study entitled "Ramp Signing for Trucks." The objectives of the study are to: (1) develop procedures to identify interchange ramps with geometric characteristics which can cause trucks to overturn; (2) develop active and passive traffic control systems to warn truck drivers of such ramps; and (3) determine the best locations for use of the traffic control systems developed.

The RFP described three technical evaluation factors in descending order of importance: offeror's available resources to complete the contract requirements satisfactorily and on schedule; offeror's demonstration of technical competence and understanding as reflected in the proposed approach to accomplish the contract requirements; and offeror's responses to the technical requirements of the RFP as reflected in the proposal. The RFP provided that in addition to these criteria, relative cost would be considered in the award decision.

Five of the six proposals received in response to the RFP were found technically acceptable and included in the competitive range. The difference in the technical scores, from highest to lowest, was 8 points, with 100 points being the maximum obtainable score. Following discussions and evaluation of best and final offers, the contracting officer determined that because of the relatively minor difference in point scores among the offerors, cost should be the determinative factor, and awarded a contract to CAR, the lowest cost offeror. TRC was the third lowest cost offeror.

As a preliminary matter, FHWA argues that TRC is not an interested party to protest the award because the firm would not be in line for award even if its protest is upheld. In this regard, the agency points out that another offeror proposed lower total costs than TRC and would be next in line for award.

Under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), a party must be "interested" in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of the party's status in relation to the procurement. Automated Services, Inc., B-221906, May 19, 1986, 86-1 CPD ¶ 470.

Here, TRC's protest challenges the FHWA's determination that proposals in the competitive range were technically equivalent. If TRC's protest were sustained, it is possible that TRC would be in line for award if the proposals were reevaluated. Under the circumstances, TRC has the requisite direct interest to maintain this protest. See National Capitol Medical Foundation, Inc., B-215303.5, June 4, 1985, 85-1 CPD ¶ 637.

TRC contends that, contrary to FHWA's position that all proposals were close in their technical approach, there are vast differences between the CAR and TRC proposals. According to TRC, CAR's approach did not address the following excerpt from the RFP's Scope of Work:

"The research is concerned with identifying and effectively treating interchange ramps that are prone to cause a vehicle with a high center of gravity (trucks, tankers, recreational vehicles, etc.) to lose control and overturn. Treatment of these ramps would allow drivers to recognize approaching horizontal and/or vertical geometric changes in sufficient time to take preventive measures.

The treatments shall be in the form of a passive signing system and an active vehicle actuated system. The treatments shall be applicable to only those vehicles with high center of gravity and shall be clear enough not to cause a significant reduction in passenger car speeds."

Specifically, TRC alleges that CAR's proposal did not meet RFP requirements to test active vehicle-actuated signs and consider high center of gravity vehicles, and that CAR's proposed data collection equipment cannot meet RFP requirements.

Determining the technical acceptability of a proposal is within the discretion of the contracting agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation. Thus, it is our position not to question an agency's technical evaluation where the protester has not demonstrated that it was clearly unreasonable. Merely disagreeing with the evaluation does not establish that it was clearly unreasonable. See Arlington Public Schools, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16. We find FHWA's judgment here to be reasonable.

CAR did not take exception to the RFP requirement to test active vehicle-actuated signs. An active sign, as opposed

to a passive sign which displays the same message at all times, attracts drivers attention by some kind of movement (e.g., flashing lights). It is continuously active regardless of traffic conditions. An active traffic actuated system, however, is a sign which becomes active in response to approaching traffic (e.g., when certain vehicles such as trucks are approaching). CAR proposed a laboratory study to examine regular drivers' and truckers' responses to actuated systems to determine if a wheelbase monitoring loop system would help to warn approaching truckers and if it would reduce undesirable responses from drivers. Assuming that the actuated system using wheelbase monitoring loops is effective in the laboratory study, the CAR approach would also evaluate such a system in a field test. Though TRC argues that evaluation of a vehicle-actuated system should not be limited to a laboratory setting, CAR does not so limit testing, but will field test the system after successful laboratory testing. Therefore, we do not find it unreasonable for FHWA to find CAR's approach technically acceptable.

TRC also argues that CAR's proposal is not responsive to the RFP's requirement that signs be applicable to only those vehicles with a high center of gravity and be clear enough not to cause a significant reduction in passenger car speeds. TRC believes that because different truck types exhibit different rollover threshold speeds, it is necessary to determine sign responses of specific vehicle types, and notes that the CAR field observation procedure does not distinguish between truck types. TRC argues that the data collection equipment proposed by CAR is not capable of providing vehicle-specific speed records, but relies on grouped speed data, and therefore does not meet RFP requirements for assessing the speed-reducing capability of the sign. TRC states that it addressed the truck rollover hazard in its proposal by application of the best available technology, a computer simulation model which determines truck rollover speed and can be applied to virtually any ramp curvature condition. With this model, TRC proposes to compare actual truck speeds at test sites to rollover speeds generated by the model, to ensure a proper determination of rollover-accident potential.

