

DECISION

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

29684

FILE: B-214746**DATE:** October 23, 1984**MATTER OF:** Schneider, Inc.**DIGEST:**

1. GAO reviews complaint by prospective contractor concerning award by recipient of federal assistance under cooperative agreement to insure compliance with statutory and regulatory requirements and terms of the cooperative agreement.
2. In negotiated procurement, award need not be made to the lowest cost offeror where request for proposals so provides and decision to award to higher cost offeror is reasonable.
3. Procuring agency is not required to permit offeror to rebut information that agency received from sources listed in offeror's proposal.
4. Where procuring agency has reasonably found awardee's proposal to be superior, protester has not met its burden of proving that procuring agency favored awardee.
5. GAO will not consider whether recipient of federal assistance under cooperative agreement was required to have its own protest procedure since failure to have such procedure would not affect award propriety.

Schneider, Inc. (Schneider), complains of the award of a mechanical installation contract for the Heber Geothermal Binary Demonstration Project (Heber) to Bechtel Constructors Corporation (Bechtel), by the San Diego Gas and Electric Company (San Diego) under request for proposals (RFP) No. Y-423302. San Diego is constructing Heber pursuant to a cooperative agreement with the Department of Energy (Energy). Schneider alleges that it was the low, responsive and responsible offeror and that it is entitled to the contract award.

030449

We review complaints by prospective contractors concerning the award of contracts by recipients of federal assistance under cooperative agreements to insure that the recipients have conducted their procurements in compliance with applicable statutory and regulatory requirements and the terms of the cooperative agreements. Xcavators, Inc., 59 Comp. Gen. 758 (1980), 80-2 C.P.D. ¶ 229. The cooperative agreement between San Diego and Energy required San Diego to conduct its procurements in accordance with OMB circular A-110, attachment "O." Under this circular, San Diego was free to use its own procurement procedures and policies provided they complied with the minimum federal standards enunciated in the circular. Pioneer Medical Systems, B-206311, Sept. 27, 1982, 82-2 C.P.D. ¶ 280.

The complaint is denied in part and dismissed in part. Schneider's claim for proposal preparation costs is denied.

Heber is being constructed to demonstrate the technology for producing electricity from thermal heat. San Diego hired Dravo Constructors, Inc. (Dravo), as its construction manager. In this capacity, Dravo was responsible for preparing and issuing the RFP for the Heber project, evaluating the proposals, and making an award recommendation to San Diego. San Diego, however, retained the right to disregard Dravo's recommendation.

On June 10, 1983, Dravo sent a letter informing prospective offerors that the RFP for the mechanical installation work at Heber would be issued shortly. The RFP, issued on June 27, provided that the contract would be awarded to the responsive proposer who submitted the lowest and best evaluated proposal. Paragraph IX, "B," listed seven factors against which proposals would be evaluated. Among them were:

"(3) Satisfactory record of performance
 . . . past unsatisfactory performance . . .
 shall be sufficient to justify a finding of
 nonresponsibility.

.

"(6) Necessary organization, experience, operational controls and technical skills"

Incident to these evaluation factors, each proposer was required to submit a list of its past and present projects for similar work.

On September 23, 1983, Dravo received 16 proposals and, after evaluating them, placed three, including the proposals submitted by Schneider and Bechtel, in the competitive range. The third proposal was eliminated from the competitive range because of technical deficiencies. Dravo then recommended that San Diego award the contract to Bechtel because Bechtel's cost proposal was low. Due to the need to revise the technical specifications, however, Bechtel and Schneider were requested to respond to revised RFP's on January 1 and February 9, 1984, and both did. After Dravo evaluated the February 9 proposals, it found that both proposals were acceptable. Dravo recommended that San Diego award the contract to Schneider because Schneider's cost proposal was now low.

San Diego received Dravo's recommendation and evaluated the offeror's experience. San Diego determined that since it had never worked with Schneider, if Schneider was awarded the contract, both San Diego and Dravo would need to hire an additional engineer to supervise Schneider's performance. This conclusion was reached, in part, because after awarding an earlier Heber project contract to another firm which had not previously worked with San Diego, San Diego found that the firm required additional supervision. San Diego estimated that the cost of hiring two additional engineers would be \$164,000 and this cost would exceed the \$60,705 cost advantage of Schneider's proposal. After reaching this conclusion, San Diego contacted two individuals at Arizona Public Service Company (Arizona)--a company listed as a reference in Schneider's proposal. These sources confirmed San Diego's belief that Schneider would require additional supervision. Based on this evaluation of Schneider's proposal, San Diego's previous experience working with Bechtel, and previous contact with Bechtel's references, San Diego concluded that Bechtel's proposal was superior and that an award to Bechtel would be more advantageous even if Schneider's proposal was determined to be low. The contract was awarded to Bechtel on April 11, notwithstanding the pendency of Schneider's complaint.

