DECISION

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

FILE: B-218249.2 **DATE:** July 19, 1985

MATTER OF: Washington State Commission for Vocational Education--Reconsideration

DIGEST:

1. Protesters must comply with requirement to furnish a copy of a protest filed with GAO to the contracting agency whether or not a "de novo" review is requested of a previous agency protest decision.

2. Allegation of possible conflict of interest by an offeror's former employee who aided in preparation of a competitor's proposal involves a dispute between private parties and is not a basis for GAO to object to an otherwise valid award.

3. Where bias is alleged, protester has burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

4. A protester's disagreement with an agency's evaluation of its proposal does not of itself render the evaluation objectionable in the absence of a showing that the evaluation was unreasonable, arbitrary or unlawful.

5. GAO does not review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials or the misapplication of a definitive responsibility criteria. A restatement of general standards of responsibility in a solicitation does not constitute definitive responsibility criteria.

The Washington State Commission for Vocational Education (CVE) requests reconsideration of our dismissal of its protest concerning the award of a contract to Northwest Futures, Inc. (NWF) under request for proposals (RFP) No. 85-003, issued by the Department of Education. The RFP sought proposals to establish a vocational education curriculum coordination center to assist states in improving their vocational programs. We dismissed the protest because CVE failed to furnish a copy of its protest to the contracting agency within 1-day after the protest was filed with our Office. For the reasons that follow, we reopen the file and deny the protest on its merits.

Propriety of the Dismissal

On January 8, 1985, CVE sent a letter to Education indicating its "inten[t] to appeal" the award of the negotiated contract. CVE had already been furnished award evaluation documents by Education, and CVE's letter stated that it was intended to "preserve [CVE's] appeal rights" since CVE was unaware of the procedures for filing a protest. (CVE did not provide our Office with a copy of this letter when it filed its protest here.) The protester then filed a protest with Education on February 4. By letter dated February 22, the agency formally denied the protest. On February 28, CVE filed its protest with our Office and requested a "de novo" review of the protest filed with the agency. The protest letter showed that copies of the protest had been sent to two named individuals.

Because it was not clear whether the protest was timely, we requested that the protester immediately submit a copy of the January 8 letter (which was referenced in its protest); the protester did so. While questions still remained about the timeliness of the protest, we decided to request an agency report from Education and so informed CVE by notice confirming receipt of its protest. Subsequently, the agency informed our Office that it had not received a copy of the protest from CVE. The agency also informed us that the named individuals that had been sent copies were state, not federal, officials and were unaffiliated with Education. We then dismissed the protest. See GAO Bid Protest Regulations, 4 C.F.R. § 21.1(a),(f) (1985).

CVE argues that because it requested our de novo review of the protest it had filed with Education on February 4, it obviously had already furnished a copy of the protest to the agency in satisfaction of the requirement of 4 C.F.R. § 21.1(a). According to CVE, it thus had complied in substance, if not in form, with that requirement.

Under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199, and our implementing regulations, an agency must file a written report with our Office within a strict time limit of 25 working days from the date the agency receives telephone notice of the protest from our Office. 4 C.F.R. § 21.3(c). The report must contain a detailed response to allegations raised by a protester. We think that possession by the agency of a written copy of the protest is essential to its ability to accomplish this task, even where the protest has previously been filed with and denied by the agency. We fail to see how an agency can know, without a copy of the protest, whether the protester desires a de novo review of all the issues previously raised, whether certain issues were abandoned, whether new arguments or points of law are made, or whether entirely new protest issues are raised. Thus, any delay in furnishing a copy of the protest to the agency potentially delays subsequent protest proceedings.

Nevertheless, in the interests of fairness, we will consider this protest on its merits since our regulations are new and have not been subject to extensive interpretation by our Office. We cannot say that CVE's interpretation that a copy of its protest to our Office had been furnished to Education was totally unreasonable where essentially the same issues were raised in CVE's initial protest to the agency. In the future, however, protesters must comply with the requirement to furnish a copy of the protest to the agency whether or not a de novo review is requested of a previous agency protest decision.

Timeliness

The agency maintains that the protest is untimely because CVE knew the basis for its protest on December 21, 1984, when the agency orally notified CVE of the award to NWF, but did not protest within 10 working days thereafter,

as required by our Bid Protest Regulations. See 4 C.F.R. § 21.2. CVE maintains that it did not know the basis for its protest until Education responded to its Freedom of Information Act request on January 28, 1985.

