

DECISION

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

FILE: B-218255.2 **DATE:** June 12, 1985
MATTER OF: Petro-Engineering, Inc.

DIGEST:

1. Allegations that (1) the services described in the solicitation should have been secured through a formally-advertised procurement; (2) the solicitation's specifications were unclear; and (3) the agency failed to include certain clauses in its request for best and final offers clarifying the alleged specification uncertainties are untimely and not for consideration since the facts on which the allegations are based should have been apparent prior to either the initial or final closing date but were not raised until after award.
2. Protest that after best and final offers discussions were reopened only with one competitor is untimely where filed more than 10 working days after the protester knew of the alleged reopening.
3. Since the solicitation contemplated an ordinary negotiated procurement and not one for architect-engineering services as argued by the protester, discussions had to be held with all offerors in the competitive range.
4. Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and GAO will not disturb the evaluation unless shown to be arbitrary or in violation of the procurement laws and regulations.
5. Where a solicitation does not indicate the relative importance of technical and cost considerations, it must be presumed that technical and cost will be approximately equal in weight.
6. Evaluated costs rather than proposed costs provide a sounder basis for determining the

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most advantageous proposal in cost-reimbursement procurements.

7. GAO generally will not become involved in appraising the qualifications of contracting personnel involved in the technical evaluation of offers.
8. The contracting agency has the responsibility for determining whether a company competing for a government contract has a conflict of interest, and GAO will overturn the agency's determination only when it is shown to be unreasonable.

Petro-Engineering, Inc. (Petro) protests the award of a cost-reimbursement contract to Williams Brothers Engineering Company (WBEC) under request for proposals (RFP) No. MOROCCO-84-001 issued by the Agency for International Development (AID) for technical services and training to be provided to the government of Morocco's petroleum company, ONAREP. Petro also seeks reimbursement for the cost of preparing its proposal.

AID received six proposals in response to the RFP. Following a technical evaluation by AID's evaluation board, only the proposals of Petro and WBEC were found to be technically acceptable, and were placed in the competitive range. AID then conducted discussions with Petro and WBEC about the technical and cost aspects of their proposals. After both companies submitted best and final offers in response to AID's request, WBEC was selected as having the proposal that was most advantageous to the government.

Petro contends that WBEC's proposal should have been found technically inferior to its proposal and that, as a subsidiary of Ashland Oil Company, WBEC will divulge confidential information from ONAREP to its parent company for use in oil exploration. Petro also complains about several of the solicitation's specifications; AID's conduct of the negotiations; and the composition of the evaluation board.

We dismiss the protest in part and deny it in part.

Timeliness

Petro argues that the services should have been secured through a formally-advertised procurement, rather

than a negotiated one. Petro also asserts that the specifications in the RFP as issued were incomplete and unclear in a number of respects.

Under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), a protest against alleged solicitation improprieties that are apparent prior to the closing date for receipt of initial proposals must be filed before that date. Here, both the alleged defect in the specifications and the fact that this was a negotiated procurement were evident to Petro when it received the RFP. Since Petro did not raise the issues prior to the closing date for receipt of initial proposals, we will not consider them on the merits.

Petro further contends that AID failed to furnish it the "final contract clauses" that AID allegedly promised would clarify certain RFP requirements and which Petro requested at the end of negotiations. According to Petro, this adversely affected the company's contingency and risk evaluations and thus the company's final price offer.

Petro's complaint that AID did not fully respond to requests for documents in effect constitutes a protest against AID's failure to incorporate alleged RFP clarifications in AID's request for best and final offers. Where alleged deficiencies in a call for best and final are apparent before the date established for submission of such offers, a protest filed thereafter is untimely. 4 C.F.R. § 21.2(b)(1). Petro, however, did not protest this matter until after best and final offers were due, so that the protest on this issue will not be considered.

