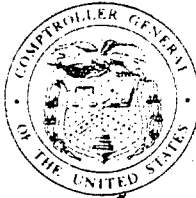


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DECISION



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

14501

[Protest of Army Contract Award]

FILE: B-197448

DATE: August 6, 1980

MATTER OF: Del Rio Flying Service, Inc.

DIGEST:

1. Where contrary assertions by protester and agency and documents tending to support agency position constitute only evidence, protester has not met burden of establishing that contracting officer and negotiating team caused protester to unnecessarily increase its price by insisting that proposed price was too low and that protester add personnel not required by RFP.
2. Where conflicting statements of protester and contracting agency constitute only available evidence, protester has not met burden of affirmatively proving that awardee alone received advance information concerning reduction in student load.
3. Allegation that protester's proposal was found technically unacceptable and that there was no valid basis for such decision is without merit since record shows that protester's proposal was never actually eliminated from competitive range and agency's technical evaluation has not been shown to lack reasonable basis.
4. GAO does not conduct investigations pursuant to its bid protest function for purpose of establishing protester's speculative statements. In absence of evidence demonstrating that awardee was pre-selected or that procurement was a sham, GAO must assume protester's allegations are speculative.

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5. Despite existence of potential conflict of interest, record does not indicate that contracting officer acted improperly in making contract award to firm employing contracting officer's daughter. Since contracting officer informed superiors of possible conflict of interest, and agency recognized and considered possible conflict prior to award, and no provision of statute or regulation was violated, there is no basis to conclude that award was improper.

Del Rio Flying Service, Inc. (Del Rio) protests the award of a contract for flight training services to Doss Aeronautical Services, Inc. (Doss) under request for proposals (RFP) No. DABT01-79-R-0183, issued by the Department of the Army, Procurement Division, Fort Rucker, Alabama (Army).

Del Rio raised the following allegations in support of its protest: 1) that the contracting officer and negotiating team insisted that Del Rio's price was too low and required Del Rio to add personnel not required by the RFP, thus causing Del Rio to unnecessarily raise its proposed price; 2) that Doss alone was given information concerning a reduction in the number of students to be trained and that this was detrimental to Del Rio's competitive position; 3) that Del Rio's proposal was found technically unacceptable because Del Rio lacked experience in rotary wing aircraft training and that there was no valid basis for this decision, and 4) that the contracting officer had pre-selected the incumbent, Doss, even before publication of the solicitation.

Del Rio subsequently raised an additional ground for protest, alleging that a conflict of interest existed which prevented the contracting officer from acting independently in negotiating the contract. The basis for this allegation is the employment of the contracting officer's daughter by the awardee, Doss.

Del Rio's first contention is that the contracting officer and negotiating team caused Del Rio to unnecessarily increase its price by insisting that Del Rio's

original price proposal was too low and requiring Del Rio to add personnel not required by the RFP. The Army denies this allegation and states that the contracting officer merely pointed out during the course of the discussions those areas of Del Rio's proposal which were considered deficient. The Army asserts that any change in Del Rio's price or technical proposal was strictly a management decision by Del Rio.

Our review of the record reveals nothing to support Del Rio's allegation that the contracting officer and negotiating team insisted either that Del Rio add unnecessary personnel or that its price proposal was too low. While the memorandum of the discussions held with Del Rio on December 18, 1979, does reveal that apparent inadequacies in the number of personnel proposed were discussed, we believe that this amounted to nothing more than fulfillment of the obligation imposed by Defense Acquisition Regulation (DAR) 3-805.3(a) (1976 ed.) which requires that offerors be advised of deficiencies in their proposals.

Del Rio implies that since the memorandum of the discussions conducted on December 18, 1979, was prepared by the contracting officer, it is not convincing evidence in support of the Army's denial of Del Rio's allegations. However, it is the responsibility of the protester to present evidence sufficient to affirmatively establish the allegations made in the protest. Robinson Industries, Inc., B-194157, January 8, 1980, 80-1 CPD 20; Reliable Maintenance Service, Inc.--request for reconsideration B-185103, May 24, 1976, 76-1 CPD 337. Where, as here, contrary assertions by the protester and the agency and documents tending to support that agency position constitute the only evidence presented, we have held, and so hold in this case, that the protester has failed to meet its burden of proof. Primeco, Inc., B-195998, January 15, 1980, 80-1 CPD 45.

Del Rio's second allegation is that Doss alone was given information concerning a reduction in the number of students to be trained and that this was detrimental to Del Rio's competitive position. Del Rio asserts that Doss became aware of the change through advance student

schedules made available to it as the incumbent contractor. Del Rio contends that if it had known of the reduction in students, it could have reduced its proposed price.

