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DECISION



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

FILE: B-213856; B-213856.2

DATE: July 31, 1984

MATTER OF: P-III Associates

DIGEST:

1. GAO does not conduct investigations in its bid protest function. Instead, its decisions are based on written submissions of the parties, with the protester bearing the burden of proof.
2. In reviewing alleged arbitrary and capricious evaluation of proposals, GAO's standard is to determine whether evaluation was reasonable and in accord with solicitation criteria. If so, and there are no other violations of the procurement statutes and regulations, an award is not legally objectionable.
3. When offeror's experience in specific geographic area covered by solicitation is listed as a subfactor under "Organizational Qualifications and Experience," agency is required to consider it and may not evaluate proposals on the basis of general or related experience alone.
4. Mere fact that a protester disagrees with evaluation of its proposal does not prove that the agency's selection was arbitrary or capricious.
5. Contracting officials are presumed to be competent and to act in good faith, and GAO will not attribute bias to them on the basis of inference or speculation.
6. Alleged plagiarism of material in prior, unsuccessful proposal by former employee of offeror is a dispute between private parties and must be resolved through court action, not in the context of a bid protest.

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7. Purpose of certificate of independent price determination is to prevent collusion between two or more bidders in an attempt to keep a third from submitting a bid; such action may violate antitrust statutes. In GAO's opinion, however, mere bragging by employee of one firm to employee of competing firm does not constitute evidence of such collusion. If protester has additional evidence of alleged criminal acts, it should be submitted to contracting officer for possible forwarding to the Attorney General.

P-III Associates protests the National Park Service's award of two contracts for stabilization of prehistoric, Pueblo Indian ruins in southeastern Utah. The firm alleges that the procurements were deficient in approximately 30 different ways and concludes that the Park Service knowingly favored the awardee, Nickens and Associates.

Because the record does not support these allegations, we deny the protest.

Background:

The requests for proposals that resulted in the protested contracts were issued in August 1983; No. 1200-83-74 covered the Glen Canyon National Recreation Area, while No. 1200-83-89 covered Canyonlands National Park and Natural Bridges National Monument.

In Glen Canyon, the solicitation states, sites date from 1050 to 1150 A.D., and elements of the Anasazi culture remain. Visitors (1.8 million in 1982) have damaged fragile structures by climbing on them and defacing them with graffiti. The statement of work for each contract requires photographing, mapping, and otherwise recording unusual aboriginal construction techniques and rock art.

Mortar work and excavation also are required, and for Canyonlands/Natural Bridges the contractor must develop a long-term stabilization plan. In some cases, sites are accessible only by boat or on foot, and supplies and equipment must be brought in by backpack or helicopter. The Park Service's short-term goal is to retain the appearance of deteriorating ruins while preventing further deterioration and making the sites safe for future visitors.

Although completion is expected to take 4 years, the cost-plus-fixed-fee contracts will be funded annually. For the first year, Nickens' contracts total approximately \$37,500 for Glen Canyon and \$98,000 for Canyonlands/Natural Bridges.

P-III's Protest:

P-III's allegations fall into four broad categories: arbitrary and capricious evaluation of technical proposals; favoritism of Nickens; plagiarism by Nickens of an unsuccessful P-III proposal for a 1982 Canyonlands project; and violation by Nickens of the certificate of independent price determination. Its initial protest to our Office, which followed denial of a protest to the agency, was based on debriefing letters prepared by the Park Service. Following receipt of the agency report, P-III alleged that there were inconsistencies between the report and the debriefing letters which served as evidence of arbitrary and capricious evaluation by the Park Service. P-III also questioned the fact that for the Canyonlands/Natural Bridges procurement, only three individuals evaluated both its own and Nickens' proposal, while a fourth member of the evaluation team was different in each case. P-III therefore argues that it cannot be sure that evaluation criteria were applied consistently. The firm seeks an investigation and reevaluation of proposals by our Office.

