

118/10
DECISION



21505
Ms. Maris
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-204459

DATE: April 13, 1982

MATTER OF: ICF, Inc.

DIGEST:

1. The principle that price or cost may become determinative where two proposals are essentially equal technically, notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria, does not justify elimination of the highest technically rated proposal from the competitive range resulting in a competitive range of one. Moreover, the record does not support a finding that the proposals were regarded as essentially equal technically.
2. Where a solicitation clearly places primary emphasis on technical factors, the elimination from the competitive range of an offeror who is rated 10 percent higher technically but has proposed costs 40 percent higher than the offeror ranked second technically, on the basis that the cost proposal is so out of line that meaningful negotiations are precluded, resulting in a competitive range of one, is inconsistent with the use of negotiation procedures to obtain the most advantageous contract for the Government.
3. Where the evaluation criteria set forth in a solicitation place greatest emphasis on technical factors, eliminating all but the lowest cost, technically acceptable proposal from the competitive range is inconsistent with criteria which stress technical excellence rather than mere technical acceptability.

ICF, Inc. protests its exclusion from the competitive range under Request for Proposals (RFP) Nos. WA81-B074 and WA81-B050, issued by the Environmental Protection Agency (EPA). RFP No. WA81-B074 solicited proposals for analyses of toxic programs integration policy issues and RFP No. WA81-B050 solicited proposals for analyses of chemical control options, both contemplated award of a cost-plus-fixed-fee, level of effort contract.

In each case, ICF contends that its highest rated technical proposal was improperly eliminated from the competitive range on the basis of cost, which was secondary to technical factors under the evaluation schemes set forth in the RFPs. We sustain the protest.

The RFPs provided that selection of an offeror for negotiation and award would be accomplished in accordance with the EPA Source Evaluation and Selection Procedures, which were available upon request. These procedures, which are similar to the four-step procedures employed by the National Aeronautics and Space Administration and the Department of Defense, involve a limited use of discussions until final contractor selection is made. See Roy F. Weston, Inc., B-197866, B-197949, May 14, 1980, 80-1 CPD 340. In accordance with these procedures, the RFPs stated that:

"The competitive range will be determined based upon the scoring of the technical proposal, the evaluation of price and the consideration of other factors. * * * The purpose of discussions is to clarify or to substantiate uncertainties in the solicitation or proposal. However, discussions shall not involve identification of proposal deficiencies. * * *"

Both RFPs contained the following language concerning the relative weights of technical and cost considerations in the evaluation of proposals:

"EPA primarily seeks technical excellence in its acquisition programs. Accordingly, unless price or cost is set forth in the evaluation criteria as a factor to be evaluated and scored, price or cost is secondary to technical quality."

Price was not set forth as a factor to be evaluated and scored in either RFP.

RFP No. WA81-B074

EPA received ten proposals in response to RFP No. WA81-B074, which was issued on May 11, 1981. The technical scores (out of a possible 100 points) and proposed costs of each offeror were as follows:

<u>Offeror</u>	<u>Rating</u>	<u>Proposed Cost</u>
ICF, Inc.	90	\$1,956,843.00
ART Associates, Inc.	82	1,407,624.00
Offeror C	60	1,968,108.00
Offeror D	58	1,578,179.00
Offeror E	57	1,818,290.00
Offeror F	56	2,072,782.00
Offeror G	42	1,447,926.00
Offeror H	35	1,523,282.00
Offeror I	33	1,299,216.00
Offeror J	31	1,371,950.00

The contracting officer eliminated every offeror but ART from the competitive range. Contract award was made to ART on September 29, 1981.

In view of the regulatory preference for competition, we have stated that a proposal must be considered to be within the competitive range so as to require discussions unless the proposal is so technically inferior or out of line as to price that any discussions would be meaningless. Art Anderson Associates, B-193054, January 29, 1980, 80-1 CPD 77. Our Office closely scrutinizes agency determinations that leave only one proposal in the competitive range. Audio Technical Services, Ltd., B-192155, April 2, 1979, 79-1 CPD 233; Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400.

EPA argues that ICF's exclusion from the competitive range was justified because after analyzing the scores and technical evaluation narratives, the contracting officer

determined that ICF's and ABT's proposals were technically equal. Under the EPA Source Evaluation and Selection Procedures, neither ICF nor ABT had any uncertainties to be discussed, and the contracting officer states that therefore it was most unlikely that technical scores would change as a result of a request for best and final offers.

ICF recognizes that it has been the consistent position of this Office that where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration in making an award notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria. See, e.g., Applied Financial Analysis, Ltd., B-194388.2, August 10, 1979, 79-2 CPD 113. ICF argues, however, that a determination that the proposals were technically equal has not been adequately justified.