Finally, Petro asserts in its comments to AID's protest report that AID reopened negotiations with WBEC after the submission of best and final offers and prior to final award by allowing WBEC to replace one of its proposed resident technical advisers with another. In response, AID denies that it did anything more at that time than finalize the contract terms already agreed upon by the parties.

Our Bid Protest Procedures require that protests against other than apparent solicitation improprieties be filed not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(b)(2). Since Petro indicates that it knew of the alleged substitution of resident advisers shortly after the

selection of WBEC for award, the company's protest that this constituted an improper reopening of negotiations, filed nearly 5 months later, is clearly untimely.

Petro argues that we should decide any untimely issue on the merits based on section 21.2(c) of our Procedures, which provides that an untimely protest may be considered for good cause shown or where a protest raises issues significant to procurement practices.

We will not consider the protest on either basis. The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the filing of a timely protest. Pacific Drilling, Inc., B-205542, May 11, 1982, 82-1 C.P.D. ¶ 454. We are not aware of any compelling reason for Petro's failure to file a timely protest on the above-mentioned issues.

As to the significant issue exception to our timeliness rules, this exception is strictly construed and sparingly used to prevent our timeliness rules from being rendered meaningless. Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 C.P.D. ¶ 55. In order for the significant issue exception to be applicable, the subject matter of the protest must not only evidence a matter of widespread interest or importance to the procurement community, but must also involve a matter which has not been considered on the merits in previous decisions. Sequoia Pacific Corp., B-199583, Jan. 7, 1981, 81-1 C.P.D. ¶ 13. The issues Petro raises, while obviously significant to the firm, are not significant under that standard.

Discussions

Petro asserts that AID violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 36.606 (1984), by conducting concurrent negotiations with it and WBEC, rather than first negotiating with Petro to the point of rejecting a best and final offer from the company before beginning negotiations with WBEC.

There is no merit to Petro's argument. The cited regulation sets forth the policies and procedures for discussions in negotiated procurement for architect-engineer services, whereas AID's solicitation clearly contemplated an ordinary negotiated procurement. In such procurements, discussions must be held with all offerors in

the competitive range. See Harrison Systems Ltd., 63 Comp. Gen. 379 (1984), 84-1 C.P.D. ¶ 572.

Technical Evaluation

Petro contends that AID erred in determining that WBEC's technical proposal was better than Petro's. Petro alleges that during discussions the agency's procurement officials spoke very highly of its technical proposal yet, according to Petro, AID's final technical evaluation resulted in Petro's technical ranking being below that of WBEC. In Petro's view, the result of this apparent downgrading of its technical proposal was completely contrary to the initial evaluation by AID's evaluation board.

Petro also contends that WBEC should not have received the high technical ranking that it did because three of the six resident advisers proposed by WBEC had been rejected by Petro as having inferior qualifications. Specifically, Petro alleges that WBEC's proposed manager applied for a position with Petro but was rejected because his resume did not show any experience in gas reservoir engineering, which Petro asserts was a critical RFP requirement, and that Petro rejected WBEC's proposed exploration geologist because he did not possess the Master's degree he listed as having on his resume.

The determination of the relative merits of proposals, particularly with respect to technical considerations, is primarily the responsibility of the contracting agency, not our Office, 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. In light of this, we repeatedly have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and that their decision will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Vibra-Tech Engineers Inc., B-209541.2, May 23, 1983, 83-1 C.P.D. ¶ 550.

Additionally, the protester has the burden to prove its case, so that the fact that the protester does not agree with the agency's technical evaluations does not in itself render the evaluations unreasonable. Dynalectron Corp., B-199741, July 31, 1981, 81-2 C.P.D. ¶ 70.

