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DECISION

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

FILE: B-197272 DATE: November 6, 1980

MATTER OF: Fox & Company

DIGEST:

1. [Protest that source selection was tainted by bias of selection official] is denied. Although protester views agency's failure to conduct preproposal conference, premature disclosure of procurement plans, and discussions and orders placed with incumbent, among other complaints, as evidencing pattern of bias, each action taken has been adequately explained by agency and was consistent with applicable law and regulations.

2. Appointment of source selection board is not improper where there is no evidence that personnel chosen were biased and composition of board is consistent with agency procurement practices.

3. Incumbent's selection for follow-on contract was proper where record indicates award was reasonably based on evaluation that conformed to RFP evaluation criteria. Protester's belief that agency improperly considered so-called "start-up time," used 0-2-5-8-10 numerical scoring system which exaggerated differences in technical merit, and failed to give adequate consideration to lower cost of its proposal is without merit because agency could consider start up problems which would result from differences in offerors' experience (a principal evaluation criterion), and source selection official based choice on meaning of scoring differences rather than on raw scores and took lower cost of protester's proposal into account.

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4. Disappointed offeror's claim for proposal preparation costs is denied where contract award to another firm is found to be reasonable.

This decision is in response to the suspension of proceedings by the U.S. District Court for the District of Columbia in a suit filed by Fox and Company (Civil Action No. 79-3487) pending receipt of our opinion in a related protest that Fox filed concurrently with our Office. Substantially similar issues are raised in the litigation and protest. Fox has asked the court to enjoin further performance of a contract Fox believes the Department of Energy (DOE) improperly awarded to Alexander Grant and Company (Grant) under Request for Proposals (RFP) DE-RP01-80RG-10092. The contract provides continued audit support services to assist DOE's Office of the Special Counsel for Compliance (Office of Special Counsel) in enforcing DOE Oil Price and Allocation Regulations.

According to Fox, award of the contract was tainted by the Special Counsel's personal desire to avoid any interruption in the enforcement audit program which he administers -- Grant was awarded a similar contract in 1978 -- which allegedly resulted in a competition biased in favor of Grant. Fox contends that a number of actions by DOE in connection with both the instant procurement and the administration of Grant's 1978 contract reflect a pattern of bias within the agency in favor of Grant. Fox argues that this bias was "institutionalized" by the naming of the Special Counsel as Source Selection Official and by the Special Counsel's use of his appointment as Source Selection Official to "control" the Source Evaluation Board (SEB) through the appointment of many of his subordinates to serve on or advise it.

The practices complained of, which Fox asserts assured the selection of Grant's more expensive "gold plated" offer over Fox's less costly proposal, include:

(A) failure to hold a preproposal conference, which Fox says was required by DOE procurement regulations in a procurement of this magnitude;

(B) discussions according Grant improper advance knowledge of the procurement, giving it a competitive advantage in meeting subcontracting requirements;

(C) discussions with Grant and among DOE officials of matters regarding the 1978 contract which allegedly impacted adversely on Fox with respect to the instant competition; and

(D) improper placement of orders under Grant's 1978 contract, giving Grant further unfair advantage.

Fox also protests that DOE unfairly evaluated proposals and that Grant's selection for award was in any event unreasonable.

Finally, Fox's protest to our Office includes a claim for proposal preparation costs.

As explained below, we are of the opinion that Fox's protest and claim are without merit.

I. Source Selection Board -- Appointment and Composition

As a preliminary matter, we consider Fox's objection to the Special Counsel's appointment as Source Selection Official; Fox believes his appointment placed him in a position to control the procurement. Fox also contends that the Special Counsel improperly appointed three of his subordinates out of five voting Board members. It objects to the naming of the Office of Special Counsel's Director of Field Operations as the Board's chairman, because he was responsible for the daily administration of the 1978 contract and because he had frequent contact with Grant's project manager, among others, during the procurement. It complains that other Board members have had working relations with Grant, that five of six advisers appointed to assist the Board were Office of Special Counsel employees, and that the Deputy Special Counsel served as an ex officio member of the Board.

The record indicates that the Office of Special Counsel was created by the Secretary of Energy in November of 1977 as a major component of the Economic Regulatory Administration (ERA). The office is headed by the Special Counsel, who is one level below the ERA Administrator organizationally. The Special Counsel is responsible for the compliance audit program, employs a large staff of auditors, and has been involved in identifying several hundred claims enforcement actions involving billions of dollars in alleged price violations.