A. Technical Proposals

We note, first, that our Office normally does not conduct investigations in its bid protest function. Instead, we base our decisions on written submissions of

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the parties, with the protester bearing the burden of proof. Vigilantes, Inc., B-213010, Feb. 8, 1984, 84-1 CPD ¶ 158. Our standard of review is to determine whether proposals were evaluated reasonably and in accord with solicitation criteria. If so, and if there were no other violations of the procurement statutes and regulations, an award is not legally objectionable. See Transmission Technology Co., Inc., B-209538, May 24, 1983, 83-1 CPD ¶ 557.

In this case, the evaluation factors and maximum possible number of points, identical for both solicitations, were as follows:

Technical Excellence	42 Points
Personnel Qualifications and Experience	24 Points
Management	24 Points
Organizational Qualifi- cations and Experience	10 Points

Under these criteria and listed subfactors, Nickens was rated 11.5 points higher than P-III for the Canyonlands/Natural Bridges project and 9 points higher for the Glen Canyon project. (Neither the scores of other, lower-rated offerors nor price, which was not weighted but which was less important than technical factors, is at issue here.)

We have obtained copies of the raw evaluation sheets from the contracting officer and have compared them with the debriefing letters and the Park Service report. In our opinion, the latter accurately reflect the initial evaluations, and while there may be semantic differences, even if resolved they would not change the relative ranking of proposals.

For example, the parties have debated the correctness of the Park Service's evaluation of P-III's proposed project director's experience. In one debriefing letter, the Park Service states that although this individual has experience in ruins stabilization, it was 5 or 6 years ago. Since the field of ruins stabilization has changed

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drastically over the past few years, the letter continues, without recent in-depth experience there would be serious drawbacks in this person's development of a long-term stabilization plan for Canyonlands/Natural Bridges.

With regard to the same individual as a proposed project director for Glen Canyon, the Park Service letter states that although she had demonstrated supervisory ability on other projects, her last stabilization experience was in 1977 as a crew member, and she has never run a stabilization program.

P-III takes exception to these statements, pointing out that the proposed project director's resume shows that she conducted a ruins stabilization evaluation in Glen Canyon, supervising up to 12 students, and that work in this area extended through April 1978.

The Park Service responds that it does not consider evaluation of sites for stabilization to be the same as actual stabilization work; it concedes that the proposed project director's experience concluded with a project write-up in April 1978.

In our opinion, the distinction between 1977 and April 1978 is one without a difference. In either case, the proposed project director's experience is not, in a relative sense, recent. On the other hand, the distinction between evaluation of sites for possible stabilization and the actual performance of such work, and between supervising a student project and one of the nature called for by these solicitations, is significant. Moreover, the dates and type of experience that this individual has are historical facts, objectively determinable. See The Jonathan Corp., B-199407.2, Sept. 23, 1982, 82-2 CPD ¶ 260. We therefore cannot conclude that the Park Service's evaluation of it was arbitrary and capricious.

Similarly, P-III argues that evaluation of its organizational qualifications and experience was improper. For this criterion, worth a possible 10 points, P-III received only 3.5 for the Glen Canyon and 7.3 for Canyonlands/Natural Bridges. P-III argues that during

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evaluation of its unsuccessful proposal for the 1982 Canyonlands project, it received 9 points for organizational experience. The Park Service responds that in 1982 it evaluated general archeological experience, while for these procurements it considered the "offeror's stabilization experience in the geographic area" covered by the solicitation.

P-III's argument assumes that the 1982 evaluation was correct; although the question is not before us, this may not be the case. In any event, since experience in a specific geographic area was listed as a subfactor in each of the solicitations in question, the Park Service clearly was required to consider it, and could not have evaluated on the basis of general or related experience alone. P-III acknowledges that as an organization, it lacks experience in ruins stabilization.

To summarize, for the Glen Canyon project, P-III received only 14 of 24 possible points for individual experience and 3.5 of 10 possible points for organizational experience. Since its total score for Glen Canyon was only 9 points less than that of Nickens, P-III could have lost on this basis alone. P-III's scores for experience were higher for Canyonlands/Natural Bridges, and thus other factors contributed to its overall lower rating. However, we cannot conclude, on the basis of the record before us, that the Park Service's evaluation was either unreasonable or contrary to listed criteria. The mere fact that P-III disagrees with the evaluation does not prove that it was arbitrary or capricious. See Data Flow Corporation, et al., 62 Comp. Gen. 506 (1983), 83-2 CPD ¶ 57.

