

DECISION

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

FILE:

B-217231.2

DATE:

May 30, 1985

MATTER OF:

Lear Siegler, Inc.--Reconsideration

DIGEST:

1. GAO will not substitute its judgment for that of agency evaluators concerning technical evaluation of protester's proposal where in camera review of source selection documents shows that evaluation was fair and reasonable and consistent with evaluation criteria in the solicitation.
2. In a negotiated procurement, award may be made to a higher priced, higher technically rated offeror as long as the decision to do so is reasonable and in accordance with the stated evaluation criteria.
3. GAO will not attribute bias to procurement officials on the basis of inference or supposition; the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester. Protester has presented no such evidence and, therefore, has not met its burden of proof.
4. Protester's claim for proposal preparation costs is denied because there is no showing that the government acted arbitrarily or capriciously in relation to protester's proposal.

Lear Siegler, Inc., Management Services Division (Lear Siegler), requests reconsideration of our decision Lear Siegler, Inc., B-217231, Jan. 2, 1985, 85-1 CPD ¶ 9, which dismissed as untimely Lear Siegler's protest of the proposed award of an audiovisual services contract by the Headquarters, U.S. Army Training Center and Fort Dix (Army) under request for proposals (RFP) No. DABT35-82-R-0134. Although we now find that Lear Siegler's protest is timely filed, we are denying the protest based on our in camera review finding that the Army had a rational basis for preferring the awardee's more technically sound proposal despite its higher cost to the government.

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In our initial decision we determined, on the basis of facts provided by the protester, that Lear Siegler first objected to the government evaluation procedures under the RFP on September 23, 1983; was advised by government procurement officials on November 1, 1984, that award was pending to another higher priced offeror; and filed its protest with this Office on November 29, 1984. Since the protest to our Office was filed more than 10 working days after Lear Siegler had actual notice of adverse agency action, the protest was deemed untimely under section 21.2(a) of our Bid Protest Procedures (4 C.F.R. Part 21 (1984)).

Lear Siegler now reports that it received notice of the Army's pending award of this contract on November 16, not November 1, 1984, and that the factual error in its letter of protest to this Office resulted from "an inadvertent typographical error". The Army has corroborated the November 16, effective date of notice of award. We therefore find on the basis of the corrected record in this case that Lear Siegler timely filed its protest consistent with section 21.2(a) of our Procedures. Accordingly, we have further developed the administrative record by obtaining an agency report on this procurement from the Army and by soliciting additional comments from the protester and other interested parties.

Solicitation DABT35-82-R-0134, a Commercial Activities Program Request for Proposals for Nonpersonal Services to Staff, Manage, Operate and Maintain the Training Audiovisual Support Center (TASC) at Fort Dix, New Jersey, was issued by the Army on November 12, 1982. As a "Commercial Activities" study, this RFP indicated that the Army would perform a cost comparison between the facility's in-house cost estimate or bid and the proposal of the selected industry representative conducted pursuant to Office of Management and Budget (OMB) Circular A-76, revised, Policies for Acquiring Commercial or Industrial Products and Services needed by the government, issued March 29, 1979. The solicitation established that as the basis for award the "proposal which provides the best overall value to the Government considering technical approach and realistic cost will be selected for cost comparison evaluation."

On June 18, 1984, best and final offers were received; and on August 6, the Source Selection Evaluation Board reported its recommendation to the contracting officer that Technicolor Government Services, Inc. (Technicolor) had the highest technical rating with the best audiovisual technical approach and experience. Although Technicolor's proposed

cost of \$7,003,691 was \$398,183 higher than Lear Siegler's \$6,605,508 proposed cost, the contracting officer made the decision on August 7, that Technicolor provided the best overall value to the government and selected that offer for the OMB Circular A-76 cost comparison. The results of the November 16 cost comparison favored conversion of the TASC operation to contract (as opposed to in-house) performance, and award was made to Technicolor on November 26.

Lear Siegler contends that its proposal provides a greater overall value to the government in both the technical factors and cost areas, and that the \$398,183 difference in the proposed costs between Lear Siegler and Technicolor--when viewed against the evaluation panel's finding that Lear Siegler was technically acceptable--is significant enough to warrant award to Lear Siegler. In support of this contention Lear Siegler states;

"Not having insight, at this time, into the weighting and ranking of proposals according to technical acceptability, it is impossible for us to assess the technical board's evaluation of our proposal. It can be assumed, however, that [Lear Siegler] had a relatively high technical score."

