



Comptroller General  
of the United States

7552510

Washington, D.C. 20548

## Decision

**Matter of:** OK's Cascade Company; Noonan Food Service;  
Western Catering, Inc.; Banks Firefighters  
Catering

**File:** B-257547; B-257547.2; B-257547.3; B-257547.4

**Date:** October 18, 1994

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protesters.  
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interested party.  
Douglas B. Lee, Department of Agriculture, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

1. Price/technical tradeoff analysis was not reasonable where it failed to take into account the availability of a quantity discount associated with a technically superior proposal in determining whether that technical superiority justified paying a price higher than that offered by a technically lower-rated proposal.
2. Discussions were not misleading where they led the protester into the area of the proposal about which the agency had concern.

### DECISION

OK's Cascade Company, Noonan Food Service, Western Catering, Inc., and Banks Firefighters Catering protest the award of several contracts under request for proposals (RFP) No. 49-93-12, issued by the Forest Service, Department of Agriculture, for mobile food services in 12 western states. The protesters raise several challenges to the agency's evaluation and source selection process.

We sustain the protest of OK's and deny the others.

The Forest Service issued the solicitation on November 15, 1993. The solicitation sought proposals for mobile food services, primarily to serve firefighters in the field, for 24 locations, each of which was covered by one or two line items in the solicitation. The solicitation anticipated award of a fixed-price requirements contract for a base period from the date of award through December 31, 1994, with four 1-year options. The solicitation did not provide any estimates of, or historical data regarding, the agency's requirements, either for individual line items or overall. The agency advises that it is impossible to provide an estimate of future requirements, since the firefighter food services being procured will be needed only when and where fires occur.

Offerors were permitted to submit proposals for any number of locations, and both the agency and the offerors appear to have anticipated that the solicitation would result in the award of more than one contract. At a pre-proposal conference, the agency advised it would be permissible for an offeror to propose "combination pricing," essentially a quantity discount under which an offeror's proposed price at all locations would drop if the offeror received a contract for a minimum number of locations.

The solicitation stated that, in determining awards, technical factors would be more significant than price. The technical factors, in descending order of importance, were equipment; experience; organization; and operating capacity and credit.

The agency received 51 proposals from 16 offerors covering 24 locations by the January 18, 1994, date set for the receipt of initial proposals (several offerors submitted proposals for more than one location). A technical evaluation team (TET) evaluated the initial proposals and conducted site visits to observe the offerors' equipment. After discussions were conducted, the agency requested best and final offers (BAFO) due by May 18. Because all of the BAFO prices submitted for four locations (Albuquerque, Goldendale, Okanogan, and Wenatchee) were higher than the government estimate for those locations, the agency requested another round of BAFOs from offerors competing for those locations. Those supplemental BAFOs were received on May 24. Based on the TET's evaluation of the BAFOs, the contracting officer selected various proposals for award. These protests followed. The agency proceeded with award and authorized the contractors to begin performance notwithstanding the protests, based on a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for the decision of our Office. See 31 U.S.C. § 3553(d) (1988).

## THE OK'S PROTEST

OK's was awarded the contract for three locations (Fresno, Wenatchee, and Albuquerque/Okanogan); it challenges the agency's failure to award the company contracts for two additional locations (Reno and Bend). The protest arises out of the Forest Service's handling of the combination pricing proposed by OK's.<sup>1</sup> OK's proposed different prices depending on the number of locations awarded to it. Thus, its daily total per-person price for meals, which was the price on which the agency focused in its price evaluation, would be \$34.85 if OK's were awarded a contract for four locations or fewer; but that price would drop to \$31.80 for all locations if OK's were awarded a contract for five locations, and \$31.55 if the firm were awarded a contract for six locations.<sup>2</sup> According to OK's, it was unreasonable for the agency to fail to take the potentially lower price into account when awarding the contract for the Reno and Bend locations, where the lower price was conditioned on the award of a contract for five locations overall, a condition which would have been met if OK's had been awarded the contract for those two locations.

The Forest Service agrees that the protester's "quantity-discount" approach was permissible. The agency also agrees that the protester's price would have dropped if the firm's proposal had been in line for award at two additional locations, bringing the total (including the three that were awarded to OK's) to five. According to the agency, however, OK's was not in line for award for any additional locations.

As to Reno, the Forest Service's evaluation of BAFOs indicated a choice among the proposals of OK's, NuWay, and a third firm. The agency initially selected the third firm's proposal for award based on a finding that it was superior technically and lower priced than that of either OK's or NuWay. That third proposal was withdrawn, however, shortly before the intended date of award.

