



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Labat-Anderson Incorporated

File: B-246071; B-246071.2

Date: February 18, 1992

David T. Ralston, Esq., Leonard, Ralston, Stanton & Danks, for the protester.
Robert A. Mangrum, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Chemonics International, an interested party.
Robert Sonenthal, Esq., Agency for International Development, for the agency.
Susan K. McAuliffe, Esq., Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against award of contract is sustained where proposals were not evaluated on the basis of the weighted evaluation factors contained in the solicitation.
2. Where agency, after receipt of initial offers, determines that an alternate approach not contemplated under the solicitation is acceptable and where agency states that alternate approach represents a "significant improvement" to the solicitation, and resulted in a more favorable evaluation of the awardee's proposal, the agency is required to either amend the solicitation or engage in appropriate discussions with the offerors to allow all competitive range firms an opportunity to compete on a common basis.

DECISION

Labat-Anderson Incorporated protests the award of a contract to Chemonics International under request for proposals (RFP) No. 91-003, issued by the Agency for International Development (AID) for technical assistance services.

Labat-Anderson contends that the agency's evaluation of its proposal was unreasonable and inconsistent with the RFP's evaluation scheme, the agency failed to conduct meaningful discussions with the protester or to provide an opportunity for the protester to revise its proposal after conducting discussions with the firm, the agency failed to formally amend the RFP to reflect its actual requirements, and the agency improperly conducted negotiations after best and final offer (BAFO) negotiations with only one offeror, allowing that offeror to submit a revised BAFO.

We sustain the protest.

The RFP, issued on May 14, 1991, by the AID Mission in Mbabane, Swaziland, contemplated the award of a cost-plus-fixed-fee contract for technical assistance services to establish and manage the Black Integrated Commercial Support Network (BICSN) program in South Africa. The RFP explained that the purpose of the BICSN project, a component of AID's Black Private Enterprise Development Project, was "to increase the rate of economic empowerment of disadvantaged South Africans by developing and nurturing promising enterprises within the black business community." The RFP stated that "BICSN is aimed at promoting greater entry of black firms into the mainstream, formal economy."

The BICSN project consists of three main components: (1) promotion/public education (to expand "black enterprises' access to commercial and industrial markets through subcontracting, franchising and other business linkage mechanisms"); (2) the Technical Assistance Fund (TAF) (providing general management and entrepreneurial training, preliminary assistance, and more intensive ("selective") assistance to those enterprises showing the greatest potential for future self-sustained growth); and (3) the Black Equity Capital Fund (BECF) (designed to attract private capital for investing in black-owned enterprises in South Africa).

The RFP set forth the following technical evaluation factors and subfactors for award: (1) institutional experience (15 points)--including small business development experience, developing world experience, and venture capital experience; (2) technical approach (30 points)--including monitoring/evaluation strategy, design/approach to TAF, design/approach to education/promotion, and design/approach to BECF; (3) contract personnel (50 points)--including field staff, and home office staff; and (4) quality of proposal (5 points). Regarding personnel, the RFP provided that:

"Contractor personnel will develop and manage the market promotion, training, technical assistance, equity fund, and other aspects of the project with a staff of six professionals (two U.S. and four South African)."

The RFP also provided that the "project will support two full-time local hire support personnel" and recognized that a "support staff of two is very small for a project activity the size of BICSN." In this regard, offerors were instructed that:

"To keep the staff lean while also providing the quality of support required, both support

positions should be staffed by experienced, highly competent persons working at senior support levels in South Africa."

The RFP also informed offerors that oral interviews were contemplated.

Cost was not assigned a numerical weight for evaluation purposes, but offerors were informed that cost proposals would be reviewed for reasonableness. The RFP provided that after the agency's technical evaluation committee (TEC) concluded its evaluation of technical proposals, the results of that evaluation would be forwarded to the contracting officer for concurrence and that the contracting officer "shall use this evaluation, together with his evaluation of the cost proposals, to determine a ranking of offers." The contracting officer "shall then negotiate with one or more firms or organizations to establish which offer is the most reasonable to the Government, and award that offeror the [c]ontract."