Lear Siegler also generally contends that the award of this contract to Technicolor violated the spirit of OMB Circular A-76 because it, Lear Siegler, could perform these services at maximum cost savings to the government. Since it deems its offer most advantageous to the government, Lear Siegler contends that its proposal should have been selected for comparison with the government's in-house cost estimate. Lear Siegler concludes that in view of the "arbitrary and capricious manner in which the solicitation process was conducted, generating unwarranted expense to the contractor," it should be reimbursed for its proposal preparation expenses. In this connection, D-K Associates, another unsuccessful offeror, has written in support of Lear Siegler's protest and also requested reimbursement of its proposal preparation costs.

The decision whether to perform work in-house or by contract under OMB Circular A-76 is a matter of executive branch policy which we do not generally review as part of our bid protest function. When an agency, however, utilizes the procurement system to aid its decision by setting forth in a solicitation the circumstances under which a contract

will or will not be awarded, we will review an allegation that the agency did not comply with established ground rules for comparing the cost of contracting to the cost of in-house performance. We engage in this limited review on the basis that it would be detrimental to the procurement system if, after the agency induces the submission of offers, there is a faulty or misleading cost comparison that materially affects the decision. DWS, Inc., B-211950.2, Feb. 10, 1984, 84-1 C.P.D. ¶ 164, citing Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 C.P.D. ¶ 317.

In this case the Army apparently conducted an accurate cost comparison which favored conversion of the TASC operation to contract performance; Lear Siegler has not shown any errors or other improprieties in the cost comparison or in the Army's decision to contract out. Lear Siegler's objection is really directed toward the Army's evaluation and selection of the offeror to be used in the cost comparison. As a result, our review of Lear Siegler's protest will be limited to determining whether evaluation of proposals was reasonable and consistent with the RFP's stated evaluation scheme.

The Army has denied the protester access to its competitor's proposal and to much of the source selection material, and, therefore, we have reviewed the proposals and the selection material in camera. Our discussion of their contents necessarily is limited because of the agency's restriction of their disclosure. See Eaton-Kenway, B-212575.2, June 20, 1984, 84-1 C.P.D. ¶ 649.

The function of our review is not to independently determine the relative merit of technical proposals, because the evaluation of proposals is properly the function of the procuring agency which must bear the burden of any difficulties resulting from a defective evaluation. Litton Systems, Inc., Electron Tube Division, 63 Comp. Gen. ¶ 585 (1984), 84-2 C.P.D. ¶ 317 at 4. Procuring agencies are relatively free to determine the manner in which proposals will be evaluated so long as the method selected provides a rational basis for source selection and the actual evaluation is conducted in accordance with the established criteria. Joint Action In Community Service, Inc., B-214564, Aug. 27, 1984, 84-2 C.P.D. ¶ 228 at 3. We will question a contracting official's determination concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. Bank Street College of Education, 63 Comp. Gen. ¶ 393 (1984), 84-1 C.P.D. ¶ 607

at 10. Moreover, the protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's evaluation of its proposal does not in itself render the evaluation unreasonable. Litton Systems, Inc., Electron Tube Division, 63 Comp. Gen. 585, supra.

Lear Siegler questions the technical evaluation performed by the Army in this case, maintaining that the technical merit of Technicolor's proposal did not outweigh the added cost to the government which that proposal represented.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the RFP specifies that cost will be the determinative factor. The Communications Network, B-215902, Dec. 3, 1984, 84-2 C.P.D. ¶ 609. We have upheld awards to higher rated offerors with significantly higher proposed costs where it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268. The procuring agency has the discretion to select a more highly rated technical proposal if doing so is in the government's best interests and is consistent with the evaluation scheme set forth in the solicitation. Haworth, Inc., B-215638.2, Oct. 24, 1984, 84-2 C.P.D. ¶ 461.

The RFP in this case explicitly advised offerors that proposals would be evaluated for technical acceptability and cost realism (as an aid to determine the offeror's understanding of the requirements and to assess the validity of the offeror's approach) and that "[t]echnical acceptability is ranked higher than the attendant cost realism." The RFP stated that the proposal which provides the "best overall value to the Government" considering technical approach and realistic cost would be selected for purposes of the OMB Circular A-76 cost comparison. The RFP also stated that evaluated cost to the government might be the deciding factor for selection "depending on whether the most acceptable overall proposal (excluding cost considerations) is determined to be worth the cost differential, if any." Therefore, as long as the record demonstrates that there was a rational and specific basis for the decision that technical superiority outweighs additional cost, our Office will defer to the agency's judgment. Electronic Data Systems Federal Corp., B-207311, Mar. 16, 1983, 83-1 C.P.D. ¶ 264.

