

DECISION



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

50769

97208

FILE: B-183190

DATE: June 10, 1975

MATTER OF: Department of Labor Day Care Parents' Association

DIGEST:

1. Department of Labor Day Care Parents' Association is an "interested party" under 4 C. F. R. § 20.1 for purpose of protesting Department of Labor's award of contract for operation of day care center where fees paid by its members account for approximately 15 percent of total operating cost of center and nearly one-third of contract price.
2. Since appointment of panel members on the technical evaluation panel is matter within administrative discretion of agency, lack of parents' representation does not provide basis for objection to award of contract.
3. Contention that award to offeror who received greatest number of points upon technical evaluation was improper because scores of only one of five panel members clearly favored that offeror's proposal is without merit since function of technical evaluation panel is to score proposals in terms of evaluation factors set forth in solicitation and not to arrive at consensus as to which offeror should receive award. Since source selection authority had information regarding individual as well as total scores, determination to award on basis of highest total point score and lowest price was not improper.
4. Regarding contention that importance of attending final evaluation was not stressed to one of five panel members who chose not to attend, and that incumbent contractor would have received higher technical score if that member had been present, nothing in record indicates that nature of notification given that member was different from that given other panel members. In view thereof, and since there is no regulation precluding panel's functioning with less than all five members, no impropriety in conduct of technical evaluation is shown.
5. Since there is no requirement that offeror's cost proposals be made available to technical evaluation panel, whose function is to evaluate technical merit of proposals against evaluation criteria set forth in solicitation, the failure to do so provides no basis for disturbing award.

PUBLISHED DECISION
54 Comp. Gen.....

On February 10, 1975, the Department of Labor Day Care Parents' Association (Parents' Association) filed its protest against the Department of Labor's award of contract No. J-9-E-5-0046 to Educational Systems Corporation (ESC) for implementation and operation of a working model child day care center at the Department of Labor.

As indicated in the request for proposals issued October 17, 1974, the day care center was opened October 15, 1968, for the dual purpose of serving as a demonstration model in employer sponsored day care service and promoting employee stability and productivity. At the date of issuance of request for proposals (RFP) No. L/A-75-5, the center enrolled some 60 children from the ages of 1 1/2 to 5 years and was operated under contract with the National Child Day Care Association (NCDCA). The cost of the program is borne largely by appropriated funds, and is supplemented with fee payments by participating parents who are Labor Department employees. The fees paid by participating employees are determined on the basis of family income. The Parents' Association has indicated that fee assessments account for approximately 15 percent of the overall cost of operating the day care center and approximately one-third of the cost of the contract awarded to ESC.

A total of seven proposals were received in response to the solicitation. Two of the proposals were not considered for award due to their late submission, three were found to be technically unacceptable, and it was determined to conduct negotiations only with the incumbent, NCDCA, and with ESC. After negotiations and receipt of revised proposals, a determination was made to award the contract to ESC based on the higher score given its technical proposal and the fact that its estimated total cost for performance (including a fixed fee) of \$170,130, which was determined by the Department of Labor to represent a realistic projection of the costs to be incurred, was more than \$6,000 lower than NCDCA's cost proposal.

The Parents' Association has raised several questions relating to the propriety of the selection process which resulted in award of the contract to ESC. Together with its substantive response to those questions, the Department of Labor has raised the preliminary issue of the Parents' Association's standing to protest the award, urging that it is the function of our bid protest procedures to provide a forum for bidders and offerors. In this regard the Department states:

"* * * To permit this forum to be used by citizens whose children participate in a Government demonstration project would not, in our opinion, be proper. The objective of this project is to implement and operate a working model of an employer sponsored Day Care Center which

will provide information so other employers in the public and private sector may duplicate this Department's model. The cost of space, equipment and utilities for the Center are borne totally by the Government. The Government bears the majority of the actual operating costs of the Center. The payments made by parents for enrollment of their children in this project should not, we believe, give them standing before the Comptroller General. * * * "

Our Interim Bid Protest Procedures and Standards, contained at Part 20 of title 4 of the Code of Federal Regulations, provide for consideration of bid protests filed by interested parties as follows:

"§ 20.1 Filing of protest.

