

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES

WASHINGTON, D. C. 20548

11853 *Bashin*

*Proc II*

FILE: B-194728

DATE: October 29, 1979

MATTER OF: Peter J. T. Nelsen

*[Protest of Bid Rejection as Not Being]*  
DIGEST:

1. Determination that proposal is not technically or financially acceptable and therefore not within competitive range is within procuring agency's discretion and will not be disturbed absent clear showing that it was arbitrary or unreasonable. Where record indicates that a technical evaluation was reasonable, GAO will not regard evaluation as unreasonable merely because the agency and the offeror disagree.
2. Proposal may be excluded from competitive range where, in the agency's judgment, the proposal has no reasonable chance of being selected for award.
3. Allegations of unfair evaluation of proposal by procuring agency is rejected as speculative since record does not support alleged unfairness and in fact suggests reasonable basis for agency's actions.

*DEC-03210*

This is a protest concerning the rejection of the proposal submitted by Peter J. T. Nelsen for Agricultural Research and Development Institute (Nelsen) to the Department of Health, Education, and Welfare (HEW) under request for proposals (RFP) 263-79-P(68)-0137.

The solicitation requested proposals for the maintenance of the National Institute of Health sheep colony. Proposals were to be evaluated for technical excellence and cost, with the technical considerations as paramount. The contracting officer rejected.

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*Evaluation protest*  
*Technical proposal*  
*Competitive bid*  
*Maintenance*  
*Contractor selection*

Nelsen's proposal as being outside the competitive range for negotiation because Nelsen was ranked third of four in the evaluation of the technical proposals and because its various proposals were significantly more costly than any other proposal. The contracting officer restricted negotiations to the two firms with the highest technical rating and which had proposed the lowest cost.

( Nelsen argues that its proposal was within the competitive range, and that negotiations should have been conducted to correct any deficiencies. In this connection, the protester refers to HEW Procurement Regulations which provide that a proposal must be so inferior technically or so costly as to preclude meaningful negotiation before being considered outside the competitive range. 41 C.F.R. § 3-3.5107(a) (1978). ( Nelsen contends that its proposal was technically acceptable and should not have been excluded from the competitive range because it has the personnel, facilities, and experience to perform the work requested in the RFP. The protester also believes that its cost is not so high as to preclude meaningful negotiations, and in any event, the RFP states that cost was to be negotiated after the technical evaluation. Nelsen also states that the cost of moving the sheep should not be considered in evaluating its cost proposal.

HEW noted several deficiencies in Nelsen's proposal. The technical evaluation panel found that:

(1) All personnel except the animal colony manager were inexperienced overall and lacked direct involvement with the management of a large sheep colony, an essential RFP requirement.

(2) Certain pasture land was significantly separated visually from the headquarters building, thus not providing necessary

security for the sheep. In addition, some pasture land appeared to have poor drainage.

(3) A potential disease threat existed in several buildings that were previously used for housing turkeys.

In addition, HEW found that Nelsen's cost proposal of \$2,145,084 substantially exceeded those of the two offerors determined to be within the competitive range, whose cost proposals were \$1,353,657 and \$1,589,160. An abstract of the cost proposals shows that the cost of moving the sheep was not included in the cost evaluation.

Nelsen argues that all of its personnel are experienced in raising sheep, and that most have raised large flocks. The protester argues that the chance of disease being transmitted to sheep is remote because the buildings have not been occupied by turkeys for 8 years. Nelsen argues that current resident sheep could easily be checked for disease. Finally, Nelsen argues that the pasture surrounding the buildings would be used for sheep requiring close supervision, that it is unlikely that 200 acres of well-drained pasture could be seen from one point, and that there is no evidence of poor drainage anywhere on the proposed land.

