

**DECISION**

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

**FILE:** B-217334

**DATE:** September 9, 1985

**MATTER OF:** Mid-Atlantic Forestry Services, Inc.

**DIGEST:**

1. Protester is not an interested party under GAO Bid Protest Procedures, where the protester was not in competitive range and, therefore, would not be in line for award even if its protest were sustained.
2. GAO does not view as unreasonable agency's determination that proposal which did not provide names of individual crew members proposed for survey of trees in National Forest, as was requested by the solicitation, was technically acceptable. Agency could reasonably view proposal as technically acceptable where proposal identified the crew members as senior undergraduate and graduate students in the biological sciences and stated that they would be trained by qualified employees of offeror. Moreover, agency properly downgraded proposal in its technical evaluation for lack of specificity in this regard.
3. Protest that awardee's employment of students contravenes government policy of subcontracting with small business concerns and small disadvantaged business concerns to the maximum extent consistent with efficient contract performance is denied where awardee's proposal shows employment relationship with students, not subcontract. Moreover, awardee's willingness to carry out policy is a matter of responsibility which GAO generally will not review.
4. Protester's objections to agency's analysis of the cost realism of the offeror's price under a solicitation for a fixed-price contract are denied. Cost realism bears little relationship to a fixed-price contract where the prime concern is cost quantum.

5. The contracting agency and not GAO is in the best position to determine the amount of time necessary to conduct a satisfactory technical evaluation. Based on protester's best and final offer which consisted of a 3-1/2-page supplement to the initial proposal, GAO will not question agency's determination that a full and fair evaluation was made in about 45 minutes, especially in view of the fact that protester's proposal received highest technical evaluation.

Mid-Atlantic Forestry Services, Inc. (Mid-Atlantic), protests the award of contracts to Midwest Water Resource Management (Midwest) under requests for proposals (RFP) Nos. R8-N-84-18 and R8-N-84-22 issued by the Forest Service, United States Department of Agriculture. The contracts require Midwest to inventory and classify red-cockaded woodpecker cavity trees in the Apalachicola and the Osceola National Forests.

The protest of the award under RFP No. R8-N-84-18 for the survey in the Apalachicola National Forest (Apalachicola) is dismissed; the protest of the award under RFP No. R8-N-84-22 for the survey at the Osceola National Forest (Osceola) is denied in part and dismissed in part.

RFP No. R8-N-84-18

The record shows that six offerors submitted initial proposals. Mid-Atlantic and two other firms were determined to be outside the competitive range as a result of the prices they offered for conducting the inventory at Apalachicola. The initial proposals submitted by Midwest and two other offerors, CZR Inc. and Biological Resources Management, were determined to be technically acceptable and within the competitive range for award; all three concerns submitted best and final offers. While the protester objects to the award to Midwest for the survey at Apalachicola, the protester has not stated any objections to the agency's determination that its offer fell outside the competitive range, based on price. Under the circumstances, even if our Office upheld Mid-Atlantic's protest that Midwest was improperly awarded the contract, Mid-Atlantic would not be next in line for award since it was excluded from the competitive range and there is still another offeror, CZR Inc., which would be eligible for award. Mid-Atlantic has not alleged that CZR Inc. is

ineligible in any way. Therefore, we conclude that Mid-Atlantic does not have the requisite direct and substantial interest with regard to award to be considered as an "interested party" under our Bid Protest Procedures. See Lockheed Engineering and Management Service, Inc., B-212858, Dec. 23 1983, 84-1 C.P.D. ¶ 18; 4 C.F.R. § 21.1(a) (1984).

Accordingly, we dismiss Mid-Atlantic's protest of the award to Midwest under RFP No. R8-N-84-18 for the survey at Apalachicola.