(a) An interested party wishing to protest the proposed award of a contract, or the award of a contract, by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office may do so by a telegram or letter to the General Accounting Office, Washington, D. C. 20548."

The term "interested party" as used in the above regulation is not limited to bidders or offerors participating in a procurement. Where a sufficient interest in the particular procurement has been demonstrated, we have considered protests initiated by various civic and trade associations. B-177042, January 23, 1973; District 2, Marine Engineers Beneficial Association - Associated Marine Officers - AFL CIO, B-181265, November 27, 1974; Arlington Ridge Civic Association, B-181015, December 23, 1975; Poguito Longwood Area Civic Association, Inc., B-183210, March 12, 1975. In view of the clear showing of financial interest by the Parents' Association in award of the contract for operation of the day care center, we find it to be a proper "interested party" for the purpose of this protest.

The several issues raised by the Parents' Association relate primarily to evaluation of proposals by the technical evaluation panel (panel). The first issue presented concerns the Department of Labor's failure to provide for representation of the parents' interests on the panel. Specifically, the protester points out that no representative of the Parents' Association was included on the panel although parents' fees account for approximately 15 percent of the total operating costs and nearly one-third of the cost of the operations contract for the day care center.

The Department of Labor explains that program authority and responsibility for the day care center, as well as responsibility for selection of members for the technical evaluation panel, lies with the Director of the Women's Bureau. Selection of the panel in fact was made from among the members of the Department of Labor Day Care Advisory Board. We are advised that the President of the Parents' Association is a member of that board but that she made no expression of interest in participating on the panel at the time of its formation.

We believe that composition of the panel is a matter within the discretion of the contracting agency. While appointment of a representative of the Parents' Association to the panel might have been appropriate in view of the parents' direct financial responsibility for nearly one-third of the contract cost, there is no basis for our Office to conclude that the appointment of one of its members was required.

The second issue raised relates to the point scoring technique used by the panel. In this connection, it is argued that the results of the evaluation failed to reflect the panel's consensus as to which proposal was favored and its position is further explained by the Parents' Association as follows:

"The panel members were not given the opportunity to discuss individual scores and reach a final consensus as to who should be the selected contractor. In fact, the chairperson acting independently chose to sign the Technical Evaluation Panel report without the joint approval or signature of the remaining members of the panel."

Suggesting that a consensus of the panel would have favored the incumbent contractor, the protester states that 4 of the 5 panel members rated NCDCA as a "favored contractor."

Upon initial technical evaluation, ESC received a total of 427 points as opposed to NCDCA's lower point score of 351 points. Initially, ESC's proposal was rated higher than NCDCA's by four of the five panel members. The fifth panel member had ranked the two proposals as equal. After negotiations and upon final technical evaluation the difference between their technical scores was reduced with ESC and NCDCA receiving 342 and 333 points, respectively. The panel member who had previously ranked both proposals equal did not participate in the final evaluation and hence the final scores reflect the votes of four panel members only.