Six proposals were received by the July 5 closing date, two of which (Labat-Anderson's and Chemonics's) were included in the competitive range. Chemonics's initial proposal, at \$11,795,409, received a technical score of 86; Labat-Anderson's initial proposal, at \$9,081,578, received a technical score of 77. On August 16, the agency issued written discussion questions to both offerors and informed each offeror that its response

"to these questions and clarifications should be in the form of a best and final offer to be submitted . . . [by August 30]. . . . Further, the technical [BAFO] will consist of the above submittal plus an oral interview to be held during the week [of September 2 through 6 in South Africa]."

Each offeror was asked to have present at its oral interview, at a minimum, its "nominees for the Chief of Party [project manager], Black Equity Capital Fund Manager, and Technical Assistance [Specialist]." No agenda was provided for the oral interviews--the protester was told there was none when it inquired--and no information was provided in the BAFO request regarding the relative weights to be assigned the written and oral portions of the BAFOs in the evaluation of proposals.

Both offerors submitted timely written BAFOs. Labat-Anderson's representatives gave their oral presentation to the TEC on September 3 and 4; Chemonics's representatives gave their oral presentation to the TEC on September 5 and 6. The first day of each offeror's oral presentation involved a presentation by the offeror's

corporate representatives. On the second day, the offerors and their team members were asked to explain their proposed first 6-month implementation schedules; each offeror's proposed individual team members then were interviewed by the TEC.

The agency explains that the TEC's review of BAFOs was based on the following technical evaluation factors for award: technical approach (based on the written BAFO--worth 20 points), personnel (now worth 60 points), and oral presentation (worth 20 points). The agency further explains that although this BAFO evaluation scheme represents a departure from the evaluation factors stated in the RFP, the evaluators chose not to evaluate the BAFOs for institutional experience and quality of proposal (two of the original four RFP evaluation criteria) because Labat-Anderson's and Chemonics's proposals were considered to be nearly equal under these two criteria after the TEC's review of initial proposals. Instead, the TEC

"decided to create separate categories for, on the one hand, 'technical approach' as presented in the written submissions and, on the other hand, 'technical approach' as articulated by the members of the project team in the oral presentation."

The agency states that the "TEC considered this distinction to be of paramount importance, and worth making formally in the evaluation."

Based upon its technical review of the BAFOs including the oral presentations, the TEC determined that "only one offeror, Chemonics, demonstrated an unequivocal capability to implement the proposed project effectively." The TEC stated that although the protester submitted a "strong original proposal," the TEC's review of the BAFO (including the oral presentation/interviews and written proposal) submitted by

"Labat-Anderson--particularly the interview and discussion sessions--raised serious questions regarding their understanding of the overall project concept and their ability to field a cohesive implementation team."

Specifically, the TEC found that at the oral presentation and interviews "the individual Labat-Anderson team members displayed a lack of consensus and at times even confusion regarding BICSN's primary purpose." The TEC found that "the firm's disappointing performance during the oral presentations and interviews was a surprise" and believed that the "poor quality" of Labat-Anderson's oral presentation resulted from an apparent lack of dialogue between the

protester's South African candidates and its American team members prior to the oral presentation. The TEC also found that the protester's written BAFO had not alleviated the TEC's initial concerns regarding Labat-Anderson's proposed strategy for allocating TAF assistance among potential recipients. The TEC rated the protester's technical proposal, after the conclusion of the oral portion of the BAFOs, as "marginal." Labat-Anderson received a final total score of 62 under the three technical evaluation criteria used by the TEC in the evaluation of BAFOs; Chemonics's final technical score was 88.

Although there is no contemporaneous source selection document, the contracting officer, in a statement prepared after the filing of the protest, states he adopted the TEC's technical findings regarding the offerors' proposals and determined that the technical superiority of Chemonics's proposal outweighed the cost difference between the proposals (Labat-Anderson's BAFO was approximately \$1,900,000 lower than Chemonics's). AID awarded a contract to the firm on September 26 for \$10,183,060, incorporating several post-BAFO proposal modifications submitted by Chemonics's (including an increase in the number of proposed support staff), some of which were solicited by letter of September 11 by AID.