In this case, although Lear Siegler's price was lower than Technicolor's, the record reflects that Technicolor's proposal received a significantly higher technical score, which the contracting officer determined more than offset the price difference between the two proposals. In fact, Technicolor's proposal was the highest rated proposal in all four of the technical areas which the RFP indicated would be evaluated (experience, comprehension of the specifications, general management, and organization and staffing). The Source Selection Evaluation Board determined that Technicolor's proposal had the best audiovisual technical approach and experience with an overall technical score of 894.6 points out of a possible 1000 points based on the evaluation of the proposal against the weighted factors set out in the solicitation. The cost over a 5-year period to implement Technicolor's proposal was \$7,003,691 which the Army considered to be a realistic cost. The protester, Lear Siegler, was technically rated overall at 771 points out of a possible 1000 points at a cost of \$6,605,508, yielding a cost differential of \$398,183 over a 5-year period.

The contracting officer figured that by selecting Technicolor's proposal over Lear Siegler's, the Army would receive 12.40 percent greater technical quality for a 5.68 percent increase in cost. Using the technical panel's detailed comparison of evaluation factors and subfactors yielding weighted technical scores, the contracting officer next figured the value of the technical/cost relationship by dividing the proposed cost by the technical score to determine that the Army was paying \$7,828.86 for each technical point of quality offered by Technicolor, and \$8,567.81 for each technical point of quality offered by Lear Siegler. Thus the contracting officer figured that in terms of what the Army was paying for each point of technical quality, Lear Siegler's proposal was actually 9.44 percent higher in cost than Technicolor's. On the basis of the technical panel's evaluation of Technicolor's proposal as superior to all other offerors, and computations showing that Technicolor's proposal was more cost-effective when viewed from the standpoint of the cost/technical point ratio, the contracting officer determined that Technicolor's proposal provided "the best overall value to the Government considering technical approach and realistic cost" under the evaluation scheme and basis for award set forth in the RFP.

Initially we note that our review here has been hampered by the failure of the Army to provide any narrative summary or other verbal analysis to facilitate our understanding of the voluminous point scoring documents. What we do have is a compendium of subjective point scoring

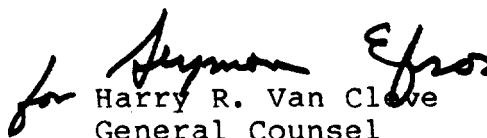
documents by several evaluators on 233 elements under four technical factors. In the absence of any narrative summarizing the rationale underlying the point scoring, we have reviewed the proposals to assure that the point scores justifiably represent both substantive and quantifiable differences between and among the offerors' proposals.

From our in camera review in this case, we conclude that the Army's evaluation had a reasonable basis and was in conformity with the evaluation provisions of the RFP. For example, in the area of experience, for which Technicolor was rated significantly higher than Lear Siegler, the latter's approach to audiovisual productions, one of the experience subfactors, was limited to an expression of the requirements it would fulfill without any expansion on the operational methodology it would apply. Technicolor, on the other hand, provided a far more comprehensive treatment, including specific information on the production techniques to be used along with specified steps for assuring that quality standards will be met. Under general management, where again Technicolor received a higher rating than did Lear Siegler, our review of the competing proposals shows that Lear Siegler essentially pledged to do well in the subfactor areas, such as government interfacing, while Technicolor described in much greater detail what it would do and how it would do it. In short, we find the record shows a rational basis for the Army's evaluation of proposals and for the selection decision.

Lear Siegler also alleges gross negligence or questionable intent on the part of the government's Source Selection Evaluation Panel in connection with its evaluation of offerors' comparative qualifications. Where, as here, a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the award, the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester, since contracting officials otherwise are presumed to act in good faith. Lion Brothers Co., Inc., B-212960, Dec. 20, 1983, 84-1 C.P.D. ¶ 7. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition. Eaton-Kenway, B-212575.2, supra. Lear Siegler has presented no probative evidence to support its allegation in this respect, and we, therefore, find that Lear Siegler has failed to meet its burden of proof.

The protest against the selection of Technicolor is denied.

Finally, Lear Siegler and D-K Associates claim proposal preparation costs in connection with this procurement. The recovery of proposal preparation costs is based on the theory that in issuing a solicitation the government enters into an implied contract with offerors that their proposals will be fairly and honestly considered. Unified Industries Inc., B-212996.2, Aug. 1, 1984, 84-2 C.P.D. ¶ 139. This implied contract may be breached, and the offeror thus entitled to recover its costs, where the record indicates both that the agency's actions were arbitrary and capricious and that these actions prejudiced the claimant. Unified Industries Inc., B-212996.2, supra, citing Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 C.P.D. ¶ 219. In view of our determination on Lear Siegler's protest, and since there is no evidence before us that the government acted improperly, there is no basis on which to grant either Lear Siegler's or D-K Associates' claim for proposal preparation costs. Tom Shaw, Inc., B-214191, Aug. 27, 1984, 84-2 C.P.D. ¶ 227.


for Harry R. Van Cleve
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