

19603

DECISION



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

FILE: B-202432

DATE: September 29, 1981

MATTER OF: Alan-Craig, Inc.

DIGEST:

1. A protest of allegedly defective estimated requirements and evaluation criteria is untimely where filed after the closing date for the receipt of initial proposals.
2. The protester was not prejudiced by the receipt of a request for best and final offers which contained an earlier deadline for submission than that given to other offerors where the agency gave the protester an opportunity to have the deadline extended which the protester refused.
3. Procurement regulations require pre-award notice that a proposal is eliminated from competitive range and will not be considered for award only if procurement involves more than \$10,000 and it appears that it will take more than 30 days after the decision to reject the proposal to award the contract.
4. Bias in evaluation of proposals will not be attributed to an evaluation panel on the basis of inference or supposition.
5. GAO will not question an agency's evaluation of technical proposals unless the protester shows that the agency's judgment lacked a reasonable basis, was an abuse of discretion, or violated procurement statutes or regulations.
6. An agency does not have to make award to the firm offering the lowest price where the RFP states that technical considerations are paramount and price secondary.

~~018719~~

116494

7. The composition of a technical evaluation panel is within the discretion of the contracting agency, and absent allegations of fraud, bad faith, or a conflict of interest, is not a matter appropriate for review by GAO.

Alan-Craig, Inc. protests the Department of Health and Human Services' award of a contract under request for proposals (RFP) No. 273-81-P-0001 to Bill Touchberry Photography. The contract is a requirements contract to provide the National Institute of Environmental Health Sciences with scientific and medical photographic services. Alan-Craig alleges that the RFP contained defective estimated requirements and evaluation criteria; that the procurement was conducted improperly in certain respects; and that the evaluation of proposals was biased and unreasonable. The firm also complains that a contract was awarded at a higher price than Alan-Craig offered. We dismiss the protest in part and deny it in part.

DEFECTIVE ESTIMATES AND EVALUATION CRITERIA

We dismiss Alan-Craig's protest concerning the allegedly defective estimates and evaluation criteria because these matters were untimely protested. Our Bid Protest Procedures require that a protest based upon alleged improprieties in an RFP which are apparent prior to the closing date for the receipt of initial proposals be filed before that date. 4 C.F.R. § 21.2(b)(1) (1981). The alleged improprieties in the estimates and evaluation criteria were apparent from the face of the RFP. Alan-Craig, however, did not file its protest until after the closing date for the receipt of initial proposals. Therefore, we will not consider these matters.

CONDUCT OF THE PROCUREMENT

Alan-Craig states that after receiving initial proposals the agency requested that best and final offers be submitted by December 15, 1980. Alan-Craig complains that

Bill Touchberry's best and final offer was considered for award even though it was not submitted until December 22. The protester also complains that after receiving the best and final offers the agency determined that Alan-Craig should not be included in the competitive range for purposes of further discussions, but did not give Alan-Craig pre-award notice that its proposal would not be considered for award as required by Federal Procurement Regulations (FPR) § 1-3.103(b) (1964 ed.). The regulation requires pre-award notice to an offeror that its proposal will not be considered further for award where the procurement involves more than \$10,000 and it appears that more than 30 days will elapse after the decision to reject the proposal is made before the contract will be awarded.

The agency reports that requests for best and final offers were mailed to three offerors including Alan-Craig and Bill Touchberry. The requests stated a closing date of December 22, 1980, except for the request sent Alan-Craig, which stated December 15. The agency did not discover its error until December 15 when Alan-Craig submitted its offer. According to the agency, on December 17 it notified Alan-Craig of the discrepancy and asked the firm if it would like additional time to work on its proposal. The agency asserts that it offered to extend the deadline for receipt of best and final offers beyond December 22. Alan-Craig responded that it did not need additional time and that it had no changes to make in its offer.

Thus, Bill Touchberry's best and final offer was not late, since it was submitted by the date stipulated in the request for a best and final offer from that firm. Rather, Alan-Craig was not given the same date as the other offerors. Since the agency, however, offered to correct any disadvantage which may have accrued to Alan-Craig and Alan-Craig rejected the offer, Alan-Craig was not prejudiced by the discrepancy in the closing dates.

Regarding the notification issue, the contracting agency asserts that the pre-award notice required by FPR § 1-3.103(b) was not given because it expected to make award within 30 days after it decided to reject Alan-Craig's offer, and the award in fact was made within that

period. In any event, an agency's failure to adhere to a pre-award notice requirement is a procedural deficiency which does not affect the validity of the award. See Bow Industries, Inc., B-196667, March 25, 1980, 80-1 CPD 219.

