DECISION

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

FILE: B-199540.3 DATE: November 16, 1982

MATTER OF: Boone, Young & Associates, Inc.

DIGEST:

1. Absent a showing of bad faith, GAO will not disturb cancellation of solicitation set aside for socially and economically disadvantaged small business concerns under section 8(a) of Small Business Act. Showing of bad faith requires undeniable proof agency had malicious and specific intent to injure party alleging bad faith, and such proof has not been submitted by protester.

2. Although source selection official's decision must be consistent with solicitation's stated evaluation criteria and must have rational basis, such official is not bound by recommendations of evaluation and advisory groups even though such groups may be composed of working level officials who normally have technical expertise required for technical evaluations.

3. Since claimant has not shown that the rejection of its proposal and cancellation of an 8(a) solicitation along with the subsequent cancellation of a resolicitation of the same requirement, also an 8(a) set-aside, were the result of bad faith on the part of agency personnel, claimant is not entitled to reimbursement of proposal preparation costs under either solicitation.

Boone, Young & Associates claims reimbursement for expenses incurred in preparing proposals in connection with request for proposals (RFP) Nos. 105-80-P-076 (076) and 105-80-P-034 (034) issued by the Department of Health and Human Services (HHS). Each solicitation called for a

proposal to establish a National Day Care Resource Center and was set aside for Boone Young under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1979). On July 10, 1980, Boone Young protested the rejection of its proposal as technically unacceptable under RFP 076. Subsequently, the agency by letter of February 27, 1981, informed our Office and Boone Young that it had determined that the rejection of that firm's proposal was the result of "sufficient breaches of good procurement practice, short of bad faith to warrant corrective action," and stated that the procuring office had been instructed to issue a sole-source solicitation to Boone Young if there was a continuing need for the services. By letter of March 23, we dismissed the protest as academic.

RFP 034 was issued to Boone Young on June 4, 1981 and canceled on July 30 because the agency determined it did not have sufficient funds to establish the program. Boone Young then protested the cancellation of RFP 034 to our Office and requested proposal preparation costs for both proposals.

Essentially, Boone Young argues that it is entitled to proposal preparation costs under both solicitations because the rejection of its proposal under the initial solicitation and the cancellation of the second solicitation both were the result of bad faith and bias on the part of agency personnel. In the alternative, Boone Young argues that since the second solicitation was issued as a "remedy" for the improprieties committed under the initial solicitation, even if its cancellation was justified, the agency is estopped, because of its prior misconduct, from denying Boone Young proposal preparation costs under the second solicitation. For the reasons set forth below, we deny both of Boone Young's claims.

Under RFP 076, the agency evaluation panel initially found Boone Young's proposal acceptable with a score of 59. However, in the contracting officer's view, the panel's report and the negative comments of the individual evaluators did not support an "acceptable" recommendation. Thus,

the contracting officer asked the panel to review its conclusion. The panel, in a memorandum dated June 25, 1980, without changing any of the scoring, changed its conclusion to unacceptable, stating that "the offeror's proposal contained too many weak points to warrant being found acceptable." The agency maintains that the panel's initial recommendation was made because the panel members believed that if no award was made, the funds for the project would expire, but that when the panel members realized that this was not so, the evaluators were unwilling to conclude that the proposal was acceptable. Although the proposal was the only one submitted, the contracting officer determined that it could not be made acceptable through discussions without being completely rewritten. The contracting officer consequently canceled the solicitation and recommended that a competitive 8(a) solicitation be issued for the requirement with Boone Young excluded from the competition because its extensive prior knowledge of the requirement would give it an unfair advantage. After Boone Young protested the rejection of its proposal, HHS conducted an investigation which resulted in the February 27 letter to our Office advising that the procuring office had been instructed to issue a sole-source solicitation to Boone Young for this requirement "if there is a continuing need for the services." The agency states that the "breaches of good procurement practice" it found consisted of the failure to properly document the reasons for changing the designation of Boone Young's proposal from acceptable to unacceptable.

