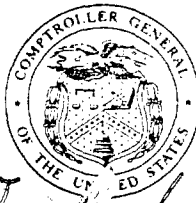


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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D. C. 20548

[Protest Alleging Irregular Conduct of Procurement]

FILE: B-196912, B-196287

DATE: April 1, 1980

MATTER OF: Carol L. Bender, M.D.;
National Health Services, Inc.

CNS00476

DIGEST:

1. Informing prospective offerors of Government estimate for anticipated procurement does not constitute prohibited "auction technique."
2. Mere speculation that contracting agency made improper disclosures to other firms during negotiated procurement does not meet protester's burden to affirmatively prove its case.
3. Determination of relative merits of proposals is responsibility of contracting agency, and thus will not be disturbed by GAO unless shown to be arbitrary or in violation of procurement statutes or regulations.
4. Protest against contracting agency's decision to have proposals evaluated by only one individual, whose professional qualifications to do so are not disputed, is denied where protester has alleged but failed to provide evidence of bias in evaluation.
5. To insure requisite due process in resolution of bid protests it is essential that all parties with legitimate recognizable interests in protest, i.e., "interested parties" under GAO's Bid Protest Procedures, be afforded fair chance to present their views; clearly, when award of contract is challenged, awardee is "interested party" for that purpose.

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Carol L. Bender, M.D., protests the award of a contract by the U.S. Consumer Product Safety Commission (CPSC) to Comprehensive Health Services, Inc. (CHS) under request for proposals (RFP) No. CPSC-P-80-1141 to operate the CPSC Employee Health Unit. Dr. Bender contends that the conduct of the procurement was irregular in a number of respects, including the fact that proposals were evaluated by only one individual, the CPSC Medical Director. National Health Services, Inc. (NHS) joins Dr. Bender in protesting CPSC's use of a single evaluator. 73 -DL602145

For the reasons set forth below, the protest is denied.

The solicitation was issued on June 13, 1979. It listed four technical evaluation factors, with a combined maximum possible score of 100 points. Although price was to be a "significant factor" in selecting the contractor, the technical proposal would be "the most important single consideration in the award of the contract."

Five proposals were received. CHS, which proposed a cost of \$71,118, received the highest technical rating, 89 points. NHS scored 82 points on the technical factors, and submitted a cost proposal of \$70,857. Dr. Bender received the lowest technical score, 78 points, and proposed a cost of \$89,082.

All five technical proposals were determined to be acceptable, and negotiations were initiated by letters to the parties requesting each to confirm that the individuals named in its proposal as staff members in fact would be employed in the contract performance, and to clarify technical items as necessary. The only scoring change based on the responses was an increase in Dr. Bender's technical score to 82 points. Further discussions were held with the offerors by telephone, and best and final offers were then submitted and evaluated. CHS's technical rating remained 89 points, but the firm now proposed the lowest cost, \$65,845. NHS's technical score and cost

proposal were unchanged. Dr. Bender changed her proposed cost only, reducing it to \$73,491. Since CHS thus submitted the best technical proposal at the lowest cost, the contract was awarded to that firm.

Dr. Bender protests that the solicitation of her proposal by CPSC in effect was a sham to give the appearance of a competitive procurement under which award to CHS always was intended. Dr. Bender states that the CPSC Medical Director approached her prior to the issuance of the RFP and advised her that in view of Dr. Bender's qualifications a proposal by her would be favorably considered, and that as long as she would propose a high quality of care her cost proposal need not be lower than \$90,000. Dr. Bender also alleges that after the initial evaluation the CPSC Medical Director disclosed to her that the technical scores ranged from 75 to 90 points, and that her technical proposal did not receive the highest score. She views these communications as improper, and speculates that similar improper disclosures were made to CHS with respect to its competitors' proposals to insure that CHS would be successful in the competition.

Dr. Bender further argues that the CPSC Medical Director's evaluation of proposals evidences a distinct bias against her and for CHS. She contends that the evaluator "ignored" information relayed to him to the effect that another offeror (presumably CHS) did not intend to employ in the performance of the contract one of the personnel so designated in its proposal; that he failed to add Dr. Bender's evaluated scores correctly (the record shows that she should have totaled 79, not 78 points initially); that he should have scored Dr. Bender's proposal higher on the factor "Organization resources and experience in occupational health programs" (she received 10 of the possible 20 points); and that he failed to investigate in sufficient detail her listed references. Although the point of the last contention is not clear, it appears that it essentially reflects Dr. Bender's disagreement with the overall evaluation of her proposal.

Dr. Bender further argues that the prejudicial effect of the above actions and inactions by the CPSC Medical Director was compounded by the fact that he was the sole evaluator of proposals.

In response, CPSC asserts that Dr. Bender was approached in good faith as a possible source to meet the agency's needs and that the \$90,000 estimated cost figure was conveyed to Dr. Bender as well as to other potential offerors merely as a "ball park figure * * * given as a part of a general description of the level of effort required for this contract." CPSC also disputes that Dr. Bender was advised of the initial technical score range, and asserts that the letter request to all offerors to verify that the individuals listed in their proposals would be available in the contract effort in fact was prompted by the information cited by the protester to the effect that an individual proposed by one of the offerors might not participate (apparently all offerors responded with the requested verification).

CPSC also argues that its Medical Director is experienced in organizing and operating health unit programs, and was otherwise highly qualified professionally to evaluate the proposals on his own. In sum, CPSC contends that all proposals were evaluated fairly and without bias.