The Army denies that Doss was given any advance information and states that the information contained in the RFP was the same information upon which award was made. Doss also denies having received any information other than that contained in the RFP or accompanying documents and states that its proposal was based upon the information furnished with the RFP.

The record contains no support for Del Rio's allegation that Doss received advance information concerning a reduction in the number of students to be trained. Indeed, the one indication of advance knowledge of this nature suggests that Del Rio itself was aware of a possible change in student load. Del Rio raised a question in that regard during the discussions on December 18, 1979, and was informed that this point could not be addressed and that no information additional to that contained in the solicitation could be provided.

In any event, where, as here, conflicting statements of the protester and the contracting agency constitute the only available evidence, we do not believe that the protester has met the burden of affirmatively proving its case. Arthur Young & Company, B-196220, March 17, 1980, 80-1 CPD 205; Reliable Maintenance Service, Inc., supra. Consequently, we are unable to conclude that Doss actually received any advance information concerning a reduction in student load.

Del Rio's third contention is that its proposal was found technically unacceptable because it lacked management experience in rotary wing aircraft training and that there was no valid basis for this decision. Del Rio maintains that there was no requirement for such experience in the solicitation or subsequent modifications, and presents a number of factual assertions in support of its technical competency to perform the contract. Del Rio also argues that the alleged finding of technical unacceptability resulted in an illegal and unauthorized sole-source award to Doss.

In the Army's opinion, Del Rio's allegation that its proposal was considered to be technically unacceptable is based on the contracting officer's letter notifying Del Rio of the award to Doss and stating that "your proposal was unacceptable based on technical evaluation." By way of explanation, the Army states that both Del Rio and Doss' proposals (the only two offers received) were found technically acceptable upon initial evaluation by the Technical Review Board and the contracting officer. After discussions were held with both offerors and revised proposals received and evaluated, the contracting officer initially determined that Del Rio was no longer within the competitive range for award. This decision, however, was questioned by the legal adviser who believed that further discussions should be held with Del Rio and Doss and best and final offers requested from both. The Army maintains that despite the language used in her letter to Del Rio, the contracting officer accepted this advice.

The Army further states that following submission of best and final offers, Doss' proposal was found to be superior from both a technical and a cost standpoint. On this basis, the members of the Board of Award unanimously agreed on award to Doss, and the legal adviser concurred in this result. Thus, the Army argues that the contracting officer's decision to award to Doss was proper and consistent with the evaluation criteria.

Our examination of the record reveals adequate support for the Army's account of the events leading up to the award to Doss. Despite the ill-chosen language used by the contracting officer in her letter to Del Rio, it is clear that Del Rio was never actually eliminated from the competitive range. The record simply indicates that the Technical Evaluation Board found Doss' proposal technically superior to Del Rio's proposal.

Our examination of the record also reveals that while it is true that the RFP did not include a specific requirement for experience in managing rotary wing aircraft training, Section D, "Evaluation and Award Factors" clearly indicated that such experience would be among those factors evaluated for award. In this regard, we also note that the contracting officer's letter to Del Rio, which was discussed

above, did not state that Del Rio's proposal was found technically unacceptable because Del Rio lacked rotary wing training experience.

While it appears that Del Rio's lower technical score was due in part to its lack of rotary wing training experience, there is no support for the premise put forth by Del Rio that this was the only area where its proposal was found lacking. In this regard, the record shows that the technical evaluation panel also found Del Rio lacking in instrument training experience.

With respect to the technical evaluation, we will not disturb the judgment of the contracting agency unless it is clearly shown to be without a reasonable basis. Robinson Industries, Inc., supra; Servo Corporation of America, B-193240, May 29, 1979, 79-1 CPD 380. Moreover, the fact that the protester does not agree with the agency's evaluation of its proposal does not render the evaluation unreasonable. Robinson Industries, Inc., supra. Since the record contains no evidence to show that the technical evaluation of Del Rio's proposal was unreasonable, we conclude that there is no merit to Del Rio's third allegation.

Del Rio's fourth basis of protest is the allegation that Doss was pre-selected for award even before publication of the solicitation. Del Rio requests that we require the contracting officer to disclose the details concerning her failure to negotiate the final option year of the prior contract with the incumbent, Doss, as well as the details of the negotiations with the incumbent on the instant procurement. Del Rio believes that this information will prove that the procurement was a sham, serving only as a vehicle for the contracting officer to make an illegal sole-source award at an increased price to the incumbent.