The RFP provided that 25 percent of the offeror's technical score would be based on the experience and academic credentials of the offeror's proposed resident exploration advisers, and 16 percent on the offeror's proposed production technology advisers. The largest portion of the offeror's technical score, 35 percent, would be for the experience and academic credentials of the offeror's proposed resident management and financial advisers. Also, 20 percent of the offeror's technical score would be for the offeror's corporate experience in giving management/financial advice to state-owned petroleum companies, and for the offeror's corporate experience in developing and presenting in-country training seminars. (The remaining 4 percent concerned proposed short-term advisers.)

Initially, we point out that following AID's initial technical evaluation the technical ranking of the Petro and WBEC proposals was too close to allow any final ranking between the two companies, although AID's evaluation board did give Petro a marginally higher technical point score. The record shows that the fact that AID found that WBEC had the stronger technical proposal after evaluating the best and final offers of the two companies was attributable as much to improvements made by WBEC in its proposal as to any downgrading of Petro's proposal.

Petro's sole complaint about the merits of WBEC's technical offer is that, in Petro's view, the awardee's proposed resident technical advisers lacked the requisite qualifications needed to perform the contract properly. This complaint, however, essentially amounts to nothing more than a difference in judgment between Petro and AID. AID found WBEC's proposed staff to be quite knowledgeable and well aware of the required duties. A mere disagreement between the protester and the agency over a technical evaluation is not sufficient, in itself, to show that the agency's judgment was unreasonable. National Council for Urban Economic Development, Inc., B-213434, Aug. 1, 1984, 84-2 C.P.D. ¶ 140.

Cost/Technical Tradeoff

Petro asserts that in making its award decision, AID ignored the impact of Petro's technical approach on any cost considerations that had to be made. According to Petro, AID should have based its award decision primarily

on technical grounds and ignored any minor cost discrepancies between Petro's proposal and WBEC's. Petro complains that AID instead based its award decision primarily on cost.

The RFP stated that cost would bear no weight in the technical evaluation, but nevertheless would be an important factor. Offerors were advised that after the initial technical evaluation and ranking, costs would be carefully considered in determining the firms found to be in the competitive range for negotiations. Award was to go "to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered."

Although the above-quoted language does not explicitly indicate the relative importance of the technical evaluation versus cost, we frequently have held that it clearly means that technical and cost considerations will be given equal weight in making an award. See, e.g., Development Associates, Inc., B-205380, July 12,, 1982, 82-2 C.P.D. ¶ 37; University of New Orleans, B-184194, May 26, 1978, 78-1 C.P.D. ¶ 401. Therefore, to the extent that Petro is challenging the award criteria by arguing that cost considerations should have been less important in making the award, the company's protest is untimely since it is based on an alleged solicitation impropriety that was apparent before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1).

With regard to AID's use of the technical and cost factors in determining that WBEC was entitled to the award, the record shows, as noted above, that AID found that while Petro's technical proposal was impressive, WBEC's was stronger, and Petro's best and final offer was almost 20 percent more than WBEC's--\$4,694,403 to \$3,974,290. In negotiated procurements, selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Lockheed Corp., B-199741.2, July 31, 1981, 81-2 C.P.D. ¶ 71. Where the agency's selection official has made a cost/technical tradeoff, the question is whether the tradeoff was reasonable in light of the solicitation's evaluation scheme. Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 C.P.D. ¶ 365. Given the fact that cost was of equal weight to technical, the significant difference in cost between Petro's proposal and WBEC's was sufficient to justify the award to WBEC.

Cost Evaluation

Petro claims that because this procurement involves a cost-reimbursement contract, uncertainties in the scope of work did not permit costs to be evaluated accurately, so that AID's conclusion that WBEC's proposal would cost the government less than would Petro's is tenuous.

