

Mr. Melody

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DECISION



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

[Protest of NIH Contract Award]

FILE: B-196371

DATE: July 22, 1980

MATTER OF: Pacificon Productions, Inc.

DIGEST:

1. Where protest was filed within 10 days of receipt of Freedom of Information Act material and is based entirely upon that information, protest was timely filed.
2. Financial capability to perform is part of affirmative responsibility determination which GAO does not review except under certain exceptions not applicable here.
3. Omission of option prices from initial proposal is not fatal to offer since such prices are generally negotiable and price revisions are permitted as result of negotiations. Where option provision was not evaluated in making award and its inclusion in RFP did not prejudice any offeror, fact that provision was improper is not basis for finding procurement defective.
4. Under 41 C.F.R. § 3-3.5103(e), where inquiry is made to offeror to clarify initial proposal and does not result in a revised proposal, such inquiry does not constitute "discussions" as defined in context of negotiations.
5. HHS regulation requiring technical evaluators to submit narrative evaluation along with raw scores does not require narrative from each evaluator but is satisfied by consensus report containing such narrative.

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6. Unchanged technical scores for best and final offers of both offerors in competitive range are not evidence of impropriety in technical evaluation where record clearly shows revised proposals were evaluated and evaluation is not unreasonable.

Pacificon Productions, Inc. (Pacificon), protests the award of a cost-plus-fixed-fee contract to Porter, Novelli and Associates, Inc. (PNA), under request for proposals (RFP) No. 263-79P(63)-0055. The RFP, issued by the National Institutes of Health (NIH), Department of Health and Human Services (HHS), formerly the Department of Health, Education, and Welfare, solicited proposals for a mass media campaign as part of the National High Blood Pressure Education Program.)

The following three offers were submitted by the January 15, 1979, deadline:

Pacificon	\$339,433.78
King and Associates	518,292.44
PNA	601,709.00

The technical proposals of Pacificon and PNA received evaluated scores of 80 and 89, respectively, and were deemed both acceptable and technically equivalent by the evaluation panel. The proposal submitted by King and Associates was found technically unacceptable.

Evaluation of the two cost proposals revealed that PNA had neglected to supply price quotations for 2 option years as required by the solicitation. Suspecting that PNA's price figure was actually an aggregate price for all 3 years, the contracting officer contacted PNA for clarification. PNA indicated that its price was based upon only the single base year but requested permission to submit a revised proposal with substantially reduced costs. Although this request was denied, PNA apparently submitted its revised proposal to the NIH cost accountant during the preaward audit. The reductions in cost were ultimately incorporated in the audit report which nevertheless concluded that PNA's accounting system was

inadequate for a cost-reimbursement-type contract. The contracting officer subsequently found PNA's accounting system adequate based upon a more current recommendation.

Negotiations were conducted with both firms in the competitive range on April 13, following completion of the preaward audits, and best and final offers were submitted on April 20, as follows:

PNA	\$307,935.00
Pacificon	335,947.16

The technical scores of both proposals remained unchanged and, since the proposals were considered essentially technically equal, the award was made based on lowest proposed cost to PNA on May 11, 1979.

Pacificon filed a Freedom of Information Act (FOIA) request with NIH on May 31, 1979, seeking information pertaining to the subject procurement. On October 5, 1979, based upon materials reportedly received on September 28, 1979, in response to its request, Pacificon filed this protest. Pacificon advances a number of bases for its protest; however, we find the protest to be without merit.

As a preliminary matter, NIH questions whether Pacificon's protest was timely filed in accordance with our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1980), which require that protests be filed no later than 10 days after the basis for protest is or should have been known. NIH urges that this protest be deemed untimely on the ground that Pacificon did not diligently pursue the information necessary to establish the bases of its protest. In this regard, NIH submits that Pacificon failed to advise the agency of the reason for its FOIA request and, furthermore, when the delays became protracted, failed to exhaust its statutory remedies by filing suit to compel release of the requested information.