Schneider first complains that it was entitled to the contract award because it submitted the lowest acceptable offer. In this regard, Schneider states that after the third proposal was submitted, an employee of Dravo informed Schneider that since both proposals were acceptable, the award would be determined by price.

This basis of Schneider's complaint is without merit. In the context of direct federal procurements, we have held that in a negotiated procurement, it is permissible to award the contract to other than the lowest cost offeror if the RFP so provides and the decision to do so is reasonable and consistent with the established evaluation criteria. Information Network Systems, B-208009, Mar. 17, 1983, 83-1 C.P.D. ¶ 272. The RFP provided that the contract would be awarded to the proposer who submitted the lowest and best evaluated proposal. This provision, combined with the listed criteria against which proposals would be evaluated, was sufficient to notify offerors that cost would not be the only basis on which the successful awardee would be chosen. Thus, San Diego was not required to award the contract to the lowest cost offeror. To the extent Schneider relied on the alleged advice of a Dravo employee that the award would be made to the low cost offeror, Schneider did so at its own risk. Article II, "A," of the "Instruction to Proposers" warned that neither Dravo nor San Diego would be bound by other than written responses to questions submitted in accordance with the procedures of that section.

Schneider next argues that San Diego's technical evaluation of its proposal was not in accordance with the terms of the cooperative agreement or the principles governing federal competitive procurements. Specifically, Schneider notes that pursuant to the principles of federal procurement law and the terms of the cooperative agreement, San Diego was required to evaluate proposals in accordance with only those criteria set forth in the RFP. Schneider asserts that it was denied the contract because it had no prior experience working with San Diego, and prior experience working with San Diego was not a stated evaluation factor. Schneider also alleges that San Diego's addition of costs to Schneider's proposal based on its experience with a firm unrelated to Schneider was an unstated criteria. Finally, Schneider argues that criterion No. 3 was the only arguable criterion under which San Diego could have evaluated Schneider's experience, and San Diego failed to adhere to this criterion because it should have considered Schneider's past performance as well as its present performance and because it did not give Schneider the opportunity

to rebut negative references San Diego received concerning Schneider. In this regard, Schneider alleges that evaluation criterion No. 3 concerned whether Schneider was responsible and that San Diego made an unwarranted finding that Schneider was not a responsible firm.

While it is a fundamental principle of federal procurement policy that all proposers must be advised of the basis on which their proposals will be evaluated, the contracting agency is not precluded from considering matters not expressly identified as evaluation factors in the solicitation as long as the matters considered are logically and reasonably related to the stated criteria. United Food Services, Inc., B-211117, Oct. 24, 1983, 83-2 C.P.D. ¶ 476. In this case, San Diego states that it assessed Schneider's experience under evaluation criterion No. 6 which provided that a bidder's experience would be considered. We find nothing improper in San Diego's considering the quality of Schneider's performance under this criterion despite Schneider's contention that its experience and past performance could be considered only under evaluation criterion No. 3.

We also cannot question San Diego's decision not to permit Schneider to rebut the references it received from the two individuals at Arizona prior to awarding the contract. Evaluation criterion No. 6 did not provide that proposers would be permitted to rebut information obtained from companies listed in the proposals. In addition, we have previously held that where offerors were required to list prior experience, the offeror is aware that the source of this experience may be contacted and the contracting agency may contact these sources and consider their replies without permitting the offeror to rebut the information and without further investigation into the accuracy of the information. See Kirk-Mayer, Inc., B-208582, Sept. 2, 1983, 83-2 C.P.D. ¶ 288. Accordingly, San Diego did not act improperly in denying Schneider an opportunity to comment on that information until the GAO conference on this complaint. Given this conclusion, we need not consider Schneider's post-conference argument about the alleged quality of its experience with Arizona--as testified to by other representatives of Arizona--since we consider that San Diego released to Schneider the content of its conversations with two of Arizona's employees for informational purposes only and not for purposes of reconsidering the award.