The selection of a source evaluation official or members of an evaluation panel is a matter falling primarily within

the discretion of the procuring activity, which will not be questioned absent evidence of actual bias. See Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176. Moreover, there is no general rule prohibiting an employee of an agency from participating in the evaluation of an offer from a contractor whose current contract he is overseeing. Roy F. Weston, Inc., B-197866, B-197949, May 14, 1980, 80-1 CPD 340.

According to Fox, however, the Board was not impartial or insulated because it was under the direct control of the Special Counsel. Fox emphasizes the intent stated in the "Forward" to DOE's SEB Procurement Handbook (June 30, 1979) that the Handbook is designed to facilitate competition and to assure an impartial and fair evaluation of proposals and other procurement information.

Actually, the "Forward" lists five underlying DOE objectives, including the desire to assure that program objectives are met to the maximum extent possible in a manner which best guarantees that Government funds are efficiently and effectively expended. Further, the SEB Handbook authorizes the appointment of a senior DOE official such as the Special Counsel as a Source Selection Officer (§ 103); provides for the appointment to an SEB of program officials who generally are familiar with the program requirements which the procurement is meant to serve and who frequently have special expertise which may be necessary in evaluating proposals (§ 102-d); and requires or permits the appointments of an SEB Chairperson, an ex-officio member and advisers (to assist in areas where special expertise is needed) of DOE personnel of the rank, experience and affiliations involved here (§ 102-d).

Accordingly, the mere appointment of the Special Counsel as the Source Selection Official and nomination of an SEB having the composition described by Fox do not in themselves reflect any impropriety. Whether the evaluation and selection process was tainted as a result of the appointment and Board composition depends on whether the alleged bias on the part of the Special Counsel existed and permeated this procurement.

II. Actions Allegedly Reflecting Bias against Fox

As stated above, certain of these actions involve the procurement now in issue, while others involve the 1978 contract awarded to Grant. Fox's point essentially is that the

actions in themselves were improper, or were indicative of a pattern of activity within DOE to ensure the selection of Grant in 1980.

A. Failure to Conduct a Preproposal Conference

The protester points out that SEB Handbook § 308 states that a preproposal conference "should be held for all procurements significant enough to justify a formal SEB," and argues that DOE's failure to hold a preproposal conference thus is a sufficient basis to set aside Grant's award. Fox asserts that it was prejudiced by DOE's failure to conduct a conference because it was unable as a result to address questions to DOE and obtain information which Grant had readily available through its greater familiarity with on-going DOE audit work and through regular contacts with DOE.

Since no conference was scheduled, Fox wrote to DOE submitting five questions which Fox says it would have asked if a conference had been held:

"1. What are the names and locations of audit sites of the remaining refiners to be audited?

"2. Is any audit work to be performed from the Washington field office?

"3. What is the nature and extent of [available] Department of Energy EDP [electronic data processing] assistance?

"4. What staffing time schedule, for training purposes, etc., is most desirable to the Department of Energy?

"5. Does the Department of Energy still prefer the engagement headquarters to be based in Dallas?"

The letter was not answered in writing. According to a "declaration" submitted by the contracting officer, it was discussed with Fox telephonically.

DOE does not explain why it decided not to hold a preproposal conference in this instance but points out that Fox knew long before the litigation was commenced and the protest was filed that there would be no conference.

We do not agree with Fox that DOE was obligated to conduct a preproposal conference. As we noted in A. J. Fowler, B-191636, October 3, 1978, 78-2 CPD 252, prebid or preproposal conferences are not held routinely but are used principally to instruct bidders or offerors where the procuring activity believes that a conference is necessary to explain complex aspects of a procurement. Further, § 308 of the SEB Handbook states in its entirety:

> "A preproposal conference should be held for all procurements significant enough to justify a formal SEB. The preproposal conference permits prospective offerors the opportunity to gain a better understanding of the objectives of the procurement. It also offers the board an opportunity to gain a better understanding of the objectives of the procurement. It also offers the board an opportunity to stress the importance of significant elements of the RFP in order that interested organizations may judge whether to incur the cost of proposal preparation."

