2-1984

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

FILE: B-213417 **DATE:** April 9, 1984

MATTER OF: D-K Associates, Inc.

DIGEST:

1. In reviewing protests against allegedly improper evaluations, GAO will not substitute its judgment for that of evaluation boards, which have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations.

2. GAO will not attribute bias to an evaluation board simply on the basis of inference or supposition.

3. Although in a negotiated procurement discussions generally are required to be conducted with offerors in a competitive range, award may be made on the basis of initial proposals where adequate price competition exists and the solicitation advised offerors that award might be made without discussions.

5. Proposals that are to be included within a competitive range generally are those which are either technically acceptable or reasonably susceptible of being made acceptable through discussions, that is, those proposals that have a reasonable chance of award.

6. Although GAO generally will entertain protests of OMB Circular A-76 cost comparisons after administrative remedies have been exhausted, GAO will not consider such a protest by a party clearly not "interested" in the cost comparison's result, for example, a protester that cannot demonstrate that under any circumstance it would be in line for award even if it were to prevail on the issue.

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D-K Associates, Inc. protests a determination made by the Department of the Navy that the firm's technical proposal was unacceptable under request for proposals (RFP) No. N00167-83-R-0083 to furnish complete storage and warehousing services for the David W. Taylor Naval Ship Research and Development Center (Center) at its Carderock and Annapolis, Maryland, facilities. D-K alleges that the Navy improperly selected for the prospective award a much higher priced offeror without establishing a competitive range and conducting necessary discussions. D-K also complains that the Navy's subsequent decision to cancel the RFP and retain the services in-house as the result of an Office of Management and Budget (OMB) Circular A-76 cost comparison was improper. We deny the protest in part and dismiss it in part.

Background

The RFP was issued as a 100 percent set-aside for small businesses, and notified offerors that the solicitation was part of a cost comparison to determine whether accomplishing the specified work in-house or by contract would be more economical. Offerors were also advised at paragraph 10(q) of page 33 of the RFP that:

> "The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government."

Clause L4 described the required content and format for technical proposals. Offerors were required to provide the following seven major areas of information in their proposals:

(a.) organizational and functional charts reflecting the offeror's intended on-site organization for management and performance;

(b.) staffing charts and a matrix of labor hours showing the number of hours for each labor category to support the functions identified in Exhibit 12 of the RFP, "Performance Requirement Summary";

(c.) a discussion of the offeror's plan for quality control;

(d.) an outline of the offeror's proposed standard operating procedure;

(e.) the offeror's start-up and phase-in schedule;

(f.) a synopsis of similar or related government and commercial work performed or being performed; and

(g.) resumes of proposed key personnel.

Clause M1 of the RFP notified offerors that an evaluation plan had been established under which all technical proposals would be evaluated for acceptability in accordance with the seven key informational requirements detailed above (hereinafter referred to by letter: (a.), (b.), etc.). Clause M1 provided that the evaluations would be based upon adjectival ratings, with the contracting officer making the final determination as to which proposals would be deemed acceptable. Offerors were informed that proposed costs would be evaluated for lowest price for only those proposals which had been found technically acceptable. Paragraph 2.2 of clause M1 also specifically provided that informational requirements (a.), (b.), and (c.) were of critical importance and that an unsatisfactory rating in any one of them would render the entire technical proposal unacceptable. The remaining four requirements were stated to be of equal importance.

The seven technical proposals received in response to the RFP were evaluated by a committee consisting of the Center's supply officer, serving as chairman, a supervisory supply systems analyst, and a supply systems analyst. According to the Navy, no member of the committee would have been affected by a cost comparison result favoring contracting for the services, and no committee member at any time had access to either the offerors' cost proposals or the Navy's in-house estimate. The consolidated ratings given to D-K by the evaluation committee were as follows:

Requirements	Ratings
(a.)	Marginal
(b.)	Unsatisfactory
(c.)	Unsatisfactory
(d.)	Marginal
(e.)	Unsatisfactory
(f.)	Marginal
(g.)	Marginal