RFP No. R8-N-84-22

Mid-Atlantic objects to the award of a contract to Midwest for the survey at Osceola on several grounds. First, the protester contends that Midwest failed to provide the names, qualifications, and experience for 21 of the 26 survey team members proposed in its best and final offer, although the solicitation expressly required such information, and, therefore, Midwest's best and final offer should not have been regarded as technically acceptable. Mid-Atlantic argues that either Midwest should have been required to correct this deficiency during discussions or that the solicitation should have been modified to permit all offerors the opportunity to submit proposals on a common basis. Mid-Atlantic contends that the agency's acceptance of Midwest's proposal without amending the solicitation to relax the requirement for information on crew members gave Midwest a competitive advantage. The protester states that it had the opportunity to use wildlife students at a savings of "thousands of dollars," but that it rejected this plan due to the solicitation's requirement that offerors provide in their proposals the names and qualifications of key personnel, including the crew members.

The protester's contention that Midwest's proposal was technically unacceptable is based on section M.02 of the RFP, which provides in pertinent part as follows:

"M. 02 - Content of Technical Proposal

"As a minimum, the technical proposal shall contain the following:

. . . . .

"3. Names, qualifications and experience of the specific individuals that will be used in the performance of this contract. This should include principal investigator, field director, crew members and others considered key members of the project team."

In its initial and final proposals, Midwest provided the names and background only for its project manager/principal investigator and the four survey crew leaders. The proposal advised that the project manager/principal investigator had served in that capacity in a prior survey of red-cockaded woodpecker cavity trees in the Kisatchie National Forest in Louisiana. Midwest also stated in its proposal that all of the four named crew leaders had prior experience in National Forest inventories of red-cockaded woodpecker cavity trees and that three of these crew leaders were faculty members in the Life Sciences Division of Eastern Illinois University (the University). However, Midwest's proposal was silent as to the names and backgrounds of the crew members. While not naming the crew members, Midwest advised in its best and final proposal that these crew members would be a competent group of graduate and senior undergraduate students at the University who are majoring in the biological sciences. In a cover letter which accompanied its best and final offers in response to both solicitations, Midwest also advised that if it were awarded contracts for both surveys (at Apalachicola and Osceola), it would conduct its inventories as stated in its proposal except that it would then employ an additional survey crew which would be led by a fourth, unnamed professor at the University.

The agency reports that Midwest's failure to provide the names of the individual crew members and a detailed listing of each crew member's experience resulted in a reduction in the evaluation point score of Midwest's technical proposal in the subcategory of "crew members." However, the agency advises that it did not regard Midwest's failure to provide names and detailed information on the crew members as constituting a material deficiency in Midwest's proposal which would preclude the proposal from being regarded as acceptable. As pointed out by the agency, Midwest's best and final proposal specifically provided that it would provide as crew members competent senior undergraduate and graduate students in the biological sciences.

Generally, the concept of responsiveness does not apply to negotiated procurements as it applies in instances of formally advertised procurements. However, certain solicitation requirements may be sufficiently material such that a proposal that fails to conform to them may be considered unacceptable. True Machine Co., B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18 at 6. Whether a proposal is technically acceptable is within the discretion of the contracting agency to determine and this Office will not disturb an agency's determination unless that determination is unreasonable. William A. Stiles, Jr.; Piazza Construction, Inc., B-215922; B-215922.2, Dec. 12, 1984, 84-2 C.P.D. ¶ 658 at 5. Furthermore, this Office has upheld an agency's determination to regard an offeror's proposal as technically acceptable, but to give the proposal a lower evaluation score due to lack of specificity, where the proposal did not contain information on the names and qualifications of proposed key personnel notwithstanding a provision in the solicitation which required such information "at a minimum." Panuzio/Rees Associates, B-197516, Nov. 26, 1980, 80-2 C.P.D. ¶ 395 at 4-6. Accordingly, in the present case, we see no basis to conclude that the agency's determination to regard Midwest's proposal as technically acceptable but to give it a lower evaluation score was improper.

In view of our upholding the agency's determination that Midwest's proposal was not materially deficient and was in fact a technically acceptable response to the solicitation, we reject Mid-Atlantic's contention that the agency was required to amend the solicitation to relax the requirement for information on the crew members as a precondition to the consideration of Midwest's proposals.