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<sup>1</sup>Although OK's raised additional issues in its initial protest, in its comments it did not respond to the agency's rebuttal of those issues, and we therefore treat them as abandoned. See Hampton Rds. Leasing, Inc., 71 Comp. Gen. 90 (1991), 91-2 CPD ¶ 490.

<sup>2</sup>The three locations for which OK's was awarded a contract were among those for which a second round of BAFOs was requested, and, in its second BAFO for those locations, OK's offered, and the agency accepted, an unconditioned price of \$31.80.

At that point, the agency was faced with a last-minute choice between the proposals of OK's and NuWay. The agency had determined that the two firms' technical proposals were essentially equal, although the agency concedes that the protester's proposal was slightly superior under the most heavily weighted technical criterion, equipment. The source selection was made on the basis of the agency's determination that the slight technical advantage in the protester's proposal did not justify paying the higher \$34.85 daily per-person price under that proposal, as opposed to NuWay's \$32.45 price. On the basis of that calculation, which essentially represented a price/technical tradeoff, award for the Reno location was made to NuWay.

The agency believed that it needed to perform a price/technical tradeoff because it considered the protester's price to be \$34.85. The agency does not deny that, if the protester's price were the five-location rate of \$31.80, the protester's proposal would have been in line for award for the Reno location, since the proposal would then have had both a slightly superior technical rating and a lower price than NuWay's. The rationale that the agency offers for not considering the protester's \$31.80 price in selecting the awardee for the Reno location is that OK's had not been found to be in line for the Bend location.

As to the Bend location, it is undisputed that there the Forest Service was required to perform a price/technical tradeoff. Trade-offs between price and technical superiority 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. In this case, the Forest Service's trade-off does not satisfy that test.

The agency was faced with a choice between the lower-rated technical proposal of D.F. Zee, with a daily price of \$28.35, and the protester's higher-rated technical proposal. The agency based its price/technical analysis and resulting trade-off between the two on the assumption that the protester's price was \$34.85. This unreasonably overstated D.F. Zee's price advantage because it did not take into account the possibility of obtaining the protester's discounted five-location rate at both Bend and Reno.

The agency failed to consider the protester's discounted rate because of the sequence of events leading to the source selection decisions, in particular the last-minute withdrawal of the third proposal for Reno and the consequent need for another source selection for that location. Because of the technical superiority of the third proposal for the Reno location, the agency had apparently assumed, at

the time initial source selection decisions were made, that awarding to OK's at Bend would only lead to its receiving four locations, thus not justifying consideration of the protester's five-location price. Conversely, by the time the agency made the last-minute decision, after the third proposal was withdrawn, to award the Reno location to NuWay, it apparently believed that the five-location price for OK's should not be considered because D.F. Zee had already been selected for award (although not awarded) the Bend location.

Once the third proposal for Reno was withdrawn, the agency needed to reconsider the source selection decisions for both Reno and Bend because of the availability of the protester's five-location pricing. In other words, the final trade-off decision needed to reflect a choice between, on the one hand, awarding the Reno location to NuWay and the Bend location to D.F. Zee (thus paying \$32.45 at Reno and \$28.35 for D.F. Zee's lower-rated technical proposal at Bend) and, on the other hand, awarding both locations to OK's (thus paying \$31.80 at both locations and obtaining the protester's higher-rated technical proposal). There is no indication in the record that urgency or any other circumstance precluded the agency from considering that choice. Because the Forest Service's price/technical tradeoff was not based on the terms of the proposals before the agency, the source selection decisions for the Reno and Bend locations were unreasonable. Accordingly, we sustain the protest of OK's.

#### THE NOONER PROTEST

Nooner challenges the award of a contract to OK's for the Fresno location on the basis of the lower price proposed by OK's. According to Nooner, there was no reasonable basis for the agency to find that the two offerors' proposals for that location were essentially equal. Nooner asserts that it possesses superior equipment and experience, while, in Nooner's view, the equipment offered by OK's is inferior. On this basis, Nooner states that it is "inconceivable" that the awardee's equipment is equal to Nooner's.

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<sup>3</sup>In response to the protest, the agency argued that, if the Reno and Bend locations are considered as a whole, the protester's price would be higher than the price of NuWay and D.F. Zee. While this represents the correct calculation of the price side of the trade-off, it does not indicate any consideration of whether the technical superiority of the protester's proposal might justify paying that price premium.

