

Cunningham



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Environmental Health Research & Testing, Inc.

**File:** B-237208

**Date:** February 9, 1990

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Dennis J. Riley, Esq., Spriggs & Hollingsworth, for the protester.  
 Patricia H. Wittie, Esq., Kirkpatrick & Lockhart, for ROW Sciences, Inc., an interested party.  
 David J. O'Connor, Environmental Protection Agency, for the agency.  
 James M. Cunningham, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Award to offeror having higher-cost, technically excellent proposal under request for proposals which gave greater weight to technical merit compared with cost advantage is justified where contracting agency reasonably determined that acceptance of proposal was worth the higher cost involved.
2. It was not unreasonable for the contracting agency to consider personnel experience in evaluating proposals under "experience of the offeror" evaluation standard since: (1) the standard did not contain a statement limiting evaluation to institutional (offeror) experience; (2) the evaluation standard contained two substandards which could arguably be fulfilled by individual employees; and (3) only one aspect of one key employee was to be elsewhere evaluated under the request for proposals.
3. Since proposed Project Manager director of successful offeror provided unequivocal offer to be employed by successful offeror at a stated hourly labor hour cost figure, contracting agency properly evaluated proposed individual as being committed to offeror.
4. Request for proposals clause which required proposed Project Manager for contract to have performed relevant projects "in the past year, on a full-time basis" reasonably conveyed contracting agency's intent that Project Manager has worked on a full-time basis on relevant projects for at

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least part of the year, but clause did not reasonably require full-time work for the entire year as protester argues.

5. Allegation that contracting agency improperly disclosed names of incumbent contractor's personnel to competitor for recruitment purpose is denied where it is speculative, at best. Contracting agency denies disclosing incumbent's staff names; moreover, there are many ways for contracting companies to identify individuals for recruitment purposes.

6. Failure of contracting agency to give written, pre-award notice of award is not significant where agency did give oral, pre-award notice of award.

7. Successful offeror's difficulties in staffing contract after award relate to contract administration and are not for consideration under Bid Protest Regulations, 4 C.F.R. Part 21 (1989). See 4 C.F.R. § 21.3(m)(1).

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## DECISION

Environmental Health Research and Testing, Inc. (ERT), protests an award to ROW Sciences, Inc. (ROW) for "on site research animal [about 7,000 rodents] colony support" at the Health Effects Research Laboratory (HERL), of the U.S. Environmental Protection Agency, Cincinnati, Ohio.<sup>1/</sup> The request for proposals (RFP) work statement provided that the successful contractor was to procure animals and supplies, and to provide animal husbandry for laboratory animal species, including disease control, and quality assurance/quality control. The RFP was for a base period of 1-year with two, 1-year options of additional services possible.

The RFP's technical evaluation criteria (which were said to be more important than cost) were "understanding the project requirements," (worth a maximum of 150 evaluation points), experience and expertise of the offeror (250 points), experience and expertise of the proposed project manager (150 points), quality assurance program plan (50 points), and management approach (400 points).

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<sup>1/</sup> The award of this contract is also being protested by another offeror, Pathology Associates, Inc. (PAI). PAI's protest will be considered in a separate decision of our Office.

The proposals received by the closing date of July 10, 1989, were reviewed by a technical evaluation panel. As a result of the initial technical evaluation, EPA determined that ROW, ERT, and PAI had submitted proposals in the competitive range for the award but that the fourth proposal should be excluded from the competitive range. As among the three competitive range proposals, EPA's evaluators scored ROW's proposal to be about 17 percent higher in technical merit than ERT's technical proposal. For example, EPA judged ROW's proposal to be "superior" in "understanding the project" and in "management approach," and "impressive" in the area of "experience and expertise."

EPA conducted negotiations with the three offerors within the competitive range as to both technical and cost matters on September 13, 1989, and these three offerors then submitted best and final offers (BAFOs) by September 15, 1989, which were reviewed by EPA's technical evaluation panel. The panel determined that ROW had "clearly submitted the best proposal from the standpoint of technical criteria." Every area in ROW's proposal was considered by EPA's evaluation panel to be "technically excellent" compared with ERT's technical proposal which was not considered excellent but rather "more than adequate" and "capable of meeting the minimum requirements of the RFP."

As to cost considerations, EPA determined that ROW and ERT were "competitive from a dollar standpoint." Further, EPA determined that, although ROW's proposed cost-plus-fixed-fee was about 27 percent higher than that proposed by ERT, ROW's financial proposal was "realistic and reasonable" and worth the higher costs and fee associated with its acceptance. Thereafter, EPA awarded a contract to ROW on September 30, 1989.