In general, Boone Young agrees with this narrative but contends it does not reflect the complete picture nor the real reasons for the agency's actions. Boone Young attributes the determination that its first proposal was unacceptable to the personal animosity of the contracting officer which resulted from Boone Young's questioning the contracting officer's actions under a prior procurement. In support of its position the firm notes that in a sole-source section 8(a) procurement it is extremely rare for the proposal to be found so deficient that it cannot be made acceptable through discussions. Further, Boone Young has submitted affidavits from two former HHS officials,

both of whom were directly involved in the agency investigation conducted as a result of Boone Young's first protest, which generally support the allegations of Boone Young and state that the agency's most recent report to GAO represents a substantial change of position and ignores the improprieties undercovered by the prior investigation. Finally, Boone Young insists HHS' admission of violations of good procurement practice is tantamount to an admission that procurement laws and regulations were not followed and that the agency's implied promise to deal with Boone Young in good faith was broken.

In order to recover proposal preparation costs, the claimant must show that the Government acted arbitrarily or capriciously with respect to a claimant's proposal or that the rejection of the proposal was motivated by bad faith on the part of agency officials. Computer Engineering Associates, Inc., B-198019, August 7, 1981, 81-2 CPD 105. In either case, the claimant must also be able to show that it had a substantial chance of receiving the award except for the agency's improper action. Decision Sciences Corporation-Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD 298.

Both of the subject solicitations were issued as set-asides under the 8(a) program and as such were not subject to the competitive and procedural requirements of the Federal Procurement Regulations and the statutory provisions they implement. Arawak Consulting Corporation, 59 Comp. Gen. 522 (1980), 80-1 CPD 404. The Small Business Administration (SBA) and the contracting agencies have broad discretion under the 8(a) program, and it is in light of that broad discretion that our consideration of bid protests involving that program is generally limited to determining whether the applicable regulations have been followed and whether there has been fraud or bad faith on the part of Government officials. Arawak Consulting Corporation, supra.

First, we see no violation of any regulation here. Even if in a regular procurement it could be argued that Boone Young's proposal should not have been rejected without discussions, under the 8(a) program there is no regulation applicable here which requires that discussions be

held in connection with an offeror's technical proposal. Arawak Consulting Corporation, supra. Further, while HHS has concluded that its documentation should have been better, the failure to document the reasons for changing Boone Young's proposal to unacceptable was not a violation of any regulation of which we are aware and would not rise to the level of a substantive impropriety in any event. See Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176.

We also find no basis for sustaining the major thrust of Boone Young's argument, which is that it was deprived of a contract because of the bad faith actions of the contracting officer.

Boone Young makes much of the change in the rating of its initial proposal from acceptable to unacceptable. The contracting officer, however, is not bound by the recommendations made by evaluation and advisory groups even though such groups may be composed of working level procurement officials and evaluation panel members who normally may be expected to have the technical expertise required for the technical evaluations. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Although the contracting officer's decision must not be inconsistent with the solicitation's stated evaluation criteria and must have a rational basis, he is vested with a considerable range of judgment and discretion in determining the manner or extent to which the evaluation will be used. The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15. Thus, the mere fact that the contracting officer did not accept the evaluation panel's initial determination, without more, does not establish that the rejection of Boone Young's proposal was the result of bad faith.

A showing of bad faith requires undeniable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. Bradford National Corporation, B-194789, March 10, 1980, 80-1 CPD 183. Prior procurement practices, inefficiency or negligence does not suffice to meet the high standard of proof required to show bad faith. Arlandria Construction Co., Inc.,--Reconsideration, B-195044; B-195510, July 9, 1980, 80-2 CPD 21. Moreover,

we will not find a discretionary determination to be arbitrary, capricious or biased if the record indicates a reasonable basis for such determination. Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260. Thus, even if animosity by a contracting officer is assumed, it must be shown that it was translated into action for which there was no reasonable basis and which was prejudicial to the protester. See Optimum Systems, Inc., 56 Comp. Gen. 34 (1977), 77-2 CPD 165.

In the final decision with respect to Boone Young's proposal, there was no dispute between the contracting officer and the evaluation panel; both ultimately agreed that the proposal was unacceptable and could not be made acceptable without major rewriting. The contracting officer's request that the evaluation panel review its recommendation was made only after he had read its report and the evaluation comments and concluded that the documentation and the score of 59 did not warrant a finding that the proposal was acceptable.

The evaluation record and Boone Young's comments are detailed and voluminous and no useful purpose would be served by discussing here each of the weaknesses found by the agency and challenged by Boone Young. Nevertheless, we have reviewed the scoring sheets of each member of the evaluation panel and the weaknesses each found which Boone Young characterizes as contradictory to the strengths stated, inaccurate, trivial, open to negotiations or debatable in view of the limited time given for proposal preparation. We have also reviewed the panel's report summarizing the collective findings of the members of the panel.