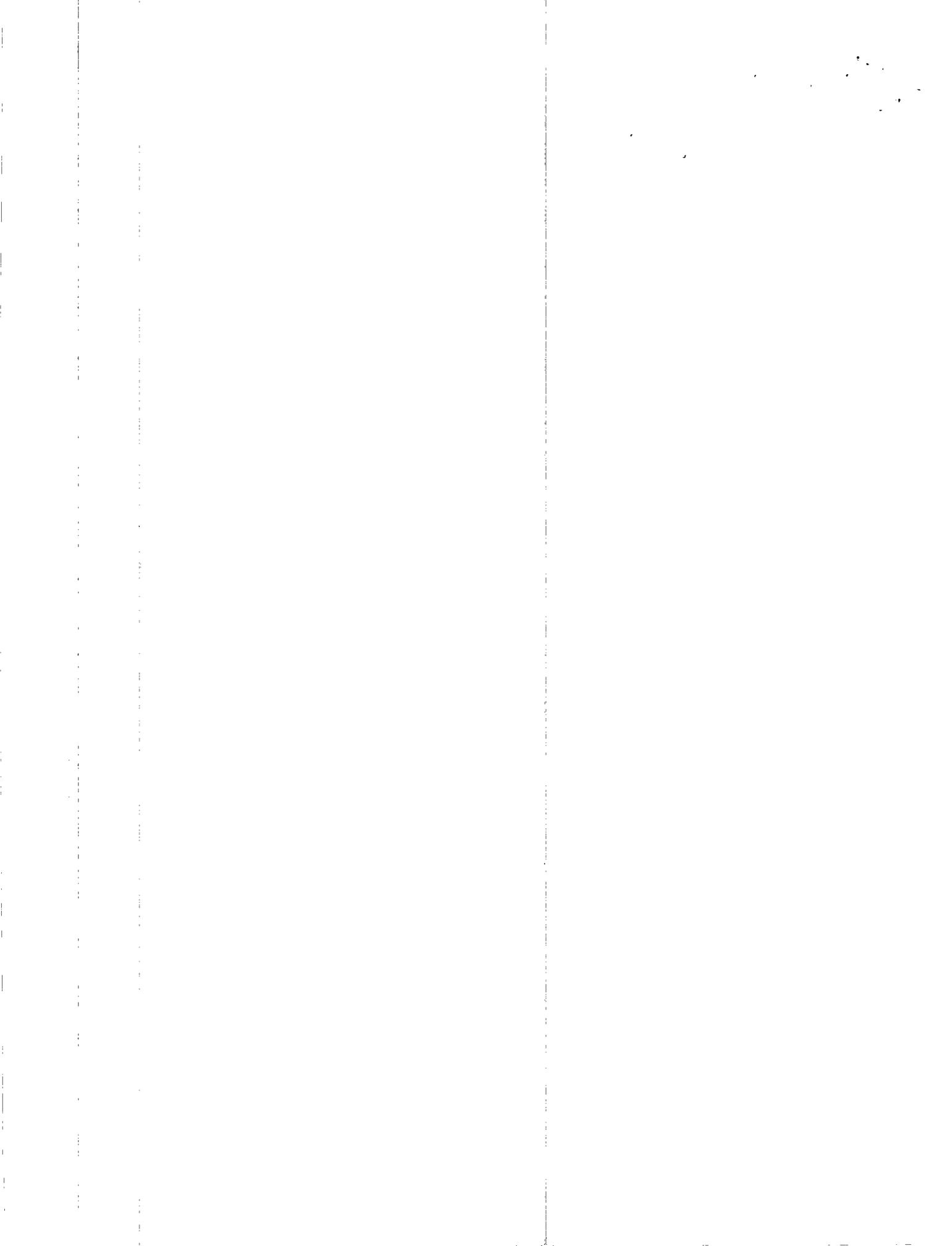
Two of those panel members gave higher point scores to NCDCA's proposal, one scored ESC's proposal higher than NCDCA's, and the remaining individual scored the two proposals as equal. The specific scores for individual evaluation factors given by each panel member, and each member's total as well as group totals were then provided to the Procurement Office, which recommended award of the contract to ESC based on its technical ranking and the fact that its cost proposal was more than \$6,000 lower than NCDCA's.

On January 29, 1975, the Chairman of the technical evaluation panel sent a memorandum to the Director of the Women's Bureau together with evaluation worksheets. On February 10, 1975, a week after the contract was awarded to ESC, four members of the panel, including the member who had not been present at the final evaluation, submitted a "Minority Report" to the Director of the Women's Bureau listing "technical irregularities" in the conduct of the evaluation and objecting to the award to ESC on the basis that it did not comport with the consensus of the panel members. The five technical objections raised in the "Minority Report" are incorporated as separate issues pertinent to the protest and are dealt with below.

