

183-43

**DECISION**



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

FILE: B-196281

DATE: June 2, 1981

MATTER OF: John J. McMullen Associates, Inc.

**DIGEST:**

1. Contracting agency's view that RFP evaluation and award criteria emphasized technical considerations over cost is more reasonable than protester's interpretation that technical considerations and cost were of equal importance. GAO sees no basis for objection to agency's exercise of discretion in selecting higher cost proposal which agency considered significantly superior technically.
2. Variations in scores assigned to proposals by individual evaluators do not demonstrate, as protester asserts, arbitrariness in agency's evaluation procedure. Protester's disagreement with judgments of agency's technical evaluators is not enough to show that evaluation lacked reasonable basis.
3. Agency's assigning low cost proposal maximum number of points for cost and giving higher cost offer fewer points, based upon degree to which its cost exceeded low offer's is not objectionable.
4. Fact that agency evaluators calculated offerors' cost per technical quality point and furnished this information to selection official did not have effect of overriding RFP evaluation and award criteria, which emphasized technical considerations over cost.

*Award*

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5. Contrary to protester's view, statement in its best and final offer that it was prepared to offer on a fixed price basis for approximately \$700,000 did not constitute firm fixed price offer.
6. No basis for objection to award is seen in protester's allegation that award in unrestricted procurement to company planning to perform in non-labor surplus area was in violation of Government's policy favoring awards to labor surplus area concerns.
7. Contention that award was made based upon proposal whose cost exceeded agency's estimate does not furnish any basis for objection to award.
8. Where no arbitrary and capricious Government action is found in regard to evaluation of proposals and selection of awardee, claim for proposal preparation costs is denied.

John J. McMullen Associates, Inc. (JJMA) protests the award of a contract under request for proposals (RFP) No. MA-79-SAC-00064, issued by the Department of Commerce (DOC).

For the reasons discussed herein, we are denying the protest.

The RFP contemplated the award of a cost-plus-fixed-fee contract for the design and preparation of plans and specifications for a Security Class Mobilization Ship (a merchant ship capable of being adapted for military purposes during wartime). It described the evaluation and award criteria as follows:

"5. EVALUATION CRITERIA

Evaluation of Technical Proposals

By use of numerical and narrative scoring techniques, proposals will be subjectively evaluated against the evaluation factors listed below in descending order of importance:

- a. Staffing and Management
- b. Previous Experience of Organization
- c. Technical Approach to Organizing and Performing the Study
- d. Understanding of the Problem and Its Constraints
- e. Cost

Items a. and b. are of equal weight and Items c., d. and e. are of equal weight.

"6. AWARD CRITERIA

Award will be made to that offeror (1) whose proposal is technically acceptable and (2) whose technical/cost relationship is the most advantageous to the Government, and who is considered to be responsible within the meaning of Federal Procurement Regulations 1-1.12. Cost will be a factor in the award decision, although the award may not necessarily be made to that offeror submitting the lowest cost. Likewise, award will not necessarily be made for technical capabilities that would appear to exceed those needed for the successful performance of the work."

JJMA, M. Rosenblatt & Son, Inc. (Rosenblatt) and four other offerors submitted proposals. Both JJMA's and Rosenblatt's proposals were included within the competitive range, and negotiations were conducted. DOC has reported that the best and final offers were ranked as follows:

	<u>Technical Score</u>	<u>Cost</u>	<u>Cost Score</u>	<u>Total Score</u>
Rosenblatt	89.8/100	\$768,059	17.5/20	107.3/120
JJMA	83.8/100	\$671,321	20/20	103.8/120

The agency selected Rosenblatt's proposal for award and JJMA protested to our Office.

The protester has presented a number of arguments challenging the propriety of the evaluation of the proposals and the selection. Summaries of JJMA's allegations, and our comments on each, follow.

**ALLEGATION:** The RFP stated that award would be made to that offeror whose proposal was technically acceptable and whose technical/cost relationship was most advantageous to the Government. This meant that a cost advantage of one proposal would be weighed against any technical advantage offered by another proposal, and the award made to the one in whose favor the scale tipped. The lower cost of JJMA's technically acceptable proposal more than offset the technical advantage of Rosenblatt's higher cost proposal.

**COMMENT:** The protester's interpretation of the RFP evaluation and award criteria is, in effect, that cost and technical considerations were to be equal or approximately equal in weight. The contracting agency, however, has maintained that cost was only one of five evaluation criteria, and that award was made to Rosenblatt because its proposal was significantly superior technically and the most advantageous to the Government overall. We believe the agency's understanding of the terms of the RFP is more reasonable than the protester's. Although perhaps less than entirely clear, the RFP indicated that technical considerations were substantially more important than cost. The protester's interpretation is based solely on the contents of the RFP paragraph 6, "AWARD CRITERIA", quoted supra. The more reasonable interpretation is to read this paragraph together with paragraph 5, "EVALUATION CRITERIA", which clearly lists cost as the fifth of the principal evaluation factors in descending order of importance, and as equivalent to factors three and four.

**ALLEGATION:** The wide variations in scores given by individual evaluators demonstrate the completely arbitrary nature of the evaluation procedure. For example, under one subcriterion, evaluators' scores ranged from one out of four points to four out of four; under another subcriterion, scores ranged from three of 10 to 10 of 10. Such variations could not reasonably exist if all evaluators had been working under a common understanding of what they were trying to do. No effort was made to monitor and manage the evaluation process in order that the results would reflect the outcome of a process of knowledgeable and informed consensus.