In sum, what is most clear from the evaluation report is that while the panel concluded that Boone Young's proposal exhibited strengths under each of the four evaluation factors, the panel also listed a corresponding number of weaknesses. For example, while the panel concluded that the proposal reflected an adequate understanding of the statement of work, it also stated that the proposed staff was not aware of the requirements for operating a resource center. It appears that the cited weaknesses and strengths were fairly evenly balanced and that a reasonable person could conclude from the evaluation report and numerical score that the proposal was unacceptable. Consequently, we

believe the record establishes a reasonable basis for the ultimate decision to reject Boone Young's proposal. Thus, on this record we cannot conclude that the contracting officer's actions, the change in rating, and the rejection of Boone Young's proposal resulted from bad faith on the part of HHS personnel.

With respect to the affidavits of the former HHS officials, which Boone Young characterizes as "conclusive new rebuttal evidence corroborating prior evidence of improprieties," we consider them as an indication of disagreement within the agency as to how the results of the internal investigation should be interpreted rather than as evidence of bad faith or that improprieties not reported to us were uncovered in the HHS investigation. Moreover, while they indicate the affiants' opinions that the first Boone Young proposal should have been accepted, those opinions are based primarily on the premise that it is very unusual for a proposal under a section 8(a) sole-source procurement to be rejected. While this may be so, it is not germane to the question of whether a reasonable basis existed for the rejection of the proposal.

The second sole-source solicitation (RFP 034), to which Boone Young responded with a proposal on July 7, was canceled because the agency concluded that the National Day Care Resources Center program represented a more "directive role" for the Federal Government than the present Administration would support, that its costs seemed disproportionately high and that the usefulness of the program to the states was questionable. The record also shows that the agency had a shortage of funds with many programs competing for them and that this program was not considered sufficiently worthy to warrant funding in place of other programs.

Boone Young contends that the cancellation is a continuation of the pattern of bad faith it had previously encountered under RFP 076. It states that but for the undue delay of HHS in issuing RFP 034, it would have been awarded a contract and thus entitled to termination costs if the contract was later terminated because of funding problems. The delay, Boone Young insists, deprived it of the remedy HHS intended it to have for the treatment it received under the initial solicitation. Boone Young further asserts that

the inclusion in the second RFP of a clause stating that funds were available for the first year of the multi-year program created an implied promise that such funds would not be abruptly withdrawn and that it reasonably relied on this promise. Boone Young finally contends that HHS is prevented under the doctrine of promissory estoppel from denying proposal preparation costs under the second solicitation.

The record shows that the delay cited by Boone Young was caused by HHS' investigation of the rejection of that firm's proposal which resulted from Boone Young's initial protest, the decision to resolicit the requirement and the need to obtain authorization from SBA to issue RFP 034. While perhaps these matters could have been accomplished more expeditiously, there is no evidence that the delay was deliberate or the result of bad faith on the part of HHS personnel. Further, since we have determined that Boone Young is not entitled to proposal preparation costs under RFP 076, it certainly would not be entitled to such costs under RFP 034 because of an alleged "promise" that Boone Young would receive an award under RFP 034 as a "remedy" for HHS' action under RFP 076. In any event, it was clear from HHS' February 27 letter ordering the resolicitation that RFP 034 would only be issued and a contract awarded "if there is a continuing need for the services." It should have been evident from this direct warning that the agency had some doubt as to whether the project would be instituted. Further, the inclusion of the Incremental Funding clause in the solicitation created no obligation on the part of HHS to fund this program. Indeed, the clause merely informed the offeror that if a contract were awarded funds would only be obligated for the first year of the program.

Finally, we cannot agree that the Government, under the doctrine of promissory estoppel, had to award a contract to Boone Young. It was always clear, from the agency's February 27 letter and the second solicitation itself, that an award might not be made.

While we recognize that Boone Young did incur the expense of preparing two proposals without receiving an award, the record shows that its initial proposal was determined to be technically unacceptable by the agency's evaluation panel and that the agency concluded after

the issuance of the second solicitation that the project should not be instituted. These are risks which are inherent in Government contracting and their occurrence does not entitle an offeror to proposal preparation costs unless there has been arbitrary or bad faith action on the part of the agency. Since we find no such action here, we must deny the claims.

for Milton J. Socolar
Comptroller General
of the United States