



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rodriguez & Associates

File: B-245882.2

Date: February 21, 1992

Benito O. Rodriguez for the protester.
Robert L. Jones, Esq., Department of Energy, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Agency reasonably rejected as unacceptable a proposal for accounting services for a governmental public utility agency, where the proposal did not evidence public utility or governmental experience on the part of the firm or its key personnel, and the solicitation evaluation criteria clearly stated that such experience would be particularly considered.

DECISION

Rodriguez & Associates protests the evaluation of its proposal under request for proposals (RFP) No. DE-RP79-91BP15895, for financial analysis and accounting support services for the Department of Energy (DOE), Bonneville Power Administration, Portland, Oregon.

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

The RFP, issued on April 2, 1991, contemplates award of a time-and-materials contract for a 1-year base period and four option periods. The RFP requires various financial analysis and accounting support services for Bonneville's Accounting and Financial Systems Division in Portland, Oregon. Eight firms submitted proposals in response to the solicitation. Bonneville eliminated three proposals, including that of the protester, as technically unacceptable and determined to award the contract to Price Waterhouse as the top-rated offeror.

Rodriguez contends that Bonneville improperly evaluated its proposal as technically unacceptable. Rodriguez argues that its proposal deserved greater credit for its related experience, even though the proposal did not reflect any direct governmental or electric utility experience. According to the protester, Bonneville penalized its proposal by carrying

over the requirement for governmental and electric utility experience to two technical factors that did not specify such experience. Rodriguez also alleges bias in the evaluation in favor of the national accounting firms competing for the contract and against small minority businesses such as itself. Finally, the solicitation contains a binding arbitration clause that the protester contends is improper.

The evaluation of proposals and the resulting determination as to whether an offeror is within the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for selecting the best methods of accommodating them. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223; Rainbow Tech., Inc., B-232589.2, Jan. 24, 1989, 89-1 CPD ¶ 66. In reviewing an agency's evaluation, we will not reevaluate the technical proposals, but will instead examine the agency's evaluation to ensure that it was reasonable and consistent with the RFP criteria. Id.

Here, the RFP provides for a consideration of price and technical factors for award evaluation purposes. The price score, calculated exclusive of options, is worth 30 points. The technical score is a composite of the scores of the following factors:

- "A. Experience of the firm, with particular consideration of: (30 points)
1. Experience in Governmental and electric utility accounting
 2. Knowledge of financial analysis and review in relation to Governmental and electric utility practices in the following areas and as described in the Statement of Work
 - a. Financial Services--Commercial payments, payroll, travel, and collections
 - b. Electric Utility Accounting--GAAP [Generally Accepted Accounting Principles] methods, internal controls, and systems integrity and efficiencies
 - c. Decision Support--Cash forecasting, revenue analysis, rate analysis, investment analysis, debt analysis, alternative financing mechanisms, and contract analysis
 - d. Financial Reporting--Fiscal reports, management reports, ratio analysis, and sales analysis and reports.

B. Personnel Qualifications (25 points)

Work experience, education, and training that show demonstrable qualifications by key personnel in

the ability to carry out tasks as described in the Statement of Work.

C. Management Planning (15 points)

1. Plan to assure timely, economical, and quality products
2. Plan to respond to changing work load requirements, including quantity and variety
3. Plan to ensure that projects will be staffed at the right skill level for the work requested under a Task Order."

The protester and the awardee received the following scores as to each factor:

<u>Evaluation Factor</u>	<u>Rodriguez</u>	<u>Price Waterhouse</u>
Experience	6.36	26.34
Personnel	7.45	22.25
Management Planning	1.84	12.7
Price	26.44	23.05
Total	42.09	84.34

Rodriguez's proposal ranked fifth among the eight proposals submitted and did not, in the agency's view, rise to the level of technical acceptability. Price Waterhouse received both the highest technical score and the highest total score, although it was not the low priced offeror. Upon determining that Price Waterhouse's prices were fair and reasonable, Bonneville determined to make award without discussions to Price Waterhouse, as authorized by the RFP.

