



Comptroller General
of the United States
Washington, D.C. 20548

3291810

Decision

Matter of: Colonial Storage Company; Paxton Van Lines, Inc.
File: B-253501.5; B-253501.6; B-253501.7
Date: October 19, 1993

Michael R. Charness, Esq., and Alice M. Crook, Esq., Howrey & Simon, for Colonial Storage Co., and William B. Barton, Jr. Esq., and William Thomas Welch, Esq., Barton, Mountain & Tolle, for Paxton Van Lines, Inc., the protesters. Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter, for District Moving & Storage, Inc., Guardian Storage, Inc., Quality Transport Services, Inc., and Interstate Van Lines, Inc., interested parties. Dennis J. Gallagher, Esq., Department of State, for the agency. Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office (GAO) will not admit an interested party's counsel to a GAO protective order where the counsel represented the interested party at a pre-solicitation conference and participated in price discussions between the interested party and the agency in the course of the protested procurement.
2. Under a solicitation contemplating multiple awards of moving and storage service contracts which includes a contract clause limiting the percentage of the total agency business that can be given to any single company but does not prohibit affiliated companies from submitting separate offers, the agency may make awards to affiliated companies if such awards do not either prejudice the government or give the affiliated companies an unfair competitive advantage.
3. The General Accounting Office has no basis to object to an agency's acceptance under a household goods movement services contract of a joint venture awardee's proffered Interstate Commerce Commission (ICC) operating authority of one of the joint venture partner's ICC license, in the

absence of any authority that prohibits a joint venture from using such authority to perform the contract.

4. Where a solicitation could reasonably be interpreted as contemplating separate awards for two types of services and this interpretation is confirmed by the agency's written response to a question that was distributed to the offerors, the agency is required to evaluate proposals with the view of making separate awards in accordance with the solicitation's evaluation scheme; protest of the agency's failure to make separate awards is sustained where the protester, which relied upon the agency's advice, was prejudiced by the fact that a combined award was made.

5. Agency departed from the evaluation scheme announced in the solicitation for moving and storage services where the agency only made awards to the lowest-priced offerors without conducting a reasonable technical evaluation consistent with the announced evaluation criteria or making a cost/technical tradeoff.

DECISION

Colonial Storage Company and Paxton Van Lines, Inc. protest the awards under request for proposals (RFP) No. 0000-225073 issued by the Department of State for moving and storage services in the Washington, D.C., Metropolitan area. The protesters argue, among other things, that a number of the awardees are not eligible for award, and that State's evaluation of proposals and the resulting awards were not in accordance with the evaluation scheme stated in the RFP.

We sustain Paxton's protests in part and deny them in part. We deny Colonial's protests.

BACKGROUND

State issued the RFP on July 22, 1992. The RFP contemplated multiple awards of fixed-price, indefinite quantity contracts for inbound and export moving and storage services for 1 year with two 1-year options. The services include both unaccompanied air baggage (UAB) and household effects (HHE) services.

The RFP stated that contracts would be awarded to the responsible offerors whose offers were determined "the most advantageous to the [g]overnment, price and other factors considered." The RFP stated that technical merit was more important than price, but as price or technical merit of proposals became more equal, technical merit or price,

respectively, could become the determining factor for award. The RFP stated:

"The [c]ontracting [c]fficer shall determine what trade-off between technical merit and price promises the greatest value to the [g]overnment, price and other factors considered."

The RFP stated that proposals which satisfactorily meet all of the requirements in the Statement of Work (SOW) would be "further evaluated for their ability to meet [the] subjective technical factors," and listed 7 technical factors and 17 corresponding subfactors in descending order of importance, by factor and subfactor, as follows:

FACTOR 1. Past Experience/Referenced/Performance

- A. Corporate Experience
- B. Corporate References
- C. Corporate Performance (Key Personnel)
- D. Corporate Performance (Proposed Staff)

FACTOR 2. Management Control System

- A. Contingency Plans
- B. Monitoring Operations
- C. Quality Control

FACTOR 3. Methodology for Supplying Required Services

- A. Approach to Providing Services

FACTOR 4. Contract Implementation

- A. Initial Start up

FACTOR 5. Contract Administration

FACTOR 6. Facilities

- A. Weights and Scale
- B. Warehouse Ownership
- C. Construction of Facilities
- D. Motor Equipment
- E. Security System
- F. Fire Detection

FACTOR 7. Technical Excellence

- A. Completion of Packing Services for Surface and Air Shipments
- B. Locator System.