Based upon our review of the record, including the evaluation panel's report and score sheets, we find that the technical evaluation was reasonable. With regard to the drainage and location of Nelsen's pastures, HEW explains that one of the designated pasture areas is in a near-level plain containing a creek and probably becomes too wet for grazing sheep during periods of excessive rain. While it may be unlikely that 200 acres of pasture could be seen from one point, HEW states the isolation of certain of Nelsen's areas was not a major technical set-back, but that it contributed to the agency's overall concern for the support of a large population of sheep in a limited and untried

area. HEW adds that Nelsen's pastures rated unfavorably in comparison to other sites evaluated for this project that allowed more quality and quantity pasture area for each animal grazing and less rugged terrain to manage.

We note that Nelsen's overall facilities were rated second by the evaluators notwithstanding the deficiencies mentioned above and the potential spreading of disease to the sheep. The evaluation panel consistently rated Nelsen's proposal lowest, however, for personnel and past experience. Nelsen specifically alleges the extensive experience of one proposed herdsman, and the evaluators' comments do not contradict Nelsen. The evaluators' concern lay with the overall experience of the other personnel, in support of which Nelsen states only that they had substantial experience.

Consequently, it appears that the proposal was evaluated in accordance with the stated evaluation criteria, that all proposals were subject to the same detailed technical examination, and that the evaluation reflected the reasoned judgment of the evaluators. We will not regard a technical evaluation as unreasonable merely because there is a substantial disagreement between the agency and the offeror. Proprietary Computer Systems, Inc., 57 Comp. Gen. 800 (1978), 78-2 CPD 212.

Accordingly, we cannot conclude on the record that HEW arbitrarily or unreasonably determined that Nelsen's proposal was outside the competitive range. Contrary to the protester's assertion, the competitive range encompasses both price and technical considerations, and either factor can be determinative whether an offeror is in the competitive range. 52 Comp. Gen. 382 (1972). Generally, a proposal receiving a low score compared to the array of scores received by other proposals need not be considered within the competitive range. 52 Comp. Gen. 382, supra. This is consistent with a proper reading of the HEW Procurement Regulations and our decisions which state that a proposal

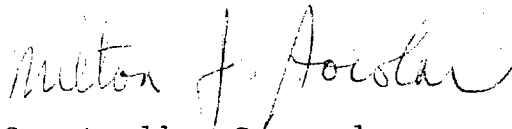
need not be considered to be within the competitive range if, in light of the competition for that procurement, the offeror does not have a reasonable chance of being selected for the final award. See 41 C.F.R. § 3-3.5107; 48 Comp. Gen. 314, 317 (1968).

Here, Nelsen received 72 points for its technical evaluation. The two offerors determined to be within the competitive range had scores of 78.4 and 87.2 points. The lowest rated offer had a score of 69.6. We believe that these scores plus Nelsen's submission of the highest cost proposal of all proposals submitted provided a reasonable basis for the contracting officer's cut-off point which resulted in the rejection of Nelsen's proposal. Thus, we are unable to agree with the protester's claim that negotiations should have been conducted to correct the deficiencies in its proposal. Techniarts, B-192158, March 29, 1979, 79-1 CPD 213; Audio Technical Services, Ltd., B-192155, April 2, 1979, 79-1 CPD 223.

Nelsen also contends that its proposal was evaluated unfairly by the evaluation panel and other agency officials involved in the procurement because the evaluators were biased in favor of the incumbent contractor and because award to the incumbent would save the cost of moving the sheep. At a preproposal conference, however, HEW assured the potential offerors that relocation of the sheep colony "is a reality and open competition does exist" and as indicated above the cost of moving the sheep was not evaluated. Nelsen's contentions are based on its disagreements with the evaluation panel regarding the technical evaluation of its proposal. To establish the existence of the effect of bias, the record must show that there was no rational basis for the evaluation. Optimum Systems, Inc., 56 Comp. Gen. 934 (1977), 77-2 CPD 165. We will not consider a technical evaluation to be unreasonable merely because bias has been alleged. As shown above, the record does not support Nelsen's contention that its proposal was evaluated unfairly or differently than the other proposals. Furthermore, we note that the incumbent contractor did not receive the award, and that award was

made to the offeror submitting the lowest cost. Accordingly, we must reject Nelsen's allegation of unfair treatment as mere speculation.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Airola".

For The Comptroller General  
of the United States