Citing a number of specific communications with NIH personnel between May 31 and September 28, Pacificon responds that it repeatedly, albeit unsuccessfully, attempted to expedite the release of this information.

It further maintains that litigation was rejected as a remedy based upon the belief, reportedly shared by NIH, that the attendant costs would not be in the economic interest of either party.

Based upon this record, we are satisfied that Pacificon pursued the matters related to its protest with reasonable diligence. Although Pacificon did not avail itself of all possible statutory remedies, it clearly exerted a good-faith effort to obtain the FOIA information. Furthermore, in view of these circumstances, we think it would be inappropriate to penalize Pacificon for delays caused by NIH. Thus, since Pacificon's protest is based entirely upon materials received pursuant to its FOIA request and was filed within 10 days of receipt of this information, it is timely. See CSA Reporting Corporation, B-196359, March 27, 1980, 80-1 CPD 225; Antenna Productions Division, DHV, Inc., B-192193, February 9, 1979, 79-1 CPD 87.

Pacificon initially contends that the contracting officer had no reasonable basis for disregarding the auditor's preaward finding that PNA's accounting system was "inadequate" for a cost-reimbursement contract and, thus, improperly concluded that PNA was financially capable of performing. Such findings of financial capability constitute affirmative responsibility determinations, which our Office does not review except under certain exceptions not applicable here. See Robinson Industries, Inc., B-194157, January 8, 1980, 80-1 CPD 20; Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. We do note, for the protester's information, that reliance by the contracting officer upon a more current favorable recommendation from the supervisor of the original auditor was not inconsistent with applicable HHS regulations and does not appear to have been without a rational basis. See 41 C.F.R. § 3-3.5105 (1979).

The protester next maintains that PNA's offer was "nonresponsive" since it did not include cost proposals for 2 option years as required by the RFP, and that the subsequent communication with PNA seeking clarification of

the number of years contemplated by its single cost figure constituted improper discussions which were prejudicial to Pacificon. We note at the outset that it is inappropriate to discuss the compliance of a proposal with the terms of an RFP in terms of responsiveness. The concept of responsiveness applies to bids submitted in formally advertised procurements and is not directly applicable to negotiated procurements. Wisner and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD 148. While a proposal in a negotiated procurement must ultimately conform to the solicitation, the fact that an initial proposal may not be fully in accord with RFP requirements is not reason to reject the proposal if the deficiency is reasonably subject to being made acceptable through negotiations. NCR Corporation, B-194633.2, September 4, 1979, 79-2 CPD 174. We have held that price is generally negotiable, and price revisions are permitted as a result of negotiations. Analysis & Computer Systems, Inc., 57 Comp. Gen. 239 (1978), 78-1 CPD 75. Option prices therefore were properly subject to negotiation and we must agree with NIH that this omission was not fatal to PNA's offer.

With regard to the communication between the contracting officer and PNA, 41 C.F.R. § 3-3.5103(e) provides that an inquiry made of an offeror does not constitute discussions if made "for the sole purpose of eliminating any uncertainty or ambiguity in an initial proposal," and the inquiry does not result in submission of a revised proposal. The contracting officer states that clarification of the number of years contemplated by the single PNA price figure was necessary for proper evaluation of PNA's offer, and the record indicates that this was the sole object of the communication. PNA did at this time request permission to submit a less costly revised proposal, but such permission was not granted by the contracting officer. Thus, the inquiry did not constitute "discussions" as defined in the negotiations context.

PNA's subsequent submission of the revised proposal to the auditors does not appear to have been

prejudicial to Pacificon. PNA had already been included in the competitive range and, therefore, properly could have submitted the revisions with its best and final offer. Furthermore, we note that discussions were held with both firms on April 13, 1979, and both submitted revised proposals.