BIAS IN THE EVALUATION

The RFP provided that the proposal review committee would evaluate each proposal for technical merit, while the contracting officer, in concert with the program staff, would determine which proposals were in the competitive range. Alan-Craig alleges that two members of the four-person technical proposal review committee were biased against Alan-Craig and in favor of Bill Touchberry. According to the protester, almost three quarters of a year before this procurement the chairman of the review committee told an Alan-Craig representative that no one in the area could provide photographic services comparable to Bill Touchberry's. The protester contends that the high score the chairman gave Bill Touchberry's proposal reflects that bias, not the merits of the proposal. Since another evaluator gave Alan-Craig's best and final offer lower scores than its initial offer, Alan-Craig accuses that evaluator of bias also.

In addition, Alan-Craig alleges that Bill Touchberry's proposal should not have been rated highly because the offeror did not provide with its initial offer information specifically required by the RFP, namely, a portfolio and a detailed methodology for accomplishing the work required. Alan-Craig also maintains that in evaluating Alan-Craig's proposal the agency ignored the fact that the firm previously had provided satisfactory service to the agency under a blanket purchase order to provide photographic services while the present contract was being competed.

We recognize that where the subjective motivation of an agency's procurement personnel is being challenged, it may be difficult for the protester to establish on the written record -- which must form the basis for our decision -- the existence of bias. Nonetheless, the protester necessarily has the burden to affirmatively prove its case.

Improper motives therefore will not be attributed to individuals on the basis of inference or supposition. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 72. Moreover, even where bias is shown, we will deny a protest if there is no indication that the bias affected the protester's competitive standing. See Delta Systems Consultants, Inc., B-201166, June 23, 1981, 81-1 CPD 519.

The critical test for determining bias in an agency's evaluation of proposals is whether all offerors were treated fairly and equally. Pioneer Contract Services, B-197245, February 19, 1981, 81-1 CPD 107. Therefore, the statement attributed to the chairman of the review committee does not in itself provide a basis to challenge the validity of the award. See Industrial and Systems Engineering, Inc., et al., B-187585, April 22, 1977, 77-1 CPD 278. Rather, it is necessary to review how offerors actually were treated.

The protester has not presented any evidence of unfair treatment except to infer it from the technical scores given Bill Touchberry and itself. Concerning the implication that the chairman deliberately downgraded Alan-Craig's proposal while upgrading Bill Touchberry's, the chairman's scores were consistent with those of the other three evaluators and the comments on his scoring sheet properly were related to the evaluation criteria listed in the RFP. Given these factors, we find no basis to object to the chairman's evaluation as biased. See Industrial and Systems Engineering, Inc., et al., supra. Although, as Alan-Craig notes, another evaluator reduced Alan-Craig's scores in relation to the other offerors' after the receipt of best and final offers, we have held that each round of evaluations constitutes a separate review of the relative merits of the offerors in each round. An evaluator cannot be said to be biased merely because he reduced the relative score of an offeror's technical proposal from one round to the next. Delta Systems Consultants, Inc., supra.

EVALUATION OF PROPOSALS

Alan-Craig protests that Bill Touchberry failed to submit with its initial offer a portfolio of representative work and a detailed methodology, which Alan-Craig contends were required by the RFP's evaluation scheme.

The RFP statement of the most significant evaluation criterion was as follows:

"Personnel

Length of experience, experience in medical or scientific photography, and diversity of experience should be addressed in the offer. Portfolios of representative work should be submitted."

That criterion was worth 50 points. The other criteria were "Facility" (30 points), "Administrative Capacity" (10 points), and "Appreciation of Needs of the Institute" (10 points). The RFP advised offerors that "paramount consideration shall be given to the evaluation of technical proposals rather than price."

After the technical evaluation of initial proposals, Bill Touchberry was considered the most qualified offeror while Alan-Craig was found to be technically unacceptable but capable of being made acceptable through discussions. Bill Touchberry's strongest asset was its facilities, which were considerably larger and more diversified than Alan-Craig's. There was some question whether Alan-Craig's facilities were adequate to perform the work, especially periodic rush demands in large volume. In addition, Bill Touchberry proposed to devote more personnel to the work than Alan-Craig. Bill Touchberry's higher scores were based primarily on these factors. Nevertheless, a significant deficiency noted in Bill Touchberry's proposal was its failure to provide the portfolio required under the Personnel criterion.