Based on our examination of the competitive range determination contained in the record, we conclude that it does not adequately support a finding that the proposals were essentially equal. Rather, the record shows that ICF's proposal was recognized as technically superior to that of ABT but the source selection official decided that because of the difference in the proposed costs, award to ICF was not justified. In this regard, the determination of competitive range states that "the higher score received by ICF is not worth the additional \$550,000 it would cost the Government * * *." Nowhere is it stated that the two proposals are regarded as technically equal.

Further, as ICF suggests, the principle that price or cost may become determinative where proposals are essentially equal technically is generally applied in making award decisions, not in competitive range determinations. The principle does not provide an appropriate rationale for eliminating a higher technically rated but higher priced proposal from the competitive range, particularly where it leaves only one offeror in the competitive range, since the very purpose of the flexible negotiation procedures is to secure the most advantageous contract for the Government, price and other factors considered. 47 Comp. Gen. 279 (1967); id. 29 (1967). The fact that technical ratings are not likely to change because there are no technical matters for discussion does not change the situation since, as ICF points out, proposed costs may indeed be reduced as a result of cost discussions and a request for best and final offers. Bell Aerospace Co., 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Global Graphics, Inc., 54 Comp. Gen. 84 (1974), 74-2 CPD 73; 47 Comp. Gen. 29, supra.

In this regard, EPA argues that ICF's exclusion from the competitive range was proper in any event because its costs were so out of line as to preclude the possibility of meaningful negotiations. ICF argues, however, that this was not consistent with the evaluation factors set forth in the RFP, which placed primary emphasis on technical matters.

ICF's proposed costs were approximately 40 percent higher than ABT's, while its technical score was only 10 percent higher. However, the RFP did state that EPA primarily sought technical excellence and that, unless price was set forth as a factor to be evaluated and scored, it would be of secondary importance. Consequently, an offeror could reasonably assume that cost was not a major concern to EPA in this procurement. While EPA argues that even in such circumstances a cost proposal can be so out of line as to preclude meaningful negotiations, we do not think such a determination is warranted where it results in eliminating the highest ranked proposal from the competitive range and leaves only one other proposal in it unless it is very clear that meaningful negotiations are precluded.

Here, EPA asserts that based on past experience, it considered any significant reduction unlikely and that any such reduction would have resulted in a reduction of technical score as well. In that connection, however, ICF believes it could have reduced its direct labor costs (which largely accounted for its higher costs) by changing the mix of personnel it proposed. EPA states that this would result in a reduction in technical score since better qualified (and therefore more highly salaried) personnel result in a higher technical rating. However, ICF argues that while the RFP required it to propose personnel at a specified level of expertise (labor category) for a specified number of hours, its proposed personnel within each such labor category would nevertheless consist of various individuals who might have various compensation rates reflecting their individual experience or expertise, even though they all fell within the general level of expertise specified. Since it was only required to quote an average labor rate for each category and was not required to specify how many of the total hours would actually be performed by each proposed individual in that category, its average labor rate could be reduced and the same personnel still be proposed by simply reducing the number of hours of work to be performed by the more highly compensated individuals within each category.

Moreover, even if a cost reduction would have resulted in a diminution of ICF's technical rating, its initial higher technical score provided something of a "cushion" for that

possibility, and ultimately the selection official simply might have been faced with the need to make the appropriate cost/technical trade-off between two competitive proposals. See, e.g., Grey Advertising, Inc., 55 Comp. Gen. 1111, 1118-21 (1976), 76-1 CPD 325.

Finally, we note that EPA has attempted to portray the award in this case as having been made on an initial proposal basis under FPR § 1-3.805-1(a). EPA points out that no technical discussions were held with ABT, and that only final negotiations were conducted with it for the purpose of definitizing the contract. However, the record shows that ABT's proposed cost-plus-fixed-fee was reduced as a result of these negotiations, and consequently, we find no basis to conclude that award was made on an initial proposal basis in this case. See University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201; National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401.

RFP No. WA81-B050

EPA received eight proposals in response to this RFP, which was issued on May 14, 1981. Award is being withheld pending our decision on this protest and therefore we will not discuss the precise technical scores received and the costs proposed by each offeror.

The record shows that there were three offerors, including ICF, who received higher technical scores than the one offeror, Enviro Control, Inc., whose proposal was included in the competitive range by EPA. Among these offerors, Enviro Control's proposed costs were the lowest. ICF received the highest technical rating, and it also proposed the highest costs of any offeror. ICF's proposed costs were substantially higher than those of Enviro Control, but the difference between its proposed costs and those of the offeror ranked second technically was considerably less significant.

We believe that the emphasis EPA placed on proposed costs to establish the competitive range in this case was inconsistent with the evaluation criteria set forth in the RFP. These criteria clearly placed greatest emphasis on technical factors, but the record shows that the source selection official in effect chose to eliminate all but the lowest cost, technically acceptable offeror from the competitive range.