In any event, our review of the cost breakdown provided by Mid-Atlantic in its proposal leads us to conclude that Mid-Atlantic was not prejudiced by the fact that the solicitation was not amended to relax the requirement for information on crew members. Mid-Atlantic's total proposed price was \$10,830.96 more than the total price proposed by Midwest. Even if Mid-Atlantic were able to use students (paid at the minimum wage specified in the solicitation) in its proposal without having its technical evaluation score lowered, the record shows that Mid-Atlantic's total proposed price would still be substantially higher than Midwest's total proposed price, and, as discussed below, price properly became the determining

factor in selection of the contractor. See KET, Inc.--Request for Reconsideration, B-190983, Jan. 17, 1981, 81-1 C.P.D. ¶ 17 at 6.

The protester further argues that, even if Midwest's proposal was technically acceptable, award was improper due to the agency's failure to follow proper procedures in its evaluation of Midwest's best and final proposal.

It is not the function of our Office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. See Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 C.P.D. ¶ 299. The determination of the relative merits of technical proposals is the responsibility of the contracting agency, which has considerable discretion in making that determination. Accordingly, we will not question an agency's technical evaluation unless the protester shows that the agency's judgment was unreasonable or in violation of the procurement laws and regulations. See Science Information Services, Inc., B-207149.2, Nov. 29, 1982, 82-2 C.P.D. ¶ 477.

The solicitation provided that award would be made to that offeror whose proposal was technically acceptable and whose technical/cost relationship was the most advantageous to the government. The solicitation further stated that award would be based upon a cost/technical tradeoff and not necessarily to either the lowest priced offeror or the offeror receiving the highest technical evaluation. The RFP provided that the proposals would be evaluated upon the following three criteria:

1. Experience and Qualifications of firm and specific individuals that will be used to perform the project.
2. Method and Approach for accomplishing project.
3. Organization structure and support facilities to accomplish the project.

The agency evaluators scored Mid-Atlantic's technical proposal for the survey at Osceola at 96 out of a total of 100 points while Midwest's technical proposal was rated at 93 points. The contracting officer determined that these two proposals were essentially technically comparable and

made award to Midwest on the basis of its lower price. Mid-Atlantic's price was \$28,735.20 (34 percent above the agency's cost estimate of \$21,466 for the Osceola survey) whereas Midwest's price for the survey at Osceola alone was \$24,117.92 and, if Midwest were also awarded the contract for the Apalachicola survey, its price would be reduced to \$17,904.24 (17 percent under the agency's cost estimate).

Mid-Atlantic objects to the agency's crediting Midwest with three points out of a possible six points in the technical evaluation of crew members' qualifications and experience. The protester contends that since Midwest did not furnish the names or specific qualifications of the individual crew members, Midwest should not have been credited with any points in this subcategory. Mid-Atlantic also objects to the agency's awarding Midwest's proposal the maximum points--10 points--in the subcategory of crew leaders since Midwest did not identify the leader of the additional crew it would use if it were awarded the contract for the surveys at both Osceola and Apalachicola. (As set forth above, in the September 26, 1984, letter accompanying its best and final offer, Midwest advised that if it received both awards it would then employ five rather than four survey crews and that this additional crew would have as its leader a professor at the University.) Mid-Atlantic contends that the agency should have reduced Midwest's score in the crew leader category by at least 20 percent since Midwest failed to either identify the fifth crew leader or specify his departmental affiliation with the University.

