

18157

EISEN
Ph 2

DECISION



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

[Protest of United States Military Academy Contract Award]

FILE: B-200839

DATE: May 19, 1981

MATTER OF: PSI Associates, Inc.

DIGEST:

1. In considering objections to technical evaluation of proposals GAO will examine record to see whether agency's determinations have rational bases.
2. Protest that agency did not give adequate notice of time set for oral negotiations is untimely where not filed within 10 days from date of receipt of notice.
3. Protest that oral discussions were inadequate, filed more than 10 days later, is untimely where protester's objection to extent of discussions arose when they took place and protester knew that no further discussions would be held.
4. Protest that firm was not given sufficient notice of date for receipt of best and final offer is untimely since it was filed after such date.
5. Written notice of award does not have to be sent to unsuccessful offerors for contracts for personal or professional service negotiated pursuant to 10 U.S.C. § 2304(a)(4) (1976). Moreover, written request generally is necessary before debriefing will be provided.
6. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by other Government agencies.

016961

115275

7. Protester has not met its burden to establish bias alleged in evaluation of its proposal where it has presented no evidence of fraud, abuse of discretion, or arbitrary action which would show that it was treated unfairly or unequally.

PSI Associates, Inc. (PSI), protests the award of a contract to Market Facts, Inc., under request for proposals (RFP) DAAG60-80-R-6660 issued by the United States Military Academy (USMA), to review current USMA admissions operations and recommend methods of increasing enrollment of well-qualified black Americans and women. PSI contends that the award was not based on the requirements and evaluation criteria set forth in the RFP; that there were certain other irregularities in the negotiations and award processes; and that PSI was discriminated against because it is a minority, female-owned and operated firm. We deny the protest in part and dismiss it in part.

USMA Requirement and the Evaluation

PSI protests that its proposal was not judged against the requirements of the RFP. PSI alleges that in an interview during negotiations the chairman of the USMA Technical Evaluation Panel commented that the USMA was really interested in an "executive search," which PSI argues was not what the RFP as issued sought. Although no written amendment of the RFP's scope of work was issued before or after that interview, PSI states that it chose to explain in its best and final offer how it would modify its proposal if the alleged oral departure from the RFP were in fact incorporated into the RFP.

The USMA responds that there was no change in the scope of work as described in the RFP as issued. The chairman of the Technical Evaluation Panel reports that his actual comment during discussions on the scope of work was that the USMA problem was "not unlike an executive search." He asserts that no oral departures from the written scope of work were made. The USMA states that all proposals were judged against the terms and conditions of the written RFP and the award was made to Market Facts because it submitted the highest rated technically acceptable proposal and the lowest price.

The RFP provided that technical proposals would be of paramount consideration in relation to price in selecting the contractor. Seven technical evaluation factors were used, labeled A-G. The RFP, as amended, provided that factors A-D were to receive the most weight, while factors E-G would receive lesser but equal weight.

[It is not our function to make determinations as to the acceptability or relative merits of technical proposals. Rather, we examine the record to determine whether the judgment of the contracting agency was clearly without a rational basis. Unless such a finding is made, or we find an abuse of discretion or a violation of procurement statutes or regulations, the agency's judgment will not be disturbed.] New York University, B-195792, August 18, 1980, 80-2 CPD 126.

Our examination of the record shows that even though PSI's proposal was considered acceptable, Market Facts, which offered to perform the work at the lowest cost, was scored higher on technical factors by each of the technical evaluators. [A comprehensive technical evaluation of proposals was made in accordance with the criteria set forth in the RFP.] Each member of the Technical Evaluation Panel provided narrative comments to reflect his or her opinion of the strengths and weaknesses of each proposal and numerically rated each proposal on the general evaluation factors set forth in the RFP (other than price). When these ratings were averaged, Market Facts scored substantially higher than PSI. [We do not find anything in the record which suggests that the evaluation was based on criteria other than those published in the RFP. The fact that a protester does not agree with an agency's evaluation does not render the evaluation arbitrary or illegal.] Sheldon G. Kall, B-199120, September 23, 1980, 80-2 CPD 221.

[With regard to the Technical Evaluation Panel chairman's alleged oral representation concerning the scope of work, the protester has the burden to affirmatively prove its case.] Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29. Where, as here, the only evidence on an issue is conflicting statements by the protester and the contracting agency, the protester's burden is not met.] Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. Further, PSI acknowledges that in its best and final offer following those discussions it responded to both the written RFP and the

chairman's alleged oral representation. Therefore, PSI would not have been prejudiced by what allegedly transpired during the oral discussions in any event. See United States District Court for the District of Columbia, 58 Comp. Gen. 451, 470 (1979), 79-1 CPD 301.

Other Negotiations and Award Irregularities

PSI protests a number of alleged irregularities in the negotiations and award processes other than those noted above. PSI contends that it received insufficient notice before the oral negotiations session. The firm states that it was telephoned on September 2, 1980, to come to the USMA the following day for an "interview" and that it was not told that the interview in fact would involve discussion of its technical proposal until its representatives arrived at the USMA on September 3. PSI also complains that the time and date of the session were set arbitrarily, and that it was told no other interview time was available.)

