

DECISION



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

Lieberman
PL-I
32110

FILE: B-219344

DATE: August 29, 1985

MATTER OF: NAHB Research Foundation, Inc.

DIGEST:

1. Responsibility for determining whether a firm has a conflict of interest if the firm is awarded a particular contract and to what extent the firm should be excluded from competition rests with the procuring agency and we will overturn such a determination only when it is shown to be unreasonable.
2. Protest that award to selected contractor creates an organizational conflict of interest is denied where agency has recognized potential for conflict and taken appropriate safeguards, awardee's proposal contains explicit representation that it will safeguard against such conflicts, and the agency retains right of prior approval of awardee's contract personnel.
3. Bias in the evaluation of proposals will not be attributed on the basis of inference or supposition, and detailed or challenging questions by agency personnel do not establish bias.
4. Agency nondisclosure of information in report to protester must be pursued under the Freedom of Information Act, and GAO has no authority to determine what information must be disclosed by agency.

033011/127785

NAHB Research Foundation, Inc. (NAHB), protests the award of a contract to the National Conference of States on Building Codes and Standards, Inc. (NCSBCS), under request for proposals (RFP) No. HC-13190 issued by the Department of Housing and Urban Development (HUD). The RFP was issued to obtain contractor services to monitor inspections of manufactured home design and manufacturing required under the National Manufactured Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 (1982), as implemented by regulations contained in 24 C.F.R. part 3282 (1985). NAHB contends that the procurement was biased in favor of the incumbent, NCSBCS, and that the award to the incumbent creates an improper organizational conflict of interest.

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

The RFP was issued on October 25, 1984, and called for a cost-reimbursement contract, with technical factors being evaluated as more significant than proposed cost. HUD received four timely proposals and, after evaluation, the Source Evaluation Board (SEB) established a competitive range consisting of NAHB and NCSBCS. Best and final offers were submitted on January 17, 1985. NAHB's technical score was 708 and NCSBCS's score was 807. Despite NCSBCS's higher proposed cost (higher by approximately \$530,000, just under 10 percent of the total cost), the SEB recommended award to NCSBCS. The HUD source selection official (SSO) determined that further discussions were necessary in order to clarify certain costs and to confirm the difference in technical scores.

After submission of additional cost data and a second round of oral discussions, NAHB and NCSBCS submitted new best and final offers. The SEB reevaluation resulted in a technical score of 818 for NCSBCS and 685 for NAHB. Based on a cost realism analysis, the SEB determined that certain of NCSBCS's estimated costs were for items which were beyond the scope of the contract, and that certain of NAHB's cost savings relating to special travel rates were inaccurate because either contractor would have available reduced government contract travel rates for its employees. As a result of this analysis, the difference in estimated cost between the two proposals essentially was eliminated. The SEB again recommended award to NCSBCS and, on May 17, the SSO concurred and selected NCSBCS for award.

NAHB asserts that award to NCSBCS creates an organizational conflict of interest because the board of directors of NCSBCS is made up of representatives of all 50 states, including individuals who are employees or heads of the state primary inspection agencies (PIA), which are being monitored under this contract. NAHB asserts that there is an inherent conflict with respect to the PIA's being monitored, since NCSBCS is controlled by members who are delegates from the state agencies which are being monitored. Finally, NAHB contends that NCSBCS's use of state administrative agencies (SAA) to monitor the activities of PIA's in other states creates a potential for conflict between NCSBCS and the states with which it has so contracted.

In considering an allegation of organizational conflict of interest, we note that the responsibility for determining whether a firm has a conflict of interest if it is awarded a particular contract and to what extent a firm should be excluded from competition rests with the procuring agency and we will not overturn such a determination unless it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94. The procuring agency bears the responsibility for balancing the competing interests between preventing bias in the performance of certain contracts which would result in a conflict of interest and awarding a contract that will best serve the government's needs to the most qualified firm. Battelle Memorial Institute, B-218538, June 26, 1985, 85-1 C.P.D. ¶ 726.

HUD points out that the above-cited statute and the implementing regulations both contemplate a cooperative working relationship between the various states and HUD, in order to establish the implementation of a national building code for manufactured homes. HUD initially awarded the monitoring contract to NCSBCS on a sole-source basis because NCSBCS had preexisting expertise in the effort by states to simplify building codes and achieve reciprocity. HUD states that the initial award handled the possibility of conflict by prohibiting any state employee from participating on a monitoring team in his own state. HUD points out that since the inception of the program in 1976, it has not received any written complaints that NCSBCS contract staff has provided any preferential treatment to PIA's run by NCSBCS officers or directors. HUD has concluded that it is satisfied with NCSBCS's objectivity.

