

Wotherspoon, P.L.

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DECISION

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

[Protest of AID Contract Award]

FILE: B-198706

DATE: August 18, 1980

MATTER OF: Pacific Consultants, Inc.

DLG 05095

DIGEST:

1. *3* Protest that postponement of competitor's oral discussions was potentially prejudicial is untimely, since it was filed more than 10 days after date that protester knew of postponement.
2. *2* Protest that RFP should have contained clause requiring successful offeror to negotiate sub-contracting plan involving percentage goals for small business is untimely, since lack of clause was obvious from RFP and protests based on such alleged improprieties must be filed prior to due date for proposals. Here, protest was filed long after that date.
3. *1* Protester has not carried burden of proof of showing that technical evaluation was unreasonable; therefore, it will not be disturbed.
4. *2* Protester argues that since Government of Haiti allegedly prefers protester, AID should award to protester. Record shows that while some Haitian evaluation panel members favored protester, Haitian Minister of Health and Director General of Ministry concurred officially in selection of awardee.
5. *4* Fact that former one-time consultant to awardee was new Public Health Officer to AID Haiti Mission, which awarded contract, does not show improper conflict of interest, since Public Health Officer has no present connection with or interest in awardee and was excluded from entire procurement process. Also, record shows no evidence of influence of Public Health Officer on procurement process.

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6. Record does not show collusion, or any present connection between awardee and another offeror whose president had been employed by awardee in past.

7. Protester contends that awardee was permitted to unilaterally submit additional information after proposal due date. However, record shows that agency requested information from both awardee and protester during proper conduct of written discussions.

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proposals
(2)*

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Pacific Consultants, Inc. (Pacific), protests the award of a contract by the Agency for International Development (AID) to Management Sciences for Health, Inc. (MSH), under AID's Rural Health Delivery Systems project in Haiti (No. 521-0091). The contract is for providing technical assistance to the Department de la Sante' Publique et de la Population (DSPP) [Haitian Ministry of Health] to strengthen its capability to manage and support a national network of rural health facilities.

DW-05096

Allegations

Pacific argues that the award to MSH was not proper, based on these allegations:

1. The AID evaluation panel members were not qualified to evaluate public health delivery system proposals.

2. The cost proposals of MSH and Pacific were roughly equal and Pacific's technical proposal was clearly superior; moreover, AID policy establishes a preference for host-country selection of the contractor, and the government of Haiti prefers Pacific.

3. Oral discussions with MSH and Pacific were originally scheduled within 1 day of each other; then MSH's discussion period was rescheduled for a week later. This gave MSH the opportunity to find out information about Pacific's proposal and use it in its own proposal.

4. MSH should not have been permitted to submit a proposal, since the new Public Health Officer for the AID Mission in Haiti had been employed by MSH until August 1979.

5. MSH and another offeror, John Snow, Inc., are interconnected and have a noncompetitive agreement. This should have disqualified both.

6. Award of the contract to MSH violates Public Law 95-507, 92 Stat. 1757, "other relevant Federal Statutes," and "the mandate set down by President Carter calling for increased participation by minorities * * * in Federal Procurement."

7. MSH was asked to submit additional information after proposals were due, and Pacific was not.

For the following reasons, we are dismissing two of Pacific's allegations as untimely and denying the remainder of the protest on the merits.

Timeliness

Section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), requires protests to be filed within 10 working days of when the protester knew or should have known the basis for the protest. Pacific filed its protest on May 6, 1980. According to Pacific, it was aware of the postponement of MSH's oral discussion on March 5, 1980. Therefore, allegation three, concerning the potential prejudice to Pacific of that action, is untimely. @07 P.L. = ' @10 =)

Allegation six, while not developed in detail by the protester, appears to be a complaint that the RFP did not contain a clause requiring the successful offeror to negotiate a subcontracting plan involving percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned by socially and economically disadvantaged individuals, as required by § 211 of Pub. L. 95-507, 92 Stat. 1757. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), requires protests based on such patent solicitation improprieties to be filed prior to the due date for initial proposals.

Since the protest was filed long after that date, this allegation is untimely and will not be considered.

Background

The following technical evaluation criteria were listed in the RFP:

	<u>Weight</u>
<u>Contractor's Personnel</u>	65 percent
Professional experience, capability language, education	
<u>Contractor's Experience</u>	35 percent
Similar project success, short-term consultant roster, leadership/project management capability	
Total	100 percent

The following numerical rating system was used in evaluating the written technical proposals:

Total Points = 400

1. Qualifications, language capability
and experience of long-term technical
candidates - 260 points total
2. Rating of qualities of firm - 140 points total
 - a. Field experience - 50 points
 - b. Home office capability - 35 points
 - c. Short-term consultants - 30 points
 - d. Quality of analysis
and work plan - 25 points

The written technical proposals were evaluated by a panel consisting of five AID members and four DSPP members. The contract is a direct contract between AID and the awardee; however, the DSPP members were invited to participate because AID felt that DSPP, as the user of the service, should have an "opportunity to express its views on the firms and personnel." Also, AID felt that the DSPP would gain experience from participation in the process. According to AID, the joint panel was to evaluate the proposals, conduct oral discussions and advise the AID Mission Director concerning the award. However, authority to make the final selection of an awardee was retained by the Mission Director.