PSI also questions the content of the September 3 discussions. It believes the panel inadequately explored the merits of its proposed methodology and its capability to perform the required tasks.)

The discussions were conducted on September 3, and PSI concedes that no further discussions were expected. PSI first raised the above matters in a letter to USMA dated October 2. (The protest to our Office was filed on October 14.) Our Bid Protest Procedures require that protests be filed with either the contracting agency or our Office within 10 working days from the time the basis for protest was known or should have been known. 4 C.F.R. § 20.2(b)(2) (1980). Even considering PSI's October 2 letter to USMA a protest about notice before the September 3 interview and the adequacy of the discussions, the matters clearly were untimely raised and therefore will not be considered on the merits. See Communications Corps Incorporated, B-195778, February 20, 1980, 80-1 CPD 143.

We note here that the record shows that PSI's concern with the adequacy of the September 3 discussions

is not based on any post-discussions notice to the firm of deficiencies in its proposal which the firm believes were not adequately explored by the USMA on September 3 so that the firm would not really have had a basis to protest the issue until it received such notice. See Systems Analysis and Research Corporation, B-187397, February 4, 1977, 77-1 CPD 90. Rather, it is evident that PSI objected to the scope of the discussions at the time they took place, and knew that no further negotiations would be conducted, so that its basis for protest arose on September 3 and it should have protested within 10 working days thereafter. See Four-Phase Systems, Incorporated, B-189585, April 19, 1978, 78-1 CPD 304.

PSI further alleges it was given insufficient notice of when the best and final offers were due. It claims it did not receive the RFP amendment of September 2 setting the due date for best and final offers at September 17 until September 12, three working days before the due date. However, our Bid Protest Procedures require that a protest against an alleged impropriety incorporated into a solicitation after initial proposal receipt be filed prior to the next closing date for the receipt of proposals. 4 C.F.R. § 20.2(b)(1). Allegedly insufficient proposal preparation time involves the type of impropriety contemplated by the requirement, see Clarke & Lewis, Inc., B-196954, January 8, 1980, 80-1 CPD 24, and PSI therefore should have protested that it could not prepare an adequate best and final offer in the time given before the date that the offer was due, September 17. Since the firm first raised the issue in the above-mentioned October 2 letter to USMA, it is untimely under section 20.2(b)(1) and will not be considered on the merits.

PSI also asserts that it did not receive any written notification that an award had been made. PSI states that it learned of the award to Market Facts by telephoning the contracting office. The USMA acknowledges that no written notification was given, but argues none is necessary. We agree with the USMA. This contract was negotiated pursuant to 10 U.S.C. § 2304(a)(4) (1976), which deals with contracts for personal or professional services, and there is no requirement for written notice of award for such contracts. Defense Acquisition Regulation (DAR) § 3-508.1 (ii) (1976 ed.).

In addition, PSI notes that the USMA did not offer to debrief it on the contract award. However, a written request by the unsuccessful offeror generally is necessary before a debriefing will be provided. DAR § 3-508.4(b). The Army reports that the USMA did not receive a written request for a debriefing; the protester's assertion that the USMA had an obligation to offer to debrief PSI is without merit.)

Finally, PSI protests the alleged refusal of the USMA to provide it with adequate information concerning the actual evaluation of the proposals received. The information consists essentially of proposal evaluation documentation and negotiation records furnished by USMA to our Office but not to PSI in the agency's report on the firm's protest. PSI contends that without this information it is unable to comment fully on the USMA's report to this Office.

Our Office has no authority to provide PSI the requested information; a protester's recourse in such a situation is to pursue its disclosure remedy under the procedures provided by the Freedom of Information Act, 5 U.S.C. § 552 (1976). Sheldon G. Kall, supra. In any event, as indicated above, while we have not reevaluated the proposals received by USMA, we have reviewed the material withheld from PSI, and it shows that USMA's evaluation of proposals conformed to the RFP's evaluation scheme, and that the agency's judgment in that regard was not unreasonable. PSI thus was not prejudiced by the non-disclosure. See Systems Consultants, Inc., B-197872, September 18, 1980, 80-2 CPD 203.

Discrimination

PSI alleges that it was discriminated against because it is a minority, female-owned and operated firm. There is no evidence of any improprieties in the record in this regard, nor are any specific instances of bias or prejudice cited, but PSI suspects that further investigation would reveal such discrimination.)

However, PSI's suspicion is not enough to invalidate the award. Unfair or prejudicial motives cannot be attributed to individuals on the basis of inference or supposition. Since the allegations therefore amount only to speculation about possible bias or unfairness on the part of the evaluators without any factual substantiation, the protest on this issue is denied. See Health Management Systems, B-200775, April 3, 1981, 81-1 CPD ____.

[The protest is denied in part and dismissed in part.]

Milton J. Aorlan
Acting Comptroller General
of the United States