The committee rated D-K marginal for its proposed organizational plan (requirement (a.)) because the plan proposed separate managements for the Carderock and Annapolis sites "causing possible adverse impact on level of service to the Center and creating severe communications problems." D-K's proposed staffing (b.) was rated as unsatisfactory because the committee concluded that the firm had materially underestimated certain manpower levels, principally at the Carderock site. The committee rated D-K's discussion of its plan for quality control (c.) as unsatisfactory because, although the firm had provided its "philosophical" approach, it had not furnished an actual plan for quality control implementation; the evaluators found, for example, that D-K "simply promises to strive to meet contract requirements by involving management employees". In light of the unsatisfactory ratings in areas (b.) and (c.), the D-K proposal was deemed to be technically unacceptable.

Two of the seven proposals, those of MAR, Inc. and another offeror, were judged technically acceptable, and their cost proposals were found to be acceptable as submitted. No written or oral discussions were conducted with those firms, as the Navy concluded, in accordance with Defense Acquisition Regulation (DAR) § 3-807.7(a)

(1976 ed.), that adequate price competition existed.[1] Because MAR had submitted the lowest-priced technically acceptable offer, MAR was recommended for award if its offered price of $2,111,516, when adjusted in accordance with OMB Circular A-76 cost comparison procedures, was lower than the Navy's in-house estimate. The authorized adjustments to MAR's price totaled $543,185; its adjusted price of $2,654,701 was more than the $2,468,500 in-house estimate. Therefore the cost comparison result favored retaining the services in-house.

Both D-K and MAR appealed the result of the cost comparison to an administrative review panel convened by the Navy. D-K also protested to the Navy the determination that its proposal was technically unacceptable, and further complained to the Small Business Administration (SBA) that the Navy had employed the wrong size standard in the solicitation and that MAR consequently was not small for purposes of the procurement.

By decision of February 9, 1984, the review panel found no improprieties in the cost comparison and accordingly recommended no changes in it, sustaining the tentative decision to retain the services in-house. According to the record, the SBA's Philadelphia Regional Office supported D-K's assertion that the Navy had employed the wrong size standard in the solicitation and determined that MAR was other than a small business concern for purposes of this or similar service procurements, but also advised D-K that this determination would have only prospective effect because the result of the cost comparison did not favor award to MAR.

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[1]DAR § 3-807.7(a)(1) provides, in pertinent part:

> "Price competition exists if offers are solicited and (i) at least two responsible offerors, (ii) who can satisfy the requirements, (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price, (iv) by submitting priced offers responsive to the expressed requirements of the solicitation."

DAR § 3-807.7(a)(2) states that, except in circumstances not applicable here, price competition that meets those factors is presumed to be "adequate."

Technical Evaluation

D-K protests that the Navy improperly determined its technical proposal to be unacceptable. The firm urges that the Navy did not properly notify offerors of the evaluation criteria against which technical proposals would be rated, that the evaluators themselves were provided no guidance as to what should be considered acceptable versus unacceptable proposals, and that the evaluators were biased against contracting for the services. D-K especially notes that while clause L4 required the offeror to discuss its quality control plan (c.), section C of RFP paragraph 2.3 provided that a complete quality control plan was to be furnished to the Center within 15 days of award and that no contract work could begin until the plan had been accepted by the Center. D-K thus argues that it properly could not be rated as unsatisfactory regarding discussion of its quality control plan because the clause L4 requirement was apparently only a broad and general one, while another section of the RFP demanded that a detailed, acceptable quality control plan be submitted only after award. Although D-K does not specifically challenge the rating of unsatisfactory for its proposed staffing (b.), the firm implies that its experience as a service contractor enables it to use less personnel than the government might deem the minimum necessary for the work.

In reviewing protests against allegedly improper evaluations, we will not substitute our judgment for that of evaluation boards, which have wide discretion. Rather, we will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria and whether there were any violations of procurement statutes and regulations. Los Angeles Community College District, B-207096.2, August 8, 1983, 83-2 CPD 175.

