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SOURCE SELECTION--FROM GAO'S PROSPECTIVE

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Introduction

In selecting their contractors, contracting agencies generally are required to solicit offers or proposals from the maximum number of qualified sources and, in the case of negotiated procurements, to hold written or oral discussions with those offerors who submit proposals within a competitive range prior to making the selection. 10 U.S.C. § 2304(g) (1976) and Federal Procurement Regulations §§ 1-3.101(c) and 3.805-1 (1964 ed.). The requirement for holding discussions need not be applied to procurements where fair and reasonable prices result from the initial proposals and the solicitation notified all offerors that award might be made without discussions. In addition, urgent procurements, procurements negotiated under the small purchase procedures, authorized set-asides, and procurements in which the rates or prices are fixed by law or regulation are exempt from the usual source selection requirements. However, most major negotiated procurements are subject to the dual requirements to obtain maximum competition and to hold discussions.

Obtaining Maximum Competition

The requirement to obtain maximum competition is straightforward. Contracting agencies are required to solicit competition from all qualified sources consistent with their needs.

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It is not sufficient for an agency to attempt to obtain only a reasonable amount of competition--it must seek out all possible sources. Proposed procurements (with certain exceptions) must be publicized in the Commerce Business Daily, and bidders mailing lists, which are used for advertised procurements, are, where appropriate, to be used for negotiated procurements as well.

In recent years, contracting agencies have attempted to control the extent of competition obtained through the use of so-called prequalification plans. A few years ago the Department of Agriculture proposed a plan to restrict competition in certain defined areas to a list of the 10 top-rated firms as previously determined. The purpose of this prequalification plan was to reduce the number of firms competing for individual procurements. As a matter of administrative convenience, the Department did not want to have to evaluate a great number of proposals each time. In Department of Agriculture's use of Master Agreement, 54 Comp. Gen. 606 (1975), 75-1 CPD 40, GAO concluded that Agriculture's prequalification plan was incompatible with the requirement for obtaining maximum competition, since the sole purpose of the plan was administrative convenience or the desire to reduce the number of firms competing for each procurement.

On the other hand, a prequalification procedure which is designed to enhance competition is not objectionable. Thus, a plan which was devised by the Department of Health and Human Services (formally Department of Health, Education, and Welfare) to be used only in exigency situations, where competition otherwise would not have been obtained, was considered proper by GAO. Department of Health, Education, and Welfare's use of basic ordering type agreement procedure, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392. Similarly, a Department of Energy (DOE) plan, its so-called "quick reaction work order (QRWO) system of contracting" was approved by GAO since DOE designed it to be used only in urgent situations, with strict procedural safeguards. B-196489, February 15, 1980, a letter to Chairman John D. Dingell of the Energy and Power Subcommittee, House Interstate and Foreign Commerce Committee, and Hittman Associates, Inc., B-198319, December 17, 1980, 80-2 CPD 437. Under this plan DOE makes multiple awards of master contracts for broad general areas of work. After award, when specific, urgent needs arise in one of the stated areas of work, DOE solicits three or more master contractors, who submit proposals for the task at hand. This second competition, generally based on price, results in modification of the successful contractor's master contract to include the specific task.

In contrast, GAO did not entirely approve of the prequalification plan devised by the Office of Federal Procurement Policy (OFPP), discussed in Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd., B-198360, December 9, 1980, 80-2 CPD 419. GAO had no problem with OFPP's preqalification system for film and videotape production because all firms might attempt to qualify, but recommended that particular procurements should be synopsized in the Commerce Business Daily. Unlike DOE, OFPP proposed to use its system as a substitute for the normal procurement process, rather than only in urgent situations.

Holding Discussions

As stated in the introduction, contracting agencies are generally required to hold discussions with offerors submitting proposals within a competitive range prior to making award in a negotiated procurement. But which proposals are to be considered within a competitive range?