The Department of Labor takes the position that the Parents' Association and the four dissenting members of the panel misconceive the panel's function, and explains that the evaluation process does not call for a selection of the winning contractor by majority vote but rather contemplates a detailed evaluation of the proposals and their scoring against the evaluation criteria set forth in the RFP. The function of the panel as set forth in the memorandum of December 4, 1974, addressed to its Chairman, is to conduct an evaluation of the technical proposals based on the evaluation criteria set forth in the RFP and using a numerical scoring technique.

The scores given by individual panel members apparently were not made the subject of discussion during the evaluation process and there is no indication that the three panel members present at the final evaluation who signed the Minority Report requested that such procedures be used. In fact, the record reflects only that after final selection was made did four members of the panel indicate that in retrospect they would have preferred to have had discussion and reconciliation of individual scores.

Moreover, the worksheet submitted by the panel Chairman to the source selection authority not only indicated total scores but gave a breakdown of the scores given by each panel member for each evaluation factor. On the same worksheet a tally of the relative



rankings of the proposals by each member of the panel was provided. Thus, the source selection authority was provided not only with total scores but with information indicating that only one panel member had ranked ESC's proposal higher than NCDCA's, and that the remaining three members present at the final technical evaluation had either ranked the two proposals equal or had ranked NSDCA's superior. We understand that after submission of the "Minority Report," the members of the TEP who had participated in the final evaluation were called before the source selection authority and were asked whether their scores as indicated in the evaluation worksheets represented their true and accurate assessments of the technical merits of the two proposals. We are told that all members verified the accuracy of their scores. Under the circumstances, it appears that when the source selection authority undertook to make its award determination it had before it all information pertinent to the technical evaluation, including that with which the four dissenting members of the panel are concerned--namely, that despite the aggregate technical scores only one panel member had actually ranked ESC's proposal as superior to NCDCA's. Nevertheless, the source selection authority chose to make award to ESC based on its higher technical score and its proposed lower cost. Under the circumstances, we believe that it was the prerogative of the source selection authority to rely on the total technical scores rather than on some other bases perhaps reflective of a consensus of the panel, even though the closeness of the scores (342 to 333) does not indicate that ESC's proposal was significantly superior. In this regard, we have recognized a very broad degree of discretion on the part of source selection officers in determining the manner and extent to which it will make use of technical evaluation results. 51 Comp. Gen. 272 (1971). For the foregoing reasons, we find no prejudice to any offeror's interest by reason of the fact that all panel members did not sign the report filed with the Director of the Women's Bureau.

The Parents' Association suggests that the presence of the fifth panel member, who was absent from the final evaluation, might have elevated NCDCA's technical score over that received by ESC. The protester complains of the fact that the "invitation to one member of the panel did not stress the importance of the meeting and therefore he did not attend," and that if this member had attended, his score could have changed the outcome of the evaluation. In response to this claim, the Department of Labor states that it does not regard it to be a function of the contracting officer to explore the reasons for an individual panel member's decision not to attend an evaluation meeting. The protester has not furnished any information as to the precise nature of the notification given this panel member and the record provides no

basis for the belief that the panel member was discouraged from attending the evaluation or that the nature of the notification was different in content from that given the other members. Since we are aware of no departmental regulation or policy which precludes the panel's functioning with less than its full membership, we find no impropriety in this regard.

In the "Minority Report" the four panel members cite as "technical irregularities" the facts that the entire panel did not meet with both offerors to discuss areas in each proposal requiring clarification or modification and that information from experience checks was not made available to the panel during evaluation. The Parents' Association cites these two facts in support of its protest, together with the fact that financial information was withheld from the technical evaluation panel.