We believe that DOE's choice of the word "should" rather than "shall" regarding holding such conferences, as well as the explanation as to why a preproposal conference is desirable, establishes a strong policy in favor of holding preproposal conferences in SEB-involved procurements, but does not mandate a preproposal conference simply because an SEB is to be used. In fact, DOE states:

> "While it is admittedly more common for [DOE] to hold preproposal conferences than not to hold [them] in SEB situations, there have nevertheless been numerous instances in the past where [DOE] has chosen not to hold [one]."

In any event, Fox's initial proposal was technically acceptable and Fox was afforded an opportunity for oral and written discussions. It then could have followed up its letter if additional information was needed. Thus, we cannot agree

that Fox necessarily was prejudiced competitively by the lack of a preproposal conference.

B. Premature Disclosure of DOE Procurement Plans

Fox complains that the Office of Special Counsel's Director of Field Operations advised Grant of the pending procurement a month or so before notice of the procurement was published in the Commerce Business Daily (CBD). Fox complains that access to this "inside" information permitted Grant to gain an undue competitive advantage because Grant was able to limit the sources potentially available to Fox to meet RFP subcontracting requirements by making exclusive subcontracting arrangements, i.e., by precluding firms named in Grant's proposal from permitting their names to be used as proposed subcontractors by any other offeror. Fox points out that the RFP required that at least 30 percent of all production manhours performed be set aside for concerns owned and controlled by socially and economically disadvantaged individuals. According to Fox, there was only a limited number of highly qualified accounting firms which met this criterion, and by the time the RFP was issued the field was further limited by Grant's exclusive arrangements.

Prior to the closing date for receipt of initial proposals, Fox wrote to DOE complaining that Grant's subcontracting practices were forcing firms to choose between potential prime contract offerors. Fox argued that such a development would not provide the broadest opportunity for all to participate in the procurement and could result in DOE obtaining reduced quality at increased cost. Fox also stated that it had found the remaining firms quoting higher than normal fees, which Fox argued would prejudice its position. Fox proposed that DOE require that Grant terminate its exclusive subcontract arrangements.

DOE refused. In its reply DOE concluded that:

> "* * * sufficient numbers of qualified minority firms remain available to potential prime contractors to insure adequate competition, consistent with statutory and regulatory requirements. Accordingly, we cannot agree with your conclusion

> that the alleged exclusivity requirement by the incumbent makes for a 'less than completely competitive situation.'"

We cannot find on this record that the agency's actions reflected bias with respect to this issue or that the protester was prejudiced by them. The record indicates that Fox was able to propose sufficient subcontractors to meet the 30 percent requirement. However, essentially because Grant outscored Fox with regard to subcontracting, Fox insists that DOE's advance disclosure to Grant of its procurement plans "placed Fox in a prejudicial position regarding the * * * minority subcontracting requirement from which Fox never was able fully to extract itself." We do not understand just what that prejudiced position was, as the SEB did not challenge Fox's subcontractors' ability and took account of the possibility that Fox might be able to expand subcontract support after award by using some of the subcontractors proposed by Grant.

Moreover, it is not clear that DOE acted improperly. According to DOE, Grant was told only that funds had been budgeted to continue the compliance audit program. DOE's budget is a matter of public record and was available to Fox. As DOE notes, it is common practice for agencies to advise an incumbent (or others who happen to inquire) that a follow-on procurement is planned. Further, an incumbent may on its own become aware of an agency's plans if as the end of the contract term approaches it is apparent that the program being supported is not being terminated.

Fox has not rebutted DOE's statement that Grant was not told of DOE's intention to include the subcontracting requirements in issue. The fact that Grant made efforts to line up such subcontractors before issuance of the RFP may well reflect no more than Grant's anticipation of subcontracting requirements. Therefore we have no basis for disputing the agency's position on this matter. Arthur Young & Company, B-196220, March 17, 1980, 80-1 CPD 205.

Finally, we are aware of no authority which would have permitted DOE to require, through the procurement process, that Grant abandon its private agreements with potential subcontractors if it wished to participate in a DOE procurement.

C. Other Discussions with Incumbent and within DOE

Fox objects to several discussions with Grant involving the firm's incumbency which Fox alleges were improper.

Fox says that the Special Counsel met with the Grant partner assigned as project manager at approximately the time the procurement was publicly announced. Fox argues that during this discussion the Special Counsel explored whether Grant would be able to increase productivity during the remainder of 1979 and into 1980 to accelerate completion of the compliance audit project. The discussion occurred, Fox says, even though the same work was the subject of the new procurement.