The RFP stated that "[t]echnical scoring will be based upon an offeror's ability to meet the standards of the subjective technical factors." The RFP listed 39 standards relating to the technical factors and subfactors and provided for adjectival ratings of (1) exceptional, (2) acceptable, (3) marginal, and (4) unacceptable. Since the same technical proposals and criteria were applicable to export services as well as inbound UAB and inbound HHE services, an offeror's technical rating was the same for each service under the rating plan used.

Section H.17 of the RFP is the contract provision that governs which contractors will receive the most orders. This section provides that while each contractor will receive a minimum order, the low-priced contractor for export services or inbound UAB or inbound HHE services will receive the most orders for those services, based on stated formulas, followed by the next low-priced contractor, and so on.¹ A certain percentage of orders are also set aside for

¹For example, under the most important subfactor, "corporate experience," the RFP included the following standard:

"Extent to which the [c]ontractor is able to demonstrate that past experience meets or exceeds the experience required for provisioning of qualified personnel in a seasonally influenced environment."

For the quality control subfactor, the following standards are stated:

- "1. Degree of detail in [c]ontractor's procedures for assuring quality control [QC].
- "2. Degree to which [c]ontractor's [QC] procedures incorporate proven techniques.
- "3. Extent to which offeror has established procedures to cover situations when [QC] is not met."

²For example, for export services, section H.17 provides that the low-priced contractor is supposed to receive 25 percent of the export traffic with the other contractors receiving lesser percentages (i.e., 20 percent, 15 percent, etc.) in order of price. Similarly, for the inbound UAB and inbound HHE services, the low-priced contractor for each service is supposed to receive 45 percent of the services, followed by the second lowest-priced contractor with 20 percent and the third lowest-priced contractor with 15 percent.

the contractors who perform quality service as defined in this section. This section also provides that "no contractor will receive more than 30 [percent] of the total projected annual export volume."

Sixteen offerors submitted proposals by the October 7, 1992, due date. All 16 offerors submitted proposals for export services and 13 of the offerors, including Paxton but not Colonial, submitted proposals for inbound services. State's technical evaluation panel (TEP) evaluated the proposals and rated the proposals of Paxton and one other offeror as "exceptional"; eleven proposals as "acceptable"; and three proposals as "marginal."

The TEP conducted discussions with all offerors. During discussions, State presented to each offeror a list of "low objective" prices for each contract line item number (CLIN).³

State requested offerors to submit best and final offers (BAFO) by April 20, 1993. All 16 offerors submitted BAFOs. The TEP evaluated these revised offers and conducted a number of visits to offeror facilities. By consensus of the TEP, the rating of Paxton was downgraded from "exceptional" to "acceptable," although no written explanation was made for this change. The rating of Interstate Van Lines, Inc. (which ultimately received one of the awards) was upgraded from "acceptable" to "exceptional" based on a site visit. The rating of the other offeror with the initial "exceptional" rating remained the same, while the ratings of all of the "marginal" offers, including that of Kloke Transfer Company (which is proposed to receive an award), were upgraded to "acceptable."

³State also prepared a list of "high objective" prices to represent the highest price that State expected to pay for a service, but only advised offerors that such a list existed. The actual data which State used to compute the individual low and high objective prices varied between low and high objectives and CLINs. The methodologies with which State calculated any given objective price "depended on the market place," and the range of methodologies included, but was not limited to, the average of the lowest sales prices offered to other customers, the average of the lowest offered prices for this RFP, and the lowest offered price.