CVE's protest essentially challenges the propriety of the evaluation process. Therefore, we do not agree that CVE knew its basis of protest when it was informed of the award to NWF. The record shows that Education furnished CVE with copies of the competing proposal (with a few pages removed for proprietary reasons) and all evaluation documents on January 7 and 8, and we think it was at this point that CVE knew or should have known the basis for its protest. We also think that CVE timely protested within 10 working days from this date. First, on or about January 7, while reviewing the evaluation documents and requesting instructions on bid protest procedures from the contracting officer, a representative of CVE orally expressed his intent to appeal and thereby preserve CVE's right to contest the award. Further, by letter dated January 8, CVE expressly notified Education as follows:

> "Notice is hereby served that [CVE] intends to appeal the action of the U.S. Department of Education in awarding contract #RFP 85-003 for the Northwestern Curriculum Coordination Center to Northwest Futures, Inc.
>
> "This letter is written as a result of meetings in Washington, D.C. . . . Since the [Education] representatives were unable to provide appeal forms or procedural information, we assume this letter of intent provides sufficient notice to preserve our appeal rights."

This letter was a culmination of telephone conversations and meetings in which CVE expressed dismay and continuing dissatisfaction with the procurement results.

We have found that a letter of intent to protest, filed with an agency, constitutes a sufficient protest where it shows awareness of a basis for protest and seeks corrective action from the agency. See Swintec Corp., et al., B-212395.2, et al., Apr. 24, 1984, 84-1 CPD ¶ 466. CVE's January 8 letter, in the context in which it was

sent, clearly expressed dissatisfaction with the evaluation results and implicitly sought corrective action. We therefore consider CVE's January 8 letter a timely protest to the agency. Further, CVE's subsequent protest to our Office is also timely since it was filed within 10 working days after its agency protest was denied. 4 C.F.R. § 21.2(a)(3).

The Evaluation Process and Analysis

The RFP advised offerors that award would be made to the offeror whose proposal was the "most favorable" to the government on the basis of technical merit and cost; however, technical merit was stated to be of paramount importance. Five evaluators scored the two proposals received in response to the RFP. The five technical scores for each proposal were averaged and then the cost factor was taken into consideration. The awardee, NWF, offered a final price of $139,851, while the protester offered $172,313. The average evaulated technical score for CVE was 77.6; the average score for NWF was 90.6. Thus, NWF was rated highest technically and lowest from a cost standpoint. Accordingly, Education awarded the contract to NWF.

CVE's first and principal contention is that a conflict of interest contaminated the integrity of the procurement process. CVE was the incumbent contractor for this procurement. The individual who is the corportate secretary and proposed project director for NWF was allegedly on CVE's payroll from September 1973 until January 1985. This same individual allegedly incorporated NWF while still employed by CVE. Apparently, the individual also helped prepare NWF's proposal and sent letters critical of CVE to various individuals while still employed by CVE. Also, NWF's proposed project assistant allegedly worked at the time for CVE, helped prepare NWF's proposal, and did not reveal that fact in NWF's proposal. CVE argues, among other things, that under Washington State statutes, state employees are prohibited from participating in transactions involving the state, in which the employee also has a financial interest. According to CVE, the actions by the two individuals also constituted an "organizational conflict of interest" that detrimentally affected its competitive position.

The issues raised by CVE are outside the scope of our bid protest function. First, the alleged violation of state conflict of interest statutes is a matter for resolution by the courts of that jurisdiction, not by this Office. Cf. The Dun & Bradstreet Corp., B-213790, June 13, 1984, 84-1 CPD ¶ 626 (where we took the same position with respect to an allegation that a contractor's approach to contract performance constituted the unauthorized practice of law under state statutes). Further, an organizational conflict of interest exists only when the nature of the work to be performed under a proposed government contract may, without some restriction on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity in performing the contract work. See the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.501 (1984). The allegations here, however, pertain to the actions of two former employees of CVE. We have specifically held that similar actions during the competitive process by former employees of an offeror involve a dispute between private parties concerning business practices and relationships, and are beyond the adjudicatory function of this Office. See DSG Corp., B-213070, Sep. 26, 1983, 83-2 CPD ¶ 378; Ted R. Brown & Associates, Inc., B-201724, Feb. 23, 1981, 81-1 CPD ¶ 127.

CVE also alleges that one of the agency's evaluators, a contract specialist, had an ex parte contact with NWF's proposed project assistant contrary to the FAR, 48 C.F.R. § 3.101-1, which requires impartiality and the avoidance of conflict of interest in government-contractor relations. Specifically, CVE alleges that the agency contract specialist questioned the time and attendance of a CVE employee (who worked on CVE's contract with the agency) and that she did so because of a "false rumor" started by NWF's proposed project assistant, then also employed by CVE. CVE has presented no evidence to support its contention that any "ex parte" contract actually occurred between the agency contract specialist and the proposed project assistant, nor is there any indication of how the alleged communication amounted to a violation of the FAR. The protester has the burden of affirmatively proving its case and unsupported allegations do not satisfy this burden. Lightning Location and Protection, Inc., B-215480, Feb. 21, 1985, 85-1 CPD ¶ 216. Accordingly, we find no merit to this contention.

Next, CVE contests certain aspects of the evaluation and the scoring results and suggests that there was bias and inconsistency in the technical evaluation.

