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DECISION



*J. N. Zerkow
Proc II*

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

FILE: B-187547

DATE: January 25, 1977

MATTER OF: Joannell Laboratories, Incorporated

DIGEST:

1. Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained.
2. Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing.

The subject protest has been filed by counsel for Joannell Laboratories, Incorporated against the exclusion of that firm's proposal from the competitive range established under request for proposals (RFP) No. N61339-76-R-0066, issued by the Naval Training Equipment Center (NTEC), Orlando, Florida. The RFP was for development of a permanently installed Defense Test Range, Device A3F78, and two Portable Combat Ranges, Device A3F80, to meet the requirements for Infantry Remoted Target Systems (IRETS). Joannell's proposal was regarded as technically unacceptable.

The protester's essential allegation is that the procurement is being conducted "in an unreasonable and prejudicial manner" as a result of Navy bias against it. As evidence of such bias Joannell states that (1) the evaluation of its proposal was unduly cursory or arbitrary because the purported proposal deficiencies do not exist in fact; and (2) the contracting officer acted improperly in refusing an appointment with either Joannell or its counsel so that Joannell could persuade the contracting officer that discussions should be conducted to "clarify" the meaning of Joannell's proposal, presumably so that Joannell could correct serious technical misunderstandings by agency officials with the anticipated result that the Joannell proposal would be found eligible for inclusion in the competitive range for the purpose of subsequent formal negotiations. In this connection, the protester refers to RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99, as a case where such a technical clarification conference was permitted, notwithstanding a finding that the firm's proposal was unacceptable, and questions why the conference was granted to a Joannell competitor in that case but refused Joannell here.

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In support of its assertion of bias, the protester, referring to litigation currently pending in the Court of Claims and to a protest it filed in this Office, suggests that the Navy's bias against Joannell stems from the firm's resort to either judicial fora or this Office to protect its rights to proprietary data under prior contracts and its right to compete in NTEC procurements.

The RFP required the submission of technical proposals in two parts, addressed to "technical approach" and "integrated logistic support (ILS) plan," weighted in that order of relative importance. Proposals were received from four firms, and upon evaluation, three were considered to be within a competitive range. Out of a possible 100 points, the highest ranked offeror received 82.4 and 81 points for technical approach and logistic support, respectively; the second ranked offeror scored 62.3 and 80; the third 75.1 and 84. Joannell was scored 54.5 and 49, with a notation of unacceptability under each criterion.

The unacceptability of Joannell's technical approach was based on the perceived necessity for a complete redesign of five of nine major assemblies and significant redesign of two other assemblies. In addition, all other areas of the proposal were considered to require in-depth clarification to completely describe the operation and design of all equipment and to describe how the design (including environmental, mechanical, electrical, reliability, safety, maintainability, EMI suppression, human engineering) would meet specification requirements. Joannell's ILS plan was also unacceptable in three of five areas, and marginal in two others.

Subsequent to this evaluation, Joannell was advised that its offer was determined to be outside the competitive range because of deficiencies in many areas; five representative deficiencies were listed. Joannell was further advised that negotiations with it were not contemplated and that a revision of its technical proposal would not be considered. However, Joannell was offered a post-award debriefing pursuant to ASPR § 3-508.4 (1975 ed.).

Joannell responded to the specific deficiencies referenced with a telegram in which it pointed out why it felt its proposal was not deficient in those areas. In turn, NTEC prepared a memorandum setting forth its technical conclusions as to why it still considered Joannell unacceptable in the areas discussed.

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NTEC's Preliminary Proposal Evaluation Report sets forth in considerable detail the deficiencies perceived in Joannell's proposal. These deficiencies, which number more than 70, appear to fall generally into such categories as (a) inconsistency with specifications, (b) incomplete information, (c) no information, and (d) technically undesirable or not feasible. In response, Joannell has furnished a point-by-point rebuttal of 32 pages in length, addressing most of the stated deficiencies. For many deficiencies, Joannell points to specific sections of its proposal where it claims to have provided either the supposedly missing or incomplete information or an indication that the specifications would be met rather than ignored. For other deficiencies it explains the reasons for its particular approach. In some instances it refers to typographical errors.

As Joannell recognizes, it is not our function to evaluate proposals to determine their eligibility for ultimate award. TQI Construction Company, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. Rather, since determinations as to the needs of the Government are the responsibility of the procuring activity concerned, the judgment of the activity's technicians and specialists as to the technical adequacy of proposals submitted in response to the agency's statement of its needs will ordinarily be accepted by this Office, absent a clear showing of unreasonableness. This is particularly the case where, as here, the procurement involves equipment of a highly technical or scientific nature and the determination must be based on expert technical opinion. See RAI Research Corporation, supra, and citations therein.

Furthermore, we will not regard a technical evaluation as unreasonable merely because there is substantial disagreement between the contracting agency and the offeror, see Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260; UCE, Incorporated, B-186668, September 16, 1976, 76-2 CPD 249; Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87, or because bias on the part of the agency has been alleged. See Decision Sciences Corporation, B-183773, supra; Plessy Environmental Systems, B-186787, December 27, 1976, 76-2 CPD ; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404. For a technical evaluation to be deemed unreasonable, it must clearly appear from the record that there

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is no rational basis for the evaluation. See, e.g., Tracor Jitco, Inc., 35 Comp. Gen. 499 (1975), 75-2 CPD 344 and 54 Comp. Gen. 898 (1975), 75-1 CPD 253; Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137.