Fox also objects to discussions within DOE regarding Grant's contract and its possible extension to meet transitional needs until a follow-on contract could be awarded. Fox attempts to construe statements made in this connection -- such as statements regarding possible negotation with Grant on a sole-source basis --as indicating that the Special Counsel was concerned only with expediency and intended to continue dealing with Grant notwithstanding the contents of any other offer received.

In part, Fox's complaints regarding the discussions held with Grant reflect its interpretation that second tier audits were beyond the scope of the 1978 and follow-on contracts. Fox attempts to differentiate between the 15 so-called "first tier" -- the 15 largest -- refiners which were audited during the life of the initial 18 month Grant contract and the remaining 20 large refiners, which Fox tries to treat as reserved for audit under the second contract.

Obviously, Fox has no basis for complaint regarding discussions of work which Grant could have been properly asked to perform under the 1978 contract. In fact, a contract can be modified without conducting a new procurement if the change is one which could have been anticipated as possible to occur during administration of the contract. Cf. American Air Filter, Inc. -- DLA Request for Reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD 443.

The Statement of Work in Appendix A of the 1978 solicitation and contract defined the proposed contractual effort as designed "to provide contract audit assistance to the Special Counsel in the execution of his assigned responsibility." DOE

asserts that both the 1978 and the 1980 contracts were intended to permit DOE to order audit support services on a task order basis to assist the Office of Special Counsel in conducting audits of any of the 35 major oil refiners within his jurisdiction. Appendix A of the 1978 Statement of Work indicated that comprehensive audits of the 18 largest refiners was attached the most importance. However, all 35 were included in the Special Counsel's assigned area of responsibility and were listed in the Statement of Work. According to the record, the compliance audit program first received full funding in the spring of 1979 --later than DOE originally anticipated -- and that the follow-on contract includes audits of the 20 so-called second tier refiners because those audits remain to be completed, not because this work was outside the scope of the original Grant contract.

On the present record, we do not view as unreasonable discussions by the Special Counsel, or others, with Grant personnel and among themselves to determine whether Grant could increase its productivity during the remainder of the 1978 contract term and by doing so commence audits of some of the second tier refiners.

Second, assuming for purposes of argument that DOE's conversations ranged outside the bounds just discussed to include a discussion of possible courses of action such as a sole-source award to Grant, there is no impropriety provided nothing was done. In this regard, DOE points out that:

> "it is a common occurrence for program officials Government-wide to submit task orders [or other requests] to their procurement [offices] which are subsequently rejected for a variety of reasons [e.g., because the request falls] outside of the contract's scope of work, etc. The fact that a task order * * * [or a sole source request] is submitted and subsequently rejected is not of itself unusual and does not mean that there is an elaborate conspiracy * * * to circumvent the law * * *. Rather, it means that program officials * * * must rely on procurement specialists for [procurement] expertise. * * *"

Third, the record indicates that the 1978 contract was extended beyond its original expiration date to provide for transition needs, but that the contracting officer determined at that time that new work would not be initiated. It was

reasonable that discussions were conducted between the Special Counsel, DOE contracting personnel and Grant leading to the contracting officer's decision. That the Special Counsel felt it important, moreover, to explore what options he could consider in order to expedite scheduling remaining work was appropriate given the importance attached to it.

Finally, Fox says it was unaware of Grant's second tier audit work at the time contract proposals were submitted. There is, however, no evidence that Fox's lack of knowledge in this regard adversely affected its competitive position. It was not offering and was not asked to perform 20 specifically defined audits, but rather to provide audit services as directed by specific task orders. If some of the work anticipated early in the procurement cycle was performed before award, Fox's position would be adversely affected only if Government-furnished workload data was incorrect and if Fox could show that it was misled because it relied on that data. See Inflated Products Company, Inc., 55 Comp. Gen. 875 (1976), 76-1 CPD 170; Jet Services, Inc., B-184934, April 12, 1976, 76-1 CPD 245.

D. Turnkey Audits and Other Task Order Directed Work

Fox complains that task orders were issued against the 1978 contract during the spring and fall of 1979 directing Grant to perform "turnkey" and other audit work which Fox believes was improper and demonstrated DOE's disregard of proper contracting procedures. The work complained of involved audits of three second tier refiners and nonproduct cost audits of seven second tier refiners. As Fox explains, a turnkey audit is a complete audit of all products at all distribution levels. A turnkey audit differs from a "modular" portion of a comprehensive audit in that it is intended to identify particular regulatory violations by focusing on specific product and distribution levels.