We find the protest to be without legal merit. First, we recognize that Federal Procurement Regulations (FPR) § 1-3.805-1(b) (1964 ed.) provides that "no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided." However, that regulation is intended to preclude direct price bidding between competing offerors, not the negotiation of a price with the Government where an offeror's standing in the competition is not divulged. 52 Comp. Gen. 425, 429 (1973). Thus, we have recognized that advising an offeror of the Government estimate for a project does not constitute an "indication * * * of a price which must be met" within the scope of FPR

§ 1-3.805-1(b). Education Turnkey Systems, Inc., 57 Comp. Gen. 8, 11 (1977), 77-2 CPD 267. Moreover, we note that since it appears from the record that similar advice was conveyed to all offerors no unfair competitive advantage can be said to have resulted from the disclosure. Id.

Second, if in fact the initial scoring range and Dr. Bender's standing improperly were disclosed to Dr. Bender, we cannot see how that worked to other than her advantage in the competition. Since she was not the successful offeror, there would be no basis to disturb the award even if the allegation were proven. See 53 Comp. Gen. 253, 258 (1973); 50 Comp. Gen. 619, 627 (1971).

Further, Dr. Bender's mere speculation based on her experience in the procurement that improper disclosures also may have been made to CHS or to other firms does not meet the protester's burden to affirmatively prove its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Concerning whether proposals were properly evaluated in light of staffing information brought to the evaluator's attention (apparently independent of the procurement), as indicated above it was in response to that information that offerors were requested to confirm their proposed staffing arrangements. In any event, we have been informally advised by CPSC that the personnel named in the awardee's proposal in fact are being used in the contract performance.

The evaluator's narrative on Dr. Bender's initial proposal regarding the 20-point experience evaluation factor under which in Dr. Bender's view she should have scored higher than she did (10 points) states:

"From the perspective of experience in the type of contractual occupational health services that are to be provided here, this contractor does not appear

to have an extensive background, nor does a large corporate structure exist. This may be offset however, by the contractor's extensive personal knowledge and experience in clinical medicine and the degree in which she would be personally involved."

Dr. Bender's only dispute with that view essentially is that the RFP did not require the contractor to have a "large corporate structure."

However, it appears that such reference by the evaluator merely indicates that affiliation with an organization that had experience in the area could have mitigated the effect of the offeror's limited background in that regard to some degree. In any case, to the extent that Dr. Bender disagrees with the evaluator's scoring under that or any other factor (e.g., factors upon which her list of references might impact), the determination of the relative merits of proposals is the responsibility of the contracting agency, not our Office, and thus will not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. WASSKA Technical Systems and Research Company, B-189573, August 10, 1979, 79-2 CPD 110. In our opinion, Dr. Bender has provided no basis to question the CPSC evaluator's judgment in that respect. We also note here that the addition of one point to Dr. Bender's initial proposal score, thereby increasing her final score from 82 to 83 points, clearly would not have changed the result of the competition.

In view of the above, and since the composition of an evaluation "panel" and the choice of evaluators is primarily within the discretion of the contracting agency, Columbia Research Corporation, B-193154, May 15, 1979, 79-1 CPD 353, we cannot conclude that the protester was prejudiced by the fact that only the CPSC Medical Director (whose professional credentials are not disputed by Dr. Bender) evaluated the proposals.

Dr. Bender also raises a number of matters regarding the procedures followed by CPSC and our Office in responding to her protest:

- (1) CPSC's "lack of responsiveness" to her request for information under the Freedom of Information Act, 5 U.S.C. § 552 (1976);
- (2) CPSC's "lack of timely notification to unsuccessful bidders"; and
- (3) our invitation to CHS to attend a conference in our Office on the protest, our solicitation of comments from that firm, and our request that Dr. Bender furnish CHS a copy of her protest submissions.

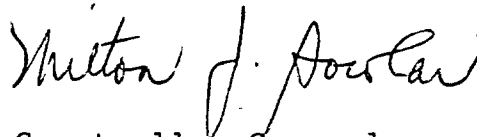
Regarding Dr. Bender's first concern, the record indicates that any nonproprietary information requested by Dr. Bender during the course of the protest ultimately was furnished to her, and thus we cannot see how she was prejudiced if in fact there was delay by CPSC in that respect. See Creative Electric Incorporated, B-189598, August 14, 1978, 78-2 CPD 114. In any event, the nature and extent of an agency's response to a request under the Freedom of Information Act is not a matter for our consideration. Federal Data Corporation, B-196643, November 14, 1979, 79-2 CPD 353.

Dr. Bender does not define what she considers to have been a "lack of timely notification" to her of the award. To the contrary, the record shows that she was informally advised by CPSC of the award 2 days before it was made, and that a letter dated the date of the award was mailed to her.

With respect to the inclusion of CHS in the protest process, our Bid Protest Procedures, 4 C.F.R. part 20 (1979), under which we consider protests against procurement actions by Federal agencies, prescribe that all "interested parties" be afforded

that courtesy, i.e., notified of the protest (section 20.3(a)), furnished a copy of the protest and of other parties' comments (sections 20.3(b) and 20.5), provided a copy of the contracting agency's report on the protest (section 20.3(c)), and invited to a conference if held (section 20.7(b)). The reason therefor is our view that to provide the requisite due process in our resolution of bid protests it is essential that all parties with legitimate recognizable interests in the protest be protected by procedures that give them a fair chance to present their positions. Systems Research Laboratories, Inc.- Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341. Clearly, when the award of a contract is challenged the awardee is an "interested party" for that purpose. See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374.

The protest is denied.



For The Comptroller General
of the United States