A debriefing initially was held with the protester by telephone and was later confirmed in writing on October 3. Labat-Anderson filed its protest with our Office on October 4 challenging the evaluation of proposals and the award to Chemonics. Labat-Anderson filed a new protest on December 5, based upon information contained in the agency's report in response to the initial protest, contending that the agency improperly conducted post-BAFO negotiations with only one offeror, Chemonics, and allowed the awardee to submit a revised BAFO. The agency has suspended performance of Chemonics's contract pending the outcome of the protest.

Labat-Anderson initially contends that the agency improperly evaluated proposals since AID failed to evaluate the proposals solely on the factors specified in the solicitation and the weights assigned to those factors. Specifically, Labat-Anderson protests the weight assigned to the oral presentations/interviews in the agency's evaluation of proposals for award since the RFP did not inform offerors of the importance of this evaluation factor. The protester essentially contends that it presented its corporate representatives at the oral presentation to familiarize the TEC with Labat-Anderson and to respond to discussion questions answered in its written BAFO, and that its proposed team members were to confirm their qualifications which were stated in the firm's written proposal. The protester asserts that several of its team members are not yet under

contract with Labat-Anderson (and, in fact, some of these individuals are also proposed by other offerors), and thus the protester should not have had to present a coordinated team at its oral presentation (and risk disclosure of proprietary information to competitors), especially since the RFP allowed for team building during the initial stages of the contract.

The agency admits that in evaluating BAFOs the TEC disregarded two RFP evaluation factors (institutional experience and quality of proposal), used a factor (oral presentation) not in the RFP as a weighted evaluation factor, and redistributed the originally available 100 technical points among the remaining three factors. Under the RFP's stated evaluation scheme, technical approach was worth 30 points; the BAFO evaluation scheme assigned 40 points to technical approach (as stated above, the agency explains that the evaluation of the offerors' written BAFOs for technical approach was worth 20 points and the evaluation of the oral presentations for technical approach was worth 20 points). AID contends that although the offerors were not advised of the relative importance of their oral presentations in the overall technical evaluation of proposals, the offerors were given adequate notice that the oral presentations would be considered in the evaluation of proposals since the agency's BAFO requests stated that the BAFOs would consist of the written submissions and the oral presentations.

The agency's primary argument in support of the TEC's evaluation of proposals and its award to Chemonics's is that Labat-Anderson was not prejudiced by the TEC's failure to evaluate the BAFOs solely on the factors originally provided in the RFP. AID suggests that since Labat-Anderson's technical BAFO score was 26 points lower than Chemonics's, even if the 20 points assigned to oral presentation are eliminated and the original evaluation scheme is followed (adopting the offerors' original scores for institutional experience and quality of proposal), the difference between Chemonics's and Labat-Anderson's technical scores would be reduced from 26 points to 21.2 points.

The Competition in Contracting Act of 1984, as implemented by the Federal Acquisition Regulation (FAR), requires that solicitations include a statement of evaluation factors (including price) and their relative importance and further requires that agencies evaluate proposals solely on those factors. 41 U.S.C. §§ 253a(b)(1)(A), 253b(a) (1988); FAR §§ 15.605(e), 15.608(a) (FAC 90-7); St. Mary's Hosp. and Medical Center of San Francisco, California, 70 Comp. Gen. 578 (1991), 91-1 CPD ¶ 597. We think the agency in evaluating BAFOs deviated from the evaluation scheme (the evaluation factors and relative weights) contained in the

RFP and failed to advise offerors of the revised evaluation scheme. We find that Labat-Anderson was prejudiced by this improper action.

The record shows that the protester's oral presentation clearly resulted in a material reduction in its technical score due to a perceived lack of understanding or consensus among its team members.¹ The record shows, however, that Labat-Anderson's approach to its oral presentation was influenced by the agency's clear failure to provide any guidance to the offerors about the expected content or importance of the oral presentations. The agency's BAFO request notices provided no information to the offerors regarding the expected content of the oral presentations or the weight to be assigned to them in the evaluation of BAFOs. The protester had inquired about the agency's agenda for the oral presentation/interviews and was told there was no agenda. The agency admits that the changed evaluation scheme (*i.e.*, to include the oral presentation factor as a separate test of the offeror's technical approach) was of "paramount importance" to the TEC's evaluation, yet the agency did not notify the offerors of this material change to the evaluation scheme and did not revise the evaluation criteria through a solicitation amendment as it should have. FAR § 15.606. Since the agency provided no information as to what was expected from the offerors at the oral presentations, and gave no notice of the weight to be afforded presentation during BAFO evaluations, we think it was improper to downgrade Labat-Anderson's proposal without affording it a reasonable opportunity to propose on the basis of the agency's revised evaluation method. See St. Mary's Hosp. and Medical Center of San Francisco, California, supra.