Our Office will not question an agency's evaluation of proposals unless the agency deviated from the solicitation evaluation criteria or the evaluation was unreasonable. Payco Am. Corp., B-253668, Oct. 8, 1993, 93-2 CPD ¶ 214. In order to establish the unreasonableness of the evaluation, it is not enough that the protester disagrees with the agency's judgment or that the protester can point to alternative methodologies available to the agency; rather, the agency's evaluation must be shown to lack a reasonable basis. Id.

Nooner contends that OK's has a history of poor performance and uses inferior equipment. Our Office has reviewed the evaluation worksheets and the proposals, and we find that the record demonstrates that the agency recognized weaknesses, as well as strengths, in the awardee's proposed equipment and experience. Similarly, the worksheets identify strengths and weaknesses in Nooner's proposal. There is nothing in the record, other than Nooner's conclusory assertion to the contrary, to indicate that the agency's judgment about the various strengths and weaknesses of either proposal was unreasonable. The Forest Service's judgment that the two proposals were essentially equal in their technical merit appears reasonable, in that it took into account the strengths and weaknesses of each proposal, and is consistent with the RFP evaluation criteria. Nooner's disagreement with the agency's judgment does not render it unreasonable.

Nooner also contends that the agency assigned too much weight to price in selecting an awardee for the Fresno location and that, for other locations, technical factors were considered determinative. This protest ground is without merit. Even where, as here, a solicitation provides that technical factors are more important than price, an agency may properly choose between two proposals on the basis of price where the two proposals are essentially equal technically. See General Offshore Corp., B-246824, Apr. 1, 1992, 92-1 CPD ¶ 335.

Finally, Nooner alleges, for the first time in its comments, that some offerors had access to more information, through participation in a professional association, than did Nooner. Nooner does not assert that it has raised this protest ground within 10 days of when it first became aware of its basis, and we therefore dismiss it as untimely. 4 C.F.R. § 21.2(a)(2) (1994). We note, however, that the protester has not suggested any way in which information that the other offerors may have gained through the professional association could have prejudiced Nooner in this procurement.

## THE WESTERN CATERING PROTEST

Western Catering contends that it should have been awarded a contract for two locations, Montrose and Boise. Western Catering contends that the record indicates that the agency had "preselected" Big Sky Catering Mobile Catering Corporation for award of the Montrose location, and showed "preferential treatment" for the firm awarded the Boise location, Stewart's Fire Fighter Food Catering, Inc. This is essentially an allegation of bad faith, which can be established only where the record contains convincing proof that the contracting officials showed favoritism or acted with the intent to injure the protester. See Group Technologies Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150.

The evidence proffered to show "preselection" of Big Sky consists of: (1) notes allegedly written by an agency official indicating that the start date for the Missoula location needed to be moved back by 1 day in order to permit Big Sky to compete for both the Missoula and the Montrose locations; and (2) the fact that Big Sky had moved its kitchen to the Montrose area before the award was announced. The agency denies that the notes were written by an agency official, and observes that they appear to be in the handwriting of an employee of Western Catering. The agency also states that the start date for the Missoula location was moved back 1 day in order to avoid overlap of the service dates for the Missoula and Montrose locations, thus increasing competition by permitting any offeror to compete for both locations. It is uncontested that Big Sky did move its equipment to the Montrose area prior to award, but both the agency and Big Sky state that the offeror did so for its own business reasons and at its own risk, not on the basis of any information provided by the agency.

The record does not support the protester's allegations. We need not attempt to ascertain who wrote the handwritten notes at issue here, since the agency was permitted to relax its specifications, as it did in shifting the start date here, in order to increase competition. Information Technology Solutions, Inc., B-254438, Sept. 27, 1993, 93-2 CPD ¶ 188. That action does not establish favoritism towards Big Sky, whose selection was amply supported by the record. Big Sky's proposal was assigned significantly higher technical ratings than Western Catering's, and the technical evaluations, which we have reviewed, appear reasonable and consistent with the RFP evaluation criteria. In addition, Western Catering's price was higher than Big Sky's. The protest of the award to Big Sky is therefore denied.

Western Catering offers equally scant support for its allegation that the awardee at Boise--Stewart's--enjoyed preferential treatment. Thus, the protester alleges that it should have been informed during discussions that the agency was advising some offerors that their prices appeared high. In the protester's view, by not so informing Western Catering, the agency failed to treat offerors equally.

The agency did not raise price concerns during its discussions with Western Catering because that firm's prices were considered reasonable. There is nothing objectionable in the agency's conduct in this regard, since the agency was not required to discuss price with Western Catering when that was not a concern, and the agency properly refrained from disclosing to Western Catering the fact that other offerors' prices were considered high. FAR § 15.610(e)(2)(iii).