In deciding protests of an agency's evaluation of proposals, our Office does not rescore the proposals or otherwise substitute our judgment for that of evaluation team members. Because the evaluation of proposals is largely subjective, it is primarily the responsibility of the procuring agency, and not subject to objection by our Office unless shown to be unreasonable, arbitrary or in violation of law. Credit Bureau Reports Inc., B-209780, June 20, 1983, 83-1 CPD ¶ 670. The fact that a protester does not agree with an agency's evaluation of its proposal does not itself render the evaluation unreasonable. Frank E. Basil, Inc., et al., B-208133, Jan. 25 1983, 83-1 CPD ¶ 91. Further, in cases where bias is alleged, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Todd Logistics, Inc., B-203808, Aug. 19, 1982, 82-2 CPD ¶ 157; Cerberonics, Inc., B-205063, Apr. 14 1982, 82-1 CPD ¶ 345.

CVE complains that the evaluators considered statements by NWF in its proposal which criticized CVE's past and potential future performance, including allegations that CVE experienced "continuous turnover of project staff" and therefore lacked adequate staff commitment. CVE states that as a result, its proposal was unfairly penalized in this area. CVE also notes that although letters of assurance from proposed staff were not required by the solicitation, Education evaluators found that CVE had not provided "documented assurances" that proposed staff would serve during performance of the contract. CVE argues that this is evidence of bias on the part of agency evaluators.

We know of no law or regulation which prohibits an offeror from adversely criticizing in its proposal the performance of an incumbent offeror. Moreover, nothing in the record supports CVE's assertion that the evaluators considered these criticisms in evaluating CVE's proposal. Rather, as CVE recognizes, the record shows that the evaluators found that CVE's proposal lacked documented assurances that its proposed staff would serve on the project. While the RFP did not require letters of

assurance from proposed staff, it did require that technical proposals include "evidence of key staffs and proposed consultants' intentions to participate in the project." We therefore find nothing improper in the evaluators' consideration of CVE's staff commitments.

Concerning the alleged bias, CVE, aside from suspicions and inferences, has presented no substantive proof establishing bias on the part of procurement officials. Where, as here, the written records fail to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Todd Logistics, Inc., supra.

CVE also faults Education's evaluation because NWF is a new organization that allegedly should not have been credited with any institutional experience, which was one of the evaluation criteria established by the RFP. However, as described in the RFP, this criterion actually included much more than the past experience of the organization. Also included as areas to be considered under this factor were evidence of commitment to the purposes and tasks of the project, the capability of the offeror to immediately initiate and maintain liaison functions with regional states, and availability of facilities and instructional material resources appropriate to the project. Therefore, the fact that NWF was newly formed did not preclude NWF from receiving any points for this criterion.

In this connection, we note that NWF proposed a "collaborative effort" with a local college which included staff sharing and lease of space at the college. While CVE disputes the extent and nature of this collaborative relationship, there are letters in the record from officials of the college which reasonably support NWF's claim of a collaborative institutional effort in performing the contract work.

CVE also questions the evaluators' consideration of the prior experience of NWF's proposed project director under the institutional experience evaluation criterion. CVE points out that "staff competencies and experience" was listed as a separate evaluation factor, and explicitly included experience of the project director. We agree that the evaluators should not have considered the proposed project director's experience in evaluating institutional

experience under these circumstances. See Data Flow Corp., et al., 62 Comp. Gen. 506 (1983), 83-2 CPD 57; Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258. Nevertheless, we do not find this a sufficient basis to sustain the protest given NWF's overall technical and cost advantage over CVE. In this connection, the record shows that only two of the five evaluators cited the proposed project director's experience as satisfying the institutional experience requirement. Further, as previously indicated, that criterion encompassed several considerations in addition to experience per se, and the evaluators who did cite the proposed project director's experience also relied on other factors (such as commitment to the project) in arriving at their total score for institutional experience.

In addition, CVE alleges that NWF misled Education evaluators by using outdated letters of support, many of which were actually written on behalf of CVE when NWF's proposed project director was CVE's project director. The letters were submitted along with NWF's proposal as support for NWF's proposed undertaking. We fail to see anything improper in NWF's use of these letters. There is no evidence that NWF misrepresented the context in which the letters were sent, to whom they were sent, or when they were sent. Accordingly, we find no merit to CVE's contention in this regard.

Finally, CVE alleges that NWF is not a responsible contractor under the standards set forth in the RFP. The solicitation, however, in setting responsibility standards, merely restated the general considerations and the general standards contained in the procurement regulations for determining the responsibility of a prospective contractor. See FAR, 48 C.F.R. § 9.104-1. Our Office does not review protests against affirmative determinations of responsibility unless there is a showing of possible fraud or bad faith on the part of procuring officials or of a possible failure to apply definitive responsibility criteria contained in a solicitation. Dragon Services, Inc., B-213041, Mar. 19, 1984, 84-1 CPD ¶ 322. General principles of responsibility restated in a solicitation do not constitute definitive responsibility criteria. Accordingly, neither exception is present here.

The protest is denied.

for Harry R. Van Cleve
General Counsel