The NCSBCS proposal provides that monitoring inspection teams can include not more than one person from any one state, and in no case will a person provided by a state participate on a monitoring inspection team which acts within that state. In addition, all contracts for such state personnel are subject to the prior approval of HUD. Finally, NCSBCS's proposal includes a certification that none of its personnel involved are subject to any conflict of interest, including the types of conflicts listed in the applicable HUD regulation (24 C.F.R. § 3282.259 (1985)).

Considering these factors, we do not believe that the composition of the NCSBCS board constitutes an actual organizational conflict of interest, and we are unable to conclude that HUD acted unreasonably in permitting NCSBCS to compete for the requirement, in view of the contractual certifications and safeguards which are imposed. See Battelle Memorial Institute, B-218538, supra; Petro-Engineering, Inc., B-218255.2, June 12, 1985, 85-1 C.P.D. ¶ 677; Columbia Research Corp., 61 Comp. Gen. 194 (1982), 82-1 C.P.D. ¶ 8.

Both NAHB's allegation regarding the inherent conflict because of the awardee's board composition and its allegation regarding the potential conflict created by use of SAA personnel to monitor PIA's are really objections to HUD's method of implementing the statute. As noted above, the statute contemplates such state cooperation, and the regulations specifically provide for the use of SAA personnel to monitor the PIA's. 24 C.F.R. § 3282.451 (1985). The only relevant regulatory prohibition is that personnel from an SAA shall not participate on joint monitoring teams operating within their state (24 C.F.R. § 3282.452(a)(3) (1985)), which NCSBCS has specifically recognized in its proposal. By permitting the approach of NCSBCS, HUD is merely implementing the statutory goal. In any event, NAHB's allegations constitute mere inferences of actual or potential conflict of interest, which do not afford a basis for disturbing a contract award since this requires "hard facts" showing an actual conflict of interest. See Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 C.P.D. ¶ 17.

Finally, appendix III of the RFP delineated the approach previously utilized by NCSBCS (and also used in its current proposal), spelling out state participation in the monitoring inspection program, including the use of state personnel on teams monitoring other states. The RFP states

that proposals may require more or less state participation, which, in our view, explicitly permits the level of participation which NCSBCS offers in its current proposal. Accordingly, to the extent the RFP provides for such an approach, NAHB's protest is untimely since it concerns an alleged solicitation impropriety which must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1985).

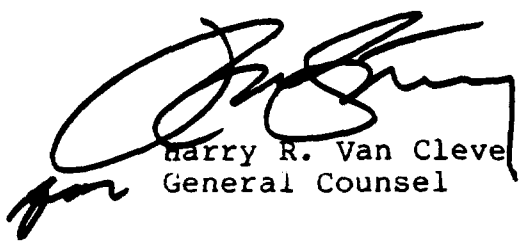
NAHB's allegations regarding agency bias in the conduct of the procurement are similarly untimely in large measure as they relate to the RFP evaluation criteria which NAHB alleges provided an unfair advantage to the incumbent. Georgetown Air & Hydro Systems, B-210806, Feb. 14, 1984, 84-1 C.P.D. ¶ 186. The same is also the case for NAHB's complaint that second best and final offers were called for. This allegation is untimely since it was not raised prior to the closing date for the receipt of the second best and final offers. Battelle Memorial Institute, B-218538, supra. Accordingly, we dismiss these two allegations as untimely.

NAHB's final allegation of bias concerns allegedly unreasonable and unnecessary demands made of its officials during an oral briefing. In particular, it objects to the expectation that NAHB personnel have certain HUD regulations memorized and the fact that it was "challenged" regarding various aspects of its proposal. Where the subjective motivation of an agency's procurement personnel is being challenged, it 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. Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. Where the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Sperry Rand Corporation, 56 Comp. Gen. 312, 317 (1977), 77-1 C.P.D. ¶ 77. In our view, NAHB has merely shown that agency personnel expected it to be knowledgeable of regulations concerning the program and that its proposal was not simply accepted at face value, but was questioned. This is insufficient support to establish bias.

Finally, NAHB has objected to our requirement that it submit its comments on the agency report within 7 working days and has objected to the agency exclusion of certain material from NAHB's copy of the agency report. As to our

requirement for comments within 7 working days, this is contained in our Bid Protest Regulations, 4 C.F.R. § 21.3(e) (1985), and is necessary for our orderly and expeditious resolution of bid protests. We note that NAHB did submit detailed comments within the required time. Regarding HUD's exclusion of certain documents, NAHB's recourse is to pursue the disclosure of the information through the Freedom of Information Act, 5 U.S.C. § 552 (1982), and our Office has no authority under that statute to decide what information an agency must release. E.R. Johnson Associates, Inc., B-217059, May 8, 1985, 85-1 C.P.D. ¶ 513; C.M.P., Inc., B-216508, Feb. 7, 1985, 85-1 C.P.D. ¶ 156.

Accordingly, we deny the protest in part and dismiss it in part.



Harry R. Van Cleave
General Counsel