In documenting the source selection, State prepared two lists, one for export services and one for inbound services, on which it ranked the offerors in order of BAFO prices beginning with the lowest. The export service list was:

<u>OFFEROR</u>	<u>PRICE</u>
Interstate	\$ 9,115,604
District Moving and Storage, Inc.	10,352,569
Guardian Storage, Inc.	10,447,994
Quality Transport Services, Inc.	10,628,896
Kloke	11,256,065
WIT Associates	12,683,063
Victory Van Corporation	13,156,981
Paxton	13,507,719
Offeror A	13,996,269
Offeror B	14,256,546
Offeror C	14,845,687
Colonial	17,224,235
Offeror D	17,858,016
Offeror E	19,540,911 ⁴
Offeror F	20,002,316
Offeror G	20,957,454

State proposed to make award to the seven lowest-priced export service offerors.

The inbound service list was:⁵

<u>OFFEROR</u>	<u>PRICE</u>
Quality	\$ 3,391,654
Guardian Storage	4,011,165
WIT	4,160,591
District	4,202,591
Offeror B	4,631,526
Offeror A	5,097,074
Offeror C	5,515,919
Offeror D	5,657,800
Kloke	6,086,876
Offeror E	6,452,237
Offeror G	6,564,958
Paxton	6,850,845
Offeror F	11,880,940

⁴Offeror E is the other offeror with an "exceptional" rating.

⁵State did not differentiate between inbound UAB services and inbound HHE services in making this list.

State proposed to make award to the three lowest-priced inbound service offerors.

Prior to making awards, State questioned whether District, Guardian Storage and Quality, which are affiliated through common ownership, had colluded on the pricing of their proposals. State requested its legal counsel to investigate what action could and should be taken. There was also some question whether award should be made to Kloke because the TEP had rated that offeror's proposal as "marginal." In this regard, while the Source Selection Authority (SSA) found that Kloke should be rated "acceptable" and the TEP upgraded Kloke's rating to "acceptable," stating that "all questions [were] addressed during negotiations," there was no further written explanation made regarding this change.

The prior contracts for these services were set to expire on April 30. In order to avoid an interruption of services, State awarded contracts on April 30 to Interstate for export services only, and to WIT for both export and inbound services. State delayed awarding other contracts until the issues concerning the potential awardees were resolved.

On May 10, after consulting with the Antitrust Division of the Department of Justice, State's legal counsel advised the SSA that there was insufficient reason to investigate District, Guardian Storage and Quality for possible price collusion, and that State could proceed with awards to those firms. On May 12, State awarded contracts for export services to District, and for both export and inbound services to Guardian Storage and Quality.

On May 19, Colonial protested the awards to our Office; Paxton protested the following day. State withheld award of the contracts not yet awarded to Kloke⁶ or Victory, pending resolution of the protests. State was not required to withhold performance on the Interstate and WIT awards, and did not do so, since the protests of these awards were filed more than 10 calendar days after the awards. 4 C.F.R. § 21.4(b) (1993). State has authorized performance under the District, Guardian Storage and Quality contracts, making a determination that urgent and compelling circumstances did not permit the agency to suspend performance while awaiting our decision. 4 C.F.R. § 21.4(b)(2).

⁶The SSA had provided reasons why she considered Kloke's proposal to be "acceptable." State now proposes to make award to that firm.

ADMISSION TO PROTECTIVE ORDER

During the course of this protest, we denied the application of Alan F. Wohlstetter, Esq., an attorney who represents District, Guardian Storage, Quality and Interstate in these protests, for admission to a protective order issued by our Office on May 24. Our Office issues protective orders, pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(d)(1), limiting the release of documents that are privileged or the release of which would result in a competitive advantage--such as offerors' proposals and agency evaluation documentation--to counsel for the protester and interested parties who have been admitted to the protective order.

In determining whether counsel may be permitted access to information covered by a protective order, we look to whether the attorney is involved in competitive decisionmaking for the client--i.e., whether the attorney's activities, associations, and relationship with the client involve advice and participation in any of the client's decisions (such as pricing, product design, etc.) made in light of similar or corresponding information about a competitor. Allied-Signal Aerospace Co., B-250822; B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201; see U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Where an attorney is involved in competitive decisionmaking, there is an unacceptable risk of inadvertent disclosure of the protected material. Id. An attorney can be involved in the competitive decisionmaking of a company by working with marketing, technical or contracting personnel on procurements, even if the attorney is not a competitive decisionmaker. Dataproducts New England, Inc.; Allied Signal, Inc.; and ITT Corp., B-245149.3 et al., Feb. 26, 1992, 92-1 CPD ¶ 231; TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160.

