

DECISION



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

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KRATZER
118973

FILE: B-205380

DATE: July 12, 1982

MATTER OF: Development Associates, Inc.

DIGEST:

1. A protester has the burden of proving bias on the part of proposal evaluators and prejudicial motives will not be attributed on the basis of inference or supposition.
2. No requirement exists that all evaluators of initial proposals evaluate best and final offers and, therefore, it is not improper for only the chairman of the evaluation panel to evaluate the revised proposals.
3. The ranking of proposals without the use of point scores is not improper since point scores are only used as guides for the award selection.
4. Where a request for proposals indicates that technical and cost factors will be evaluated without an indication of relative weight, both factors are to be accorded equal weight in evaluation.
5. Where the record does not reasonably support a procuring agency's determination that a higher priced proposal is technically superior to lower priced proposal, and the record does not indicate that the agency properly considered costs in making its selection, selection of higher priced firm is improper.

Development Associates, Inc. protests the award of a contract to Kirschner Associates, Inc. under RFP 81-073 issued by the Department of Education. The RFP contemplates a cost-plus-fixed-fee contract for the development and dissemination of a handbook concerning bilingual vocational training programs. Development

Associates essentially contends that the award to Kirschner at a higher cost was not justified. We sustain the protest.

The RFP is for the development of a Resource Handbook concerning the establishment of systems that provide ancillary instruction and services to persons who need bilingual vocational training. Ancillary instruction and services improve the employability of trainees and are in addition to vocational training and job-related English instruction. Based upon site visits of three refugee camps and five bilingual vocational training projects, the contractor is to design a system to deliver ancillary services and prepare a draft handbook based on that system. The contractor is then required to conduct four geographically dispersed information workshops to obtain feedback for revision of the draft. The final draft must then be disseminated by the contractor.

The RFP provides that the technical proposals will be evaluated on the basis of project purpose (30 points), general plan (25 points), staff competencies and experience (20 points), management plan (15 points) and organizational criteria (10 points). The RFP advises that award will be made to the offeror whose proposal is "most advantageous to the Government, price and other factors considered."

The four proposals submitted in response to the RFP were evaluated by a five-member technical panel, resulting in the following average technical point scores:

Development Associates, Inc.	79.8
Juarez & Associates, Inc.	78
Kirschner Associates, Inc.	72.8
Inter America Research Associates	62.2

The contracting officer found Inter America's proposal to be technically unacceptable. The department conducted discussions with the three firms remaining in the competitive range, submitting to each a list of questions which addressed perceived ambiguities and weaknesses in the technical and cost proposals. A second set of written questions, which, for the most part, consisted of those questions which were answered inadequately in a firm's initial responses, culminated in the submission of best and final offers. Development Associates offered to perform the requirement at an estimated cost of \$212,101, and Kirschner at \$247,353. The Department conducted audits and price/cost analyses and, except for discerning a necessity to negotiate an overhead rate ceiling with Kirschner, took no exception to the cost estimates of the two firms.

The program officer, who also served as chairman of the technical panel, evaluated the best and final offers and concluded that Kirschner responded satisfactorily to all technical questions raised in negotiations, while Development Associates' responses were not completely satisfactory in at least three specified respects. On this basis, the program officer recommended to the contracting officer the selection of Kirschner.

Development Associates protests the award on a number of grounds. First, it asserts that one of the panelists who evaluated initial proposals was biased against Development Associates as indicated by the inordinately low score the evaluator gave its proposal and the fact that the evaluator apparently applied evaluation criteria not set forth in the RFP. Were this biased evaluator's score eliminated, the protester's initial point advantage over Kirschner would have been greater. The protester also contends that the evaluation of best and final offers was improper because the full panel did not participate and the program officer who performed the final evaluation did not adhere to the evaluation criteria in any systematic fashion. Last, the protester questions the adequacy of discussions and takes issue with the three cited weaknesses in its proposal. The protester argues that, in view of its high initial score, the Department has not justified the award to the higher priced firm.

ALLEGED EVALUATOR BIAS

Development Associates initially contends that one of the members of the technical evaluation team was biased against it. As proof of this allegation, the protester points out that the evaluator applied evaluation criteria not listed in the RFP, made petty criticisms of its proposal and not of the other proposals, and gave its proposal an inordinately low score (51 compared with 97, 93, 85 and 73). The protester points out that if this evaluator's low score were eliminated, its advantage over Kirschner would be 14 points rather than 7.

The critical test for determining bias in the evaluation of proposals is whether all offerors in the competition were treated fairly and equally. See Servo Corporation of America, B-193240, May 29, 1979, 79-1 CPD 380. The protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition, A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 CPD 541, even though the subjective motivation of an agency's

procurement personnel may be difficult for a protester to establish on the written record. Pioneer Contract Services, Inc., B-197245, February 19, 1981, 81-1 CPD 107.

The factors cited by Development Associates are offered only as inferential proof of bias which, as indicated, we will not accept. In this respect, we observe that the large bulk of the evaluator's criticisms are consistent with the scope of the RFP criteria and that the evaluator acknowledged the high points of the protester's proposal as strengths.

Although we do not find evidence of bias, we agree with the protester that certain weaknesses cited by the evaluator indicate that criteria other than those designated in the RFP may have been applied. For example, the protester asserts that the evaluator criticized its proposal for the absence of a bibliography, yet the RFP does not require that proposals contain bibliographies. We do not, however, perceive any substantial prejudice to the protester as a result. Based on the nature and scope of the other weaknesses noted by the evaluator, it does not appear that the elimination of factors which allegedly should not have been considered would have significantly altered the score. Moreover, the precise extent of Development Associates' initial evaluation point score advantage over Kirschner is of no great import since the initial scores merely establish which firms are in the competitive range and will be evaluated further upon the submission of a best and final offer. Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107. The fact that an offeror receives the highest score after initial technical evaluation neither means that the offeror's score is permanently fixed at that value, nor establishes that firm as the "winner" of the competition. Importantly, none of the objectionable observations by the evaluator were pointed out as weaknesses during discussions or relied upon as bases for the final selection.

EVALUATION BY LESS THAN FULL PANEL

Next, Development Associates claims that the evaluation of best and final offers was improper because it was undertaken by the program officer who was chairman of the evaluation panel rather than by the entire five-member panel. The RFP did not require the evaluation of proposals by a panel. Moreover, we have frequently recognized that all of the evaluators of initial proposals need not rescore the revised proposals. See Roy F. Weston, Inc., B-197866, B-197949, May 14, 1980, 80-1 CPD 340 at p. 20. We, therefore, find no merit to this contention.

FAILURE TO SCORE BEST AND FINAL OFFERS

The protester also contests the failure to use scoring or rating procedures in the final evaluation. The RFP did not indicate, however, that proposals would be evaluated on the basis of numerical point scores. Moreover, although a point scoring system may be useful as a guide to intelligent decision-making, numerical scores merely reflect the disparate judgments of the evaluators and, as such, do not transform the technical evaluation into a more objective process. Ranking proposals directly, that is, without scores, may be a more meaningful method if ranking permits the contracting activity to gain a clearer understanding of the relative merits of the proposals. See MAXIMUS, B-195806, April 15, 1981, 81-1 CPD 285. Thus, we find nothing inherently improper with ranking proposals without the aid of numerical scores.

DISCUSSIONS AND FINAL EVALUATION

Development Associates also takes issue with the weaknesses cited by the project officer, predominantly on the ground that they were not adequately discussed. The protester contends that the Department has not justified the award to Kirschner on the basis of a 17 percent higher cost to the Government. We agree.

We recognize that, in a negotiated procurement, there is no requirement that award be made on the basis of the lowest cost. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Health Management Systems, B-200775, April 3, 1981, 81-1 CPD 255. Rather, the procuring agency has the discretion to select a highly rated technical proposal instead of a lower rated, lower cost proposal if doing so is in the best interest of the Government and consistent with the evaluation scheme set forth in the RFP. American Coalition of Citizens with Disabilities, Inc., B-205191, April 6, 1982, 82-1 CPD 318. The crucial inquiry in making such a determination is whether the difference in terms of performance represented by the technically superior proposal outweighs the cost to the Government of taking advantage of it. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. The record, thus, must show that there was a rational basis for the selection decision. The University Foundation, California State University, Chico, B-200608, January 30, 1981, 81-1 CPD 54. We do not believe the Department has established on the record a reasonable basis for the selection of Kirschner.

As mentioned above, the Department requested the firms within the competitive range to answer written questions

which were based upon perceived weaknesses and ambiguities in the initial technical proposals. The Department evaluated the responses and followed up on those questions which were answered inadequately with a second set of written questions. The responses to the two sets of questions were submitted as part of best and final offers. The project officer evaluated the best and finals and recommended award to Kirschner on the basis that it answered all written questions adequately while Development Associates failed to do so, at least in three respects.

First we observe that the project officer's conclusion that Kirschner answered all technical questions adequately, thereby eliminating all weakness, is not completely supported by the record. For example, the RFP states, in connection with the staff competencies and experience criterion (20 points), that "proposed staff shall have the ability to communicate in a language other than English." The Department noted in the initial set of written questions presented to Kirschner that its initial proposal did not indicate second language abilities. Kirschner responded with the admission that none of the key staff members is fluent in a language other than English, but pointed out that each staff member at least studied a second language (although no member studied a language used in any bilingual training program funded by the Department). Kirschner also stated its belief that the cultural awareness is more important than speaking a second language and that if it finds it necessary, it will arrange to have a translator for interviews. We do not believe it may be reasonably concluded that this response meets the explicit requirement that key staff speak a language other than English.

Next, we question the project officer's conclusion that, based on the answers to technical questions, Development Associates' proposal had three weaknesses which made it technically inferior to Kirschner. The weaknesses noted are failure to: (1) recognize and resolve potential problems concerning the tasks to be performed, (2) set forth a procedure by which information workshop locations would be selected, and (3) set forth a procedure by which a bilingual vocational training project would be selected for site visits.

We do not believe that the first two weaknesses support a finding that Kirschner's proposal is superior because Kirschner's proposal contains similar weaknesses. Three members of the task evaluation panel cited as a weakness the failure of Kirschner to recognize and resolve potential problems in performing the requirement. We observe that although both

proposals recognized a problem and proffered a solution with respect to the availability of refugee camps for the collection of data, it appears that neither proposal explicitly isolated any other significant potential problems. Additionally, Kirschner's proposal failed to set forth a procedure for the selection of information workshop locations.

The remaining weakness, in itself, does not appear to establish significant superiority on the part of Kirschner. The statement of work requires the contractor to visit and study five bilingual vocational training project sites. The sites are to be determined jointly with the program officer by the end of the third month of contract award. In both sets of written questions, the Department asked the protester to discuss the criteria and process used for selecting project sites. The protester's best and final offer set forth as criteria for selection of the sites languages addressed, geographic distribution, program experience, and type of sponsoring organization. Additionally, the firm designated five sites selected from a two-page list of sites, supplied by the Department, which "appear to be good candidates for consideration."

This response met with criticism on two grounds: Development Associates had not set forth a procedure for selecting sites and had selected two sites from the list supplied by the Department which are in fact instructor training projects as opposed to vocational training projects. (This error occurred because Development Associates failed to observe that, unlike the first page of the list which was entitled "Bilingual Vocational Training Project Directors," the second page, from which the two incorrect sites were chosen, was entitled "Bilingual Vocational Instructor Training Project Directors.") We are unable to understand the significance the Department seems to attach to the failure to delineate a procedure and the erroneous selection of the two sites in view of the fact that the selection would ultimately have to be approved by the project officer. While we agree that this reflects somewhat negatively on Development Associates' proposal, we are not persuaded, on the basis of the record before us, that this weakness, in itself, establishes Kirschner's technical superiority, especially in view of Kirschner's failure to adequately answer all technical questions.

Aside from the fact that the finding of technical superiority of Kirschner's proposal is not supported, there is no indication that the Department ever weighed

the technical advantage it perceived in Kirschner's proposal against the added cost to the Government of securing that advantage. Rather, it appears that the Department misapprehended the role of cost under the RFP. For instance, the Department states in its report that "since task performance methods will differ by each offeror, a direct cost comparison is not feasible or practicable." Additionally, the Department states that "technical consideration was of paramount importance." The RFP provides, however, that the contract will be awarded to the offeror submitting the proposal which is "most advantageous to the Government, price and other factors considered," and that the Government reserves the right "to accept other than the lowest offer." Where the RFP indicates that technical factors and cost will be evaluated and considered for award, absent any contrary indication, both factors are to be considered substantially equal in weight. 52 Comp. Gen. 686 (1973); University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50, at p. 4. Thus, whatever the relative technical merits of the two proposals, there is nothing in the record to show that the Department accorded cost its proper weight, or that the Department even considered the significantly higher costs associated with Kirschner's proposal.

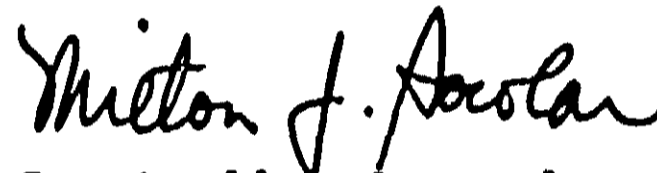
In conclusion, while the Department concedes that Development Associates' initial proposal was technically superior to Kirschner's, it attempts to justify the award entirely on the basis of the answers to the written questions which address perceived weaknesses in the initial proposals. The program officer's determination that Kirschner answered all technical questions is not supported by the record. The same is true of the determination that Development Associates' final proposal is inferior because it contains three weaknesses. In addition, the Department did not properly consider the respective cost estimates of the two proposals. Under the circumstances, we conclude that on this record, the Department has not reasonably justified the selection of the higher cost firm.

Under the circumstances, we would normally be disposed to recommend that the Department reopen negotiations with the two firms, reevaluate the proposals and, if it selects Development Associates, terminate Kirschner's contract for the convenience of the Government. We find, however, that this corrective action is not appropriate in this instance. The Department reports that Kirschner began to perform October 1, 1981. Kirschner, now in the ninth month of an 18-month contract, has essentially completed the groundwork for the

drafting of the handbook. As the Department states, the production of the handbook draws heavily upon the personal knowledge and understanding gained by contractor personnel during the first half of the project. Thus, were Kirschner's contract terminated, Development Associates could not use Kirschner's work product to reduce the time it will take to complete the project and the completion of the handbook will be delayed at least nine months. The Department also reports that direct contract costs at this point approach one half the entire contract amount and that it has incurred other significant costs in administering the contract. Since Development Associates would have to repeat the preliminary tasks performed by Kirschner, the Government would receive no benefit from these expended funds. We believe that termination for convenience would not be in the best interest of the Government.

Therefore, although we sustain the protest, we do not recommend corrective action.

The protest is sustained.



Acting Comptroller General
of the United States