Competitive range

Quite simply, the competitive range includes all proposals which have a reasonable chance of being selected for award. Defense Acquisition Regulation (DAR) § 3-805.2(a) (1976 ed.). (In case of doubt, the regulation instructs that the proposal shall be included in the competitive range.)

To be within the competitive range, a proposal must meet two tests. Under the first, the proposal must be acceptable or at least readily susceptible of being made acceptable. For example, if an agency is asking for proposals concerning a computer system with a specified minimum output capacity, a proposed system which fails to meet that minimum is technically unacceptable and need not be considered within the competitive range, regardless of price. 53 Comp. Gen. 1 (1973). On the other hand, if the defect in the proposal or failure to comply with a material requirement could easily be cured without extensive revision to the proposal, it may be considered in the competitive range. NCR Corporation, B-194633.2, September 4, 1979, 79-2 CPD 174.

Secondly a proposal may be fully acceptable and yet not be included in the competitive range because it does not compare favorably to the other proposals received, price and other factors considered. For example, if an agency receives 12 proposals, all technically acceptable, but five of these are far ahead of the others in terms of price and technical excellence, discussions need not be held with every offeror. The contracting officer could decide that only the top five proposals are within the competitive range, and although the other seven proposals are acceptable, it is not worthwhile to conduct discussions with these offerors because they have little or no chance of being selected for award. See generally,

Hittman Associates, Inc., supra. In this respect, GAO has consistently held that the determination of competitive range is primarily a matter of administrative discretion, and will not be disturbed in the absence of a clear showing that such determination was arbitrary or an abuse of discretion. B-166213(1), July 18, 1969; Joule Technical Corporation, B-197249, September 30, 1980, 80-2 CPD 231.

Common sense is required in these situations. For example, if an agency receives three technically acceptable proposals, but decides to hold discussions with only one offeror, it should be prepared to justify its exclusion of the other two proposals; it will not be sufficient to show only that the best of the three proposals was retained for discussions. The agency must be able to show that only the best proposal had a reasonable chance of receiving the award, or GAO will consider exclusion of the other two acceptable proposals to be improper. See 46 Comp. Gen. 191 (1966).

Content of discussions

Once the contracting officer has established a proper competitive range and is prepared to hold discussions with the offerors whose proposals are within that range, what should the parties discuss?

The answer would appear to be obvious. GAO has repeatedly stated that the discussions, be they written or oral, must be

meaningful. In theory, it would seem that the contracting officer should discuss fully with each offeror the weaknesses and deficiencies in its initial proposal, and that as a result of these discussions, the offeror should be able to submit a more competitive revised proposal. In practice, however, the requirement for meaningful discussions has created difficulties for all concerned. An actual case will illustrate the problem.

A number of years ago, the National Aeronautics and Space Administration (NASA) took the GAO admonition about the need for meaningful negotiations to heart. In a highly complex procurement involving space technology, Fairchild Industries and General Electric (GE) were the competitors for the final production phase of the program; they had previously received awards for the study phase. Fairchild's technical proposal for the production contract was initialy ranked ahead of GE's, but after discussions, GE improved its final technical proposal to the point where it was scored about the same as the Fairchild's. NASA therefore selected GE for award because of an evaluated cost advantage.

Fairchild then protested to GAO, claiming that GE had won the competition unfairly. Fairchild argued that during the competitive range discussions, NASA had disclosed many of its ideas to GE, which in turn merely incorporated these

ideas into its final proposal. In short, Fairchild accused NASA of technically transfusing Fairchild's ideas and innovative approaches into the GE proposal. NASA and GE denied the charge, arguing that GE's technical improvements were due to GE initiatives, but NASA acknowledged that it had pointed out to GE the weaknesses in its initial proposal in accord with its interpretation of the meaningful discussion requirement.