Here, evidence in the record establishes that Mr. Wohlstetter was involved in the competitive decisionmaking of District with respect to this procurement. He attended a pre-solicitation conference for District and questioned agency officials about the proposed solicitation provisions concerning source selection and distribution of work among awardees. He participated in an April 2, 1993, discussion session between representatives of District and the agency addressing District's pricing structure and the reasonableness of the agency's price expectations.

In June, after the protests were filed and the protective order was issued, Mr. Wohlstetter submitted a notice of appearance and an application for admission to the protective order with an associated affidavit, stating that he was not involved in competitive decisionmaking for

his clients. We were informed of his participation in the pre-solicitation conference and the April 2 discussions by the agency and the protesters after we received Mr. Wohlstetter's application. Mr. Wohlstetter explains that he did not consider his participation as involvement in District's competitive decisionmaking process, but only as legal counsel for that firm.

The determinative issue is not whether Mr. Wohlstetter is a competitive decisionmaker for District, but whether he is involved in District's decisionmaking process. See Dataproducts New England, Inc.; Allied Signal, Inc.; and ITT Corp., supra; TRW, Inc., supra. Since discussions conducted with an offeror in a negotiated procurement can have a significant impact on the success or failure of an offeror's proposal, see Federal Acquisition Regulation (FAR) §§ 15.601; 15.610, Mr. Wohlstetter's participation in discussions on behalf of his client is evidence of his involvement in that offeror's competitive decisionmaking process. In our view, such involvement presents an unacceptable risk of inadvertent disclosure of the protected information of competitors which would be made available to Mr. Wohlstetter under the protective order. Therefore, we denied Mr. Wohlstetter's request for admission to the protective order.

AWARDS TO AFFILIATED FIRMS

The protesters first contend that the export service awards to Quality, Guardian Storage and District would violate the prohibition in section H.17 of the RFP--that no contractor may receive more than 30 percent of the total export business--inasmuch as these offerors are affiliated and the awards to all three of these companies will exceed the 30 percent limitation. State and these awardees argue that they were not prohibited from submitting separate offers and should not be considered the same entity for purposes of this limitation.

The general rule regarding bids or offers from affiliated companies is that the contracting agency may accept bids or offers from such firms unless doing so would be prejudicial to the interests of the government or would give the affiliated bidders/offerors an unfair advantage over other bidders or offerors. Fiber-Lam Inc., 69 Comp. Gen. 364 (1990), 90-1 CPD ¶ 351; Pioneer Recovery Sys., Inc., B-214700; B-214878, Nov. 13, 1984, 84-2 CPD ¶ 520.

Here, the RFP did not prohibit affiliated offerors from submitting separate offers and did contemplate multiple awards. The 30 percent limitation on export business arose from State's desire to obtain services from a number of companies. In explaining, prior to the RFP's issuance, the

agency's need for multiple contractors as provided for by section H.17, the Assistant Secretary of State for Administration stated:

"Diversification - The Department should not allow any single company to have custody of a disproportionately large share of State HHE. Thus, the Department should allocate assignments such that no one company performs more than 30 percent of the business."

We are unable to say that awards to affiliated companies, which operate independently with their own facilities and warehouses and are capable of performing these contracts independently of each other, as is the case with regard to Quality, Guardian Storage and District, is inconsistent with the purpose of this limitation or would otherwise prejudice the government. See 39 Comp. Gen. 892 (1960).

Nor are the other offerors in this procurement prejudiced by awards to affiliated companies. Since all offerors were supposedly competing under the same evaluation criteria and each offeror's proposal was judged independently, these affiliated offerors did not have an unfair competitive advantage over the other offerors. Compare Protimex Corp., B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247 (affiliated bidders may each submit a bid on a multiple award sale of petroleum products conducted under a true competition since this was not prejudicial to the other bidders) with Atlantic Richfield Co., 61 Comp. Gen. 121 (1981), 81-2 CPD ¶ 453 (affiliated bidders may not each submit a bid on a lottery-type sale of petroleum products since this would be prejudicial to the other bidders by giving the affiliated companies a greater chance to win the "lottery").