For purposes of this decision, we need only address requirements (a.), (b.), and (c.), since an unsatisfactory rating in any one of them would render the technical proposal unacceptable. As indicated earlier, the evaluation committee's consolidated rating for D-K's proposed organization (a.) was marginal because D-K had established two separate managements for the Carderock and Annapolis facilities. Although the requirements of clause L4 did

not specifically establish the necessity for a formal organizational liaison between the two facilities, we do not think the marginal rating was unreasonable given that the Center, which having two work sites, required a single service operation. In any event, the marginal rating for (a.) did not make D-K's proposal unacceptable.

Regarding D-K's proposed staffing plan (b.), we note that the firm proposed two employees for shopstores at the Annapolis site and three employees for the same operation at the Carderock site, whereas the RFP's labor hour matrix indicated the man-years required at each site to be 2.42 and 3.42, respectively. In the same vein, D-K proposed three employees for the Carderock site for the receiving and inspection function, whereas the labor hour matrix required 3.33 man-years. We therefore do not think that it was unreasonable for the evaluation committee to find D-K unsatisfactory in this area. The determination of an agency's minimum personnel needs is the prime responsibility of the procuring agency. See Dyneteria, Inc., B-211525, December 7, 1983, 83-2 CPD 654. If D-K had wished to establish that its corporate experience and on-site visits enabled it to make adjustments "to properly reflect the circumstances" at both sites, as the firm represented in its proposal, it was incumbent upon the firm to demonstrate in its proposal that such adjustments were compatible with the Navy's expressed minimum personnel needs, especially where D-K was on notice that an award on the basis of initial proposals without discussions was a possibility. The firm did not make that demonstration.

We also do not think that the RFP requirement that a detailed, acceptable quality control plan be submitted to the agency after award necessarily indicates, as D-K implies, that the discussion of the offeror's quality control plan (c.) in its technical proposal needed to be set forth only in a broad and general way. We agree with the evaluation committee's comments, for example, that the plan for the actual implementation of quality control is vague. Seemingly, corrective action under D-K's approach in this area is to be generated only after service complaints have arisen; there is a definite lack of expressed

measures in the discussion. We do not think it was unreasonable for the evaluation committee to conclude that D-K had not demonstrated in its technical proposal a sufficient quality control plan to meet the agency's needs, and therefore to give the firm an unsatisfactory rating for requirement (c.).

D-K has also alleged that the composition of the evaluation committee precluded a fair evaluation of proposals because all members were employees of the Center who would be affected, at least indirectly, by a decision to contract for the services. This allegation is unsubstantiated. As indicated earlier, the Navy states that no member of the committee would have been affected in any fashion and, more importantly, we think it rather illogical for D-K to imply that the evaluation committee members were biased against contracting for the services when in fact they gave high scores in a majority of proposal areas to both technically acceptable offerors. We see nothing to indicate that the evaluators acted unreasonably or arbitrarily in making their judgments, see Diversified Data Corporation, B-204969, August 18, 1982, 82-2 CPD 146, and we will not attribute bias to an evaluation panel simply on the basis of inference or supposition. D-K has not carried its burden of proof in this matter. Todd Logistics, Inc., B-203808, August 19, 1982, 82-2 CPD 157.

Award Without Discussions

Paragraphs 1.2 and 1.3 of clause M1 set forth the specific provisions regarding discussions. Paragraph 1.2 established that the contracting officer would make the determination as to which offers were to be included in the competitive range, based upon "technical acceptability and the proposed cost to the Government." The competitive range would include all offers "which have a reasonable chance for award." Paragraph 1.3 provided that all offerors selected to participate in discussions would be advised of deficiencies in their offers and would be afforded a reasonable oppportunity to correct those deficiencies. Those offerors selected to remain in the competitive range would then be notified to submit best and final offers.