Our examination of the record reveals that all options provided for in the prior contract with the incumbent already had been exercised. Thus, there was no "final option year" remaining in the prior contract at the time the instant procurement was undertaken. In addition, there is no evidence in the record before us to indicate that Doss was pre-selected for award or that the procurement was a sham designed to allow the contracting officer to make a sole-source award to Doss at an increased price.

Regarding Del Rio's request that we require the contracting officer to disclose the details of the negotiations with Doss, it is not the practice of our Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the validity of a protester's speculative statements. Robinson Industries, Inc., supra. In this regard, we note that the memoranda of discussions conducted with Doss on December 3, 12 and 18, 1979, which are contained in the record, provide no support for Del Rio's allegations. In the absence of evidence that Doss was pre-selected for award or that the procurement was a sham, we must assume that Del Rio's allegations are speculative.

Del Rio's fifth and final basis of protest is that a conflict of interest existed which prevented the contracting officer from acting independently in negotiating the contract. The basis of this allegation is the fact that the contracting officer's daughter is employed by the awardee, Doss.

Del Rio asserts that the contracting officer knew that if Doss was not awarded the contract, her daughter's job would be eliminated and that her daughter would be forced to either move to a new location where the contracting officer could not regularly visit her daughter and grandchildren, or that her daughter would be forced to go to work for a new company if a job was available, and lose her seniority with Doss. Del Rio argues that the contracting officer's superiors must have known of the alleged conflict of interest and that it was improper for them to have imposed the burden of administering the instant solicitation and contract upon her. Del Rio argues further that under these circumstances, the contract with Doss cannot be allowed to stand.

The Army advises that the contracting officer denies any wrongdoing. According to the contracting officer, her daughter has not been a member of her household for fifteen years and does not reside in the same town or county as the contracting officer. The contracting officer also states that the loss of her daughter's position as a clerk-typist with Doss is not of major concern to her and that as in the past, her daughter could, if necessary, find a comparable job in the area or another city.

The contracting officer states that she advised her office chief at the time her daughter went to work for Doss that if this would create a conflict of interest with her administration of the then existing contract with Doss, she would not object to the reassignment of the contract's administration to another contracting officer. Her office chief discussed the matter with the Director of Industrial Operation, who advised that no conflict of interest appeared to exist.

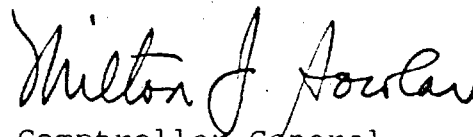
The Army has submitted a written statement dated April 8, 1980, from the former Director of Industrial Operation who made the decision that no conflict of interest existed. This statement confirms that the contracting officer informed her superiors of the potential conflict of interest and that her superiors determined that she should continue to administer the contract with Doss. The Army also states that they have found no violation of the pertinent Department of Defense regulation (31 C.F.R. § 40.7(a) (1979)) dealing with standards of conduct and advising personnel to avoid any conflict of interest between their private interests and the public interest related to the duties or responsibilities of their position.

Based on their review of the facts, the Army concludes that the contracting officer was not influenced in her decision to award the contract to Doss by her daughter's employment with Doss. The Army contends that the record clearly indicates that the independent Technical Review Board also found Doss' technical proposal to be superior to Del Rio's proposal. The Army therefore asserts that Del Rio's allegation is without merit.

It is, of course, incumbent upon the agency to avoid even the appearance of favoritism or preferential treatment by the Government towards a firm competing for a contract. Burgos & Associates, Inc., B-195839, February 25, 1980, 80-1 CPD 155. We, therefore, believe that the preferable course of action for the agency in this case would have been to reassign administration of the Doss contract upon learning that the contracting officer's daughter was employed by Doss. In this regard, the Army reports that responsibility for administration of the Doss contract has been reassigned.

Nevertheless, the contracting officer denies any wrongdoing and the record contains no evidence to the contrary. In fact, the record shows that the contracting officer brought the alleged conflict of interest to the attention of her superiors who determined that no conflict of interest existed. The record also shows that Doss' proposal was found technically superior to Del Rio's by the independent Technical Review Board and that Doss' final price proposal was lower than that of Del Rio. On this basis, the Board of Award (of which the contracting officer was a member) unanimously agreed to make the award to Doss. In addition, the Army has concluded that there was no violation of the regulations governing standards of conduct for its employees.

Based on our analysis of the above facts and circumstances, we cannot conclude that the agency or contracting officer acted improperly here. Since the contracting officer brought the potential conflict of interest to the attention of her superiors, and the agency recognized and considered the possible conflict of interest prior to award, and since no provision of statute or regulation has been violated, we find no basis to conclude that the award to Doss was improper. See QUAD Corporation, 56 Comp. Gen. 745 (1977), 77-1 CPD 453.



For the Comptroller General
of the United States