WIT'S INTERSTATE COMMERCE COMMISSION (ICC) LICENSE

Paxton protests that the export and inbound awards to WIT, a joint venture of Guardian Moving and Storage Co., Inc.⁷ and SBI Inc., d/b/a Laurel Van Lines, were improper because WIT allegedly does not have the required ICC operating authority.

The RFP contained the general requirement that the contractor comply with all local, state and federal laws, regulations and ordinances, and possess the necessary operating authorities required by regulatory agencies. In addition, the RFP included a business management questionnaire to be submitted with the proposal requesting

⁷Guardian Moving and Storage Co., Inc. is not affiliated with or related to Guardian Storage.

a variety of information pertaining to the responsibility of the offeror. Question No. 11 of this questionnaire requested the offeror to provide its authority under applicable federal and state laws to operate as a motor carrier and specifically provided a blank calling for the ICC permit number and the area covered by the permit.⁸

WIT's proposal responded to this question by indicating that its ICC permit number was "MC49109-1" and attaching a copy of this permit, which was issued to Guardian Moving and Storage Co. and was applicable to 47 states and the District of Columbia. No other ICC licenses were apparent from the offer.

Paxton alleges that WIT does not have the required ICC operating authority in its own name, or, alternatively, that Laurel allegedly did not have the requisite ICC license at the time of award or commencement of contract performance.

State accepted the ICC operating authority cited in WIT's proposal as sufficient evidence of WIT's ICC authority to operate as a motor carrier of household goods. Paxton has not cited, and we have not found, any authority that prohibits a joint venture from using one of the joint venture partner's ICC operating authority to perform a household goods movement services contract, even if the other partner does not have the ICC authority.⁹ On the other hand, in Quality Transport Servs., Inc., B-225511, Mar. 26, 1987, 87-1 CPD ¶ 346, the procuring agency reported that it was advised by the ICC that a joint venture may operate under one of the partner's ICC operating authority. Under the circumstances, we have no basis to object to State's acceptance of WIT's proffered operating authority.

SEPARATE AWARDS FOR INBOUND UAB AND HHE SERVICES

Paxton protests State's evaluation and selection of the proposals for inbound services, alleging that State advised offerors that, consistent with section H.17 of the RFP, it would evaluate and make awards separately for inbound UAB services and inbound HHE services. State acknowledges that it advised offerors of its intention to separately evaluate and award inbound contracts for UAB and HHE, but maintains that it was not required under the RFP to evaluate for and make such separate awards.

⁸This question also specifically requested local permit numbers and areas covered.

⁹State advises that in response to the protest Laurel has provided evidence of its own ICC operating authority.

Section M of the RFP provided for multiple awards and reserved the agency's right to make award on any or all CLINs. Section H.17 stated, in pertinent part, with regard to ordering services under the multiple contracts:

"[t]here will be two sets of inbound offerors, one for UAB and one for HHE. Firms may qualify as both a UAB and HHE low offeror, or as a low bidder for only one inbound service item, UAB or HHE."

We think that an offeror could reasonably interpret the RFP, when read as a whole, as contemplating separate inbound UAB and inbound HHE evaluations and awards.

The number of awards was the subject of an offeror's question:

"[Question]. How many contract awards does . . . State anticipate? Section M and Section H-17 indicate that only a certain number of contracts will be awarded. Will the Department award a contract to all qualified responsible offerors in a competitive range?"

"[Answer]. Contracts will be awarded to at least 5 export companies. The number may exceed 5 . . . At least 3 companies will be awarded inbound contracts. However, if no company wins both inbound UAB and HHE business, the number of inbound contractors will be at least 6."
[Emphasis supplied.]