Western Catering also sees evidence of favoritism in the contracting officer's having sold a puppy to the owner of Stewart's and in reports of friendship between the awardee's owner's wife and the contracting officer's companion.<sup>4</sup> The agency responds that the puppy sale took place at the price advertised to the public for all the puppies in the litter, and that there were no improper contacts between the contracting officer (or his companion) and the awardee's owner (or his wife). The agency also points out, and our review confirms, that the substantial superiority of Stewart's technical proposal over Western Catering's was determined by the evaluators, not the contracting officer. Moreover, Western Catering's price was higher than Stewart's. We therefore find that there is no evidence supporting the allegation that Stewart's benefited from preferential treatment.

#### THE BANKS PROTEST

Banks also protests the selection of Stewart's for the Boise location. Banks contends that the technical evaluation of its proposal was unreasonable, and that a proper evaluation would have rated its proposal superior to other offerors'. The Stewart's proposal was selected for award on the basis of its lower price and a determination that all proposals were essentially equal technically, although the Stewart's proposal was found to be slightly superior to the others.

Banks asserts that the evaluation documents demonstrate bias against the protester through the lack of documentation supporting the finding that the proposals were technically equal. In particular, Banks argues that the agency

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<sup>4</sup>Banks adopts this protest ground as well.

unreasonably downgraded the firm's proposal because of its "innovative approach" to the configuration of steam tables and burners in serving lines. Our review of the record finds no evidence supporting this allegation.

As to the protester's "innovative approach," the agency viewed Banks's proposed placement of the steam tables on the burners as a serious deficiency under the most heavily weighted criterion, equipment, because the burners would be unavailable for cooking. The agency raised the issue of the location of the steam tables with Banks during discussions. Although the firm modified its proposal somewhat in this regard, the configuration in its BAFO still rendered the burners unavailable for cooking during serving. Because Banks does not dispute that the configuration of kitchen equipment was properly a subject of evaluation under the equipment criterion in the RFP, the protester's only dispute is with the agency's technical judgment concerning the desirability of Banks's approach. The protester's mere disagreement with the agency's assessment does not establish the unreasonableness of that judgment, which our review indicates is both reasonable and consistent with the RFP criteria.

Banks also contends that the agency conducted misleading and unequal discussions with the offerors concerning price. Banks alleges that the agency identified the government estimate to some offerors, but not to Banks, and that it is "highly likely" that Stewart's knew the government estimate prior to submitting its proposal. The agency denies that it disclosed its estimate to any offeror. Inasmuch as Banks offers no supporting evidence for its allegation, we view it as mere speculation, which provides no basis to sustain a protest. Bay Decking Co., B-239075, July 24, 1990, 90-2 CPD ¶ 70.

The protester views the discussions conducted as misleading in that it was advised that its prices "appear to be high," while, in fact, the prices needed to be substantially reduced in order to be competitive. According to Banks, the phrase "appear to be high" is commonly understood to call for an adjustment of under one dollar in the daily price for food services.

Agencies are not required to afford offerors all-encompassing discussions, and need only lead offerors into the areas of their proposal considered deficient. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. Banks concedes that the agency raised its concern about the proposal's high price during discussions. Notwithstanding the protester's contention about the "commonly understood" meaning of the phrase "appear to be high," the discussions cannot reasonably be viewed as misleading, particularly

since, during discussions, the agency identified as high the protester's prices for many different items (in some cases without the phrase "appear to be high"), including breakfasts, sack lunches, dinners, buffet lunches, salad bars, hot can meals, handwashing facilities, and several specified beverages and pastries. Banks cannot reasonably contend that it was not advised that its prices were viewed as high. We therefore conclude that the discussions were neither unequal nor misleading.

The protest of OK's is sustained; the remaining protests are denied.

We recommend that the agency perform a proper price/technical tradeoff analysis for the Reno and Bend locations. If, as a result of that analysis, the agency concludes that OK's was not in line for award at either of those two locations, the current contracts should continue. If the agency concludes that OK's should have been awarded one or both of those locations, the relevant contracts should be terminated (or modified to delete that location) and a contract awarded to OK's, if otherwise appropriate; in that event, and because performance for the base period is substantially completed, OK's would also be entitled to recover its proposal preparation costs. In any event, OK's is entitled to the costs of filing and pursuing this protest, including reasonable attorneys fees. 4 C.F.R. § 21.6(d)(1). OK's should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

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