Where an agency clearly has violated procurement requirements, the reasonable possibility of prejudice is a sufficient basis for sustaining the protest. McKesson Corp.; Harris Wholesale Co.--Recon., B-243018.2 *et al.*, Aug. 20, 1991, 91-2 CPD ¶ 170; Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Here, the agency

¹This occurred despite the fact that the TEC found that Labat-Anderson's original written proposal presented an "outstanding monitoring/evaluation strategy" and that the protester's TAF approach was "well-structured and thoughtfully presented." The TEC specifically recognized the strength of Labat-Anderson's proposal because it received a high score despite the TEC's reservations concerning two key personnel. At least two evaluators noted that the protester's initial proposal showed a good understanding of the intent and objectives of the project.

states that elimination of the oral presentation as a separately weighted evaluation factor does not affect Labat-Anderson's relative standing. The record shows that the TEC's view of the protester's oral presentation influenced not only the 20 percent of the technical evaluation attributed to the presentation, but the evaluation of the protester's personnel and technical approach in the written BAFO submission, which were not evaluated independently of the oral presentation. For example, the protester's BAFO was downgraded under the personnel factor, and the TEC's BAFO evaluation results show that the perceived lack of project understanding among the protester's team members resulted from the oral presentations not the firm's written BAFO. Also, an alternate individual proposed by Labat-Anderson in its written BAFO was not evaluated by the agency, even though AID directed the protester during discussions to propose an alternate, because that individual was not presented at the oral interviews. Since it is clear that the oral presentations had an effect on the evaluation of personnel and the written BAFO's technical approach, we cannot agree with AID that the elimination of the 20-point oral presentation factor establishes that the oral presentation did not affect the outcome of the evaluation.

It is also unknown as to how the protester's BAFO would have been evaluated under the two RFP factors (institutional experience and quality of proposal) that were not considered by the TEC. Although the two offerors were ranked substantially equal in these two areas after initial proposals, neither offeror received the maximum points available and it is possible that an improvement in Labat-Anderson's BAFO in those areas (for which it was not evaluated) could have resulted in a higher overall evaluation score. Most important, since the agency conducted a technical/cost tradeoff after BAFOs, even a slight change in technical scores of the two proposals could have had an effect on the outcome of the agency's final evaluation for award. Since the protester was prejudiced by the agency's failure to evaluate BAFOs in accordance with the RFP's stated evaluation factors and their stated relative weights, the award was improper. St. Mary's Hosp. and Medical Center of San Francisco, California, supra.

Labat-Anderson next contends that the agency improperly failed to formally amend the solicitation to reflect a change of requirements.² Specifically, the protester

²The protester also contends that the agency changed the "focus" of the procurement when it questioned Labat-Anderson's proposed approach "to assist a select group of black entrepreneurs to penetrate the formal sector

contends that the agency improperly permitted Chemonics to propose an additional (i.e., seventh) professional staff member (resulting in an approximate \$400,000 increase in cost) when the RFP stated that the staff will consist of six professionals and elsewhere notified offerors of the agency's interest in keeping the staff "lean."

Labat-Anderson contends that the agency's acceptance of Chemonics's alternate approach represents a change in the agency's requirements, especially since the TEC concluded, after reviewing Chemonics's proposal, that the additional position "represents a significant improvement to the design information contained in the RFP." The agency states that no formal amendment to the RFP was required because the number of personnel stated in the RFP was not a maximum and because any amendment to the RFP to incorporate Chemonics's proposed approach would constitute technical leveling or technical transfusion.

