

Halperin

DECISION



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

FILE: B-209297; B-209297.2

DATE: April 22, 1983

MATTER OF: Ted L. Biddy and Associates, Inc.

DIGEST:

1. Where bias is alleged, protester has 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.
2. Even if bias is proven, a protest will be denied if there is no indication that the bias adversely affected the protester's competitive standing.
3. Protest against alleged deficiencies apparent on the face of a request for proposals must be filed prior to the closing date for receipt of proposals in order to be timely.
4. Only offers found to be materially (versus mathematically) unbalanced must be rejected.
5. Absent a nonresponsibility determination by the procuring agency, no basis exists to preclude contract award merely because offeror may have submitted below-cost prices or a below-cost proposal where the contract is not on a cost-reimbursement basis.

Ted L. Biddy and Associates, Inc. (Biddy), protests the award of contracts for survey work under two requests for proposals (RFP) issued by the United States Army Corps of Engineers, Mobile District. By request of the protester and agreement of the parties, we have consolidated these two protests.

Protest Under RFP No. DACW01-82-R-0024

Biddy protests the award of a requirements contract for survey services under RFP No. DACW01-82-R-0024 to Hoffman and Company, Inc./Bethel Whitson Company, Inc. (Hoffman). Biddy contends that two of three technical evaluators were

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biased against it causing unfair evaluation of its proposal. Bidy further claims that, but for this alleged bias, it would have been awarded the contract.

We deny the protest.

The RFP advised offerors that technical merit would be weighted 75 percent and price 25 percent¹. Three evaluators scored the technical proposals and a different individual scored the price proposals. The three technical scores for each proposal were averaged prior to being computed with the price evaluation score. The awardee, Hoffman, received a price score of 92, while Bidy, with a lower priced offer, received a price score of 96. Another offeror, Cardan Systems Corporation, submitting an even lower priced offer, received a price score of 97. No improprieties have been alleged concerning the price scoring.

Hoffman's and Bidy's evaluated technical scores and averages were as follows:

	<u>Technical Evaluator A</u>	<u>Technical Evaluator B</u>	<u>Technical Evaluator C</u>	<u>Average</u>
Hoffman	81	62	75	72.7
Bidy	73	38	59	56.7

¹The protester originally argued that it should have been awarded the contract "since it proposed to perform the work at the lowest cost to the Government and otherwise met all of the requirements of the specifications." The protester failed to realize that another offeror had a lower price proposal and that price, nonetheless, was only a secondary consideration in evaluation. Bidy later amended its position, stating that, but for the allegedly biased evaluations of two evaluators, it "would have had the most overall points and would have been awarded the contract."

Biddy alleges that the low score given it by technical evaluator "B" was a result of bias. Biddy did not indicate why that evaluator was biased. Biddy did, however, respond to evaluator B's comments concerning Biddy's proposal. Biddy claims to have received unfair treatment by evaluator "C" because this evaluator had negative dealings with Biddy on two prior projects.

After a thorough examination of Biddy's claims and the full record before us, we do not find that Biddy received unfair treatment. The comments of all three evaluators and the record indicate that the stated evaluation criteria were reasonably applied and the scoring was accurately calculated. In cases where bias is alleged, 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. Todd Logistics, Inc., B-203808, August 19, 1982, 82-2 CPD 157; Cerberonics, Inc., B-205063, April 14, 1982, 82-1 CPD 345. Where, as here, the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Todd Logistics, Inc., supra.

Even if the evaluations of technical evaluators "B" and "C" are disregarded as the protester contends they should be, Hoffman (and not Biddy) would still be in line for award. Hoffman's technical score (evaluator "A") of 81 (75 percent), combined with its price score of 92 (25 percent), would give it a final rated score of 83.75. Biddy's technical score (evaluator "A") of 73 (75 percent), combined with its price score of 96 (25 percent), would give it a final rated score of 78.75, which is lower than Hoffman's. Even where bias is shown, we will deny a protest if there is no indication that the bias adversely affected the protester's competitive standing. Earth Environmental Consultants, Inc., B-204866, January 19, 1982, 82-1 CPD 43; Alan-Craig, Inc., B-202432, September 29, 1981, 81-2 CPD 263.