With the above principles in mind, we have carefully reviewed the record in this case, including the detailed technical submissions. We find that the record establishes fundamental disagreement between Joanell and the Navy as to the adequacy of the Joanell proposal, but does not permit the conclusion that the Navy's evaluation was unreasonable. Although we are not in a position to resolve the disagreement with respect to each stated deficiency, it does appear to us that many of the disputed points are of such a nature that the proposal could reasonably be evaluated as it was.

For example, many areas of disagreement appear to involve only the exercise of reasoned technical judgment with respect to either the desirability or efficiency of a particular approach or the extent to which some feature of the proposed system is adequately addressed in the proposal. As one example, in response to NTEC's observation that Joanell's system, in response to a requirement for simulated night time rifle fire, would illuminate the entire target, Joanell responds that it proposed "low level illumination of the target which can be spot intensified with a small strip of reflective tape to simulate rifle fire." In our opinion, this response does not establish that the perceived deficiency does not exist, but only that Joanell regards its approach for simulated rifle fire as an acceptable one while NTEC does not so view it. While we do not mean to suggest that this type of deficiency alone should necessarily warrant rejection of a proposal, we do think it typifies many of the areas of disagreement in this case.

In other areas, Joanell indicates that (1) it may have caused confusion with regard to one aspect of its system because it defines a requirement differently than do the specifications, and (2) it did not adhere to specified requirements because its approach would be more advantageous. However, it is not clear that Joanell's proposal adequately explained either of these approaches, and we point out that even if the proposal did so, the desirability of a nonconforming approach would be entirely up to the evaluator's judgment.

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In still other areas, although Joannell states that deviations in its proposal with respect to voltage and dimensions were merely typographical errors, it is not clear to us why the evaluators should have been aware of that fact. Moreover, we do not agree with Joannell that a perceived proposal deficiency does not exist because "[b]y extrapolation" from data referenced in the proposal the evaluators could have determined the acceptability of another aspect of Joannell's system, since it is the responsibility of offerors to submit clear and complete proposals. See, e.g., Servrite International, Ltd., B-187197, October 8, 1976, 76-2 CPD 325.

Finally, we note that Joannell, while attempting to rebut or explain each of the deficiencies noted with respect to its technical approach, has not responded to any of the deficiencies noted with regard to the ILS portion of its proposal.

Thus, on this record, we cannot conclude that the technical evaluators acted arbitrarily or unreasonably in rating Joannell's proposal as they did. It appears that the evaluation was consistent with the specifications and evaluation criteria, that all proposals were subject to the same detailed technical examination, and that NTEC's evaluation reflected only the reasoned judgment of the evaluators. See METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44.

In view of this evaluation and the resulting disparity between Joannell's scores and the scores achieved by the other three proposals, we see no basis for objecting to the exclusion of Joannell from the competitive range. See 52 Comp. Gen. 718 (1973); *id.* 382 (1972). Neither can we say that NTEC acted improperly by refusing to meet with Joannell after Joannell's proposal had been rejected. Discussions need be held only with those offerors who are in the competitive range. ASPR § 3-805.1. Although Joannell states it wanted only to "clarify" its proposal, it was the judgment of NTEC that Joannell's proposal required major revision and could not be made acceptable by clarification. That judgment is not subject to question unless "there is evidence of fraud, prejudice, abuse of authority, arbitrariness, or capricious action." B-165457, March 18, 1969, quoted in METIS Corporation, *supra*, at 616. There is no such evidence in this case.

We recognize that denying any offeror whose proposal is not included in the competitive range an opportunity to discuss the proposal until a post-award debriefing "may make it extremely difficult" for the offeror to prove that rejection of its

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proposal was incorrect. Daconics, B-182309, May 19, 1975, 75-1 CPD 300. However, we also recognize that "once a proposal has been determined to be unacceptable * * * it would be illogical to discuss this conclusion with the offeror thereby placing him in the position to clarify or enlarge upon the proposal and possibly to allege that once this has been done the proposal should be reconsidered," and that in any event that applicable regulations (here ASPR § 3-508.4) provide only for a debriefing after a contract has been awarded. Daconics, supra. Accordingly, we held in Daconics that an agency properly declined to discuss an unacceptable proposal with an offeror prior to award selection, notwithstanding the offeror's request that it be allowed to do so. The same conclusion is warranted here.

The case of RAI Research Corporation, supra, is not inconsistent with this view. Joanel is incorrect in stating that its competitor was permitted to clarify its proposal so that it was ultimately found acceptable, notwithstanding an initial finding of unacceptability. In that case, there were two proposal evaluation reports from agency technical personnel, one finding the proposal to be unacceptable but the other finding the proposal acceptable. Under such circumstances, the contracting officer felt he had a duty under ASPR § 3-805.2, which provides for including doubtful proposals in the competitive range, to include the proposal in the competitive range and to hold discussions with the offeror. There was, of course, no such doubt concerning Joanel's proposal in this case.

In summary, we find that there is no evidence of bias on the part of NTEC against Joanel. The evaluation of Joanel's proposal appears to have a reasonable basis, and the refusal of the contracting officer to meet with Joanel to discuss its proposal was consistent with both applicable regulations and a prior decision of this Office. "Where, as here, the record reasonably supports the agency's * * * [actions], mere allegations of biased evaluation provide no basis for our Office to interfere with the agency's determination" that a proposal was unacceptable and outside the competitive range. Servrite International, Ltd., supra.

The protest is denied.


Deputy Comptroller General
of the United States