DECISION

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

81-1 CPD 365

FILE: B-201368 DATE: May 8, 1981

MATTER OF: Hager, Sharp & Abramson, Inc.

DIGEST:

1. Although protester's technical proposal was superior, it was not unreasonable for contracting officer to decide in favor of lower technically rated proposal in order to take advantage of lower cost.

2. Fact that chairman of evaluation panel rather than entire panel reviewed revised proposals is not objectionable, since composition of technical panel is within discretion of contracting agency.

3. Where successful offeror's proposed costs were compared with costs proposed by other offerors and prior contract costs before award was made, judgment made on basis of comparison will not be disturbed, since contracting agency is not required to conduct in-depth cost analysis.

4. Negotiations with offeror were meaningful where strengths, weaknesses, fee and cost of proposal were discussed.

5. Contention that successful offeror lacks experience and expertise to perform contract is dismissed, since GAO will not review affirmative determination of responsibility.

Hager, Sharp & Abramson, Inc. (HSA), protests the award on November 14, 1980, by ACTION of a cost-reimbursement contract under request for proposal (RFP) 80-25 to the Center for Human Ecology Studies (CHES) for training assistance and support services. The American Institutes for Research (AIR) joins HSA in the protest. The contract runs until September 30, 1981, and is renewable for two additional periods of up to 12 months each.

HSA alleges three major deficiencies in the selection process. It alleges that the RFP evaluation criteria were not followed, that ACTION did not complete a reasonable or adequate cost analysis, and that ACTION did not hold meaningful negotiations with HSA. In addition, AIR alleges that CHES is not recognized as an experienced firm and may not have the technical expertise to perform the contract as required. Based on our review of the record, we find no reason to sustain these protests.

The RFP, issued June 25, 1980, stated that award would be made to the firm whose proposal was determined to be most advantageous "after consideration of technical ability, the most favorable pricing arrangement, and other factors." The RFP further stated that proposals would be evaluated for technical quality on a 0 to 100 point scale. The RFP also called for separate cost proposals for the basic period and each option period.

The RFP further stated that the competitive or negotiation range would be determined by taking the total cost proposed by the "lowest qualified offeror" and dividing that cost by one hundred (100) to determine the value of an evaluation point. The cost of the highest rated technical offeror would then be recorded as quoted and all other cost quotations would be adjusted upward by multiplying the difference in evaluation points of each technical proposal from the highest rated technical proposal by the dollar value of an evaluation point with the resulting amount added to each cost proposal.

Four proposals were submitted by August 25, 1980, the due date for proposals. On September 30, an evaluation panel reported the results of its evaluations. HSA received the highest overall average score at 83.47, AIR was next at 76.16, and then CHES at 58.23 (the fourth

offeror received 41.50 and was excluded from the competitive range). In addition, HSA quoted a total estimated cost of $1,252,664, AIR quoted $1,040,747 and CHES quoted $882,947.

Negotiations were conducted with the three remaining offerors and best and final offers were submitted by October 31. The revised technical proposals were reviewed, this time only by the chairman of the evaluation panel. The chairman did not rescore the proposals. But he reported that the order of technical quality remained the same with HSA still rated first, AIR second and CHES third, although the gap between HSA and AIR had widened by HSA moving up while the gap between AIR and CHES had narrowed by CHES moving up.

The cost proposals also had changed: HSA proposed a total cost of $1,166,921 (previously $1,252,664); AIR proposed a cost of $1,092,450 (previously $1,040,747, and CHES a cost of $886,646 (previously $882,947). As indicated, award was made to CHES on November 14, 1980.

HSA's protest that the award was made contrary to the RFP evaluation criteria is based partly on telephone conversations it had just prior to the award with both the chairman of the evaluation panel and the "head of ACTION's Contract Office." According to HSA, it was advised separately by both these officials that, although its proposal was far superior to CHES' proposal, cost was the determining factor in the selection. (HSA explains that it called these officials because it was unable to reach the contracting officer.)

In HSA's view, ACTION "dramatically changed" the evaluation award criteria after best and final proposals were received so that technical merit was no longer considered a critical factor. In this connection, HSA states that its technical score was 43 percent higher than CHES' while its cost was only 28 percent higher. (While we agree with HSA's 43 percent figure, we calculate HSA's cost proposal as being 30, not 28, percent higher, using the costs, of $1,166,921 and $886,646, plus $10,258, which, as noted below, ACTION concedes are costs which were

omitted by CHES and should have been included in its proposal.)