ERT essentially argues that: (1) as the incumbent contractor for the services, it had more required experience than ROW; (2) ROW never intended to use the Project Manager who was finally confirmed in ROW's best and final proposal; and (3) given (1) and (2) above, and ERT's lower proposed cost and fee, ERT should have been awarded the contract.

In reviewing protests of allegedly improper proposal evaluations, our Office will not substitute its judgment for that of the contracting agency's evaluators, who have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations. Norfolk Ship Sys., Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309.

Furthermore, in a negotiated procurement, there is no requirement that award be made on the basis of lowest cost. Agency 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 tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. The judgment of the contracting agency concerning the significance of the difference in the technical merit of offers is accorded great weight. Asset Inc., B-207045, Feb. 14, 1983, 83-1 CPD ¶ 150. We have consistently upheld awards to offerors with higher technical scores and higher costs so long as the result is consistent with the evaluation criteria and the contracting agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Battelle Memorial Institute, B-218538, June 26, 1985, 85-1 CPD ¶ 726.

#### Offeror Experience

The record of EPA's proposal evaluation under this evaluation standard shows that EPA found: (1) ROW "had performed many similar animal colony management tasks" at another federal facility; (2) ROW's staff all had a "high level of experience" and the staff's skills tended to complement each other; and (3) ROW had a very clear understanding of all government regulations involved. Ultimately, however, ROW did not receive an evaluation score higher than ERT's in this area because ROW, unlike ERT, had not "managed a contract having requirements similar to the requirements involved in the subject RFP."

As to ERT, EPA found that, although ERT, as the incumbent, had direct experience in performing the required services, some other ERT-listed contracts contained technical tasks that "bore no resemblance to the required services." Further, ERT's proposal referred to "most of the pertinent government regulations [although a] few of the original laws were not listed."

ERT contests EPA's assignment of identical proposal scores to it and ROW in the offeror experience area mainly on the grounds that: (1) as the incumbent for these services it was allegedly entitled to a score higher than ROW's; (2) EPA improperly evaluated two of its listed contracts; and (3) EPA improperly used ROW's individual employee experience as a substitute for ROW institutional experience.

Based on our review of the record of EPA's evaluation of the offeror experience, we conclude that EPA's judgment was reasonable. Merely because ERT was the incumbent for these services does not mean that EPA was precluded from exercising its discretion in determining how favorable a score that prior service should be given. Moreover, it is well-established that an offeror's mere disagreement with an agency's evaluation of its proposal does not render that evaluation unreasonable. Lembke Constr. Co., Inc., B-228139, Nov. 23, 1987, 87-2 CPD ¶ 507. In our view, ERT has merely disagreed with EPA's scoring of the experience stemming from ERT's prior contract without showing that the scoring is unreasonable.

Similarly, we conclude that ERT's objection to EPA's evaluation of two of its listed contracts--identified by ERT as its "Tampa and Micronuclei" contracts--evidence mere disagreement with EPA's conclusion that these two contracts did not constitute "research animal colony management."

ERT also contests the procedure under which EPA assigned scores under the offeror experience criterion of the RFP. EPA was of the opinion that it was entitled to evaluate not only each offeror's "institutional experience" but also the experience of the key staff of that offeror in determining scores under this evaluation standard. Given this view, EPA insists that ROW's "institutional experience may not have been as great as other offeror's [but] the combined experience of ROW and its proposed staff was impressive."

In reply, ERT cites Washington State Commission for Vocational Education--Reconsideration, 64 Comp. Gen. 681 (1985), 85-2 CPD ¶ 59, for the proposition that evaluators should not consider a key employee's experience in evaluating institutional experience where that employee's individual experience was to be evaluated elsewhere in the RFP under another evaluation standard. However, EPA argues that the evaluation standard in this RFP permits consideration of personnel experience.

In the cited case the "institutional experience" standard included "past experience of the organization," and "availability of facilities and instructional material resources appropriate to the project." Therefore, two of the areas in the "institutional experience" evaluation standard could not even arguably be fulfilled by individual employee's skills and experience. Further, in the cited case, "staff competencies and experiences" was to be separately evaluated.

By contrast, the "offeror experience" standard in this RFP contained only two substandards: (a) "Performance of Projects involving research animal colony management . . ."; and (b) "Demonstrated indepth knowledge and understanding of all animal welfare regulations . . ." Both of these substandards arguably could be fulfilled by individual employees. Moreover, only the Project Director's "experience and expertise . . . in managing an animal research program" was to be separately evaluated under the subject RFP's evaluation standards, and there was no separate evaluation standard for "staff competencies and experience." Further, we have also held that where the "experience of organization" evaluation standard did not contain a statement limiting evaluation to offeror experience, it was reasonable to consider personnel experience. Energy & Research Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258. Consequently, EPA, which did not exclude consideration of personnel qualifications in the offeror experience standard, could properly consider personnel qualifications under this standard.