The Navy did not establish a competitive range, but rather decided to make award to that offeror whose technically acceptable proposal offered the lowest price. D-K notes in that regard that MAR's offered price was in

fact much greater than D-K's, and although admitting that the RFP allowed for award without discussions, argues that the rejection of its proposal, without it being afforded the opportunity to revise, was an arbitrary action by the Navy.

We do not agree with D-K's assertion that it was improper for the Navy not to establish a competitive range of offerors who would be given an opportunity for discussions and the submission of best and final offers. Although in a negotiated procurement discussions generally are required to be conducted with offerors in a competitive range, there are certain specified exceptions to that general rule. One such exception is where the record shows the existence of adequate competition to ensure that an award without discussions will result in a fair and reasonable price, provided that the solicitation advised offerors of the possibility that an award might be made without discussions. Blurton, Banks & Associates, Inc., B-211702, October 12, 1983, 83-2 CPD 454. As we have already indicated, the Navy determined under DAR § 3-807.7(a)(1) that adequate price competition existed for this procurement[2], and the RFP at page 33, paragraph 10(q), informed offerors that an award might be made without discussions. Therefore, we see nothing objectionable in the Navy's decision not to establish a competitive range and not to conduct discussions. Id.

In any event, even if the Navy had established a competitive range, it is unlikely that D-K's proposal would have been included within it. Generally, the proposals that are to be included within the competitive range are those which are either technically acceptable or reasonably susceptible of being made acceptable through discussions--that is, proposals which have a reasonable chance of being selected for award. Peter J. T. Nelsen, B-194728, October 29, 1979, 79-2 CPD 302. In that same

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[2]The fact that the SBA regional office has subsequently determined MAR to be other than small does not affect the Navy's original conclusion under DAR § 3-807.7(a)(1) that adequate price competition existed, because MAR met the size standard (albeit erroneous) listed in the RFP. See Empire Moving and Storage Co., B-210139, May 20, 1983, 83-1 CPD 543.

regard, even a proposal which is technically acceptable or capable of being made acceptable may be excluded from the competitive range if, relative to all proposals received, it does not stand a real chance for award. Hittman Associates, Inc., 60 Comp. Gen. 120 (1980), 80-2 CPD 437. We do not see how the Navy's limitation of potential awardees to only MAR and one other technically acceptable offeror prejudiced the protester. The Navy's report to our Office shows that each of these offerors was rated "good" and "marginal" in the key areas, and generally better than D-K in the others; D-K's technical proposal was rated unsatisfactory in two of the key areas, where only one unsatisfactory rating made a proposal unacceptable, and its over-all ranking based upon the consolidated ratings made its proposal fifth low in terms of technical quality out of the seven proposals submitted. Thus, the firm really had no chance of award. See Media Works, Inc., 61 Comp. Gen. 202 (1982), 82-1 CPD 42.

Appeal of Cost Comparison Result

Under procedures that implement the policies established in OMB Circular A-76, the Navy allows for appeals of cost comparison results to the Navy's Commercial Activities Administrative Review Panel by "contractors and potential contractors." As already indicated, D-K elected this administrative appeal remedy, which resulted in a decision affirming the cost comparison result. Although we generally entertain such protests of A-76 cost comparisons when administrative remedies have been exhausted, see Suburban Lawn & Landscape Service, Inc., B-209206, October 13, 1982, 82-2 CPD 334, we will not consider a protest by a party clearly not "interested" in the issue within the meaning of our Bid Protest Procedures, 4 C.F.R. part 21 (1983). Whether a party is sufficiently "interested" depends upon its status in relation to the procurement. Evans Engine & Equipment Co., Inc., B-211337, July 21, 1983, 83-2 CPD 107. Here, D-K would not be in line for award even if it were established that the A-76 cost comparison result was based upon improper calculations, and that the correct result would favor contracting for the services instead of retaining them in-house. Although the SBA has initially determined that MAR is not small for purposes of this procurement, the other technically acceptable offeror, and not D-K, would be in line for award, pending a cost

comparison conducted in the manner D-K suggests. Therefore, we will not consider D-K's challenge to the A-76 cost comparison result and accordingly dismiss the protest on this issue.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States