In any case, HSA contends that with a technical score of less than 60, CHES should never even have been considered to be in the competitive range. Moreover, HSA states that ACTION did not rescore the revised proposals and did not apply the formula described in the RFP. Rather it believes ACTION merely treated all revised proposals as technically equal and made award to the lowest offeror. HSA maintains that this approach to award selection is contrary to FPR § 1-3.805-2 ("cost-reimbursement type contract," which provides that for this type of contract estimated costs of contract performance should not be controlling in the award selection, and contrary to GAO decisions, which call for the agency to notify offerors of the evaluation criteria to be used and to follow those criteria in making the award selection.

ACTION, in turn, disputes HSA's contention that its decision to award to CHES was inconsistent with FPR § 1-3.805-2 and with GAO decisions. Rather ACTION argues that its award decision was rationally founded and consistent with the RFP evaluation criteria.

Regarding the telephone conversation that HSA had with ACTION officials just prior to the award, ACTION states that the correct interpretation of the statements made by its officials to HSA would be that "technical superiority was probably not sufficient to offset significant cost differences when another fully acceptable proposal existed." Moreover, ACTION argues that the RFP criteria controlled the award selection and not what HSA claims was said to be the award factors by ACTION officials (other than the contracting officer) in telephone conversations prior to the award. As for HSA's unsuccessful attempt to talk to the contracting officer, ACTION states that its contracting officer did not want to talk to HSA or any other offeror about the procurement prior to the award selection because she felt that such discussions would be improper and require that negotiations be reopened with all offerors. We see no reason to question the action in this respect.

We have recognized that in a negotiated procurement selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Thus we have upheld awards to lower priced, lower scored offerors where it was determined that the cost premium involved in making an award to a higher rated, higher priced offeror was not justified in light of the acceptable level of technical competence available at the lower cost. Grey Advertising, Inc., supra. As we stated in 52 Comp. Gen. 358 at 365 (1972), the determining element is not the difference in technical merit per se, but the considered judgment of the procuring agency concerning the significance of that difference. On the other hand, we have also upheld awards to higher rated offerors with significantly higher proposed costs because it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. Riggins & Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 783.

Therefore, the question in this case is whether ACTION's determination to award to CHES was reasonable in light of the RFP evaluation scheme.

In reviewing the record, we find that the evaluation panel, in reporting the results of its evaluation of the initial technical proposals, stated that only HSA and AIR had a good grasp of the work as well as qualified staff, while the CHES proposal had major deficiencies. However, in its detailed analysis of the CHES proposal, the panel noted that its members "felt positive about the firm--they have dynamic people, they operate from a sound philosophy, and they are currently performing good work." The panel stated that the weaknesses were "mainly lack of specificity of how they would perform the work, not demonstrating a solid understanding of the time involved in accomplishing tasks and how the tasks interrelate, and depth of experience in many of the task areas." But the report further stated that "the entire panel shared the

feeling expressed in the comments of one panelist: "I have good feelings about their [CHES's] proposal. The group seems to be eager, enthusiastic, and professional * * *. They seem, to use a sports analogy, to be a 'good prospect' for future use by the agency."

The evaluations were reported to the contracting officer. The contracting officer then turned to the cost proposals, and divided CHES low cost of $882,947 by 100, to arrive at a point value of $8,829. A total of $222,844 was then added ($8,829 x 25.24 points, the difference between HSA's high technical score and CHES' score). As a result, CHES was evaluated at $1,105,791, in accordance with the RFP formula, and HSA's evaluated price remained $1,252,664. On this basis CHES was placed in the competitive range.

We are mindful of the fact that HSA's technical proposal was clearly superior. However, considering that the evaluation panel described CHES as a "good prospect" for the future, that the chairman in his review of the revised technical proposals reported that CHES had improved even though deficiencies remained, and a cost/technical tradeoff evaluation was made after best and final offers in accordance with the RFP formular mentioned in the proceeding paragraph, we do not find it unreasonable for the contracting officer to decide in favor of CHES, in order to take advantage of the lower cost. It may be that some other contracting officer would have reached a different conclusion. However, where there is a reasonable basis for the judgment reached by the immediate contracting officer, the fact that some one else would have decided otherwise does not make the judgment illegal or improper. In that regard, we indicated in Grey Advertising, supra, that before our Office will disturb a judgment there must be a clear showing of an arbitrary abuse of discretion or violation of the procurement statutes and regulations.

Moreover, we see no reason to object to the award because the chairman rather than the entire evaluation panel reviewed the revised proposals. The composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object in the absence of evidence of fraud, bad faith or conflict of interest. New York University, B-195792, August 18, 1980, 80-2 CPD 126. Similarly, whether

the revised proposals were rescored is not a matter of concern so long as the results of the reevaluation were adequately reported to the selection official as in this case. Design Concepts, Inc., B-186125, October 27, 1976, 76-2 CPD 365.