Rodriguez argues that the agency improperly evaluated the firm's experience (Factor A) because it considered governmental and electric utility experience to the virtual exclusion of any related experience. The first subfactor of the experience factor only references governmental and electric utility experience. Likewise, the other subfactor requires offerors to demonstrate their expertise in four financial analysis areas "in relation to Governmental and electric utility practices." Although we think that the experience technical factor does not necessarily restrict Bonneville to reviewing only governmental and electrical utility experience, it places an obvious stress upon such experience by requiring "particular consideration" of such experience.

While Rodriguez earned little credit for its experience, the protester admits, and the record confirms, that it has no experience in electrical utility accounting. Although the protester earned some credit for its governmental experience, this experience was not extensive. Rodriguez's proposal reveals only one federal government client, a current contract with the Small Business Administration for management consulting services, and four past contracts with

Utah state agencies or colleges. Given the RFP's strong emphasis on governmental and electrical utility experience, we think that Bonneville could properly accord Rodriguez's proposal little credit under the experience factor and that this lack of experience could be reasonably translated to an overall unacceptable rating. See Smith Bright Assocs., B-240317, Nov. 9, 1990, 90-2 CPD ¶ 382.

The protester argues that the agency penalized its proposal by adding an unannounced governmental and electric utility component to the remaining technical factors, personnel qualifications and management planning. Where, as here, a solicitation lists general experience as an evaluation criteria, an agency may, in appropriate circumstances, consider the experience as it reasonably relates to other specific evaluation factors without further announcement in the solicitation. See Sabreliner Corp., B-242023; B-242023.2, Mar. 25, 1991, 91-1 CPD ¶ 326; Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517. Here, Bonneville reasonably downgraded Rodriguez's proposal in the other two technical areas owing to Rodriguez's relative lack of public utility and governmental experience.

For example, the personnel qualifications technical factor states that key personnel must possess the work experience, education, and training to perform tasks as described by the RFP's statement of work. The statement of work provides that contract personnel must be knowledgeable of applicable Bonneville and commercial work practices, as well as Bonneville and federal rules and regulations, and must perform work in accordance with these standards. It follows that key contractor personnel must possess experience in governmental and electric utility accounting.

The management planning technical factor makes a similar demand that "projects . . . be staffed at the right skill level for the work requested under a Task Order." Since the RFP calls for many services that are either specific to Bonneville as a government agency (e.g., budgetary compliance reviews with respect to applicable federal regulations) or to Bonneville as a governmental electric utility (e.g., financial analysis of Bonneville customers), it follows that the management planning factor seeks staff with an adequate background in governmental and electric utility accounting.

Accordingly, we believe that Bonneville properly accorded Rodriguez's proposal only some credit for personnel qualifications, given that its key personnel had no electric utility experience and limited federal government experience. Likewise, with regard to management planning, the agency reasonably downgraded Rodriguez's proposal because of its perceived inattention to acquiring staff with electric utility experience.

The protester also claims that Bonneville improperly lowered its management planning score because it lacked a local office in Portland, Oregon, and its proposal did not indicate a willingness to open one. Since the RFP clearly requires the contractor to provide financial analysis and accounting support services for Bonneville's Accounting and Financial Systems Division in Portland, the fact that Rodriguez's proposal identifies only a Utah office and is silent as to the availability or prospect of Portland office space provides a reasonable basis for deeming its proposal unable to assure "timely, economical, and quality products."

Rodriguez's protest also indicates an expectation of an evaluation preference owing to its status as a small minority business. This solicitation, issued on an unrestricted basis, contains no evaluation preference for small or minority owned businesses. In the absence of such a provision, Rodriguez's proposal was not entitled to greater weight as a result of its minority ownership or small business status. See Cherokee Elecs. Corp., B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467. To the extent that the protester alleges that the agency's evaluation of its proposal was discriminatory, Rodriguez has not produced, nor can we find, any evidence to support this contention; we will not attribute bias in the evaluation of proposals on the basis of inference or supposition. Smith Bright Assocs., supra.

Based upon our review of Rodriguez's proposal and the agency's technical evaluation, we find that Bonneville reasonably concluded that the protester did not have the required experience and available personnel to perform the contract work. Accordingly, we find reasonable Bonneville's rejection of Rodriguez's proposal as technically unacceptable. Since Rodriguez's proposal was unacceptable, the fact that award was made at a higher price than offered by Rodriguez provides no basis to object to the award. See TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37.