**COMMENT:** The contracting agency has noted that the differences cited by JJMA appear in raw worksheets of individual evaluators, which were compiled prior to discussion by the full evaluation panel. While the function which evaluators are expected to perform can vary depending on the agency involved and the particular procurement, we have observed that it generally involves evaluating the proposals in accordance with the RFP evaluation criteria, not trying to arrive at a consensus as to which proposal should receive the award. See Department of Labor Day Care Parents Association, 54 Comp. Gen. 1035 (1975), 75-1 CPD 353. Moreover, disparate point scores from individual evaluators are not uncommon, as the scores only reflect individual subjective and objective judgments. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD 427. We have often stated that our function in reviewing protests of this nature is not to evaluate the proposals but rather to review the record of the agency's evaluation; we have also noted that we will not become involved in making independent judgments as to the precise numerical scores which should have been assigned to proposals. See, for example, Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. In the present case, we see no basis on the record to conclude that the scoring variations cited by JJMA demonstrate any impropriety in the evaluation procedure.

**ALLEGATION:** The technical evaluation of JJMA's proposal was unfair. JJMA should not have received lower scores than Rosenblatt in the areas of experience, technical approach, or understanding of the problem. JJMA should not have been penalized for not proposing increased depth of the vessel, as the RFP specified the principal vessel dimensions. Also, JJMA, an experienced firm, should not have lost points for proposing fewer staff hours than the Government's estimate.

COMMENT: The evaluation of technical proposals is the function of the contracting agency, and, as previously discussed, it is not our function to become involved in independent determinations as to the precise numerical scores which proposals should have been given. In the present case, DOC points out that the six member evaluation panel was composed of personnel from three Government agencies, and that all members rated Rosenblatt's proposal higher than JJMA's. The protester's rescoring of the technical evaluation--as, for example, in proposing that the lowest scores given by evaluators in various categories be eliminated--is, as the agency has suggested, essentially an attempt to substitute its judgment for that of the agency evaluators. On the issue of vessel depth, while the protester has strenuously maintained that the RFP specified the required design, the contract to be awarded apparently did involve design work and the RFP Statement of Work specifically contemplated alternative design approaches in several areas. In DOC's view, the nature of the requirements did not obviate the need for offerors to respond with more than simply an offer to satisfy the requirements specifically stated in the RFP. We do not believe JJMA has shown enough to establish that the agency's evaluation in this respect clearly lacked any reasonable basis.

ALLEGATION: It was improper for the agency to score cost by giving JJMA the maximum possible 20 points and giving Rosenblatt fewer points based on the degree to which its cost exceeded JJMA's cost.

COMMENT: As the contracting agency points out, we have held that this scoring method is not objectionable. See, for example, Didactic Systems, Inc., B-190507, June 7, 1978, 78-1 CPD 418; Francis and Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79.

ALLEGATION: The JJMA proposal's costs per technical quality point was lower than the Rosenblatt proposal's.

COMMENT: The contracting agency states that the dollar per technical quality point analysis was presented to the selection official merely to provide him with an additional perspective, and maintains that it was not a hidden substitute for the evaluation and award criteria set forth in the RFP. In this light, we do not see how the protester's allegation demonstrates any impropriety in the evaluation and selection process.

ALLEGATION: JJMA's best and final offer specifically stated that JJMA was willing to perform the work for a stated fixed price.

COMMENT: The agency maintains the protester never submitted a fixed price offer, and this view is supported by the record. In this regard, JJMA's September 25, 1979, letter responding to the agency's request for best and final offers discussed costs and fee, and merely stated in closing that JJMA was prepared to offer " \* \* \* on a fixed price basis for approximately \$700,000. (may be slightly lower or higher)." We agree with DOC that this was not a firm fixed price offer. See in this regard Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472, modified as to recommendation, 56 Comp. Gen. 505 (1977), 77-1 CPD 256.

ALLEGATION: Rosenblatt's best and final cost of \$768,059 was in excess of the agency's estimate of \$720,000, and the agency rushed through an additional budget allocation just prior to expiration of the fiscal year in order to permit award to be made to Rosenblatt.

COMMENT: The RFP was issued about two months before the end of the fiscal year, and best and final offers were received four days before the end of the fiscal year. The contracting agency points out that its estimate of needed funds was exactly that, an estimate. The agency states the appropriated funds were available and were allotted routinely under the circumstances. We do not see anything in the protester's allegations which would furnish a basis to object to the award.

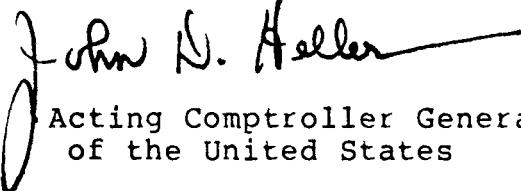
ALLEGATION: The award was in violation of the Government's policy that awarding Government contracts to companies in labor surplus areas is to be encouraged. After best and final offers were received, the agency encouraged Rosenblatt, which had submitted its proposal on the basis of performing the work in New York, to agree to perform in a non-labor surplus area (the District of Columbia) so that award could be made to it.

COMMENT: The agency has denied that it encouraged Rosenblatt to relocate the site of performance from New York to Washington. Also, the contracting officer has pointed out that the fact that New York is a labor surplus area has no bearing on the award, since the RFP was not restricted to labor surplus area offerors. We see nothing in JJMA's allegations which provides any basis for objection to the award.

ALLEGATION: Since the award of the contract to Rosenblatt was improper, and since JJMA was improperly denied an award, the Government should reimburse JJMA for the costs of preparing its proposal.

COMMENT: The basic standard for recovery of bid or proposal preparation costs is arbitrary and capricious Government action towards the claimant. In cases where, as here, we find no basis for objection to the evaluation of proposals and the selection, we see no grounds to find the existence of arbitrary and capricious action necessary to support the recovery of proposal preparation costs. See for example Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD 235.

The protest and claim are denied.

  
Acting Comptroller General  
of the United States