Protest Under RFP No. DACW01-81-R-0057

Request for proposals No. DACW01-81-R-0057 required the submission of unit and extended prices for 26 line items, representing a mix of labor and materials. The extended prices were to be calculated by multiplying the unit prices

by the stated estimated quantities of each item which the agency believed to represent its approximate needs. Award was to be made to the offeror with the technically acceptable proposal most advantageous to the Government, price and other factors considered.

Twenty-nine proposals were received. After evaluation, eight were determined to be in the competitive range. Negotiations were conducted. The two lowest priced best and final offers submitted were: Rutledge and Associates, Inc. (Rutledge), \$626,400; Bidby, \$753,742. The Rutledge proposal was considered most advantageous to the Government. Award was made to that firm.

Bidby protested the award to the agency, arguing that Rutledge submitted an unbalanced offer, that the awardee's offer does not meet the "evaluation for realism" test, and that the Government's line item estimates did not reflect its actual anticipated needs. Bidby supported its protest by stating that it had the same contract from June 1979 through June 1981 and that all the work received during those 2 years consisted of just four of the line items "and not one nickel's worth of work using all the other classifications." Bidby argues that, if these four line items alone were the basis for price evaluation, it, not Rutledge, would be the offeror with the lowest priced proposal.

Bidby's protest to the agency was denied. Bidby timely appealed that decision to our Office. Bidby's protest is dismissed in part and denied in part.

Bidby's protest that the Government's estimates were faulty is dismissed as untimely because protests against alleged deficiencies such as this, apparent on the face of the RFP, must be filed prior to the closing date for receipt of proposals in order to be timely. 4 C.F.R. § 21.2(b)(1) (1983). See H. G. Peters & Company, Inc., B-183115, March 22, 1976, 76-1 CPD 190.

We find Bidby's argument that Rutledge's offer should have been rejected because it was unbalanced to be without merit. There are two aspects to unbalanced offers. The first is a mathematical evaluation of the offer to

determine whether each item of the offer carries its share of the cost of the work plus profit or whether the offer is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced offer. An offer is not materially unbalanced unless there is a reasonable doubt that award to the offeror submitting a mathematically unbalanced offer will not result in the lowest ultimate cost to the Government. Consequently, only an offer found to be materially unbalanced may not be accepted. Diversified Computer Services, Inc., B-201681, July 7, 1981, 81-2 CPD 13. While Rutledge's prices for two of the line items (item 1 and 2) were far below those of other offerors and the Government's estimates for the line items, none of Rutledge's prices exceeded the Government estimate for any given line item. Although the Army concedes that, based on actual performance of the contract, "the estimate for contract line item 1 was grossly miscalculated," we cannot conclude that Rutledge's offer was materially unbalanced so as to justify its rejection. Rutledge's total price for the contract remains low even if line items 1 and 2 are not considered in the evaluation of offers. In addition, while the Government's estimate has been proven by actual performance to be in error, we have no basis to conclude that it was not the Government's best estimate at the time of award. In the circumstances, we see no basis to object to the award based on a mathematically unbalanced offer by Rutledge.

We find Bidder's final argument, that Rutledge's prices were inadequately evaluated for cost realism, to be without merit. While Rutledge's prices were considered low on two of the line items, Rutledge explained, to the agency's satisfaction, that its normal anticipated costs for those items were included in its margin on the overall contract. Because this is not a cost reimbursement contract and since the agency would not be obligated to pay more than the prices offered by the awardee, the cost analysis was properly limited to making sure that the prices are not unreasonably high for each of the line items (and not whether the awardee will in fact be able to supply the line items at a profit based on his offered price). Since all of Rutledge's prices are below the Government's estimates and its total price of \$626,400 is far below the Government's

estimated price of \$895,375, we see no reason to question the reasonableness of the agency's cost analysis. Additionally, absent a nonresponsibility finding, no basis exists to preclude a contract award merely because an offeror may have submitted below-cost prices or a below-cost proposal where the contract is not on a cost-reimbursement basis. Jenkins Equipment Co., Inc., B-207512, June 2, 1982, 82-1 CPD 531; Decision Sciences Corporation, B-205582, January 19, 1982, 82-1 CPD 45. Rutledge's explanation concerning its pricing served to guarantee that its prices were not a result of a mistake and that the agency would not be required to pay more than the offered prices for the quantities of those line items which it would order.

for *Nancy R. Van Cleave*
Comptroller General
of the United States