Further, Fox argues that DOE improperly issued a task order against the 1978 contract directing Grant to audit crude oil inventories of a number of the nation's larger refiners. Attempting for purposes of the instant protest to establish this action as part of the pattern of prejudice alleged, Fox says this task order:

> "was hurriedly issued to Grant under political pressure for the DOE to ascertain the true causes of long gasoline lines in the spring

> of 1979. DOE did not compete that special procurement, which entailed an additional 75,000 hours of work. It is clear that this inventory audit bore no real relation to the compliance audit and that Grant was selected noncompetitively simply because it was already doing work for DOE."

In this regard, Fox cites the contracting officer's statement in a deposition to the effect that he did not sign such task orders because he viewed them as improper. Subsequently, the contracting officer signed a declaration which has been filed with our Office in which he recants his statement on the bases: (1) that his statement involved transactions which had occurred some time earlier, (2) that his recollection of the events had been mistaken, and (3) that in fact he had signed a number of task orders involving turnkey and second tier contractors, which presumably he believed to have been proper at the time.

Whether a task order does or does not fall within the scope of a particular contract or requires a competitive procurement involves construing the contract documents. In light of our earlier discussion, Fox cannot complain of work which could have been properly ordered under the 1978 contract, regardless of how or in what sequence the work may have been ordered. Fox has not established that the turnkey audit task orders were in any way improper, and we therefore cannot agree that their issuance necessarily reflects a general bias in Grant's favor.

Regarding the alleged audit of crude oil inventories, DOE explains that:

> "The task assignment given to Grant was not 'to audit largest refiners' [but rather] the task was to undertake a systems review of the inventory management practices of five of the largest refiners."

In this regard, the Appendix A Statement of Work for the 1978 procurement and contract stated that the awardee would perform audits "in sufficient depth and with sufficient scope to support conclusions that the audited [target] firm was in substantial compliance with" DOE's regulations, or that it was not. This work was to include a survey consisting of:

> "sufficient analysis and evaluation of the company's accounting procedures and practices * * * to determine the most practical and efficient audit procedures and techniques"

which might be used in conducting future audits of specific transactions. Since any comprehensive audit program must consider inventory practices and procedures, we see no justification for Fox's complaint.

E. Other DOE-Incumbent Contracts

Fox asserts that Grant has been awarded every compliance audit assistance contract let by DOE, a fact which Fox believes illustrates DOE's disregard for proper procurement practices.

Fox's assertion is true but misleading. There have only been three such awards including the 1978 award and the award now in dispute. The third Grant-DOE contract was awarded by another DOE organizational unit to Grant on a sole-source basis to audit additional oil companies. The contract involved audits of smaller firms which were not included in the 35 companies which are targets of the compliance audit program.

Neglecting to point out that the Special Counsel says he opposed this third award, Fox argues that DOE has not adequately explained why Grant was selected.

However, we do not consider what another DOE organizational unit may have done as relevant to deciding the question presented here, i.e., whether proper contracting practices were followed in this instance. The propriety of this (third) and the initial 1978 award have not been considered by our Office.

In a related line of argument, Fox asks that we consider the findings and recommendations made in our report entitled "The Department of Energy's Practices for Awarding and Administering Contracts Need to be Improved" (EMD-80-2). There we criticized certain DOE procurement practices -- the use of task orders and so-called "quick reaction work-order master contracts" -- as well as its practices in awarding a number of contracts on a sole-source basis. The report responded to a request for a review received from the Chairman of the Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce.

However, our concern there was directed toward DOE's tendency in some instances to include too broad a range of work in master contract type of arrangements, preventing firms from competing for work covered by individual task orders. Fox has not challenged the scope of the contracts in dispute as too broad and our report did not question the procurement practices used in awarding the task order agreements initially, i.e., the type of procurement action Fox does question. Moreover, our work took the form of an audit and review of policy matters and was not a decision by this Office based on a complete record developed in the bid protest forum regarding the legal propriety of the practices examined.

III. DOE Evaluation of Proposals

In addition to Fox's allegation that Grant's selection was the product of bias, which we consider further in part IV, Fox asserts three specific objections to the Board's evaluation. According to Fox: (1) the Board improperly weighed the importance of avoiding delay resulting from a change of contractors because this was not an evaluation factor stated in the RFP, (2) Fox's proposal was downgraded because it did not propose a plan for turnkey audits, even though such a plan was not requested, and (3) DOE used a point system to tabulate technical sources which would tend to enlarge any difference in technical merit and distort the relative importance of such a difference.

Award was to be made to the firm submitting the proposal which was considered most advantageous to the Government, i.e., reflecting the greatest overall value weighing technical merit principally against cost. The solicitation indicated that proposals would be evaluated by considering: (1) contractual terms ("contract proposal") offered, (2) technical merit ("technical proposal"), and (3) cost ("cost proposal"). Contract and cost proposals were to be evaluated without numerical scores. The SEB was responsible for the initial evaluation of technical proposals, which the RFP stated were to be scored and evaluated based on the following criteria (listed in descending order of importance):

(A) Technical approach (including the offeror's comprehensive plan and work monitoring and reporting procedures);

(B) Qualifications and availability of key personnel and project management approach;

(C) Related "corporate" (firm) experience; and

(D) Available "corporate" (firm) resources.

According to the RFP, the second and third factors were to be given approximately equal weight. The greatest weight was to be assigned to offerors' proposed technical approaches; the least, to corporate resources.

First, we reject Fox's contention that the Board, and ultimately the Special Counsel, improperly considered so-called "start-up time" (i.e., difficulties associated with a change in contractors). Start-up time was not listed among the principal evaluation criteria stated in the solicitation. It does not appear, however, that "start-up time" was considered as a separate criterion here. As stated in the SEB report:

> "The major concern expressed by the Board regarding the * * * Fox proposal was its corporate experience in major industrial regulatory audit work. Although [Fox] provided an adequate response to the requirements of the RFP, the Board expressed reservations that the approach did not indicate a clear understanding of the complexities of the OSC project. * * * Fox was able to demonstrate prior experience in regulatory compliance auditing, but the Board remained unsatisfied that [Fox's] experience was similar in size and scope to [the work required], nor did it indicate an adequate ability to manage a large group of subcontractors in a litigation-sensitive environment. These concerns, and the resulting learning curve implications which would impact OSC operations, were seen by the Board to be [inconsistent with the prompt completion of the compliance audit program.]" (Emphasis added.)

It is clear from our review of the record, including the depositions, that the Board's and Special Counsel's concern with the delay which DOE anticipated in bringing Fox up to the level of performance expected of Grant reflected DOE's belief that Fox had less experience than Grant. DOE's concern was not that it would take Fox several weeks to start performing, as such.

In this regard, we held in our decision in AEL Service Corporation, et al., 53 Comp. Gen. 800, 805 (1974), 74-1

CPD 217, that the purpose of requiring that the evaluation factors and their relative weight be disclosed in a solicitation is to assure an adequate basis to permit offerors to submit accurate and realistic proposals. The need to disclose subcriteria, however, depends upon their relationship to the main criteria set out in the RFP. Although subcriteria which define essential characteristics or which measure performance of an end item being procured must be disclosed, we concluded in AEL that disclosure was not necessary if the subcriteria consist of elements which are naturally implied by the main listed criteria.

Here, firm ("corporate") experience was listed as a principal criterion, and we believe it implicitly includes the impact on performance that a particular experience level might have. We thus agree with the assumption suggested by the Board's report that consideration of transitional (learning curve) problems was implicit in the stated evaluation criteria, and that DOE could properly consider what Fox denominates as "start-up time."

Moreover, Fox in fact was asked about its transitional plans during discussions. The record indicates that Fox proposed an accelerated start-up schedule of four weeks and admits it could not reduce so-called start-up time to zero. Fox, therefore, could not have improved this aspect of its proposal even if "start-up time" had been specifically listed as an evaluation factor. Consequently, we believe that in any event Fox was not materially prejudiced by DOE's consideration of "start-up time."

Second, Fox's belief that a turnkey audit plan was not requested is incorrect. Fox's failure to discuss a turnkey approach was included in DOE's list of deficiencies discussed during oral and written discussions. Fox was given the opportunity to revise its proposal in this regard and did so, expressly discussing the so-called "turnkey" approach in its best and final offer. Thus, we see no basis for Fox's claim that this aspect was unfairly considered.

