

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190023

DATE: January 31, 1978

MATTER OF: Francis & Jackson, Associates

DIGEST:

1. Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, GAO does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination.
2. Comparison of proposed prices with each other and with independent Government estimate satisfies regulatory requirement that price analysis be conducted.
3. In unrestricted procurement, it is improper to evaluate proposal submitted by small business differently from how proposals of large business are evaluated.
4. Where agency evaluates proposals by numerically scoring proposals under each of four evaluation factors, it is not improper under circumstances of case for price to be scored on basis of entire "spread" of points available, so that total available points are awarded to lowest proposed price and less points, mathematically determined, are awarded to other proposed prices.
5. Contract awarded on basis of initial proposals without discussions is proper where solicitation notified offerors of such possibility and agency determines that there was adequate competition resulting in fair and reasonable price.

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Francis & Jackson, Associates (FJA) has protested the award of a contract to Auerbach Associates, Inc. pursuant to request for proposals (RFP) No. DACA73-77-R-0014, issued by the Department of the Army's Corps of Engineers for non-personal services to perform an analysis and study in connection with improving management of the Corps' Program, Planning and Civil Preparedness Division, Directorate of Military Construction.

FJA raises four basic objections:

(1) The RFP was improperly issued on a competitive basis since it contained alleged proprietary material that FJA had submitted in a prior unsolicited proposal;

(2) That in view of FJA's alleged small business and labor surplus area status, the RFP should not have been issued on an "unrestricted" basis;

(3) That the evaluation of proposals submitted under the RFP was defective in that "price" was accorded greater weight than was established in the RFP and that a price and cost analysis was not performed as required by Armed Services Procurement Regulation (ASPR) § 3-807.2; and that the evaluation should have reflected FJA's status as a small business;

(4) That the ensuing contract was improperly awarded on the basis of initial proposals without discussions in derogation of 10 U.S.C. § 2304(g) (1970).

The RFP required the submission of proposals on a fixed price basis only, and stipulated that proposals would be evaluated on the basis of four factors of equal weight. Price was one of those factors. The three proposals received were evaluated with regard to the three technical factors by a panel of four evaluators. Out of a possible 75 total points (25

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each) for the three technical factors, FJA received a composite score of 63.25, while Auerbach received 61 points, and Dynamic Research Corporation was scored at 59.5. The firms' proposed prices were \$96,000, \$67,487 and \$152,102, respectively. Points for price were awarded on the basis of a direct linear scale starting with the maximum number of points (25) for the lowest price and correspondingly fewer points given to the other two prices depending upon the degree to which they exceeded the low price.

Accordingly, 25 points were added to Auerbach's technical score for a total of 86, 17 to FJA's technical score for a total of 80.25, and 1 to Dynamic's for a total of 60.5. Award was made to Auerbach on the basis of its proposal being most advantageous to the Government from the standpoint of price and other (technical) factors.

FJA's first two contentions will not be considered. Our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals shall be filed prior thereto. 4 C.F.R. § 20.2(b)(1). The assertions that the RFP was based on FJA's proprietary data and that the RFP should not have been issued on an unrestricted basis are clearly assertions that the solicitation was defective.

With respect to the first issue, FJA states it protested when it "was first notified of a possible open competitive procurement." However, the Corps reports that its "first notice * * * of FJA's concern for the alleged proprietary material was upon receipt of FJA's protest after the award to Auerbach," and FJA concedes at another point that upon receipt of the RFP it "chose NOT TO PROTEST" because it anticipated that application of the evaluation criteria and proper negotiation techniques would result in recognition of the superiority

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of the proposal it would submit. Accordingly, we find the allegation clearly to be untimely filed. Moreover, we do not view the circumstances as giving rise to an issue which would warrant consideration of the allegation under the "significant issue" exception of 4 C.F.R. § 20.2(c).

With regard to the second issue, FJA appears to base its protest on information it obtained at a post-award debriefing. That information indicates that the contracting officer originally anticipated that the procurement would be set aside exclusively for small business participation but concluded that a set-aside was not feasible because none of the firms to be solicited was a small business or labor surplus area concern. FJA states that the contracting officer's conclusion was faulty because it has been a small business for more than two years and has offices in a labor surplus area. In this regard, the contracting officer states, and FJA denies, that he contacted FJA prior to issuance of the RFP and was advised that FJA was not a small business.

