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

FILE: B-213058 **DATE:** March 28, 1984

MATTER OF: CSR, Incorporated

DIGEST:

1. Protester alleging agency's bad faith has not met its burden of proving by irrefutable evidence that agency had a malicious and specific intent to harm it where protester has submitted speculative allegations as to the agency's motive for taking certain actions and agency has submitted reasonable explanations for taking these actions.

2. Agency had a reasonable basis to cancel negotiated small business set-aside where the Small Business Administration found that the only offeror who submitted a technically acceptable proposal was not a small business.

CSR, Incorporated (CSR), protests the cancellation of the National Cancer Institute (NCI), Department of Health and Human Services (HHS), request for proposals (RFP) No. NCI-CO-33857-41, a 100-percent small business set-aside, and the reissuance of this RFP as an unrestricted solicitation. CSR requests that HHS reinstate the solicitation and make an award to CSR. In the alternative, CSR requests proposal preparation costs.

The protest and request for proposal preparation costs are denied.

The RFP, issued to five small business firms on July 7, 1982, sought proposals to perform technical writing, answer telephone inquiries and distribute publications in response to cancer-related inquiries. All five initial proposals were judged technically acceptable after being evaluated by the initial technical review group and the source evaluation group (SEG). The SEG recommended that the contracting officer include all offerors in the competitive range. The contracting officer accepted this recommendation and all offerors were sent questions and requested to submit best and final offers by February 25, 1983. After receiving best and final offers, the SEG decided that it needed to ask all five offerors further questions. The offerors were sent the questions and given the opportunity to participate in oral

discussions. Following these discussions, the offerors were required to submit second best and final offers. The SEG evaluated the second best and final offers and found that only the proposal of Information Management Services, Inc. (IMS), was technically acceptable. However, the solicitation was canceled because IMS was found to be other than small by the Small Business Administration (SBA).

CSR alleges that the RFP was canceled because the NCI wanted to award the contract to Biospherics, the incumbent contractor and the subcontractor to IMS. The SBA found that IMS was not an eligible small business and CSR alleges that the history of the procurement demonstrates NCI's bias in favor of IMS-Biospherics. CSR first notes that the solicitation was initially issued with a small business size standard of 500 employees. CSR states that this was not the correct size standard because this standard is used with research and development projects rather than with service contracts. CSR believes that NCI chose this standard because, under this standard, Biospherics qualified as a small business. CSR states that NCI refused to change the standard and did so only after the SBA ruled that the correct standard was $2 million in receipts and the Secretary of HHS refused to permit NCI to withdraw the solicitation as a small business set-aside.

NCI responds that it originally sought to use a small business size standard of 500 employees and to withdraw the procurement as a small business set-aside when the SBA ruled that $2 million was the proper standard because NCI did not believe that there were any technically capable small business firms meeting the $2 million standard. NCI reached this conclusion because it believed that a firm meeting this standard (1) would have to devote all of its resources to the contract and might have to undergo substantial expansion because the value of the contract was estimated at $1.5 million; (2) would probably have to subcontract part of the work, an arrangement which NCI found technically unacceptable; (3) would have to have additional employees for peak performance periods and these employees would be idle during off periods; (4) in a past procurement, NCI received only one small business proposal and the proposal was found technically unacceptable; and (5) none of the three small business firms on the capability statement submitted to NCI by SBA were technically acceptable.

This Office will not attribute bias to government procurement officials based on a protester's speculative allegations. Francis Technology, Inc., B-205278.2, August 29, 1983, 83-2 CPD 265. Here, NCI has given a reasonable and adequate explanation as to why it initially

chose to specify 500 employees as the small business size standard. Thus, since CSR has only speculated as to NCI's motive for choosing the 500-employee standard, CSR has not met its burden of affirmatively proving that NCI chose the standard to favor IMS-Biospherics. Regarding CSR's request that we investigate the previous solicitation, this Office does not conduct independent investigations as part of our bid protest function to ascertain the validity of a protester's speculative statements. Marine Industries Northwest, Inc.; Marine Power and Equipment Company, B-208270; B-208315.2, February 16, 1983, 83-1 CPD 159.

CSR contends the solicitation need not have been canceled because CSR's proposal was improperly evaluated and should have been found technically acceptable and therefore NCI could have made award to a small business firm, CSR.

CSR alleges that the questions asked by NCI after the submission of the first best and final offers favored the incumbent because only the incumbent was familiar with the required performance. For this reason, CSR contends that NCI's decision to change the contract from a level-of-effort contract to a mission contract favored IMS-Biospherics. The competitive advantage which a firm gains by virtue of its incumbency is not unfair unless that advantage is the result of unfair government action or preferred treatment. Contact International, Inc., B-207602, May 31, 1983, 83-1 CPD 573. NCI explains that it changed the contract type because a mission contract is the preferred type under 41 C.F.R. § 1-1.703-2(a) (1983). The record shows that the questions asked by NCI ("what are the two most important aspects of contract performance and how will you insure that they are met") after the initial best and final offers were submitted were part of the technical evaluation criteria stated in the RFP. Thus, CSR again has done no more than speculate as to NCI's motives and CSR has not met its burden of proving that NCI undertook these actions to favor IMS-Biospherics.

