**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Regional Laboratory for Educational Improvement of the Northeast and Islands, Inc.

File: B-270774; B-270774.2; B-270774.4; B-270774.5

Date: April 22, 1996

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Jeffrey C. Morhardt, Esq., Department of Education, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal does not comply with applicable statute relating to the composition and authority of proposed governing board is denied where the proposal shows that the awardee proposed a governing board that complies with all statutory requirements.

2. Protest that awardee engaged in "bait and switch" tactic is denied where record shows that key employee in question had submitted a letter of intent which the awardee included in its proposal; awardee's post-award substitution of the key employee because of the individual's unavailability is not objectionable where record shows that individual was proposed in good faith, but became unavailable for employment after contract award.

3. Protest challenging the evaluation of the awardee's proposal on various grounds is denied where the record shows that the agency's evaluation was reasonable and consistent with the evaluation scheme outlined in the solicitation and applicable statutes and regulations.

4. Agency's cost/technical tradeoff is unobjectionable where record, when read as a whole, shows that selection was based on fact that awardee's proposal was found technically superior, offered greater level of effort, and was only slightly higher in price.

DECISION

The Regional Laboratory for Educational Improvement of the Northeast and Islands, Inc. (RLE) protests the award of a contract to Brown University under request for

proposals No. 95-040, issued by the Department of Education (DOE) for services relating to the operation and support of 10 regional educational laboratories. RLE's protest relates to a contract for operation and support of the regional educational laboratory for the northeast region of the United States which includes Puerto Rico and the Virgin Islands. RLE primarily argues that the award was improper because Brown's proposal was technically inferior to RLE's and more expensive; RLE also contends that there were various improprieties in the agency's actions during the acquisition.

We deny the protest.

The RFP contemplated the award of a 5-year cost-plus-fixed-fee contract to the firm submitting the proposal representing the best overall value to the government considering five technical factors and price. The five factors (and weights, based on 125 possible points) were as follows: quality of technical approach (35 points); quality of management plan (25 points); quality of personnel (20 points); corporate performance and capability (20 points); and quality of the offeror's proposed specialty area (25 points). (Within each evaluation criterion, the points were further divided among numerous subfactors.)

Two proposals--Brown's and RLE's--were received, and found to be within the competitive range. Following discussions and site visits at each firm's facility, the agency requested best and final offers (BAFO). Brown's BAFO received an evaluation score of 108.2 points, and RLE's received 109.2 points. Brown's proposed cost was $24,329,252, and RLE's was $24,050,000. Notwithstanding RLE's slightly higher technical score, the agency ultimately rated Brown's proposal technically superior to RLE's, and determined that this superiority offset Brown's slightly higher price. DOE therefore made award to Brown.

BROWN'S COMPLIANCE WITH 20 U.S.C. § 6041

Under 20 U.S.C. § 6041(h)(6) (1994), each regional laboratory must establish a governing board comprised of representatives from various specified constituent organizations and groups (such as teachers, state educational representatives and commissioners, and educational researchers). By the terms of the statute, the governing board is required to be the sole entity responsible for guiding and directing the regional laboratory, determining the regional agenda, and performing various other oversight functions. The RFP required compliance with the statute and called for a governing board to be in place within 2 months of the award date. The protester maintains that the regional laboratory at Brown will ultimately be subject to the authority of the Board of Regents of Brown University and that, since that entity does not meet the requirements relating to the composition of the regional board specified in 20 U.S.C. § 6041, Brown's proposal is noncompliant with both the terms of the RFP and the statute, and should have been rejected.

This argument is without merit. Brown's proposal nowhere takes exception to the governing board requirements and, in fact, describes Brown's efforts to establish a governing board that complies with the statutory requirements within the 2-month time frame. Brown's described board is compliant both structurally and compositionally; the board members were discussed as follows:

> "The members of our Regional Governing Board have been named and have accepted their membership role. The [appropriate state educational] Commissioners are designated as permanent Board members . . . . Board members represent state and local school boards, school administrators, parents, higher education, public and nonpublic elementary/secondary education, government, community and business."

Brown's proposal goes on to specify detailed procedures for the operation and governance of the board as well as procedures for such things as filling vacancies, establishing operating committees, and interacting with the regional laboratory and numerous constituent advisory organizations. In addition, the proposal details at length the responsibilities and authority of the board in terms of guidance and oversight of the regional laboratory. Finally, Brown specifically advised the agency during discussions that "[t]he Governing Board is responsible for LAB governance and other duties prescribed by statute and the contract, including the setting of policy and responding to high priority educational needs specific to the region." There was no indication in the proposal that Brown intended that the Board of Regents for Brown University would have any control over the regional laboratory or the governing board. We conclude that there was no basis for rejecting Brown's proposal as noncompliant with the governing board requirements.