Third, regarding the numerical scoring system used, Fox states that:

> "The point system was on a scale of 10-8-5-2-0, so that, for example, if Grant and Fox were very close together but Grant

> was slightly better, it would receive an 8 but Fox would receive a 5 * * *. When all point scores are aggregated, this distorted spread becomes substantial, and [the] Chairman of the SEB * * * acknowledged that the scoring system worked in this case to exaggerate the difference in scores between the Fox and Grant technical proposals."

Fox points out that the contracting officer stated in his deposition that he did not know the reason for using such a system. However, such a system is indicated in the SEB Handbook, Appendix 4, and DOE contends that it is widely used by other Government agencies to assure a reasonable spread in assigned scores.

Grant's technical proposal was assigned a total score of 815.5 out of a possible 1000 points, while Fox received 653 points, as follows:

	Grant	Fox	Max Poss.
Technical Approach	351	306	450
Key Personnel and Project Management	202.5	170	250
Related "Corporate" Experience	220	140	250
"Corporate" Personnel Resources	42	37	50
TOTAL	815.5	653	1000

Technical scores alone, however, do not form a basis for the award of a contract. Numerical point scores, when used for proposal evaluation, are useful as guides to intelligent decision making, but are not themselves controlling in determining award, since these scores can only reflect the disparate, subjective and objective judgments of the evaluators. Whether a given point spread between competing offers indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement, and while technical scores must of course be considered by source selection officials, such officials are not bound thereby. Bunker Ramo Corpoation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427. Thus

while a more refined scoring methodology (including numbers, 1, 3, 4, 6, 7, and 9 in the scoring scheme) may have reduced any unintended distortions in the final scoring, it was ultimately the Special Counsel's responsibility as Source Selection Official to determine what if any significance should be attached to the scores tallied by the SEB, Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. As indicated below, we believe the Source Selection Official's judgment here in choosing Grant for the award was rationally founded. Bunker Ramo Corporation, supra.

IV. Selection for Award

Arguing that the Special Counsel was not concerned with whether the new procurement was competed or not, and that his only concern was that "there be no delays, no interruptions, no loss of expertise, no loss of prompt and capable work," Fox contends that:

> "The clear picture which emerges from the record which has now been developed and from an analysis of all the available facts is that the selection officials in every instance and at every opportunity gave Grant an unfair advantage."

Indeed, Fox complains, the Special Counsel "admitted that he did not read the full Fox proposal."

First, we reject Fox's implication that the Special Counsel could not have made his decision properly without having read its full proposal. While a rational selection certainly cannot be said to result if the selecting authority is unfamiliar with the facts, a full reading of all proposals is not an essential prerequisite to a sound decision -- provided the selecting official has before him a full and accurate presentation of the relevant facts. Burns and Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57, aff'd. August 3, 1979, 79-2 CPD 77.

The Burns & Roe case is similar to this case in a number of respects. There we held that the award of a cost-type contract to ARO, Inc. by the Air Force was rationally founded and consistent with the evaluation criteria notwithstanding that the protester believed ARO had benefited improperly from an extended period of incumbency. Both the initial decision

and decision on reconsideration turned in part on our conclusion that the source selection officer was fully briefed regarding the merits, risks and costs of each proposal, permitting an informed judgment to be made.

The Special Counsel explains in his deposition the procedure followed in presenting the SEB's report and in making his selection. He states:

> "A. * * *[The Director of Field Operations] had slides, graphs, and was sort of master of ceremonies making an extensive report, sort of reporting for the whole Board.
>
> "The attorneys were there from Procurement and the General Counsel's office, the senior Procurement people were there, people from my office, members of the Board * * *.
>
> "That meeting took several hours * * * and involved an extended report and a lot of questions and answers, and an examination of the competing proposals in some detail.
>
> "I asked the chairman and members of the Board a number of questions about how they made the critique and evaluated the different factors as they did, how they approached the different quantification, assignment of numerical values to those analyses, those criteria. * * * the matter was completed in the late afternoon * * *.
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> "* * * I took several days to make [my] decision, perhaps close to a week * * *."

In making that decision, the Special Counsel indicates:

> "A. * * *what I looked at were what was the makeup, * * * a bottom-line disparity of about 150-plus points in a technical evaluation out of 1000 possible * * *. I found the largest amount was in related corporate experience. I found other significant differences, probably the next largest was in

> the area of comprehensive plan under technical approach. [At the briefing] I asked a number of questions of the [Director of Field Operations] and [other] members of the Board as to what they meant by that, what was superior or inferior, one against the other, in those areas. I asked questions, I remember, about what kind of related corporate experience Fox had had. We even had, as I recall, a little colloquy about what the difference was between related experience and the prior experience of an incumbent under an existing contract because, of course, it was a matter I was trying to be sensitive to. * * *."