As it turned out, GAO sustained Fairchild's protest on grounds other than the technical transfusion issue. However, in the course of its decision, GAO stated that it never intended to endorse a negotiating procedure "whereby information which would give an unfair competitive advantage to any proposer would be disclosed during the negotiation process." 50 Comp. Gen. 1, 8 (1970).

Soon thereafter NASA revised its source evaluation procedures (NASA Procurement Regulation 70-15) to provide essentially that during written or oral discussions before award of cost-type research and development contracts, ambiguities and uncertainties should be pointed out to each offeror, but deficiencies should not be discussed, because to do so would in effect constitute an auction technique.

Subsequently, in another large NASA procurement, GAO recognized that pointing out deficiencies during the course of discussions could lead to price auctions, technical

transfusion, and technical leveling, and that these practices are detrimental to the competitive process. 51 Comp. Gen. 621 (1972) (the Pratt-Whitney case). Technical leveling occurs when a contracting agency helps an offeror to upgrade its technical proposal by telling it what changes ought to be made in order to improve it. For example, if an offeror proposes a design which is acceptable, but the agency thinks that another approach would be better, telling the offeror to adopt the better approach would constitute technical leveling. On the other hand, merely pointing out to an offeror where its proposal is deficient does not constitute technical leveling. The difference between technical leveling and proper negotiating techniques is not always easy to see.

A price auction occurs when a contracting officer reveals the low offeror's price or other information which gives one offeror an unfair advantage over the others in competition. It is all right to tell an offeror that its price is too high, but it is not all right to tell an offeror its relative standing compared with the other offerors, or to reveal the identity, number or proposed prices of other offerors. DAR § 3-805.2(a), supra.

In the Pratt-Whitney case, supra, GAO concluded that in view of the many problems associated with the conduct

of discussions, no fixed, inflexible rule can be used to construe the requirement for written or oral discussions. Rather, the content and extent of discussions is a matter of judgment primarily for determination by the contracting agency. That determination is not subject to question unless clearly arbitrary or without a reasonable basis.

The framework established 10 years ago by these two NASA cases survives today. DAR § 3-805.3 (1976 ed.). provides that in conducting discussions under negotiated procurements, offerors should be advised of deficiencies in their proposals and afforded a reasonable opportunity to correct or resolve them. (Deficiencies are defined in the regulation as parts of a proposal which do not satisfy the Government's requirements.) The regulation further provides that while offerors should be advised of deficiencies, the discussions should not disclose the strengths or weaknesses of competing offerors or information from one offeror's proposal which would enable another offeror to improve its proposal. Finally, the regulation prohibits contracting officers from engaging in auction techniques.

Under the Pratt-Whitney standard, the contracting officer has wide discretion to decide the content and extent of discussions. In most cases coming to GAO, contracting agencies are able to justify the discussions held despite allegations

by protesters that they were not meaningful. For example, in Okaw Industries, Inc., B-197306, September 29, 1980, 80-2 CPD 228, the Navy was soliciting proposals for radomes (fiberglass enclosures used to protect radar equipment). Okaw's proposal was considered technically marginal for a number of reasons, but largely because of poor randome panel construction. During oral discussions, Navy asked Okaw to submit samples of its panel construction. According to Okaw, the Navy did not express any concern to it, but only wanted to see "the type of work that Okaw does." The Navy, however, insisted to GAO that the sample submission was intended to resolve its concerns about panel construction and that Okaw was aware of this. In denying the protest, GAO stated that "the Navy was not required to do more than raise the issue of panel construction with Okaw in order to meet its obligation to conduct meaningful discussions." In other words, the Navy did not have to spell out its concern with the offered product; it was sufficient that the offeror was asked to submit a sample during the course of discussions. Clearly the offeror must be very alert in such situations.