EVALUATION OF BROWN'S PROPOSAL

RLE raises numerous arguments with respect to the evaluation of Brown's cost and technical proposals. We find no merit to any of RLE's contentions; we discuss several below.

Bait and Switch

RLE maintains that Brown engaged in a prohibited "bait and switch" tactic with respect to one of its key employees, specifically, that Brown's proposal represented that a particular individual would serve as its executive director but that, after award, she declined to serve in this capacity. RLE maintains that this was improper and resulted in a misevaluation of Brown's proposal under the Quality of Personnel evaluation factor.

"Bait and switch" tactics, whereby an offeror's proposal is favorably evaluated on the basis of personnel it does not expect to use during performance, have an adverse effect on the integrity of the competitive procurement system and may provide a basis for the rejection of that offeror's proposal. Meridian Mgmt. Corp, Inc.; NAA Services Corp., B-254797; B-254797.2, Jan. 21, 1994, 94-1 CPD ¶ 167. This does not mean, however, that substitution of employees after award is entirely prohibited; such substitution is unobjectionable where the offeror acted reasonably and in good faith in including the individual in its proposal. Id.

The record shows that Brown proposed the individual in question in good faith, and had no basis until approximately 2 weeks after the award to suspect that the individual in question would be unavailable during performance. Brown's proposal included a resume and letter of committment furnished by the individual, and she explains in an affidavit that she was in fact committed to work for Brown during the proposal submision process, so much so that she traveled at her own expense to the site visit scheduled by the agency. She states that she was committed to Brown at the time she learned of the award decision on December 11, and that only subsequently did she decide to decline the job with Brown and advise Brown of her decision. This explanation is reasonable on its face, and since RLE has furnished no countervailing evidence, we conclude that Brown proposed the individual in good faith. The substitution thus does not warrant upsetting the award.

Contract Type

RLE argues that the agency improperly awarded Brown a cost sharing, no fee type contract, rather than a cost-plus-fixed-fee type contract, as contemplated under the RFP.

The record shows that each offeror had a preapproved indirect rate for use in cost reimbursement contracting. In order to increase the competitiveness of its proposal, Brown offered to place a limit on its indirect rate that was substantially below its preapproved rate; in essence, therefore, Brown offered to bear the remainder of its indirect costs during performance. The agency decided that this arrangement was better described in terms of cost sharing, and it thus included the appropriate clauses in the award document. Since nothing prohibited Brown or any other offer from proposing an indirect rate cap; the cost proposals were evaluated in accordance with the RFP; and the precise structure of Brown's contract had no other adverse effect on RLE's competitive standing, this argument is without merit.

Evaluation of Brown's Proposal Under the Specialty Area Evaluation Criterion

RLE takes issue with the evaluation of Brown's proposal under the Specialty Area factor, under which offerors were to choose one of nine areas to highlight in their proposals. Under the larger scheme envisioned by the RFP (the award of a total of

10 regional contracts), a single specialty area will be awarded to each regional laboratory, with at least two regional laboratories performing work under the same specialty area. RLE maintains that Brown's proposal of the "language and cultural diversity" area should have been downgraded because three regional laboratories will be performing in this same area.

Where a protester challenges the evaluation of proposals, our Office does not independently evaluate proposals or substitute our judgment for that of the agency; our review is limited to considering whether the evaluation was reasonable and consistent with the RFP's stated evaluation criteria, and applicable statutes and regulations. Polar Power, Inc., B-257373, Sept. 2, 1994, 94-2 CPD ¶ 92.

RLE's argument is without merit. Nothing under the Specialty Area evaluation factor provided for consideration of the duplicative nature of a chosen area; the factor provided only for consideration of the "potential of the proposed work to advance knowledge and practical applications within the specialty area," and the "extent to which the specialty area is incorporated into and managed with the whole statement of work framework." In fact, the RFP contemplated multiple awards in a given specialty area, specifically stating that ". . . the government reserves the right to support more than one Laboratory to do work in a given specialty area." Thus, the mere fact that Brown proposed a specialty area that may be duplicative of work being performed in another region was not a basis for downgrading a proposal under this factor.

COST/TECHNICAL TRADEOFF

RLE maintains that the source selection decision was irrational because award was made to a technically inferior, higher-priced offeror; Brown's proposal received a technical rating of 108.2 points versus RLE's 109.2, and Brown's cost was $279,252 higher than RLE's.