CSR states that in the second request for best and final offers, received 4 days after the oral presentations, CSR was not asked any additional technical questions. On this basis, CSR cannot understand how its previously acceptable offer was rated unacceptable after the SEG evaluated the second best and final offers. CSR alleges that NCI violated its procurement regulations because NCI did not notify the four offerors that their proposals were technically unacceptable until 5 months after that decision was made and after the SBA found that IMS was not an eligible small business. CSR believes that the proposals were not found

unacceptable until after the SBA found IMS ineligible to receive an award. In this regard, CSR also questions the contracting officer's request to the four offerors to keep their proposals open while the IMS size protest was pending.

These allegations, however, do not demonstrate that NCI conducted the procurement in bad faith. Initially, the fact that a proposal is included in the competitive range does not mean that the proposal is technically acceptable in every respect. Rather, it indicates that the proposal could be made acceptable without major revisions. Metric System Corporation; Command Control and Communication Corporation, B-210218; B-210218.2, September 30, 1983, 83-2 CPD 294. Thus, a proposal which was initially placed in the competitive range could be found unacceptable after best and final offers are received. See Electronic Data Systems Federal Corporation, B-207311, March 16, 1983, 83-1 CPD 264. NCI may have caused some confusion by labeling the initial proposals in the competitive range as technically acceptable. However, this is not a basis to find that NCI must accept a proposal which it does not find acceptable.

An agency does have an obligation to conduct meaningful negotiations with all offerors in the competitive range. Louis Berger and Associates, Inc., B-208502, March 1, 1983, 83-1 CPD 195. The negotiations may be oral or written. Aero Products Research, Inc., B-200820, January 15, 1982, 82-1 CPD 33. For the negotiations to be meaningful, the agency must furnish to the offeror information concerning the areas of deficiency in the offeror's proposal and it must permit the offeror to submit a revised proposal. NCI states that after the initial proposals were received, CSR was sent a list of the deficiencies found in its proposal and it submitted a revised proposal. While CSR alleges that it was not notified of all the deficiencies in its proposal, CSR has not alleged any specific deficiencies of which it was not notified. We have no basis to conclude that NCI did not notify CSR of the deficiencies with which it was concerned. We also note that an agency is not obligated to discuss every aspect of a proposal which receives less than the maximum score. See Louis Berger and Associates, supra. Insofar as CSR claims that it did not receive written technical questions after the oral presentations, NCI states that all questions were asked during the oral presentations. Since oral discussions are permissible, the fact that NCI was not sent written questions does not provide a reason to question NCI's decision.

Concerning CSR's allegation that it was not notified that its proposal was technically unacceptable until 5 months after discussions were held, we regard an agency's

failure to give notice as a procedural irregularity which does not affect the legality of an agency's actions unless it prejudices the offerors. Investors, Inc., B-209816, May 17, 1983, 83-1 CPD 523. Since CSR's proposal was not technically acceptable, no prejudice was present. Insofar as CSR believes that NCI found its proposal unacceptable after the SBA found IMS was not an eligible small business, NCI has submitted the SEG's evaluation of second best and final offers to this Office. That evaluation dated March 30, 1983, which was made months before the SBA's decision, concludes that CSR's proposal is technically unacceptable.

Finally, NCI explains that the contracting officer kept the four technically unacceptable proposals in the competitive range and requested the offerors to keep their proposals open because the contracting officer anticipated that further negotiations might be held with these offerors. The contracting officer later changed his mind because he found the best course of action was to resolicit NCI's requirements. Given this explanation, we fail to see how the contracting officer's actions were taken in bad faith.

A protester who alleges that a contracting agency acted arbitrarily or in bad faith must submit irrefutable proof that the agency had a malicious and specific intent to harm the protester. Photo Data Inc., B-208272, March 22, 1983, 83-1 CPD 281. In this case, although CSR has submitted a number of allegations that NCI was biased and acted in bad faith, most of these allegations speculate as to NCI's motive for taking certain actions. NCI has submitted a reasonable explanation for each of these actions. Thus, although we recognize that it is difficult to submit proof as to an agency's subjective motives for acting in a certain manner, we cannot find that CSR has met its burden of proof. See IFR, Inc., B-209929, May 17, 1983, 83-1 CPD 524. Consequently, since a showing of bad faith is a prerequisite to an award of proposal preparation costs, CSR's request for proposal preparation costs is denied.

Regarding CSR's contention that NCI's decision to cancel the solicitation was arbitrary, a contracting officer has broad discretion to decide whether to cancel a procurement and we will only question a decision to cancel a procurement if that decision lacks a reasonable basis. Francis Technology, Inc., supra. Here, NCI found that the only technically acceptable offeror was ineligible to receive an award. Thus, since we have found no basis on which to question NCI's proposal evaluation, the contracting officer's decision to cancel the procurement was reasonable.

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The protest and request for proposal preparation costs are denied.

for Milton J. Socolar
Comptroller General
of the United States