Sometimes GAO finds that a contracting agency, in its zeal to avoid technical transfusion or leveling, fails to conduct meaningful discussions. An interesting example

is Harbridge House, Inc., B-195320, February 8, 1980, 80-1 CPD 112, in which the Navy was seeking proposals to conduct procurement training courses. Harbridge House and Sterling Institute were among the firms included in the competitive range. Harbridge House's initially proposed price was much lower than Sterling's, but Sterling's technical proposal was significantly better in the Navy's opinion. Discussions were confined solely to price, because the Navy felt it understood the strengths and weaknesses of the proposals and feared that any discussion of technical factors would result in transfusion and leveling. When best and finals were received, the technical proposals were unchanged, but Sterling's price had been reduced to equal Harbridge House's. Sterling received the award.

Harbridge House protested, contending that the discussions had not been meaningful. GAO agreed, pointing out that in a procurement for training courses, where personnel and organizational qualifications, rather than technical approaches, were the primary concerns, technical transfusion and leveling should not have been considered major problems. GAO also pointed out that as a result of limiting the discussions to price alone, Navy afforded Sterling an opportunity to reduce its high price, but did not give Harbridge House any opportunity to improve its lower-rated technical proposal.

Another recent illustration of the failure to conduct meaningful discussions occurred in Logistic Systems Incorporated, B-196254, June 24, 1980, 80-1 CPD 442. In that case, the Army solicited proposals for the decontamination and cleanup of Frankford Arsenal, Philadelphia, Pennsylvania, so that the area could be turned over to the public for recreational or industrial use. Proposals were received from a number of firms, including Logistic Systems Incorporated (LSI) and Rockwell International Corporation, both of whom were determined to be within the competitive range.

Army evaluators found that Rockwell had submitted the best technical proposal, while LSI's proposal was low as to cost (estimated at about $4 million compared to $6 million for Rockwell). Among other faults, the Army found LSI's technical proposal lacked sufficient information on laboratory facilities and personnel.

During written discussions, the contracting officer asked LSI to give consideration to its proposed costs and manhours and certain estimates of work to be performed; proposed laboratory facilities and personnel were not specifically listed in the contracting officer's letter.

When best and final proposals were evaluated, there was no change in the technical ratings. A "best buy"

analysis was performed and, as a result, a cost contract was awarded to Rockwell on the basis of its technical superiority.

LSI then protested to GAO, alleging among other things, that if the Army had mentioned its concerns regarding laboratory facilities and personnel to LSI, the firm could have satisfied them. The Army argued that it had no duty to point out weaknesses under DAR § 3-805.3, supra, only deficiencies, but that in any event the weaknesses had been pointed out sufficiently when the contracting officer requested that LSI review its cost and manhour estimates.

GAO agreed with LSI, stating that even if LSI could infer certain inadequacies from the contracting officer's questions regarding cost, it would not be reasonable to expect LSI to infer the informational inadequacies in personnel and laboratory facilities. GAO stated:

> "Where, as here, a proposal in the competitive range is informationally inadequate so that the agency evaluators cannot determine the extent of the offeror's compliance with its requirements, the agency should use the discussion process to attempt to ascertain exactly what the offeror is proposing. In this connection, we have recognized that where a solicitation specifically calls for certain information, the agency should not be required to remind the offeror to furnish the necessary information with its final proposal. Value Engineering Company, B-182421, July 3. 1975, 75-2 CPD 10. But here the solicitation was not so specific in calling for information on the offeror's personnel and laboratory facilities."

GAO reasoned that DAR § 3-805.3, supra, should not be interpreted so as to prevent a contracting agency from using the discussion process to ascertain exactly what an offeror is proposing to furnish. "* * * [A] contracting agency may not avoid its duty to conduct meaningful discussions by labeling informational inadequacies in a proposal as 'weaknesses' rather than 'deficiencies'." In GAO's view, technical leveling would not have occurred if the informational inadequacies had been discussed, since the sole purpose of the discussions would have been to ascertain what LSI was proposing to furnish the Army.

On this point, it is interesting to compare LSI with the Okaw case, previously discussed. In Okaw, the agency's concern was that the offeror's construction design was inadequate; by requesting a sample, the agency was able to determine that Okaw's product was not acceptable. In GAO's view, the agency had no duty to help the offeror to improve or change its design, since a major rewrite of the proposal would have been required. LSI, however, holds that a contracting agency has a duty to try to find out what the offeror is proposing to furnish, once the agency includes the offeror within the competitive range. The Army's difficulty with LSI might have been avoided if the offeror had

been excluded from the competitive range in the first place. Decilog, B-198614, September 3, 1980, 80-2 CPD 169.

Finally, another recent "discussion" case worth noting is International Underwriters, Inc., B-198109, December 1, 1980, 80-2 CPD 410. The case involved the award of a cost-type contract by the Agency for International Development (AID) for operation of a self-funded health and accident cost program (a program in which claims would be paid out of AID's own funds) for foreign students. AID's solicitation placed great emphasis on prior experience with operating self-funded programs. International submitted a proposal which indicated that it had operated some self-funded programs in addition to the more common commercially-funded programs. AID evaluators tried to contact International's listed self-funded clients, but eventially made award to another offeror, after these attempts had been unsuccessful.

International, in its protest to GAO, insisted that during discussions with AID, it had not been aware that AID had failed to reach these clients. AID argued that the offeror should be held responsible for this failure, since AID had relied on the addresses and telephone numbers provided in the proposal.

GAO sustained the protest on the basis that AID should have told International of its inability to contact the clients. GAO stated:

> "Contracting agencies have a duty to point out deficiencies in an offeror's proposal during the course of competitive range discussions. Checchi and Company, 56 Comp. Gen. 473 (1977), 77-1 CPD 232. While some types of deficiencies may not be readily cured, the type of deficiency noted here is particularly suitable to cure through discussions. The deficiency was not that International lacked experience in self-funded programs, but that it had failed to provide satisfactory evidence of its experience. We do not understand why International was not asked to provide the missing information or not informed of the problem AID was having in contacting International's clients. The deficiency might have been easily remedied. We think that the negotiations would have been more meaningful had AID discussed the deficiency with International prior to calling for best and final offers."

In conclusion, whether a given weakness or inadequacy in a proposal must be discussed is to be determined by the nature of the weakness or inadequacy and the impact that its disclosure would have on the competitive process. Dynalectron Corporation, 55 Comp. Gen. 859 (1976), 76-1 CPD 167.

Reopening of Discussions

Once discussions have been conducted and best and final proposals submitted, the contracting agency should proceed with the award selection and not reopen the negotiations

unless there is a valid reason to do so. B-176283(3), February 5, 1973. As GAO stated in that case, the reopening of negotiations in the absence of a valid reason tends to undermine the integrity of the competitive process. If negotiations are reopened for no good reason, it might seem to the offerors that the sole purpose of the reopening is to avoid making award to a particular offeror or to favor another offeror who otherwise would not be in line for the award.

Of course, it may be necessary to reopen negotiations. For example, a change in the Government's requirements will usually require a reopening. DAR § 3-805.4(b) states in this respect that the stage in the procurement cycle at which the change occurs and the magnitude of the change shall govern which firms should be notified of the change. Thus if the competitive range has been already established when the change occurs, normally only those offerors within the range need be notified. If, however, the change is very substantive, the solicitation should be canceled and the procurement resolicited no matter what stage of the procurement cycle has been reached when the change occurs.

There are two recent GAO cases which illustrate the difficulty in deciding when negotiations should be reopened

because of a change. Ford Aerospace & Communications Corporation, B-200672, December 19, 1980, 80-2 CPD 439; and Optimum Systems, Inc., B-194984, July 16, 1980, 80-2 CPD 32.

In Optimum Systems, DOE solicited proposals for the operation of a computer facility. The work was for a broad range of services covering computer operations, support programming, analysis, planning, and management services. Offerors were to base their proposals on furnishing a level-of-effort of about 60 staff years, in a defied labor mix. Finally, the solicitation instructed that all of the hardware was to be provided by the Government, including IBM model 168 processors.

Optimum Systems was the incumbent contractor, and submitted a proposal, but upon completion of the negotiations, another offeror, EDSI, was rated highest because of its experience and capability in software and computer support services. (The costs proposed by Optimum and EDSI were about equal.)

Prior to award the agency altered the system configuration of its facility by substituting IBM model 3033 multiprocessors for its earlier IBM model 168 computers. But the agency decided that the introduction of the newer or upgraded

central processors did not require a solicitation amendment and a reopening of negotiations because:

1. The skills required are not significantly different.

2. The procurement was for services only, and some upgrading in the system must always be expected.

3. All offerors competed on the same skill mix and level of effort, and no change in the skill mix or 60 staff years level-of-effort was expected from the change.

The contract was thus awarded to EDSI without a reopening of negotiations, and Optimum's protest followed.

The protester argued that it could have achieved cost savings because of the attractiveness of the new equipment to employees and the resulting decrease in management time and attention "necessary to keep an overloaded and obsolete system functioning" (the protester's description of the DOE facility using the older processors).

GAO was not persuaded by the protester's arguments. It stated that:

> "The level-of-effort nature of the solicitation obligates the successful offeror to provide a specified number of 'direct productive manhours,' * * * regardless of the type of computer on which [DOE's] system was based. It was this requirement, not changed by the introduction of the 3033's, that was the overwhelming consideration from an offeror's point of view and, absent some change in this

requirement, we think the effects on the competition directly traceable to the changed to the 3033's would be minimal."

The other recent case, Ford Aerospace, involved a different "kettle of fish." The Air Force had solicited proposals for the development and acquisition of a navigation and targeting system. Both Ford Aerospace and Martin Marietta had submitted proposals and alternate proposals. In Martin's case it proposed an alternate delivery schedule. (The solicitation delivery schedule was quite complicated, consisting of many options which were exerciseable by the Air Force within specified time frames.)

Eventually the award was made to Martin based on certain technical factors which led the Air Force to conclude that Martin's proposal offered the lower technical risk and the best chance for meeting the delivery schedule. Before award was made to Martin, however, Air Force decided to accept Martin's alternate delivery schedule as part of the contract.

Ford protested to GAO on a number of grounds, one of which was that the Air Force had denied Ford the opportunity to compete on an equal basis by accepting Martin's alternate delivery schedule without permitting Ford to propose the same schedule.

The Air Force argued that Ford was not prejudiced because it had not considered Martin' alternate schedule in the evaluation or until after Martin was selected for the award. The Air Force also argued that the alternate schedule in fact was more favorable to the Government and therefore its acceptance of the alternate schedule could not have prejudiced Ford any more than could a price reduction by an already-low bidder would prejudice the other bidders.

GAO agreed with the Air Force that the alternate schedule had not figured in the evaluation except to a limited extent in the management area. The technical, logistics, and cost areas were evaluated, GAO found, without regard to the alternate schedule.

However, in GAO's view, the most significant question was whether the Air Force, having evaluated Martin's proposal on the basis of the RFP delivery schedule, could properly award a contract to a firm on the basis of a different delivery schedule. In this regard, GAO accepted the Air Force's argument that if the alternate schedule actually accelerated the delivery, Ford would have no basis to complain, since there would be no prejudice to Ford. But GAO's analysis of the complicated delivery schedule indicated otherwise; in certain

respects the alternate delivery schedule appeared to relax the RFP delivery requirements, rather than accelerate them. Thus GAO concluded that the Air Force's acceptance of Martin's alternate delivery schedule represented a change in requirements which should have been communicated to Ford by amending the RFP and allowing alternate delivery schedules to be proposed.

On this basis GAO sustained the protest. At the same time, Ford had filed an action in Federal District Court on the same matter. GAO's decision was submitted to the Court, but on the delivery schedule issue the Court agreed with the Air Force and not with the GAO decision.

Award Selection After Discussions

A contracting agency's judgment as to which offeror should receive an award will not be questioned by GAO, so long as the selection is reasonable and consistent with the evaluation criteria established by the solicitation. 52 Comp. Gen. 198 (1972). It is reasonable, for example, to award a contract to a higher-rated firm despite a higher cost where an agency determines that the technical superiority of the winning offeror's proposal is worth the premium. See Riggins & Williamson Machine Company, Inc., et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168.

On the other hand, a contracting agency may decide to award a contract to the offeror proposing the lowest cost with a lower technical score if it finds that technical considerations d not overcome the benefit of the lower cost. As GAO stated in 52 Comp. Gen. 686, 690 (1973):

> "* * * whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency."

GAO has recognized that when numerical scores are used by the contracting agency to evaluate proposals, the ultimate selection of a contractor should be the result of the agency's judgment as to what the scores indicate and not the result of a quantum difference in point scores alone. Id. As stated by GAO in Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325, "* * * the question of whether a difference in point scores is significant is for determination on the basis of both what that difference might mean in terms of performance and what it would cost the Government to take advantage of it." In Grey, the Navy made award to a firm (Bates) which did not receive the most points, because award to that firm was considered to be less costly than award to the incumbent (Grey) although Grey had achieved a higher point score. The Navy concluded

that Grey's advantage resulted largely from its incumbency and that Bates eventually would be as good a performer and would be less costly. GAO sustained the award as being rational and consistent with the evaluation criteria of the solicitation.

In contrast, GAO questioned the Department of Education's selection of a contractor for a study project in ABT Associates, Inc., B-196365, May 27, 1980, 80-1 CPD 362. There, the contracting officer proposed to make award to ABT after best and final proposals were received. She found that while ABT's proposal was technically equal to the only other proposal in the competitive range, its costs were somewhat lower. However, award was not made at this point. Instead, the negotiations were reopened because both offerors had proposed fees which were deemed excessive. The offerors then lowered their fees but the other offeror (SRI Associates) also substantially lowered its costs, and it received the award based on its revised proposal.

ABT protested to GAO, contending that the agency deviated from the RFP's evaluation criteria, which provided that technical factors were of "paramount importance." GAO pointed out that even if a solicitation assigns greater weight to technical factors cost nevertheless may become determinative if the proposals are found to be essentially equal technically. Nevertheless GAP sustained the protest on another basis.

As indicated above, after submission of the first best and final proposals, ABT and SRI were rated technically equal (ABT's technical score was 93 and SRI's technical score was 92). Then SRI significantly reduced its costs as a result of a proposed staff reduction. Yet the second best and final proposals, which reflected the SRI cost reduction, were not rescored or reevaluated; the record merely indicated the contracting officer's belief that SRI should receive the award because of the significant cost reduction. Based on this record, GAO concluded there was no rational support for the contracting officer's conclusion that the technical proposals remained equal, given SRI's cost reduction.

In this case, the contracting officer might have been able to justify her selection of SRI if the revised proposals had been reevaluated and the two proposals had still remained equal technically. For example, the agency might have determined that SRI had eliminated unnecessary staff and had thereby been able to reduce its proposed costs without harm to its technical proposal. It was the agency's failure to rescore the revised proposals which caused GAO to sustain the protest.

Conclusion

In summary, it appears that some contracting agencies are finding the statutory and regulatory requirements for maximum practical competition and meaningful discussions burdensome on occasions. They are seeking new ways to speed up and simplify the procurement process, through prequalification and through limiting the content and scope of discussions.

GAO has reviewed such attempts on a case-by-case basis, looking at whether competition is restricted or enhanced and applying a "reasonable basis" test to agency actions. Protests are likely to be sustained, as shown by the cases cited here, where offerors are not treated equally or where agency action in violating proposals appear to be unreasonable.