Accordingly, we find no merit to HSA's contention that the evaluation criteria were not followed.

HSA next contends that ACTION did not complete a reasonable or adequate cost analysis. It contends that ACTION had no initial cost estimate for this contract and thus had no sound basis on which to analyze costs. As a result, HSA maintains either ACTION allowed CHES to budget for less than the entire scope of work in the option years or ACTION's cost analysis for the option years was faulty. (HSA points out that as the incumbent contractor for this work, HSA is familiar with the true costs.)

As an example, HSA states that the largest cost element of the contract is in a series of training seminars for which the contractor does all of the work; that five of these seminars are required in the contract base period; and, that nine of these seminars are required in each of the option years. HSA states that CHES' budget for these seminars barely increases in the option years.

HSA also states that CHES is a community-based non-profit organization with no national programming experience, and that it is proposing for this contract to open a Washington, D.C., office, staff an office in Maine, and keep the head program staff member in Boston, Massachusetts. Thus, HSA contends that any indirect cost figures submitted by CHES should have been regarded, at best, as speculative, and, that in the circumstances the contracting officer should have considered imposing indirect cost ceilings.

ACTION responds to these contentions by stating that its negotiator prepared a cost analysis comparing prior contract costs with costs submitted by the offerors. Moreover, ACTION states that a breakdown of the final direct costs for CHES and HSA shows that CHES proposed

higher costs in several categories and that the significant exception was in the category of consultants. ACTION speculates that this may be attributed to CHES' proposal to use fulltime regular staff to do most of the work while HSA proposed to use outside consultants for several functions.

As to CHES' indirect costs, ACTION states that CHES' overhead pool was reviewed by ACTION's Director of Audits and considered acceptable. Thus, ACTION states, it saw no reason to establish ceilings for overhead.

ACTION, however, admits that CHES failed to include in the option years certain costs for workshops to be provided during those years. ACTION estimates the omitted cost to be $10,258, but feels that this possible increase in cost is not significant in comparison with the total cost differential between CHES and HSA of $280,275, over the 3-year period.

We agree. As we stated in Grey Advertising, supra, an agency's evaluation of competing cost proposals involves the exercise of informed judgment which we will not disturb unless there is clearly no reason for it. Furthermore, the agency is not necessarily required to conduct an in-depth cost analysis or verify each and every cost item of the offeror's cost proposal. New York University, supra. Here, it seems to us sufficient that prior contract costs were compared with the proposed costs and that the proposed costs of each offeror were compared to the others.

HSA also contends that ACTION failed to hold meaningful negotiations with it. Specifically, HSA contends that ACTION misled it into thinking that only a small number of its direct cost estimates were too high. According to HSA, the contract negotiator made no mention of overhead as being too high but yet, at the debriefing, HSA was told it lost because of its indirect costs and fee. It also states that no mention was made of its option year costs which were disproportionately higher than CHES' option costs.

ACTION replies that during the discussions the evaluation panel's comments concerning strengths and weaknesses were provided to HSA along with discussion of its cost proposal. It states that specific elements of cost, particularly staff salaries which included significant increases over the salaries paid under HSA's previous contract were discussed. According to ACTION, HSA explained that in the past, as a new business, it had paid and accepted salaries below the market, but now it believed that its staff salaries must reflect its experience and current market trend. ACTION further states that its negotiator was also led to understand that this philosophy applied to consultant cost increases.

Further, ACTION states that other direct cost items, including materials/supplies and communications, were discussed to identify certain items that appeared excessive in light of previous cost history, but that no attempt was made to drive down costs by using rates other than those established by the cognizant Government audit agency. (ACTION reports that HSA's indirect contract costs had been reviewed by DCAA and it had recommended overhead rates for HSA.)

Concerning fees, ACTION states that the negotiator asked HSA for its rationale and was told that HSA's fees were based on past performance and the cost of doing business. The negotiator then told HSA that it would have to assess the competitiveness of the fee in preparing its best and final offer.

Based on the foregoing, we do not conclude that the negotiations with HSA were misleading or incomplete. HSA's indirect cost rate was that recommended by DCAA. ACTION had no duty to try to get HSA to reduce the DCAA recommended rates. However, other aspects of the HSA cost proposal were discussed, including salaries and fees.

Accordingly, HSA's protest is denied.

Finally, we find no reason to question the award because of AIR's contention that CHES lacks the experience and expertise to perform the contract. In our

opinion, AIR's contention essentially involves a question of whether CHES is a responsible offeror for this procurement. It is well settled that our Office will not review affirmative determinations of responsibility, and, therefore, the ground of protest is dismissed. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

AIR's protest is dismissed.

Harry R. Van Cleve

For the Acting Comptroller General
of the United States