Nor can we conclude that there were inconsistencies in the evaluation process due to the fact that there was a different, fourth evaluator for Canyonlands/Natural Bridges. The Park Service advises that one member of the panel asked to be relieved of the task of evaluating Nickens due to a potential conflict of interest. It therefore appears that the agency was attempting to prevent bias, rather than promoting it, when it permitted a substitution.

B. Other Bases of Protest

P-III's other bases of protest are, in our opinion, without legal merit.

As evidence of favoritism toward Nickens, P-III alleges that Park Service personnel toured proposed stabilization sites by helicopter with Nickens personnel, discussed contents of future solicitations with them, and attempted to award a sole source contract or to modify an existing Nickens contract for the work covered by the protested contracts.

The Park Service responds that the so-called helicopter tour actually was an inspection trip by a contract administrator and an archeologist, who were transported to three sites at the same time that Nickens was moving its field crews. At this time, the scope of work for follow-on contracts had not yet been defined, the Park Service states.

We find this explanation reasonable and, as we frequently have stated, we will not attribute bias to contracting officials, who are presumed to be competent and to act in good faith, on the basis of inference or speculation. CSR, Inc., B-213058, March 24, 1984, 84-1 CPD ¶ 364; Vigilantes, Inc., *supra*. Moreover, since the Park Service did conduct a competitive procurement for the contracts in question, the fact that it considered--and apparently could not justify--a sole source award or contract modification is irrelevant.

As evidence of plagiarism by Nickens, P-III quotes extensively from a proposal that it submitted for the 1982 Canyonlands project, comparing it with portions of Nickens' proposal for the current Canyonlands procurement. The protester implies that Park Service officials improperly released portions of the unsuccessful P-III proposal that had been marked proprietary.

The agency and Nickens respond that an individual who in 1982 had been working for P-III subsequently was hired by Nickens. They attribute the similarity between the two proposals to the fact that both were based on his notes

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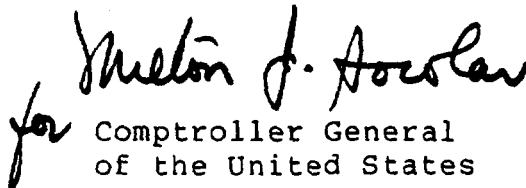
and ideas. The Park Service, however, denies that it released P-III's 1982 proposal.

This appears to be a dispute between private parties, i.e., the Nickens employee and P-III, his former employer, concerning an alleged improper business practice. The dispute, which also involves the alleged breach of a nondisclosure agreement signed by this individual, must be resolved through court action and not in the context of a bid protest. James G. Tunison & Co., B-213394, Dec. 29, 1983, 84-1 CPD ¶ 38; Kirk-Mayer, Inc., B-208582, Sept. 2, 1983, 83-2 CPD ¶ 288.

Finally, as evidence of an alleged violation of the certificate of independent pricing, P-III states that this same individual told a P-III employee that the firm would be "flushing money down the tubes" if it bid on the projects, which had been promised to Nickens. P-III argues that this was an improper attempt to induce it not to bid.

In our opinion, even if the statement was made, it is in the nature of bragging and does not constitute evidence of collusion. Collusion is usually between two or more bidders who are attempting, in violation of antitrust statutes, to keep a third from bidding. Prevention of such collusion is the purpose of the certification of independent price determination. See B.F. Goodrich, B-192602, Jan. 10, 1979, 79-1 CPD ¶ 11. If P-III has further evidence of these alleged criminal acts, it should present it to the contracting officer for possible forwarding to the Attorney General in accord with Federal Acquisition Regulation, § 3.303, 48 Fed. Reg. 42,110 (1983) (to be codified at 48 C.F.R. § 3.303).

The protest is denied.


for Comptroller General
of the United States