As noted by State, the offeror's questions and answers were not expressly incorporated into the RFP.¹⁰ Nevertheless, where an agency disseminates written responses to questions during the course of a procurement, the agency may be bound by its responses, particularly where the RFP is not otherwise clear and one or more offerors would be prejudiced if the agency does not adhere to its statements. See Automation Mgmt. Consultants Inc., 68 Comp. Gen. 102 (1988), 88-2 CPD ¶ 494; General Electrodynamics Corp., B-221347.2; B-221347.3, May 13, 1986, 86-1 CPD ¶ 454.

Here, Paxton alleges that it structured the pricing of its proposal with State's advice in mind and was prejudiced by State's failure to evaluate proposals for separate inbound UAB and HHE awards. While State alleges that Paxton

¹⁰On the first page of these questions and answers, offerors were admonished that they "should understand that questions and answers are provided as advisory information only and do not constitute a change in the solicitation."

was not prejudiced because of its overall high price for inbound services, the record, as discussed below, shows the possibility that Paxton may have been prejudiced, given its competitive price for the UAB services. State has provided no reason for not performing separate evaluations other than referring to its right to make multiple awards or partial awards. We think the agency was obligated to evaluate the offers with separate awards in mind and determine what awards would represent the "best value" to the government under the RFP evaluation criteria. See Allied-Signal Aerospace Co., B-240938.2, Jan. 18, 1991, 91-1 CPD ¶ 58. Paxton's protest of this matter is sustained.

IMPROPER PROPOSAL EVALUATION

The protesters assert that the proposals were improperly and unreasonably evaluated with inadequate documentation to support awards under the RFP "best value" evaluation scheme, and that State actually made the award selections solely on the basis of lowest-priced, technically acceptable offerors. We agree.

Source selection officials in negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In exercising this discretion, selection decisions are subject only to the tests of rationality and consistency with the RFP evaluation criteria. Id. Implicit in the foregoing is that selection decisions be documented in sufficient detail to show that they are not arbitrary. Hydraudyne Sys. and Eng'g B.V., B-241326; B-241326.2, Jan. 30, 1992, 92-1 CPD ¶ 88.

There is no source selection statement in the record describing a cost/technical tradeoff; nor is there a TEP report discussing the relative merits of the proposals. The only contemporaneous comparisons of proposals are the two lists of offerors--one for export services and one for inbound services--ranked in descending order by price. Without exception, the lowest-priced offers were selected for awards in order of price without any discussion of relative technical merit. State contends that the technically acceptable offers were all "technically equal" to one another, and the only basis upon which to make the award selections was price, since there was no technical advantage in the non-selected offerors that would warrant paying a premium for their services.

The TEP's consensus reports regarding the 14 technically acceptable offerors show that each offeror received identical acceptable ratings for each of the 39 evaluation standards--evidence that implies technical equality. Such

consistently identical ratings could also suggest that no effort was made to differentiate among the relative technical merits of the proposals as required by the RFP. Based upon the evaluation record as a whole, we conclude that the latter explanation is clearly possible, but that at a minimum, the record does not contain a reasonable basis for the selection decisions.

The TEP's consensus rating sheets and the evaluators' worksheets for each offeror contain numerous instances of unsupported ratings. For example, the TEP downgraded Paxton's initial technical rating from "exceptional" to "acceptable" after receipt of BAFOs, even though Paxton did not modify its technical proposal and the site visit to Paxton's facility elicited only positive comments. There is no contemporaneous explanation in the record for this downgrading, and the evaluators did not explain why the initial, apparently valid comments made to support the "exceptional" rating were no longer valid. Instead, the "E's" (delineating exceptional ratings) for every standard on the evaluators' worksheets were simply changed to "A's" (delineating acceptable ratings).