Even though FJA purports to base its second allegation on the information acquired at the debriefing, we think the thrust of the second protest allegation is that the procurement should have been set aside for small business because at least one firm, FJA, was a qualified small business prospective offeror for the procurement. Although FJA did not learn until after award why the procurement was not set aside, it did know, upon receipt of the RFP, that the procurement was unrestricted. If, in view of its alleged small business status, it believed a set-aside was appropriate, it should have protested the matter to the contracting officer at that time. In any event, because the decision as to whether a procurement should be set aside for small business is within the authority and discretion of the contracting agency, this Office generally is "reluctant" to second-guess an agency's

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decision not to set aside a procurement and has declined to consider a protest of such a decision. Par-Metal Products, Inc., B-190016, September 26, 1977, 77-2 CPD 227; see also Reliance Electric Company, B-190237, B-190303, October 20, 1977, 77-2 CPD 313.

Turning to the second two allegations, we find the protest to be without merit, since the record indicates that the evaluation was proper and the decision not to conduct discussions was consistent with statutory and regulatory requirements.

With regard to the evaluation, the Corps states that the price analysis required by ASPR § 3-807.2 was in fact performed. In pertinent part, that section provides that price analysis may be accomplished in various ways, including the comparison of price quotations submitted (ASPR § 3-807.2(b)(1)(i)) and the comparison of proposed prices against an independent cost estimate prepared by the purchasing agency (ASPR § 3-807.2(b)(1)(v)). The Corps reports that both of these comparisons were made, and that Auerbach's low price of \$67,487 was considered reasonable when compared with both the other prices submitted and with the Corps' own estimate of \$75,000. Nothing more in the way of a price analysis was required under the circumstances.

With respect to FJA's suggestion that the scoring of price proposals should have been adjusted to eliminate various competitive disadvantages suffered by small business and labor surplus area firms when in competition with large business concerns, we have held that in an unrestricted procurement it is "improper to score a small business proposal differently from one submitted by a large business solely on the basis of size." Lamar Electro-Air Corporation, B-185791, August 18, 1976, 76-2 CPD 170. Rather, all proposals must be evaluated on the basis of the announced criteria, without regard to any unspecified (in the RFP) factors such as small business size status. See UCE, Incorporated, B-186668 September 16, 1976, 76-2 CPD 249; Signatron, Inc., 54

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Comp. Gen. 530, 535 (1974), 74-2 CPD 368; AEL Service Corporation et al., 53 Comp. Gen. 800 (1974), 74-1 CPD 217.

FJA's main objection to the evaluation concerns the assignment of all 25 points to Auerbach's proposal and spreading out the other proposals over the entire 25 point range. FJA points out that the three technical factors were not scored in that way, and also questions how such a scoring of price can represent any "evaluation" at all with respect to whether a low price is "good because it is low" or no good "because it is too low." FJA also states that the scoring method is improper because the number of points awarded its proposal was dependent on the proposed price of the high offeror, and if that offeror had proposed a price of \$330,000, then "FJA would have won."

Procuring activities have broad latitude in determining the particular method of proposal evaluation to be utilized. Augmentation, Inc., B-186614, September 10, 1976, 76-2 CPD 235; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237. The only requirements are that the method provide a rational basis for source selection and that the evaluation itself be conducted in good faith and in accordance with the announced evaluation criteria. Grey Advertising, Inc., 55 Comp. Gen. 111 (1976), 76-1 CPD 325; Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253 and 55 Comp. Gen. 499 (1975), 75-2 CPD 344; EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338. Agencies generally utilize numerical point ratings in "an attempt to quantify what is essentially a subjective judgment." 52 Comp. Gen. 198, 209 (1972). In many instances, both initial and best and final offers are evaluated through use of numerical techniques, see, e.g., Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427; Applied Management Sciences, Inc., B-184654, February 18,

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1976, 76-1 CPD 111, while in other instances the agency may numerically score only initial offers and will instead rely on a subjective analysis of best and final proposals. See 52 Comp. Gen. 198, supra; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. When numerical scoring schemes are utilized to evaluate proposals, technical factors are traditionally scored on the basis of the extent to which the evaluators, in the exercise of their good faith subjective judgments, believe proposals merit perfect or less than perfect numerical ratings. See, e.g., Bunker Ramo Corporation, supra; Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD _____. Most often, the scores assigned by the evaluators are what is utilized in proposal evaluation. In some instances, however, the evaluator's scoring will be "normalized" so that the highest rated proposal is equated to a maximum score (e.g., 100 points). See 52 Comp. Gen. 382 (1977). Thus, competing technical proposals may all have close numerical ratings or may receive disparate scores which can cover the full range of points available.