Here, as previously stated, the RFP specifically provided that this requirement will be performed with "a staff of six professionals (two U.S. and four South African)." The RFP further provided that the project would support two full-time local hire support personnel and, in the interest of keeping the staff "lean," both support positions should be staffed by experienced and highly competent individuals. We believe that a reasonable interpretation of the RFP is that offerors had to propose a method of meeting the RFP requirements with six professionals and two support staff, especially since the RFP recognized that the limited staff may be small for a project of this magnitude. The record shows that the TEC's acceptance of Chemonics's proposal of the additional professional position was based upon the TEC's determination that the proposed addition was a significant improvement to the solicitation which resulted in a more favorable rating of Chemonics's technical proposal. Moreover, the record shows that not only did Chemonics propose an additional professional staff member, but that the agency also accepted Chemonics's offer of additional support personnel prior to award.

Where an agency, after the receipt of offers, determines that an alternate approach not contemplated by the RFP is as acceptable as or more desirable than the approach called for

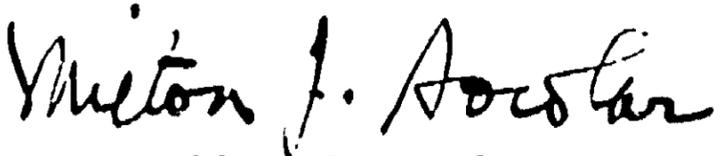
economy." Based upon the RFP's statement of the purpose of the BICSN project (to promote "greater entry of black firms into the mainstream, formal economy") and the RFP's requirement for targeting and selecting appropriate recipients of available assistance, we cannot find, and the protester does not show, that the agency's statement referring to a "select group" changes the focus of the project from that stated in the RFP.

under the RFP, the agency must either amend the RFP or engage in appropriate discussions with the offerors in order to allow all competitive range firms an opportunity to compete on a common basis. Rix Indus., Inc., B-241498, Feb. 13, 1991, 91-1 CPD ¶ 165. Here, we do not find that such action on the part of the agency would constitute either technical leveling or technical transfusion within the meaning of the FAR, as AID contends, if the agency, at a minimum, informs the offerors that additional staffing may be required and proposed, especially where the agency does not need to provide information to the firm regarding the particular nature of the alternate approach (e.g., the agency need not provide a specific description of duties proposed by the other offeror). See id. Since Labat-Anderson's proposal was criticized for generating too much information for its proposed staff which reflected the number permitted by the RFP, we think the agency's acceptance of staffing above the number of personnel stated in the RFP, without advising Labat-Anderson of this change of requirements, shows the reasonable possibility of prejudice to Labat-Anderson based on the agency's improper action. See Logitek, Inc.--Recon., supra.

In fashioning a remedy, our Office considers the particular circumstances surrounding the procurement at issue. Here, the evaluation was not based solely on the weighted evaluation factors stated in the RFP and there is a question as to whether the RFP adequately reflected the agency's actual requirements. It is unclear how the outcome of the competition would have been affected had offerors been able to prepare their proposals in response to a solicitation which contained a statement of the actual evaluation factors, the relative importance of those factors, and the agency's actual staffing requirements. Consequently, we recommend that the agency amend the solicitation to provide these two offerors with a statement of the evaluation factors and their relative importance. We also recommend that the RFP be amended to at least notify offerors that additional staff may be permitted and that the numbers stated in the RFP do not represent the maximum number of personnel that may be proposed. Another round of BAFOs should be requested from these offerors. If Labat-Anderson is then the successful offeror, AID should terminate Chemonics's current contract and award the contract to the protester, if otherwise appropriate. We also find that Labat-Anderson is entitled to the costs of pursuing its protest, including attorneys' fees.

4 C.F.R. § 21.6(d)(1); St. Mary's Hosp. and Medical Center of San Francisco, California, supra.

The protest is sustained.³

for 
Comptroller General
of the United States

³Since we are sustaining Labat-Anderson's protest on other grounds, we need not review the protester's remaining protest contentions which are necessarily rendered academic. We note, however, that the record shows that both offerors were not treated equally with respect to the technical evaluations. Specifically, for certain professional positions Chemonics proposed both a primary and alternate candidate and the TEC selected the candidate it thought was best qualified. On the other hand, when Labat-Anderson proposed an alternate in its written BAFO, the TEC felt it could only accept the candidate used in the oral presentations.