Six proposals were received. The AID members of the panel independently scored the proposals according to the above scoring system. MSH's proposal was rated highest by all panel members, with a total average score of 317. Pacific's proposal was rated second by four members and third by the fifth, with an average total score of 283. Only those two firms were determined to be within the competitive range. AID states that the DSPP members were also asked to score the proposals, using the same scoring system. Those members, according to AID, refused, however, to use that system, or to follow the RFP criteria; instead, they placed emphasis on previous experience in Haiti, the presence of Haitians on the advisory team, and the quality of the written proposals. The DSPP members did not put their views in writing or rank the proposals, but orally informed AID personnel that they considered Pacific's proposal to be the best, and that they were also impressed with two others not selected by AID for the competitive range.

AID and DSPP representatives then mutually agreed to put the first choice of each into the competitive range. This coincided with AID's own competitive range determination. Oral discussions were conducted with each offeror, with all panel members present. The AID panel members prepared memoranda to the Mission Director recommending an awardee. Three of the four members (the fifth member was only involved in the review of the written technical proposal)

recommended MSH for award. Three of the four DSPP members orally favored Pacific. The DSPP members did state that they considered both firms to be well-qualified, and that they could work with either firm.

According to AID, the Mission Director met with the AID panel members, discussed the evaluations, and determined that the contract should be awarded to MSH, based on the technical evaluation. The Mission Director then met with the then Minister of Public Health to explain the selection process and attempted to obtain the Minister's concurrence. According to the Mission Director, the Minister did not express a preference for either firm. Subsequently, the President of Haiti replaced the Minister. The Mission Director then briefed the new Minister concerning the selection process. The new Minister appointed one of the DSPP panel members to be Director General of the Ministry. The Director General recommended to the new Minister that MSH be awarded the contract. The Minister then determined that he preferred MSH, and formally concurred with the AID Mission Director's proposed selection.

Qualifications of Evaluators

Pacific contends that the AID members of the evaluation panel, other than the contracting officer, were unqualified to evaluate the proposals because they are not medical doctors, but are only junior officers with little public health experience. AID, however, argues that an M.D. is not a necessary qualification for a panelist here, because this project involves providing the DSPP with administrative, financial, structural and logistical support in developing a rural health care system. Therefore, project implementation and systems management experience are more important than medical expertise in judging the proposals. AID's description of the experience of the panel members in question includes public health experience.

Generally, we will not become involved in appraising the qualifications of contracting agencies' technical personnel. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. In any event, based

on our review of the record, we cannot question AID's position that its panelists were qualified to evaluate the proposals.

Technical Evaluation and Selection Process

Pacific argues that its technical proposal was clearly superior to MSH's proposal, and that since the costs were roughly equivalent it should have received the contract. AID agrees that the costs were basically equivalent, but contends that, while both technical proposals were good, MSH had the best technical proposal.

Before discussing the specific complaints raised by Pacific, we note that in resolving cases in which a protester, as here, challenges the validity of a technical evaluation, it is not the function of our Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the procuring agency since it must bear the burden of any difficulties incurred by reason of a defective evaluation. In light of this, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and such discretion must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. Industrial Technological Associates, Inc., B-194398.1, July 23, 1979, 79-2 CPD 47. Thus, our Office will not substitute its judgment for that of the procuring agency by making an independent determination. John M. Cockerham & Associates, Inc.; Decision Planning Corporation, B-193124, March 14, 1979, 79-1 CPD 180. Additionally, the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.-- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Pacific contends that DSPP members numerically ranked Pacific first and MSH fourth. This, combined with the AID ranking of MSH first and Pacific second shows that Pacific's proposal is clearly superior. AID states that, to its knowledge, the DSPP panel

members never ranked the proposals numerically, but merely stated a preference. In any event, argues AID, the lack of consensus demonstrates that both proposals were good, not that one was clearly superior. We agree. The fact that half the panel ranked the MSH proposal first makes it impossible to conclude that it was clearly inferior to Pacific's proposal. This is especially true when the panel members who did not rank the MSH proposal high apparently did not apply the stated evaluation criteria.

Pacific also argues that AID's contracting officer, a panel member, recommended that Pacific be awarded the contract, and that he had the responsibility for recommending the awardee. AID points out that in this instance the contracting officer was just one member of the evaluation panel, and that the Mission Director had the responsibility to select the awardee. The contracting officer initially ranked MSH first and Pacific third, but favored Pacific after oral discussions; however, subsequent to the selection of MSH, the contracting officer stated that the selection was "properly made and correct." Again, it is our opinion that this shows only that there were two good proposals and that this panel member favored Pacific, not that Pacific's proposal was clearly superior.