In contrast, the TEP upgraded the technical rating of the low-priced offeror for export service, Interstate, from "acceptable" to "exceptional" solely on the basis of a site visit. However, the narrative discussions of the site inspections showed no significant qualitative differences, other than State's adjectival ratings, between the sites of Interstate and several "acceptable" offerors, such as Colonial and Paxton. Remarkably, in documenting Interstate's final evaluation, evaluators raised each "A" on the worksheets to an "E" for all 39 standards, even though many of the evaluation standards were not related to what could reasonably be expected to be learned from a site visit (e.g., corporate experience and corporate references). Moreover, many of the evaluators' comments supporting raising Interstate's "acceptable" ratings to "exceptional" were not understandable or not related to the respective evaluation standards.¹¹ Colonial has argued that the

¹¹For instance, the first standard under the corporate performance (key personnel) subfactor provided for evaluating the "[d]egree to which the [w]arehouse [m]anager has experience in handling" the type of services called for under this RFP and the extent of the diversity of that experience. An evaluator upgraded Interstate's rating from "acceptable" to "exceptional" for this standard, explaining that the "[o]n-[s]ite inspection showed procedures better than written proposal." Interstate also was upgraded to an "exceptional" rating on the next standard, which provided
(continued...)

unexplained rating of Interstate resulted from its low price, i.e., either in order to assure award to the low-priced offeror or to make the technical evaluation's appear to have been considered. Whatever State's reasons, they are not disclosed or supported in the evaluation records.

Also unexplained is State's conclusion that Kloke's proposal was acceptable, even though Kloke's warehouse does not satisfy the RFP's location requirement that "to receive consideration for award, all offerors must maintain a warehouse facility in the Washington, D.C., Metropolitan area as defined in [the RFP]." The RFP defined the Washington, D.C., Metropolitan area as being within a 50-mile radius of the Washington Monument. The agency measured the distance to Kloke's warehouse to be 56 miles. State also checked the distance with the American Automobile Association, which confirmed that the location of the warehouse was beyond the 50-mile radius. Although State pointed out this deficiency in discussions with Kloke, Kloke did not change its BAFO to propose a different warehouse. The TEP and SSA did not address this matter in justifying Kloke's "acceptable" rating.¹²

There is also no documentation to support State's response to this protest that the offerors are technically equal. For example, the TEP documented in the record numerous problems with Kloke's proposal and gave it an initial technical rating of "marginal." After meeting with the SSA, who declined to accept the "marginal" rating, the TEP raised all of the "marginal" ratings to "acceptable" ratings, documenting each change by simply stating that its concerns were satisfied. One concern by the TEP was the "serious performance problems" experienced by Kloke on a prior State

¹¹ (...continued)

for evaluating the "[e]xtent of warehouse manager's years of experience dealing with household effects." The evaluator's comment supporting this raised rating stated: "[f]ull training in-house provided to all personnel." [Emphasis in original.] The foregoing illustrative comments do not relate to the stated standards or the applicable evaluation criteria.

¹²The protesters also assert that State reopened negotiations only with Kloke after BAFOs were submitted. Since Kloke is unacceptable and should not receive award, no party is prejudiced by such an alleged impropriety. See The Winkler Co., B-252162, June 8, 1993, 93-1 CPD ¶ 444; National Med. Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1. Therefore, we will not address this issue here.

contract, a problem relevant to several evaluation criteria, e.g., corporate performance. See donald clark Assocs., B-253387, Sept. 15, 1993, 93-2 CPD ¶ _____. While the SSA documented reasonable justifications for finding Kloke acceptable, the record does not establish why Kloke is technically equal to the other acceptable offerors.

Given the lack of evaluation documentation, we are unable to say that State could reasonably find any offeror superior or inferior in technical merit to any other offeror. There is also no support for State's determination that all 14 "acceptable" proposals are technically equal, other than the fact that all offerors received identical "acceptable" ratings for all 39 evaluation standards. Even the "marginal" initial proposals with numerous identified deficiencies were evaluated as "acceptable" in all evaluation areas after receipt of BAFOs, often without explanation. In sum, the evidence in the record best supports a conclusion that State made award selections on the basis of price, even though offers were submitted on the basis that technical merit was most important.

PREJUDICE

Prejudice is an essential element of every viable protest. We will not sustain a protest where no reasonable possibility of prejudice is evident from the record. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

It is apparent that Paxton, which asserts that it prepared its proposal on the assumption that this was a "best value" procurement, was prejudiced with regard to the export service award selections, since its price fell just outside of the range of offerors to which awards have been made or proposed, and its initial "exceptional" rating, lowered without documentation after BAFOs were received, suggests that the firm might well have been otherwise in line for award. In addition, one of the seven proposed awardees, Kloke, does not comply with a material RFP requirement and is ineligible for award.