#### Project Manager Evaluation

Under this evaluation standard, ROW's BAFO proposed that Mr. John Bowers would be its Project Manager. Based on the qualifications of Mr. Bowers, EPA raised ROW score in the Project Manager evaluation standard one numerical rank. After the contract was awarded, Mr. Bowers ultimately declined ROW's "otherwise acceptable offer because of other commitments," according to EPA, which, during the pendency of this protest, contacted Mr. Bowers by telephone about his dealings with ROW. Thereafter, ROW hired Mr. Edwin Sands to be Project Manager.

ERT essentially argues that ROW never intended to employ Mr. Bowers but only used that individual and his resume to improperly obtain a higher evaluation score than the score ROW would otherwise have obtained. EPA states that Mr. Bowers signed a July 5, 1989, letter (included in ROW's initial proposal), addressed to ROW's president, in which Mr. Bowers stated that he "indicate[d] [his] desire to be employed by ROW if ROW [were to be] the successful offeror on the [subject RFP] . . . at [a specified hourly rate]." When EPA's representative asked Mr. Bowers about the July 5 letter, Mr. Bowers "indicated that he had signed the letter and was sorry if it had misled or confused anyone." The EPA representative states that Mr. Bowers further confirmed that ROW had contacted him immediately after the award and had flown him to Cincinnati. During those discussions Mr. Bowers ultimately decided not to accept the position. Given Mr. Bowers' replies to EPA, EPA concludes that these

facts do not support ERT's allegation that ROW never intended to employ Mr. Bowers.

ERT also reports that it contacted Mr. Bowers by phone on December 6, 1989. Mr. Bowers told ERT that he admitted signing the July 5, 1989, "letter committing [him] to work for ROW if ROW won the contract." Mr. Bowers also stated that the letter "quoted a meaningless hourly [labor] rate" and that he ultimately "declined ROW's offer [after award of the contract], citing other arrangements."

We do not understand Mr. Bowers alleged statement that the stated hourly labor cost figure was "meaningless" since the figure was specific and directly linked both to ROW and the stipulated project. Nevertheless, the July 5, 1989, letter of Mr. Bowers was an unequivocal offer to be employed by ROW for the contract in question.

Given the unequivocal nature of Mr. Bowers's July 5 offer, we agree with EPA's conclusion that the facts do not support ERT's allegation. Therefore, it was proper for EPA to evaluate Mr. Bowers's experience and qualifications as he was properly viewed as being committed to ROW upon any award.

Next, ERT alleges that Mr. Bowers did not meet the RFP Provision (H.16), which required that the Project Manager perform "projects involving laboratory science animal science in the past year, on a full-time basis," since Mr. Bowers had not been employed on a full-time basis for the entire year prior to EPA's proposal evaluation. EPA states that what it wanted by this provision was to "assure itself that any Project Manager would have had recent experience" on a full-time basis for at least part of the prior year and that EPA did not mean to require full-time work for the entire prior year.

We agree with EPA's position that the above clause H16 reasonably expressed EPA's intent for this provision and also that Mr. Bowers's resume showed that he complied with the reasonable meaning of this provision.

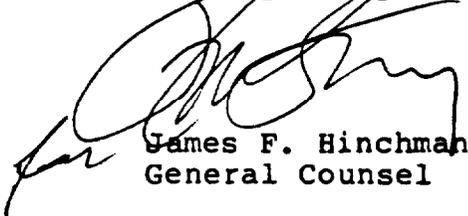
#### Other Grounds of Protest

ERT alleges that: (1) EPA must have improperly disclosed ERT's employees' names under its prior contract with EPA so as to assist ROW's recruitment efforts for the present contract; (2) EPA allegedly failed to give written pre-award notice of the ROW award; and (3) ROW had great difficulties staffing the contract after the award, thereby showing it should not have been awarded the contract.

As to: (1), we agree with EPA, which denies that it disclosed the names, that this allegation is speculative at best since there are many ways for competing companies to identify individuals working for an incumbent contractor for recruitment purposes; (2) we agree with EPA's position that, since it gave oral, pre-award notice of the ROW award to ERT, EPA's failure to give pre-award, written notice of that award is not significant; and (3) these difficulties, which were ultimately overcome, in any event, according to EPA, have to do with EPA's administration of the contract and are not cognizable under our Bid Protest Regulations (4 C.F.R. Part 21 (1989)). See 4 C.F.R. § 21.3(m)(1) (1989).

Finally, given EPA's ranking of these proposals and based on its analysis of their relative merits and proposed costs, we have no basis to question the award to ROW at a higher proposed cost and fixed fee.

We deny the protest.



James F. Hinchman  
General Counsel