Concerning the suggestion that it was improper for less than the entire panel to participate in negotiations with ESC and NCDCA, the Department of Labor states that as a general rule only the contract negotiator and Chairman of the evaluation team participate in negotiations and that there is no requirement that all panel members be included in those discussions. This is consistent with the long-standing view of this Office that the content and extent of discussions required is not susceptible of precise definition. Rather, we have held that the question of whether the statutory requirement for written or oral discussions has been met is a matter of judgment for determination based on the particular facts of each case, B-179126, February 12, 1974; B-180734, May 31, 1974; 52 Comp. Gen. 467 (1973); 54 Comp. Gen. 60 (1974). Thus, it is axiomatic that there is no requirement that all or any particular member of the technical evaluation panel participate in negotiations.

With respect to the Parents' Association's concern that financial information was withheld from the panel, we note that the directions given the panel explicitly provided for the withholding of such information during the course of the technical evaluation. Such information was withheld in order to avoid the possibility that cost considerations might have improperly influenced the technical scoring. As the instructions to the panel expressly provided for the withholding of cost data from the panel, and as such procedure is reasonable, we fail to see that the withholding of such information was improper or prejudicial to any offeror.

Concerning the contention that information from "experience checks" was withheld from the panel, we are unable to identify with any certainty the information to which the protester refers. However, the RFP did provide that the offerors "experience and qualifications as

related to this project" are to be a factor for evaluation, and the solicitation further required offerors to demonstrate their experience and qualifications by submitting an "outline of previous projects and specific work previously performed or being performed." Thus, information necessary to evaluate proposals in terms of the offeror's experience was before the panel during the technical evaluation.

As an additional irregularity in the evaluation process the Parents' Association suggests that ESC and NCDCA were treated differently during the course of negotiations. The protester's contention in this regard is as follows:

"Another irregularity was reported regarding the closing of the day care center during its scheduled move from the Auditor's Building to the space in the new Department of Labor Building. ESC initially reported that they would close the center for one week during this time. The panel objected to that approach. NCDCA did not address the item. After two panel members met with the contractors, ESC withdrew this item, and NCDCA changed their proposal to close the center for two days. However, NCDCA was not advised of this mistake and was not given an opportunity to revise their proposal. This resulted in a lowered score by another member of the panel who was not present at the meeting with the contractors. Consequently, this item was not evaluated on the same basis for each of the competing contractors."

In response, the Department explains that it discussed the matter with ESC and not with NCDCA during negotiations since only ESC's initial proposal had been deficient in this regard. Initially, ESC had proposed to close down operation of the day care center to accommodate the move to new facilities. Since closing of the operation was unacceptable to the Department of Labor and was regarded as a deficiency in its proposal the matter was discussed with ESC. On the other hand, NCDCA's proposal as initially submitted provided for uninterrupted operation of the center during the transitional period and hence the matter was not discussed during negotiations with it. We do not know the reasons for NCDCA's revision of its proposal to provide for a two-day closing of the operation but it appears to be one made of its own volition.

In addition to the above allegations, the Parents' Association claims that due consideration was not given to the emotional impact that a change in contractors would have on the children enrolled at the day care center or to the cost of rewiring to accommodate ovens necessary to provide warm lunches.

In response to this contention, the Department of Labor reports that no advantage was or could be given the incumbent contractor to offset emotional impact, if any, on the children affected because it was determined that the emotional impact of a change of contractors on the children concerned was not something that could be quantified as an evaluation factor and thus the solicitation did not provide for its consideration. With regard to the contention that the cost of rewiring was not considered in evaluating ESC's proposal, we note that the solicitation specifically provides that the Government will furnish kitchen equipment and utilities. None of the costs to be borne by the Government was added to either proposal.

The Parents' Association has offered two additional bases for its protest, including its allegation that the Chairman of the panel was biased and that NCDCA was misled by one member of the panel to increase the amount of its proposal by \$5,000. Inasmuch as the protester has offered no specific information as to the manner in which NCDCA was misled to increase the costs proposed and has offered nothing to substantiate its allegation of bias on the part of the Chairperson, those contentions will not be considered.

For the foregoing reasons, the protest is denied.

ACTING


Comptroller General
of the United States