While Fox attempts to characterize the Special Counsel as insensitive to competitive procurement needs, in our view the portions of the record just quoted bear out DOE's position that the Special Counsel diligently discharged his assigned functions as his responsibilities were defined for him by his procurement and legal advisers based on DOE regulations and decisions of this Office.

Regarding the actual selection of Grant over Fox, the record shows that DOE viewed Fox's technical proposal as strong in key personnel and other staff areas but as less "responsive" to particular DOE auditing needs. In the course of our review we have fully examined the Grant and Fox proposals. It appears that it was Grant's greater experience with compliance audits that gave it an advantage; Grant was able to focus more precisely on those areas where it knew problems had been encountered.

Further, we note that in the evaluators' opinion Fox lacked major industrial regulatory audit experience comparable to that which Grant had gained by virtue of its incumbency. The Special Counsel concurred in the SEB's view that award to Grant would reduce difficulties in starting performance, because there would be virtually no learning curve.

While Fox argues that it has performed other regulatory audit work, and insists that undue weight thus was placed on concern with start-up problems, we have no reason to question DOE's judgment in this regard in view of the protester's own admission that the magnitude of audit work which may be required under this contract makes it one of the largest

audit assistance contracts awarded. The difference regarding the Fox and Grant technical proposals becomes largely a measure of the benefit Grant possessed by virtue of its incumbency. While the Government has an obligation to assure that offerors may compete on an equal basis, offerors frequently are not equal in their ability to compete. We have consistently recognized that some firms may enjoy a competitive advantage by virtue of their incumbency or particular circumstances, or as a result of benefits received through Federal or other public programs. The Government is not required, as Fox seems to believe, to equalize competition for a particular procurement by considering the competitive advantage accruing to firms due to their incumbency or other special circumstances, provided that their advantage is not the result of unfair Government action or favoritism. Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD 148, and cases cited therein. We see no reason to believe it was here.

C. Alleged "Gold-Plating"

Finally, we consider Fox's allegation that:

> "In their preoccupation to ensure that Grant obtained the follow-on compliance audit support contract, the OSC officials elected to do business with a competitor whose proposal more than exceeded the requirements of the RFP and carried a premium price tag. This choice * * * constitutes a wasteful form of 'goldplating' the contract requirements.
>
> "The selection of Grant in place of Fox was not the choice of a technically qualified offeror over a technically unqualified one. According to the SEB and source selection reports, both proposals were technically acceptable. * * *."

After auditing both cost proposals, DOE concluded that both firms had projected realistic costs. However, DOE estimated that the cost of contracting with Fox would be about 11 percent less than the cost of performing similar work with Grant, primarily because Grant chose to charge a greater fee.

Fox recognizes that award based on a higher priced proposal is not improper where a procurement is negotiated if technical merit is to be considered and the contracting activity concludes that the difference in cost is outweighed by the technical merit of the more costly proposal. Fortec Constructors, B-188770, August 7, 1979, 79-2 CPD 89. However, Fox views DOE's award as unjustified in the circumstances of this case.

We do not agree with Fox that the Special Counsel as Source Selection Official paid too little attention to cost. The Special Counsel clearly recognized that he was required to weigh the apparent technical advantage afforded by Grant against the price advantage which might be obtained by award to Fox. Moreover, his deposition plainly indicates that he considered potential cost important and realized that it was to his advantage to weigh the potentially lower cost of Fox's proposal. Lower cost, he was aware, might be translated into increased total production, actually enhancing his chance to meet scheduled completion dates.

A selection consistent with the evaluation criteria stated in the RFP will not be disturbed unless clearly shown to be without a reasonable basis or unless it is the product of bias or intentional misconduct by agency procurement personnel. It is enough that on the record in this case the Special Counsel appears to have had before him a full and accurate presentation of the relevant facts and that he made a reasoned decision based on the procurement record. Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, supra.

The protest is denied.

Because the protest is denied, Fox's proposal preparation cost claim also is denied. Cf. Jets, Inc., B-195617, February 21, 1980, 80-1 CPD 152.

Harry R. Van Cleve

For the Comptroller General
of the United States