Also, Pacific "seriously questions" the French language ability of several MSH team members. Further, Pacific claims that the RFP states that a knowledge of Creole is "highly desirable and near mandatory" for the Financial Advisor. Pacific states that its Financial Advisor speaks fluent Creole and MSH's Financial Advisor speaks no Creole.

MSH's proposal states that all proposed personnel are presently at or will meet the required level of fluency in French. Also, this was discussed in the oral discussion session, and the panel was satisfied with MSH's language fluency levels. On the other hand, Pacific has provided no evidence to support its allegations and, therefore, has not carried its burden of proof. Concerning the position of Financial Advisor, the RFP states that knowledge of Creole is "especially important." MSH's proposed Financial

Advisor does not, in fact, speak Creole, while Pacific's Financial Advisor does. The memoranda from panel members indicates that the language difference was considered, but that MSH's candidate was generally rated better in other areas and, therefore, the proposals were approximately equal at this position.

Related to the issue involving the evaluation of proposed personnel, Pacific questions one panel member's alleged higher ranking of MSH's "Chief of Party." In fact, the record shows that the panel member in question ranked the "Chief of Party" candidates proposed by the two offerors as "even."

Host Country Preference

Pacific contends that, despite an AID agency-wide desire to have qualified host-country personnel work on projects, Pacific was penalized for proposing to use Haitian nationals. Also, Pacific argues that the AID panel members gave little consideration to Pacific's experience on a prior project in Haiti.

According to AID, there is no agency policy favoring use of host-country personnel, nor was this an evaluation criterion listed in the RFP. However, knowledge of Creole, which is spoken by many Haitians, was considered useful, and points were awarded for proposing Creole speakers. Also, experience in Haiti was considered an advantage, but not a factor as important as the qualifications of the long-term advisors. Points were awarded to Pacific for its experience.

The record supports AID's statement. Memoranda from the panel members and summaries of meetings of the panel state that Pacific's proposal was superior in the areas of knowledge of Creole and experience in Haiti. However, as the evaluation criteria made clear, those factors were not considered as important as other factors on which Pacific was not ranked as highly.

Concerning the selection process, Pacific contends that the Haitian government favors it for the award,

and that AID should comply with the wishes of the Haitian government. Pacific supports this position by pointing to the preference of the DSPP panel members and of the alleged preference of the then Minister of Health.

The record does not support the contention that the government of Haiti favored Pacific for the award. That three of four Haitian evaluation panel members rated Pacific higher than MSH, does not establish the official position of the Haitian government. In fact, the present Minister and Director General of the DSPP officially concurred in the selection of MSH.

In summary, Pacific has not shown that the AID technical evaluation was unreasonable. On the contrary, the record shows that the evaluation criteria were clearly delineated in the RFP, that they were followed in the evaluation, and that MSH's proposal was strongest on those factors that were weighted the heaviest.

Alleged Conflict of Interest

Pacific contends that MSH should not have been permitted to compete because a former MSH employee was the new Public Health Officer for the AID mission. AID points out that the person in question was never a regular employee of MSH, but rather served as a consultant to MSH on one previous project. He also has no financial or other interest in MSH. Finally, AID states that the person in question was "excluded * * * from all involvement in the selection process" and that "his views were never solicited and were never offered."

Pacific has presented no evidence that the person in question influenced the procurement process. In the absence of evidence, we cannot question AID's implicit position that this allegation does not affect the validity of the award.

Alleged Collusion

Pacific contends that MSH and John Snow, Inc. (John Snow), should have been excluded from consideration for award because John Snow is "the profit arm

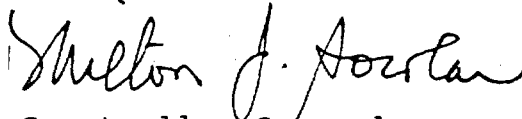
of MSH." According to AID, the relationship between the companies is very different. John Snow was owned by MSH until July 1, 1978, when the companies separated. At that time a severance agreement was executed between MSH, and a former employee who became President of John Snow. That severance agreement included a noncompetition agreement to last 4 years. However, the former employee notified MSH that he considered the agreement null and void and, therefore, John Snow would compete with MSH. AID was aware of this situation, but considered it to be a matter to be resolved by the two companies, and not a reason to exclude them from competition.

We agree with AID. Pacific has not alleged, nor does the record indicate any collusion between the two firms. Also, it certainly appears that the two firms are entirely separate entities.

Post-Closing Date Request for Information

Pacific contends that MSH was improperly permitted to submit additional information after the due date for initial proposals, and other offerors were not. This allegation seems to be the result of Pacific's misunderstanding of the nature of negotiated procurements. The request referred to was sent to both offerors in the competitive range, Pacific and MSH, and both responded. The request was a perfectly normal and proper instance of discussions conducted in accordance with Federal Procurement Regulations § 1-3.805-1(a) (FPR amendment 153, September 1975). The requests notified offerors of weaknesses in their proposals and requested clarification or augmentation.

The protest is denied.



For The Comptroller General
of the United States