Through discussions and a request for best and final offers, the offerors were asked to supply specific information in certain areas where their proposals were deficient. Bill Touchberry was asked, among other things, to submit a portfolio, to describe the medical and scientific photographic experience of its employees which would be devoted to the work, and to describe how it would meet the agency's rush requests and delivery requirements. With its best and final offer, Bill Touchberry submitted a portfolio and responded to the agency's questions in such a manner as to significantly improve its score, whereas Alan-Craig was unable to improve upon its relatively lower scores in the significant evaluation areas of Personnel and Facilities.

Based principally on the technical evaluation of best and final offers, in which Bill Touchberry outscored its nearest competitor by 19.5 points and outscored Alan-Craig by 25.75 points, the contracting officer determined that only Bill Touchberry should remain in the competitive range and, after price discussions, made award to that firm.

The fact that Bill Touchberry did not submit the required portfolio with its initial offer did not necessitate the rejection of the offer. The procurement regulations require that discussions be held with firms whose initial offers are either acceptable or reasonably susceptible of being made acceptable. FPR § 1-3.805-1. The discussions must be meaningful, that is, they must point out proposal deficiencies or weaknesses. Dynalectron Corporation, 55 Comp. Gen. 858 (1976), 76-1 CPD 167. Thus, the fact that an offeror's initial proposal may lack certain information requested in the solicitation does not necessarily require its rejection if the deficiency can be corrected.

Accordingly, Bill Touchberry properly was given the chance to furnish the necessary portfolio with its best and final offer, and since the firm did so, we cannot object to the award on this basis.

As to Bill Touchberry's alleged failure to detail in its initial offer the method that it would use to accomplish the work required, we point out that the RFP did not require in absolute terms that a detailed methodology be furnished. In any case, the evaluators found Bill Touchberry's proposal to do the contract work as reflected in the firm's initial and final offers considerably superior to the other offerors'. It is the evaluators' function, not this Office's, to determine the relative merits of technical proposals, and they necessarily have considerable discretion in making that determination. Therefore, we will not question an agency's evaluation unless the protester shows that the agency's judgment lacked a reasonable basis, was an abuse of discretion, or otherwise was in violation of procurement statutes or regulations. See BDM Corporation, B-201291, June 26, 1981, 81-1 CPD 532.

The thrust of the protest on this issue is that Alan-Craig's offer should have been judged at least as highly as Bill Touchberry's was. In view of the principles discussed, we consistently have held that a protester's disagreement with a contracting agency's evaluation does not render the evaluation arbitrary or illegal. See, e.g., PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382. The protest on this issue is denied.

Alan-Craig also contends that the agency failed to consider its prior satisfactory performance. However, such experience was appropriate for evaluation only in conjunction with the Personnel evaluation criterion, as set out above. See Sheldon G. Kall, B-199120, September 23, 1980, 80-2 CPD 221. The record shows that the agency in fact considered Alan-Craig's experience under that criterion in evaluating the firm's offer.

AWARD TO HIGHER PRICED OFFEROR

Alan-Craig protests that Bill Touchberry was awarded a contract at a price more than \$6,000 higher than Alan-Craig's offer of slightly less than \$32,000.

Since the evaluation criteria fairly advised offerors that technical considerations were paramount and price secondary, the agency was not constrained to make award to the firm offering the lowest cost. The record shows that the agency considered price in its evaluation, but that, as promised in the RFP, paramount consideration was given to technical proposals. Absent a showing that the technical evaluation was not conducted in accordance with the evaluation scheme set forth in the RFP, we have no basis to object to the award simply because Alan-Craig offered a lower price. See Sheldon G. Kall, supra.

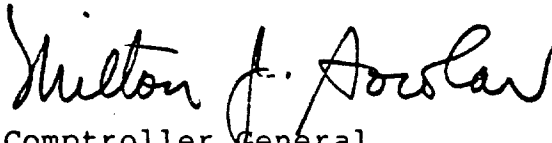
OTHER MATTERS

The protester objects to the composition of the proposal review committee because it included only one person from the agency who would use the services being acquired. The composition of a technical evaluation panel,

however, is within the discretion of the contracting agency, and absent an allegation of fraud, bad faith, or conflict of interest, is not a matter appropriate for review by this Office. New York University, B-195792, August 18, 1980, 80-2 CPD 126.

Alan-Craig also complains that the agency failed to consider its status as a minority business with a good performance record. Since the RFP contained no preference for minority business offerors, the agency properly did not consider this factor in its evaluation.

The protest is dismissed in part and denied in part.



Acting Comptroller General
of the United States