Paxton may also have been prejudiced with regard to the inbound service awards. Paxton is the twelfth lowest-priced offeror for inbound services considered in the aggregate and roughly \$2.7 million higher than any of the awardees. However, its price is more competitive when UAB services are evaluated separately. Considering that State initially rated Paxton higher than any of the five lower-priced offerors there is a possibility that Paxton was prejudiced with regard to the inbound service awards by State's failure to adequately take technical evaluation factors into account in the selection, to make a cost/technical tradeoff, and to separately evaluate inbound UAB and HHE services.

Thus, Paxton's protests are sustained with regard to both the export and inbound service awards.

Colonial was not prejudiced by State's actions. Colonial's price is significantly higher than any of the selected contractors and many of the non-selected offerors.¹³ Even in the face of the agency's assertions that Colonial's proposal would not be in line for award in any case because of its very high price, Colonial did not allege or show that its export services proposal was technically superior to any of the 10 lower-priced apparently acceptable proposals.¹⁴ Thus, there is no reasonable possibility that Colonial would have been selected for award if the agency had properly evaluated proposals in accordance with the "best value" evaluation scheme. See Federal Info. Technologies, Inc., B-240855, Sept. 20, 1990, 90-2 CPD ¶ 245; WHY R & D, Inc., B-221817, Apr. 16, 1986, 86-1 CPD ¶ 375. Moreover, although Colonial argues that State conducted an unannounced low-price, technically acceptable procurement, Colonial did not allege that it could or would have significantly lowered its price to be in line for award had it been informed of the change in evaluation scheme. Therefore, Colonial's protest is denied.

RECOMMENDATION

Where an agency has departed from a "best value" evaluation scheme and has made the award selection on the basis of the low-priced, technically acceptable offer, we ordinarily recommend that the agency either reevaluate the proposals in accordance with the stated scheme, or amend the solicitation and provide the offerors with an opportunity to submit revised proposals. See, e.g., Trijicon, Inc., supra. If the agency wishes to pursue one these options here, it should do so. The unusual circumstances of this case suggest other recommendations that will mitigate the disruption to State's moving and storage service requirements that might result from a complete reevaluation.

With regard to the export service awards, we recommend that Kloke's proposal be rejected as technically unacceptable and awards be made to Victory and Paxton.

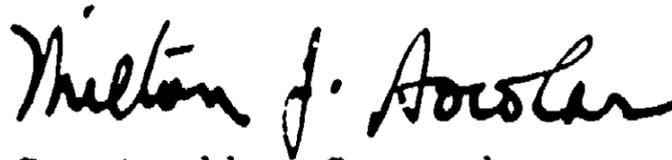
¹³Colonial's \$17,224,235 price is more than \$4 million higher than any of the awardees' prices.

¹⁴While Colonial's counsel had access under the protective order to the proposals and evaluations of all of the awardees, it only compared Colonial's proposal to Kloke's and Interstate's proposals. Even in comparing Colonial's proposal to Interstate's, Colonial only alleged that it should have been rated similarly to Interstate.

We recommend that the UAB portion of the inbound service awards be broken out for separate evaluation, and that State either document an evaluation and cost/technical tradeoff or amend the solicitation to state the desired evaluation scheme and request revised proposals.¹⁵ Upon completion of either option, any contracts held by offerors, who are unsuccessful after the reevaluation, should be terminated and award(s) made to the successful offeror(s).

Paxton is also entitled to the costs of filing and pursuing its protests, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), Paxton should submit its certified claims for such costs, detailing the time expended and cost incurred, directly to the agency within 60 days after receipt of this decision.

The protests are sustained in part and denied in part.

for 
Comptroller General
of the United States

¹⁵We do not recommend that the inbound HHE service portion of the award be disturbed. Since Paxton's price is so much higher than virtually all of the offerors for this service, there is no reasonable possibility that it would be in line for award for these services. If the agency believes that the inbound UAB and HHE services should be combined, it should amend the RFP and incorporate the new evaluation scheme, obtain revised proposals, and make awards in accordance with the revised evaluation criteria.