Two contentions posited by Pacificon pertain to a postaward determination by NIH that the renewal option clause in the solicitation did not conform to HHS regulations. In this regard, 41 C.F.R. § 3-1.5401 requires that option clauses establish a price which the Government may unilaterally elect to accept. The contracting officer reports that the option prices solicited here were not firm but, rather, merely constituted a starting point for further negotiations with the contractor. In view of this deficiency and the confusion it might have caused among the offerors, NIH deleted the renewal option from the contract, with the apparent intention of competitively resoliciting its requirement for the 2 additional years. More recently, however, NIH has decided to award to PNA on a sole-source basis for the first of these 2 years.

Pacificon first contends that since the renewal option provision was defective and confusing to the offerors, the procurement itself was necessarily defective. This argument is without merit. It is clear from the contracting officer's memorandum that the option provisions were not considered in the evaluation process and, indeed, had no bearing on the award. Thus, even though the provisions may have been improper, neither offeror was prejudiced by its inclusion in the solicitation.

Second, the protester takes issue with NIH's decision not to competitively solicit the procurement for both option years. Subsequent to its initial intention to competitively resolicit, NIH determined that the subject mass media campaign would be benefited by continuation of PNA as the contractor and has formulated a sole-source justification to this effect.

The primary justification cited is the following:

"It is not unusual for six months or more to elapse between the formation of information strategies, preparation of public messages, and the appearance of finished public service announcements. For this reason, and despite all good intentions, no newly installed mass media contractor, no matter how capable, can be expected to maintain a continuous and interlocking flow of multi-media information."

We cannot conclude that NIH's decision to procure from PNA for an additional year is without a rational basis. Allen and Vickers, Inc., 54 Comp. Gen. 1100 (1975), 75-1 CPD 399.

Pacificon further observes that certain technical evaluations prepared by individual review panel members contained only raw scores with no explanatory narrative. The protester argues that those individual evaluations not including a narrative should have been given no weight by the contracting officer since they did not conform to the applicable regulations. We disagree. None of the evaluators submitted merely raw scores but all had some narrative with the scores. While some were shorter than others, we note that the only evaluator to rank Pacificon higher than PNA had the briefest narration. Moreover, section 3-3.5104 of the HHS regulations requires only that the technical evaluators supply a narrative evaluation, not that each evaluator prepare such a report. This was done when the consensus report was furnished the contracting officer.

Pacificon urges two final bases for its protest. First, it alleges improprieties in the technical evaluations of the best and final offers as evidenced by no change in either score despite the substantial price reduction in PNA's proposal and the "substantial

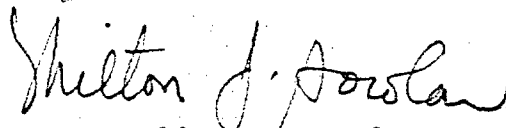
improvements" in Pacificon's initial proposal. The contracting officer reports that the changes in the PNA proposal (particularly the substitution of a new subcontractor) were specifically brought to the attention of the review panel, with a request for comments on the technical impact of the substitution. The memorandum from the evaluators states that "the replacement of the NCK firm was judged as having no impact on the technical excellence of the PNA optional proposal." It further explains that "the overall scoring remained unchanged." Technical evaluations by procuring agencies will be questioned by our Office only upon a clear showing that they were arbitrary or unreasonable. Group Operations Incorporated, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79. In view of the foregoing facts, we find no basis for concluding that the technical evaluations here were unreasonable or otherwise improper.

Finally, Pacificon challenges the propriety of contacts made between NIH and the National Institute for Drug Abuse (NIDA), another division of HHS for which both Pacificon and PNA had performed contracts. Pacificon argues these contacts evidence undue influence and bias.

The contracting officer states that NIDA was contacted concerning past performance of both offerors since both listed the agency as a reference in their proposals. We find nothing improper in one Government agency conferring with another regarding contractor performance.

Pacificon's allegation that an officer of PNA had a telephone conversation and lunch with an official of NIDA during the pendency of this procurement, which could have led to coercion and bias, is based on mere speculation and is, therefore, unsubstantiated.

The protest is denied.



For The Comptroller General
of the United States