Rodriguez also protests the inclusion of a binding arbitration provision in the solicitation that requires protesters to submit protests to binding arbitration before filing in another forum. The protest of this provision, raised after the rejection of Rodriguez's proposal, is untimely under our Bid Protest Regulations, since the meaning and import of this provision were apparent from the face of the solicitation. 4 C.F.R. § 21.2(a)(1) (1991). During the course of the protest, the agency abandoned its efforts to proceed with arbitration under the clause in this case, thereafter arguing that the issue became moot. While we are not considering the issue here, we question the

legality and propriety of the binding arbitration clause in a separate letter to the Secretary of Energy.

The protest is denied in part and dismissed in part.


for James F. Winchman
General Counsel



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel
B-245882.2

February 21, 1992

The Honorable James D. Watkins
The Secretary of Energy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today dismissing in part and denying in part the protest of Rodriguez & Associates of a contract award by the Bonneville Power Administration. The contract was awarded to Price Waterhouse under request for proposals No. DE-RP79-91BP15895, for financial analysis and accounting support services. We dismissed as untimely that portion of Rodriguez's protest concerning the legality of a binding arbitration clause included in the solicitation.

The clause is inconsistent with the provisions of the Competition in Contracting Act of 1984 (CICA). CICA statutorily established the General Accounting Office bid protest procedures, 31 U.S.C. §§ 3551-3556 (1988), as well as a parallel bid protest forum for automated data processing acquisitions in the General Services Administration Board of Contract Appeals (GSBCA), 40 U.S.C. § 759(f) (1988). The Bonneville arbitration clause by its terms eliminates the possibility of a GAO or GSBCA protest, since protesters must file for binding arbitration prior to pursuing applicable administrative remedies and must agree that the arbitrator's ruling will be binding on other forums. We are aware of no authority in the statutes governing the activities of the Department of Energy or the Bonneville Power Administration pursuant to which Bonneville may deprive vendors seeking to sell goods and services to the federal government of the rights and remedies established by CICA.

While Bonneville has not argued that it generally has authority to deprive bidders and offerors of their rights to pursue statutory bid protest remedies, the agency contends that it is empowered to institute binding arbitration as an alternative proceeding. Government officials have no authority to submit controversies involving the United States to binding arbitration, absent specific statutory authority. 32 Comp. Gen. 333 (1953); 8 Comp. Gen. 96 (1928); 7 Comp. Gen. 541 (1928); B-151071, Mar. 24, 1976; see also 33 Op. Atty. Gen. 160 (1922) and 4B Off. Legal Counsel 709 (1980) (Justice Department opinions that the government may not agree to binding arbitration, since a federal official may not delegate to a private party

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decisionmaking authority that has been vested in him or her by Congress); Brannen v. United States, 20 Ct. Cl. 219, 224 (1885); United States v. Ames, 24 Fed. Cas. 784, 789 (C.C.D. Mass. 1845).

We do not find that the Bonneville Project Act of 1937, 16 U.S.C. § 832a(f) (1988), confers specific statutory authority to submit bid protests to binding arbitration, as contended by Bonneville. Bonneville's authority under the Act to enter into "final settlement" of contract claims is in the nature of a general grant of authority, rather than a specific congressional authorization to submit claims to binding arbitration.

Bonneville suggests a basis for its use of binding arbitration may be in the Administrative Dispute Resolution Act, 5 U.S.C. § 582(a) (Supp. II 1990), which allows agencies to use dispute resolution proceedings, such as arbitration, "for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such a proceeding." We disagree. Although this provision does authorize agencies to employ arbitration for dispute resolution, the parties must agree to arbitrate the particular dispute. The Act provides that "[a]n agency may not require any person to consent to arbitration as a condition of entering a contract or obtaining a benefit." 5 U.S.C. § 585(a)(3).

Thus, we question the legality and propriety of Bonneville's binding arbitration provision. We bring this matter to your attention so that the agency can take such action as it finds appropriate.

Sincerely yours,


James F. Hinchman
General Counsel