The record shows that while FHWA considered TRC's approach acceptable, it did not consider it the only acceptable approach. FHWA considered rollover speed information supplementary, since the study was not being done to determine rollover speeds and/or conditions but to identify existing ramps with rollover characteristics and to develop signs that will warn truck drivers of such ramps. FHWA notes, for example, that the use of accident histories is an

appropriate approach to the RFP's requirement to "develop procedures to identify interchange ramps with geometric characteristics which can cause trucks to overturn." Thus, the procedure to be developed can be based on other parameters as well as on a specific measure such as speed.

CAR's analysis will assess the speed reducing capabilities of signs using speed profiles generated from grouped vehicle data. The analysis will examine specified groups of vehicles characterized by vehicle speed, vehicle type and headway, thereby allowing specific hazard-prone groups of vehicles to be identified and the effects of the signs to be evaluated. Thus, according to the FHWA, it is not essential that vehicle-specific data be used to assess the speed reducing capabilities of signs. We cannot say that the FHWA's evaluation is unreasonable, particularly since the RFP lists no specific requirements for data collection equipment.

In its comments on the agency report, TRC also alleges that the principal investigator proposed by CAR does not meet the RFP's professional discipline requirements. However, the individual to whom TRC refers, though listed as a co-principal investigator in CAR's initial proposal, is not the principal investigator listed in CAR's best and final offer.

TRC next alleges that FHWA gave more weight to cost than to technical considerations, and thus misapplied the evaluation criteria set forth in the RFP. We have previously held that where, as here, an RFP indicates that cost will be considered, without explicitly indicating the relative weight to be given to cost versus technical factors, it must be presumed that cost and technical considerations will be considered approximately equal in weight. Morris Guralnick Associates, Inc., B-218353, July 15, 1985, 85-2 CPD ¶ 50. Within this general guideline, we have recognized that in a negotiated procurement, selection 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 trade offs may be made and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. We have upheld awards to lower-priced, lower-scored offerors where, in the agency's considered judgment, the significance of the

technical difference was not such as to warrant the higher price in light of the acceptable level of technical competence available at a lower cost. Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71.

Here, the contracting officer determined that all offerors would be able to perform acceptably, and the record indicates that the agency never viewed TRC's slightly higher point score as evidencing actual technical superiority over the awardee. CAR's cost was approximately 12 percent lower than the next low offeror's cost, and was approximately 15 percent lower than TRC's cost. In these circumstances, since the record shows that the offerors were found essentially technically equal, we find no reason to question the agency's determination to make award on the basis of cost. Where selection officials reasonably regard technical proposals as being essentially equal, cost may become the determinative factor in making an award, even where the RFP evaluation scheme assigns cost less importance than technical factors. PRC Kentron, B-225677, Apr. 14, 1987, 87-1 CPD ¶ 405. Here, where cost and technical considerations must be considered approximately equal in the selection process, clearly lower cost could properly be the deciding factor between proposals considered to be essentially technically equal.

In comments on the agency's report, TRC also challenges FHWA's determination that CAR is a responsible contractor, alleging that FHWA has a prejudiced view of CAR's technical capability, as evidenced by FHWA's defense of CAR's methodological procedure which TRC believes is a departure from good research practice, and thus is unable to make a proper determination of responsibility.

Our Office does not review an affirmative responsibility determination absent a showing of possible fraud or bad faith, or misapplication of definitive responsibility criteria. 4 C.F.R. 21.3(f)(5). Contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be virtually irrefutable proof that the agency has a malicious and specific intent to harm the protester. Hugo's Cleaning Service, Inc., B-228396.4, July 27, 1988, 88-2 CPD ¶ 89. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition. Micronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185. TRC's allegation is simply based on a disagreement with FHWA's methodological analysis; there is no indication in the record of any malicious and specific intent on FHWA's part to harm the protester.

Finally, TRC has requested that it be reimbursed the costs of preparing its proposal and its protest costs. However, since we find the protest without merit, we deny the claim for costs. Actus Corp./Michael O. Hubbard and L.S.C. Associates, B-225455, Feb. 24, 1987, 87-1 CPD ¶ 209.

The protest is denied in part and dismissed in part.


James V. Hinchman
General Counsel