Similarly, in evaluating price, agencies may utilize a variety of evaluation methods. They may, for example, consider cost without scoring that factor even though various other evaluation factors are scored. Donald N. Humphries & Associates, et al., 55 Comp. Gen. 430 (1975), 75-2 CPD 275; Marine Management Systems, Inc., B-185860, September 14, 1976, 76-2 CPD 241; Charter Medical Services, Inc., B-188372, September 22, 1977, 77-2 CPD 214. They may, in some instances, quantify technical point scores in terms of dollar advantage by computing cost/quality ratios. Shapell Government Housing, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161; Corbetta Construction Company, 55 Comp. Gen. 201 (1975), 75-2 CPD 144; see also Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Price may also be evaluated by numerically scoring proposed prices and totaling the points awarded for both cost and other evaluation factors. See, e.g., AEL Service Corporation, et al., supra; Dynalectron Corporation, B-187057,

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February 8, 1977, 77-1 CPD 95; Hansa Engineering Corporation, B-187675, June 13, 1977, 77-1 CPD 423. When this latter evaluation approach is utilized, it is not uncommon for proposed prices to be scored, as in this case, with the lowest price being awarded the maximum possible point score. See, e.g., Hansa Engineering Corporation, *supra*; Design Concepts, Inc., B-186880, December 22, 1976, 76-2 CPD 522; Grey Advertising, Inc., *supra*; see also Computer Network Corporation; Tymshare, Inc., 56 Comp. Gen. 245 (1977), 77-1 CPD 31.

This is not to say that every possible evaluation approach would be appropriate in every instance. For example, in Bell Aerospace Company, *supra*, we found the agency's particular method of evaluating price to be questionable because it could have produced a misleading result and was inconsistent with the relative weights assigned to the evaluation criteria. 55 Comp. Gen. at 257-60. See also Genasys Corporation, 55 Comp. Gen. 835 (1977), 77-2 CPD 60, where we stated that "a more rationally founded method of evaluating cost should have been employed." 56 Comp. Gen. at 859. Similarly, the concerns expressed by FJA with regard to the evaluation scheme used in this case might have validity under certain circumstances, such as where the evaluation encompasses either a very low proposed price, which casts doubt on the validity of a technical proposal or which is associated with a technically unacceptable proposal, Design Concepts, Inc., B-186125, October 27, 1976, 76-2 CPD 365; cf., DOT Systems, Inc., B-185358, August 26, 1976, 76-2 CPD 186, or an absurdly high price which bears no apparent relationship to the effort proposed. In the former circumstances, of course, the inclusion in the point "spread" of a "too low" or unacceptable price could distort the intended evaluation results. In the latter situation, inclusion of a very high price, i.e., the \$330,000 posited by the protester, can result in a "bunching" of scores for the other prices which in effect would improperly reduce or eliminate price as an evaluation factor. See W.S. Gookin & Associates, B-188474, August 25, 1977, 77-2 CPD 146; Group Operations, Inc., 55 Comp. Gen. 1315 (1976), 76-2 CPD 79.

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Here, however, we see nothing unreasonable or improper with the evaluation scoring scheme used by the Corps under the circumstances. The scored proposals were relatively close technically, the low proposed fixed price was regarded as reasonable, and the low price was below the Government estimate. Accordingly, we see no basis for objecting to the award of the full 25 points for price to the low offeror or to the award of 32 percent less points, which were mathematically rather than subjectively determined, to the protester's proposal when its proposed price was some 42 percent higher than the low offeror's price, and cannot conclude that the scoring was inconsistent with the criteria set forth in the RFP. That price happened to be the critical determinant of the successful offeror in this instance may be attributed to the fact that Auerbach's technical score was very close (within 2.25 points) to FJA's so that Auerbach's more significant superiority in terms of price overcame FJA's margin in the technical areas.

Finally, FJA objects to the Corps' failure to conduct written or oral discussions. FJA's primary contention in this regard is that "the differences in the proposals * * * and the disparate prices preclude a determination of sufficient competition to assure the Government that fair and reasonable prices would be arrived at without discussions." FJA further suggests that discussions should be required in any procurement for the type of services involved herein "whenever the lowest priced proposer does not have the best technical proposal."

ASPR § 3-805.1(a), which implements 10 U.S.C. § 3304(c), provides:

"(a) Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:

* * * * *

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"(v) in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror."

In this regard, paragraph 7.1 of the Solicitation Instructions and Conditions, as well as paragraph 10(g) of Standard Form 33A, warned offerors that award might be made without discussions and that proposals should be submitted initially on the most favorable terms.

As indicated above, the Corps determined, on the basis of the three proposals received, that the most favorable proposal was that submitted by Auerbach and that Auerbach's low price was reasonable. We think this satisfies the regulatory requirement regarding adequate competition, and we are aware of no other requirement for discussions such as suggested by FJA. Accordingly, we are unable to object to the award on the basis of initial proposals. See United States Towers Services, B-185840, July 14, 1976, 76-2 CPD 44; Imperial Products Co., Inc., B-186061, August 11, 1976, 76-2 CPD 155.

The protest is denied.

Deputy


Comptroller General
of the United States