Petro is correct to the extent that, by the nature of cost-reimbursement contracts, proposed costs do not provide a sound basis for determining the most advantageous proposal, since the government is required within certain limits to pay the contractor's actual, allowable and allocable costs. 52 Comp. Gen. 870 (1973). That does not mean, however, that proposed costs should be discounted; it only means that the government cannot simply rely on proposed costs in selecting a contractor, but instead needs to examine their realism. Moreover, we have stated that the procuring agency's judgment in evaluating proposed costs is entitled to great weight, since the agency is in the best position to determine the realism of costs and must bear the major criticism for cost overruns because of defective cost analyses. Lockheed Corp., B-199741.2, supra. Thus, we will not second-guess an agency's cost evaluation unless it is not supported by a reasonable basis. Triple A Shipyards, B-213738, July 2, 1984, 84-2 C.P.D. ¶ 4.

The record is clear that AID thoroughly evaluated all aspects of Petro's initial proposed costs and discussed all the weaknesses and deficiencies it found with Petro prior to providing Petro the opportunity to submit a best and final offer. Although AID was impressed with Petro's technical proposal, the agency found Petro's cost proposal difficult to follow and inflated. In fact, AID found Petro's estimated costs to be almost so high as to place the company outside the competitive range. AID, however, decided that the company could be brought into the competitive range through discussions. Nevertheless, the agency's procurement officials advised Petro at the beginning of the discussions that "major cuts" in Petro's proposed costs would have to be made before Petro could even be considered for award. In this regard, the record shows that as AID went through Petro's cost proposal page by page, it became apparent to the agency that Petro did not "understand the concept of overhead and G and A as well as other more common aspects of cost reimbursement contracts."

The record also shows that AID discussed with WBEC several areas of that firm's initial proposed costs. AID determined that while WBEC's final proposed costs for personnel and overhead had increased, they nevertheless were reasonable.

Under the circumstances, we have no legal basis to question AID's cost realism evaluations. The protest on this issue is denied.

Overseas Salary Differential

Petro protests AID's failure to include in the RFP the fact that additional compensation for service in foreign areas where conditions of environment differ substantially from conditions in the United States was inapplicable to employment service in Morocco. Petro alleges that it therefore allowed for salary differentials in the employment agreements it reached, and included these salary differentials in its proposed costs.

The record shows that Petro in fact was specifically advised by AID during discussions that any salary differential for its proposed employees probably was not an allowable item of cost, but that if Petro decided that it had to provide a salary differential, then the cost should be added to its overall proposed cost and AID would then determine its allowability. Consequently, Petro clearly had the opportunity to investigate the situation and, if warranted, alter its employment agreements and adjust proposed costs in this area prior to submitting a best and final offer. Therefore, we consider that any costs for overseas salary differentials in Petro's best and final offer were included solely at Petro's discretion rather than because of any failure on the part of AID to inform the company of the consequences of including such costs.

Alleged Disclosure of Petro's Cost Data

Petro alleges that AID's procurement officials improperly disclosed some of its cost data to WBEC when AID requested best and final offers from the two offerors. According to Petro, very specific and detailed cost information concerning oil and gas reservoir engineering was disclosed to AID during discussions which then was "diffused directly or indirectly" to WBEC.

Petro's protest thus is based only on the suspicion that its cost data was passed on to WBEC. AID categorically denies that any pricing data or other competitive information about Petro was disclosed to WBEC either during discussions or in the request for best and final offers. As stated above, the protester has the burden of affirmatively proving its case. Since Petro has presented us with no evidence of actual disclosure of its cost proposal to WBEC, we must conclude that Petro's protest on this issue is merely speculative and that Petro has failed to meet its burden of proof.

Composition of AID's Evaluation Board

Petro claims that AID's proposal evaluation board was composed of members who had insufficient technical expertise and experience to evaluate the proposals properly. Petro alleges that the board did not include the necessary specialists in exploration and development geology, geophysics, surface and reservoir engineering, computer systems engineering, and petroleum company management. Petro asserts that its technical proposal would have been ranked significantly higher than WBEC's had AID's evaluation board been made up of these specialists.