Finally, there is no evidence to support Schneider's position that San Diego found Schneider was a nonresponsible firm. Even if we accept Schneider's argument that its experience was evaluated under criterion No. 3, and this criterion was composed of matters related to responsibility, this evaluation was proper. In this regard, we have consistently held that in a negotiated procurement, traditional responsibility criteria may be used as proposal evaluation factors. See Anderson Engineering and Testing Company, B-208632, Jan. 31, 1983, 83-1 C.P.D. ¶ 99. Thus, San Diego could use these factors to downgrade Schneider's proposal without finding that Schneider was nonresponsible.

Schneider next alleges that San Diego's addition of the cost of supervisory personnel to Schneider's proposal was outside the stated evaluation criteria. In this regard, San Diego reports that it found Bechtel's proposal to be superior based on a comparison of the relative experience of the two companies with entities other than San Diego and would have made the award to Bechtel even if Schneider's proposal had been considered to be low. Consequently, even if we found that in evaluating Schneider's proposal San Diego should not have considered the additional supervisory costs or San Diego's lack of prior work experience with Schneider, this improper action did not prejudice Schneider. Thus, we will not consider this basis of Schneider's complaint.

Schneider also complains that San Diego's evaluation of its proposal was unreasonable. To support this position, Schneider first notes that Dravo, San Diego's construction manager, recommended Schneider for award. Schneider alleges that Dravo's recommendation was based on a thorough evaluation of Schneider's proposal and contact with six sources of experience (apparently other than with Arizona) listed in that proposal. Schneider asserts that San Diego had no basis on which to reject Dravo's recommendation and that, in doing so, San Diego ignored the complimentary recommendations it received from the references which Dravo contacted.

We find no basis to object to San Diego's decision to reject Dravo's recommendation. We have consistently held that the source selection official is not bound by the recommendations and conclusions of the evaluation panel, and we will defer to judgment of the source selection official even when the evaluation panel has the technical expertise to evaluate proposals. See Madison-McAfee-Stull Transit Group, B-203766, Apr. 5, 1982, 82-1 C.P.D. ¶ 301. San Diego, as evidenced by its reservation of right in the RFP to choose the ultimate awardee, was the selection official.

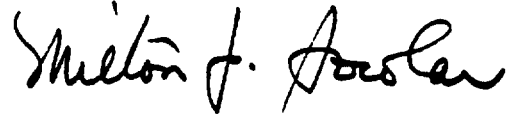
Thus, the issue is the reasonableness of San Diego's decision that Bechtel's proposal was superior to Schneider's proposal.

We conclude that San Diego's decision has not been shown to be unreasonable given San Diego's finding that Bechtel's proposal was superior, a finding that we cannot question on the basis of the record. Further, the record does not demonstrate that Dravo's recommendation was based on a complete evaluation of Schneider's proposal. Rather, our review of Dravo's recommendation shows that it was based on an evaluation of the proposer's costs, workhours and ability to meet the required schedule dates. Nor does the record indicate that when San Diego evaluated Schneider's proposal, San Diego was aware of any positive recommendations Dravo received from references of Schneider which Dravo contacted. Thus, even if this information existed, since San Diego was not made aware of it, it is not relevant in determining whether San Diego's decision was reasonable. Finally, as noted above, San Diego was properly within its authority to disregard Dravo's recommendation.

Schneider also has alleged that San Diego was biased in favor of Bechtel. This basis of Schneider's complaint is based on the fact that in evaluating the proposals, San Diego added costs to Schneider's proposal, but did not add supervision costs to Bechtel's proposal for the times when Bechtel's employees would be working overtime. Schneider also argues that San Diego improperly considered San Diego's prior work history with Bechtel. San Diego responds that it will not incur any additional costs as a result of Bechtel working overtime. Although Schneider has submitted the costs it believes San Diego will incur, Schneider has offered no explanation as to why San Diego will necessarily incur these costs. Accordingly, we have no basis on which to question San Diego's conclusion. Thus, Schneider has not met its burden of affirmatively proving that San Diego was biased.

Schneider finally alleges that San Diego violated the cooperative agreement because San Diego failed to provide its own protest resolution procedures as required by section II of OMB circular A-110, attachment "O." Even if San Diego was required to have protest procedures, the failure to comply with this requirement is a procedural irregularity not affecting the merits of the contract award. Consequently, this complaint basis is denied.

Because we have found Schneider's complaint to be without merit, Schneider's request for proposal preparation cost is denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States