In this regard, the determination of competitive range states as follows:

"Enviro Control is recommended for selection for negotiations because of the good rating it received during the evaluation, coupled with its attractively low price. * *, *

"* * * [E]nviro Control submitted a very good proposal and one that will certainly meet the Government's needs.

"The other factor that causes Enviro Control to stand out * * * is its low price as compared to other offerors. ICF, Inc. submitted an excellent proposal but their costs were entirely too high. [With regard to the other two more highly rated offerors it is stated, in effect, that the differences in technical scores do not support the additional costs associated with them.] The four remaining offerors received technical scores that were lower than Enviro Control's. All but three of them offered costs that were higher than Enviro Control. * * * the one company that did submit a lower price also scored substantially lower than Enviro Control. * * *

Thus, contrary to the evaluation factors set forth in the RFP, EPA made proposed costs the determinative factor in establishing the competitive range in this case and did so on the basis that Enviro Control's proposal would meet the Government's needs. That is inconsistent with the evaluation criteria which stress technical excellence rather than merely adequately meeting the Government's needs. We therefore conclude that the decision to eliminate all but one offeror from the competitive range was unreasonable.

Recommendation

WA81-B074

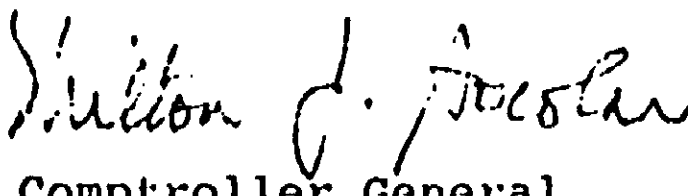
Since the contract was awarded approximately six months ago, we believe it would be impractical to reopen discussions and to consider changing contractors at this point in the contract term. We do not believe that either the costs associated with such a remedy or the disruption of EPA's operations can be justified where any award would necessarily be for an abbreviated time period. We are recommending, however, that the contract options for additional quantities and for future years' services not be exercised, and that any such needs be met by issuing a new competitive solicitation.

LA81-B050

EPA should include ICF in the competitive range, conduct discussions, and seek best and final offers as promptly as possible. The two other offerors who were also ranked higher technically than Enviro Control should be contacted, and if still interested, included in the competitive range as well.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

The protest is sustained.

for 
Comptroller General
of the United States

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

B-204459

April 13, 1982

The Honorable Jamie L. Whitten
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of ICF, Incorporated, wherein we recommend that ICF be included in the competitive range and discussions be conducted under RFP No. WA81-B050, and that no options be exercised in the contract awarded under RFP No. WA81-B074, because ICF was improperly excluded from the competitive range under both solicitations.

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

William J. Jordan
for Comptroller General
of the United States

Enclosure



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

B-204459

April 13, 1982

The Honorable Mark O. Hatfield
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of ICF, Incorporated, wherein we recommend that ICF be included in the competitive range and discussions be conducted under RFP No. WA81-B050, and that no options be exercised in the contract awarded under RFP No. WA81-B074, because ICF was improperly excluded from the competitive range under both solicitations.

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

William F. Tolson

Comptroller General
of the United States

Enclosure



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

B-204459

April 13, 1982

The Honorable Anne M. Gorsuch
Administrator
Environmental Protection Agency
Washington, D.C. 20460

Dear Ms. Gorsuch:

Enclosed is a copy of our decision of today on the protest of ICF, Incorporated, wherein we recommend that ICF be included in the competitive range and discussions be conducted under RFP No. WA81-B050, and that no options be exercised in the contract awarded under RFP No. WA81-B074, because ICF was improperly excluded from the competitive range under both solicitations.

As the decision contains a recommendation for corrective action, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires your agency to submit to the named committees within prescribed times written statements of the action taken on the recommendation.

We would appreciate advice of the action taken on the recommendation.

Sincerely yours,

Milton J. Vossler

for
Comptroller General
of the United States

Enclosure



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

B-204459

April 13, 1982

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of ICF, Incorporated, wherein we recommend that ICF be included in the competitive range and discussions be conducted under RFP No. WA81-B050, and that no options be exercised in the contract awarded under RFP No. WA81-B074, because ICF was improperly excluded from the competitive range under both solicitations.

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for *Milton I. Norstan*
Comptroller General
of the United States

Enclosure



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

B-204459

April 13, 1982


The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of ICF, Incorporated, wherein we recommend that ICF be included in the competitive range and discussions be conducted under RFP No. WA81-B050, and that no options be exercised in the contract awarded under RFP No. WA81-B074, because ICF was improperly excluded from the competitive range under both solicitations.

The agency has been advised of its obligations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure