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DECISION

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

FILE: B-208502 DATE: March 1, 1983

MATTER OF: Louis Berger & Associates, Inc.

DIGEST:

1. Meaningful discussions were held where the contracting agency identified those areas in the protester's proposals which it considered deficient and gave the protester the opportunity to correct those deficiencies in a revised proposal. Since the agency considered all other areas of the protester's proposal to be, at a minimum, adequate, it was under no obligation to point out every aspect of the protester's proposal which received less than the maximum score.

2. Where the protester's best and final offer weakened one area of its technical proposal, the contracting agency was not required to reopen negotiations and allow the protester another opportunity to revise its proposal; whether or not such action is taken is a matter within the agency's discretion.

3. The protester's disagreement with the contracting agency over the relative merits of its technical proposal does not render the agency's evaluation unreasonable or otherwise provide GAO with a basis to question the evaluation.

4. Award to the higher priced, higher scored offeror was proper since it was in the best interests of the Government and consistent with the solicitation's evaluation scheme.

5. Protester has not met its burden of affirmatively proving its case where allegation of conflict of interest due to the employment of a former agency official by

one of the awardee's subcontractors is based solely on the protester's speculative statements.

Louis Berger & Associates, Inc. (LBA), protests the award of a cost-plus-award-fee contract to ICF, Inc. (ICF), under request for proposals (RFP) No. WA 81-C274, issued by the Office of Solid Waste, Environmental Protection Agency (EPA).

The RFP solicited proposals for the conduct of an economic, regulatory and environmental analysis aimed at assessing the impact of policies, programs and regulations in the area of solid and hazardous waste. LBA offered the lowest price, but EPA awarded the contract to ICF on the basis of ICF's higher technical score. LBA argues that its lower price coupled with its competitive technical score offers the greatest value to the Government. EPA disagrees, pointing out that the RFP clearly informed all offerors that technical quality would be more important than price. In light of this, EPA argues that the award to the higher priced, higher scored ICF was proper.

We deny the protest.

Under the provisions of the Resource Conservation and Recovery Act 42 U.S.C. §§ 6901 et seq. (1976), EPA is responsible for developing regulations for the treatment and disposal of solid and hazardous waste. In order to fulfill this mandate, EPA must have a clear understanding of the economic and environmental impact of its regulatory decisions. Consequently, EPA uses economic and environmental impact analyses in the development and implementation of its regulations. The RFP was issued to 550 firms to procure the expertise necessary to conduct these analyses. Five firms responded and four of these were determined to be in the competitive range. Their initial technical scores and proposed prices were as follows:

Offeror	Technical (Max. 1000)	Price
ICF	789	$25,823,202
Rockwell International	657	24,982,879
LBA	540	21,992,023
JRB Associates	504	24,023,159

Although within the competitive range, LBA's proposal contained certain weaknesses. EPA, therefore, notified LBA in writing that negotiations would be required to discuss these weaknesses. Specifically, EPA requested that the following information be provided during negotiations:

(1) An explanation of the transition from imput-output model results to net social impacts;

(2) An elaboration on the welfare economics considerations; and

(3) A revision of personnel assignments to reflect the amount of hazardous waste analysis experience.

Upon completion of negotiations with all the firms found within the competitive range, EPA requested best and final offers with the following results:

Offeror	Technical	Price
ICF	829	$24,508,808
Rockwell International	702	24,291,234
LBA	600	18,402,826
JRB	600	22,738,291

As noted above, EPA concluded that ICF's higher scored, higher priced proposal offered the greatest value to the Government and decided to make the award to that firm. Upon learning of this decision, LBA immediately filed a protest with our Office. However, notwithstanding the protest, EPA proceeded with the award on the grounds that for purposes of protecting human health and the environment, as well as providing regulatory relief to the economy in areas where EPA has overregulated, it was urgent that an immediate award be made to ICF.

The specific grounds for LBA's protest are that LBA is best qualified technically and with its lowest price, its proposal, not ICF's, offers the greatest value to the Government and an award to ICF creates a conflict of interest since subsequent to submission of proposals, an EPA Deputy Assistant Administrator for Solid Waste (the same

office that issued the solicitation) left EPA to join a firm which is a member of the ICF technical team.

In rebuttal, EPA argues that, contrary to LBA's belief, it was not the most technically qualified offeror. According to EPA, its evaluation team found LBA's technical proposal to contain the following problems:

(1) Failed to address all elements of a Regulatory Impact Analysis;

(2) Assumed that manufacturing process and disposal technologies would remain constant when in fact they may change as a result of regulation;

(3) LBA and its subcontractors lack the specific expertise and experience in using EPA's hazardous waste data bases which is necessary to meet EPA's needs;

(4) LBA's personnel with the strongest background in hazardous waste analysis would be available the least amount of time and its personnel with the weakest background would be available most of the time;

(5) On a sample work assigment, LBA did not perform well and only later through negotiations and LBA's best and final offer was EPA convinced that LBA could be rated satisfactory for this requirement;

(6) In its best and final offer, LBA reduced the hours that would be available from those subcontractors with the most hazardous waste analysis experience; and

(7) LBA's program and project management plan contained multiple layers of management which made the plan unnecessarily structured and limited the contract flexibility necessary to ensure the most productive response to EPA's needs.

EPA points out that its technical evaluation team did not give LBA a deficient rating for items 1, 3 or 7 and, therefore, did not seek clarification of these items during negotiations. In EPA's opinion, this was the correct action to take since once the evaluation team was satisfied that LBA's proposal exhibited a generally adequate understanding of EPA's requirements, the agency was under no obligation to discuss the fact that LBA had received less than the maximum score.

As to items 2, 4 and 5, EPA notes that these were considered weaknesses in LBA's proposal and as a result were discussed with LBA during negotiations. According to EPA, LBA's best and final offer provided sufficient clarification to raise LBA's score on these evaluation factors from inadequate to adequate.

Finally, as to item 6, EPA states that LBA's "drastic reduction in the availability of subcontractors with hazardous waste analysis experience" did not occur until it submitted its best and final offer. Having by that time already conducted two rounds of discussions with LBA and since it is within an agency's discretion to reopen negotiations after the receipt of best and final offers, EPA decided that it was under no obligation to inform LBA of its concern. Consequently, EPA did not give LBA another opportunity to revise its proposal.

In EPA's opinion, the foregoing proves that LBA's proposal was properly evaluated and was not, contrary to LBA's belief, the most technically qualified proposal. In addition, EPA disagrees with LBA's argument that its proposal offered the greatest value to the Govenment. The RFP's evaluation criteria stated:

> "EPA desires the greatest value in this particular procurement; therefore, technical quality shall be considered of primary importance. Cost or price shall be considered secondary to technical quality."

Based on this RFP provision, EPA maintains that the award to the higher priced, higher scored ICF was justified.

In addition, besides ICF's clear superiority over LBA when their technical scores are compared, EPA argues that, by using a "total cost per evaluation point" method of evaluation, it becomes quite apparent that ICF offers the greatest value to the Government. Under this method, the offerors are ranked as follows:

Offerors	Total Cost Per Evaluation Point
ICF	$29,546/point
LBA	30,648/point
Rockwell International	34,603/point
JRB	37,897/point

Consequently, despite LBA's lower price, EPA maintains that ICF provides the highest quality for the lowest cost and that the award to ICF was, therefore, in full accord with the RFP requirement that the proposal selected offer the greatest value to the Government.

Regarding LBA's allegation of a conflict of interest due to the employment of a former EPA Deputy Assistant Administrator for Solid Waste by an ICF subcontractor, EPA argues that this allegation is without merit. According to EPA, the individual in question did not take any part in the evaluation of proposals. Moreover, ICF expressly stated in its best and final offer that this individual had no role in the preparation of ICF's proposal nor would he take part in the management or performance of any of the contract work if ICF should receive the award. In light of these facts, EPA concludes that there is no basis to question the propriety of the award to ICF.

At the outset, we note that it is not the function of this Office to reevaluate technical proposals or resolve disputes over the scoring of technical proposals. The determination of the Government's needs and the best method of accommodating those needs is primarily the responsibility of the procuring agency. Consequently, it is the procuring agency which is responsible for the overall determination of the relative desirability of proposals. In making such determinations, contracting officers enjoy a reasonable range of discretion in determining which offer should be accepted for award and their determinations will not be questioned by our Office unless there is a clear showing of unreasonableness, abuse of discretion, or a violation of the procurment statutes or regulations. Diversified Data Corporation, B-204969, August 18, 1982, 82-2 CPD 146.

LBA recognizes that our Office does not reevaluate technical proposals. Nevertheless, in its comments on the

EPA protest report, LBA challenges EPA's conclusions on the technical merit of its proposal and finds these conclusions to be unreasonable. At considerable length, LBA seeks to prove that its proposal did in fact offer EPA the technical quality it was seeking, that it properly addressed all areas of a Regulatory Impact Analysis, that it did not assume that manufacturing processes and disposal technologies would remain constant through the years, that LBA and its subcontractors had sufficient expertise in hazardous waste data bases, that its poor performance on EPA's sample work assignment can be explained by the fact that the assignment was vague and gave an unfair advantage to the incumbent contractor (ICF), that LBA's reduction in the number of hours available from certain subcontractors had no impact on LBA's ability to respond to EPA requirements and finally that EPA incorrectly characterized LBA's program and project management plan as unnecessarily structured, but even if EPA were correct, it should have discussed these concerns with LBA at some point during negotiations. EPA has in turn rebutted LBA's charges of unreasonableness by reemphasizing its earlier reasons for evaluating LBA's proposal as it did.

The threshold question here is whether EPA conducted meaningful discussions with LBA during the negotiations process. LBA apparently believes that EPA failed to identify all the deficiencies in LBA's technical proposal and to give the protester an opportunity to correct those deficiencies in a revised proposal.

Meaningful discussions, either oral or written, are normally required in negotiated Federal procurements. In these discussions, the contracting agency must furnish the offerors information concerning the areas of deficiency in their proposals and give them the opportunity to revise their proposals. However, the context and extent of discussions needed to satisfy the requirement for meaningful discussions are matters primarily for determination by the contracting agency whose judgment will not be disturbed unless it is without a reasonable basis. Photonics Technology, Inc., B-200482, April 15, 1981, 81-1 CPD 288.

As noted above, EPA did identify three deficiencies in LBA's proposal and discussed those deficiencies during negotiations. LBA revised its proposal in light of this information and, as a result, EPA raised the firm's score in those areas from inadequate to adequate. EPA also notes that there were three other areas in the LBA proposal where the firm was considered to be merely adequate. In EPA's opinion, once LBA had achieved at least an adequate score

under all the evaluation criteria, the agency was under no obligation to continue negotiations to help LBA raise its overall score higher. We agree.

The general rule is that, where the procuring agency considers an initial proposal to be acceptable and in the competitive range, the agency is not obligated during discussions to point out every aspect of an offeror's proposal which received less than the maximum score. Planning Research Corporation, B-205161, February 5, 1982, 82-1 CPD 98. Here, EPA informed LBA of what it considered to be the three deficiencies in LBA's proposal and held discussions on those points. This constituted meaningful discussions and EPA was not required to notify LBA of the other three areas where it had received less than the maximum score.

In this connection, it should also be noted that EPA was not required to reopen negotiations with LBA after receipt of its best and final offer. The general rule is that, while agencies may reopen negotiations after receipt of best and final offers, there is no legal requirement that they do so. Systems Sciences Incorporated, B-205279, July 19, 1982, 82-2 CPD 53. Thus, EPA was under no obligation after the receipt of LBA's best and final offer to notify LBA of its concern over the "reduction in the availability of subcontractors with hazardous waste analysis experience" and reopen negotiations to allow LBA another opportunity to revise its proposal.

Since we have found that EPA conducted meaningful discussions with LBA, the next issue is whether the record supports the reasonableness of EPA's technical evaluation. LBA has pointed out various statements in the record by EPA procurement officials which questioned the technical quality of LBA's proposal. In LBA's opinion, these conclusions were unsupported and prevented a fair consideration of its cost proposal. However, our examination of the various stages of the evaluation process reveal that LBA's proposal was treated in the same manner as all the other proposals and scored in the identical fashion. Moreover, despite the occasional statement that LBA in effect could not meet the level of quality required by EPA, LBA's technical proposal was ultimately determined to be "adequate." It appears that this is in fact LBA's real concern--that its technical proposal was found to be only adequate. LBA would have rated itself much higher.

This leads, therefore, to LBA's more specific arguments regarding EPA's technical evaluation. As noted above, LBA

questions all seven of the reasons EPA has given for rating LBA's technical proposal only adequate. Realizing that our Office does not reevaluate technical proposals, LBA argues that EPA's determinations are unreasonable--an allegation our Office will review. However, LBA's detailed discussion of these seven areas does not demonstrate that EPA's determinations were unreasonable, but rather that it can be argued that they were wrong. For each of EPA's criticisms, LBA points out where it believes EPA's evaluation was incorrect and explains what EPA should have concluded. We have held in the past, and hold here again, that a disagreement between a protester and a contracting agency over the relative merits of a technical proposal does not render the agency's evaluation unreasonable or otherwise provide us a basis to question the evaluation. Photonics Technology, Inc., supra.

LBA has also argued that its cost proposal was never properly considered. In LBA's opinion, this was a result of an inadequate technical evaluation which blinded EPA to the benefits of LBA's lower cost. According to LBA, the combination of its low cost and acceptable technical approach offered the greatest benefit to the Government and entitled LBA to the award.

It is well established that in a negotiated procurement there is no requirement that award be made on the basis of the lowest cost. Baird Corporation, B-206268, July 6, 1982, 82-2 CPD 17. 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. Therefore, the record 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.

Here, we have already concluded that there is no basis to question EPA's evaluation of LBA's technical proposal. Moreover, we have also noted that ICF's final technical score was 229 points higher than LBA's, and EPA has shown that on a "total cost per evaluation point" method of

evaluation ICR's proposal clearly offers the greatest value to the Government. In view of these facts and since the RFP specifically stated that technical quality would be more important than price, we find that there was a rational basis for EPA's decision to award the contract to the higher priced, higher scored ICF.

LBA also claims that a conflict of interest exists which should bar any award to ICF. As noted above, LBA believes that this conflict of interest arose when an EPA Deputy Assistant Administrator for Solid Waste left the agency after the receipt of proposals and joined an ICF subcontractor. EPA and ICF, on the other hand, maintain that this individual had no role in the award selection and has no role in the performance of the contract.

It is a general rule that the protester has the burden of affirmatively proving its case and that our Office will not conduct investigations to establish the validity of a protester's speculative statements. Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121. Here, LBA's allegation that ICF was the beneficiary of some sort of favoritism due to the former Deputy Assistant Administrator's employment by the ICF subcontractor is based solely on LBA's speculative statements. There is no evidence that this individual had any influence whatsoever on the selection of ICF. Rather, both EPA and ICF contend that the Deputy Administrator has had no involvement in the procurement. In light of this, we find that LBA has failed to meet its burden of proof on this issue. Therefore, our Office will not consider this ground for protest on the merits.

Finally, in its comments on the agency report, LBA complains that EPA improperly added $150,000, to its cost proposal for evaluation purposes. EPA explains that this was done for the sake of cost realism. According to EPA, LBA's best and final offer had no line item for subcontract administration expenses and the agency therefore added $150,000 to LBA's price proposal to reflect cost realism. In rebuttal, LBA argues that EPA's action was unnecessary since its contract administration costs were included in its line item for overhead.

However, we do not have to consider this issue since, as indicated above, EPA properly awarded the contract to the higher priced, higher scored ICF. In other words, whether EPA should have added the $150,000 to LBA's price proposal or not is irrelevant since this decision had no actual impact on the award determination.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States