The record shows that the technical evaluation team specifically determined that Brown's proposal was technically superior to RLE's, notwithstanding its lower point score. The evaluation panel met after performing its final scoring of the proposals to arrive at a consensus regarding the relative merits of the proposals and to make a recommendation to the source selection official. The written record of this meeting states that "[t]he overall consensus of the panel was that the Brown proposal was technically superior." This conclusion was based on what the evaluators identified as numerous strengths of the Brown offer, including Brown's proposed emphasis on the involvement of state and local education agencies, its understanding of the full array of educational reform initiatives in the region and its reputation as a nationally recognized research facility with considerable expertise in the area of education reform. The evaluators also preferred the Brown proposal

because it offered a substantially higher level of effort (291,147 hours over the life of the contract) than RLE's (235,587 hours).

The source selection authority (SSA) adopted these conclusions, as reflected in the SSA decision document, which states that "[a]lthough the review panel was not unanimous on which firm presented the better technical proposal, the majority of the technical review panel concluded that the proposal offered by Brown University is technically superior." (The record shows that there were five technical evaluators, only one of whom assigned a higher score to RLE's proposal. The one panelist assigning a higher score to RLE was "philosophically opposed to [Brown's] constructivist approach.") The SSA's decision document goes on to state that the comments of the one dissenting evaluator appeared to be weighted against Brown without adequate regard to the overall ability and approach of Brown to do the work, and that ". . . the ratings of the other four panelists are more reliable and present a more balanced analysis of the two proposals."[1]

RLE has not shown that the agency's conclusions regarding the technical advantages of Brown's proposal are unreasonable, and in light of those advantages the agency properly could conclude that Brown's proposal was worth its relatively small additional cost (particularly given the greater number of hours it proposed). The fact that RLE's proposal was scored slightly higher than Brown's did not preclude this tradeoff decision. S&S Garment Mfg. Co., B-252807, Aug. 2, 1993, 93-2 CPD ¶ 65.

MISCELLANEOUS ISSUES

RLE raises numerous additional arguments which are either without merit, lack evidentiary support, or concern matters our Office will not review. For example, RLE contends that one or more of the agency's evaluators acted to improperly influence the other evaluators when the panel was reviewing the proposals. RLE states in this regard that "it is our understanding that one or more of the members of the technical evaluation team claimed of being able to convince at least one other evaluator to change his/her rating . . . ." Even if RLE is correct that the alleged attempt by certain evaluators to persuade others was improper (in fact, there often is interaction among the evaluators as they attempt to reach a consensus), RLE has submitted no evidence in support of its allegation--it has not

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[1]RLE argues that the duplicative specialty area issue, discussed above, also militated against the tradeoff in favor of Brown's proposal. Given our conclusion, however, that the agency reasonably did not downgrade Brown's proposal in this area, there is no basis for finding that consideration of this area would have led the agency to reach a different tradeoff result.

even identified which of the five evaluators allegedly acted improperly. Rather, RLE's contentions are based entirely on speculation.

Several of RLE's additional arguments relate to Brown's responsibility; RLE argues, for example, that Brown is "unfit" to be the regional laboratory because it has been investigated by the National Institute of Mental Health. Our Office will not review an affirmative determination of a prospective contractor's responsibility absent a showing of possible bad faith on the part of agency officials, or a failure to apply definitive responsibility criteria. McDonnell Douglas Corp., B-259694.2; B-259694.3, June 16, 1995, 95-2 CPD ¶ 51; Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O&G Industries, Inc., A Joint Venture, B-255756.2, Apr. 20, 1994, 94-1 CPD ¶ 268. RLE does not allege that either of these exceptions applies here.

Finally, several of RLE's additional arguments simply fail to state a valid basis for protest. In this regard, protesters are required to provide a detailed factual and legal statement, supported by explanation or evidence, that establishes the likelihood that the protester will prevail in its claim of improper action; failure to do so will result in dismissal of the protest ground. Bid Protest Regulations, section 21.1(c)(4), 60 Fed. Reg. 40,737 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.1(c)(4)); Oracle Corp., B-260963, May 4, 1995, 95-1 CPD ¶ 231. For example, citing statements made in Brown's comments submitted in response to the agency's report, RLE contends that Brown has "unclean hands" because it allegedly obtained procurement sensitive information relating to the site visit at RLE's facility. However, those comments were prepared by Brown's counsel, who were admitted to a protective order during the protest, and thus had access to the entire record including proprietary or source selection sensitive information relating to RLE. There is no evidence or reason to believe that Brown's counsel made this information available to Brown in violation of the express terms of the protective order.

The protest is denied.

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