AID states that the composition of its evaluation board was consistent in all respects with the FAR for negotiated procurements in that it was composed of a chairman representing AID's project office, a representative of AID's contracting office, and a representative of the AID energy office involved in the project. AID also states that it hired an independent energy consultant to complete the board.

Our Office will not become involved in appraising the qualifications of contracting personnel involved in the technical evaluation of offers absent a showing of fraud, conflict of interest, or actual bias, on the part of the evaluators, not present here. PAE GmbH, B-212403.3, et al., July 24, 1984, 84-2 C.P.D. ¶ 94; University of the District of Columbia, B-213747, Sept. 24, 1984, 84-2 C.P.D. ¶ 330. Therefore, we will not consider Petro's challenge to the expertise of the members of AID's board or Petro's objection that AID's board lacked a sufficient number of technical experts.

Conflict of Interest

Petro alleges that WBEC will have a conflict of interest in serving as a consultant to ONAREP on behalf of AID because it is a wholly-owned subsidiary of Ashland Oil Company, which stands to benefit substantially from any information that WBEC obtains in its consulting capacity. Petro points out that the RFP specifically requires the contractor to assist ONAREP in attracting oil companies like Ashland Oil to explore for hydrocarbon reservoirs in Morocco through joint venture arrangements.

The responsibility for determining whether a company has a conflict of interest and to what extent the company should be excluded from a competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94. Further, mere inferences of actual or potential conflict of interest do not afford a basis for disturbing a contract award--there must be "hard facts" showing an actual conflict of interest. See Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 C.P.D. ¶ 17.

Petro has not presented us with any evidence showing an actual conflict of interest other than its argument that a conflict cannot be "avoided, neutralized or mitigated" because of WBEC's corporate relationship with Ashland Oil. Moreover, the record shows that both WBEC and Petro stated in their best and final offers that all information that would be obtained from the advisory role to ONAREP would be kept strictly confidential. Also, WBEC's contract contains a clause wherein WBEC promises such confidentiality. Consequently, we think that AID has taken adequate steps to protect against a possible conflict of interest. See Columbia Research Corp., 61 Comp. Gen. 194 (1982), 82-1 C.P.D. ¶ 8. Further, whether during performance WBEC actually fulfills its obligation not to disclose is a matter of contract administration that we do not review, since the procuring agency has the responsibility for administering the contract. J.R.'s Crown Tours, B-216321, Sept. 24, 1984, 84-2 C.P.D. ¶ 340.

Bias

Petro alleges that AID's contracting officer was instructed to favor WBEC for award.

Where the subjective motivation of an agency's procurement personnel is being challenged, it admittedly is difficult for a protester to establish--on the written record which forms the basis for our Office's decisions in protests--the existence of bias. See Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. Nevertheless, if the protester fails to demonstrate bias, its allegations must properly be regarded as mere speculation. Sperry Rand Corp., 56 Comp. Gen. 312, 319 (1977), 77-1 C.P.D. ¶ 77. Further, unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 C.P.D. ¶ 541. Here, Petro's basis for the allegation of bias is an anonymous telephone call that it received from a person supposedly familiar with the procurement. We consider this insufficient support to establish bias. Therefore, Petro has not met its burden of proof.

Award Pending the Protest

Finally, Petro objects to AID's awarding of a contract immediately after the filing of its protest. In response, AID asserts that award before resolution of the protest was justified under the applicable procurement regulations. In any event, we have consistently held that the alleged failure of an agency to follow regulatory requirements in making an award notwithstanding a pending protest is merely a procedural defect that does not affect the validity of an otherwise valid award. Creative Electric Inc., B-206684, July 15, 1983, 83-2 C.P.D. ¶ 95

Petro's protest is dismissed in part and denied in part. Accordingly, Petro's claim for proposal preparation costs also is denied. Management Services, Inc., B-206364, Aug. 23, 1982, 82-2 C.P.D. ¶ 164.

for Seymour E. Eaves
Harry R. Van Cleave
General Counsel