The agency advises that it gave only half credit--three points--to Midwest's proposal in the subcategory for crew members' qualifications and experience. The agency reports that it had a proper basis upon which to provide partial credit for crew members in the technical evaluation of Midwest's proposal since Midwest had advised that it would be providing as crew members individuals who were either senior undergraduate or graduate students in the biological sciences. The agency also points out that Midwest's proposal stated that the students would be employed as crew members only after having been interviewed by two of the faculty members who would be serving as crew leaders and that Midwest's proposal also provided that the crew members were to be trained in red-cockaded woodpecker cavity tree identification by the project manager and by an individual who was the former chairman of the Red-Cockaded

Woodpecker Recovery Team as appointed by the United States Fish and Wildlife Service, Department of the Interior. The agency contends that, based on the information contained in Midwest's proposal, the evaluators were justified in awarding partial credit to Midwest's proposal in the category of crew members.

Concerning the credit given in the evaluation for the crew leaders, the agency advises that the fifth crew leader and crew were not evaluated under the subcategories of crew leader and crew members, but were instead evaluated under the subcategory of "additional personnel," which the evaluation scheme defined as including backup crews. The agency reports that the members of the fifth crew (including the leader) were evaluated as "additional personnel" since the fifth crew was to be used only if the offeror received award under both solicitations. The record shows that the fifth crew proposed by Midwest in connection with its best and final offer resulted in one additional point in the technical evaluation in the subcategory of "additional personnel."

We do not believe that it was unreasonable for the Forest Service's technical evaluators to give Midwest partial credit for crew members based on the crew members' status as senior or graduate students in the biological sciences and proposed training of such personnel by qualified Midwest employees. Since the fifth crew leader and crew were offered by Midwest as an additional or backup crew to be employed in the event it received both contracts, we are not persuaded that the agency's evaluation of such personnel as "additional personnel" worth an additional technical point in the evaluation scheme was unreasonable.

We note that even if the fifth crew leader and crew had been evaluated in the manner urged by the protester (that is, reducing Midwest's rating by two points for failing to name the crew leader and not rating Midwest's proposal one point higher because of the additional crew contingent upon award of both survey contracts), the resultant net decrease in Midwest's technical score, by a total of three points, would not necessarily have altered the agency's determination that Midwest's and Mid-Atlantic's proposals were essentially technically equal so that award would be based on price. We have stated that while technical point ratings are useful as guides for intelligent decisionmaking in the procurement process, whether a given



point spread between two competing proposals indicates a significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. See Ares, Inc., B-209323, Mar. 31, 1983, 83-1 C.P.D. ¶ 336. In other words, even if the protester were to prevail on this protest issue, it is likely that the contracting agency would have determined that Midwest's technical score of 90 points was so close to Mid-Atlantic's technical score of 96 points that it would not be worth spending an additional \$10,831 to gain the very small technical superiority offered by Mid-Atlantic. Id. at 3.

Mid-Atlantic also protests the award to Midwest on the basis that Midwest's use of faculty and students of the University's biology department is an abuse of the small business set-aside program. The protester states that the survey project carried out by Midwest "is obviously a major effort of the University's biology department" and that Midwest's use of these personnel clearly violates the clause on the utilization of small business and small disadvantaged business concerns which is set forth in the solicitation. See Federal Acquisition Regulation, 48 C.F.R. § 52.219-8 (1984). That clause provides in applicable part that in the awarding of subcontracts the contractor agrees to carry out to the fullest extent consistent with efficient contract performance the government's policy that small business concerns and small disadvantaged business concerns shall have the maximum practicable opportunity to participate in performing government contracts.

Both Midwest and the agency advise that the professors and students involved in the surveys are employees of Midwest and that no contractual relationship exists between Midwest and the University and there is nothing in the record which indicates the existence of a subcontract with the University. In any case, an awardee's willingness to carry out the policy set forth in the above regulation concerns the awardee's responsibility, which, as a matter for the contracting agency's judgment, we generally do not review. See G&R Supply Co., B-212945, Oct. 12, 1983, 83-2 C.P.D. ¶ 458. In addition, enforcement of an awardee's obligations under that provision is a matter of contract administration which this Office does not consider. Id. at 2.

Mid-Atlantic also protests the price analysis used by the government to compare the offerors' prices with each other and with the independent government cost estimate.

Mid-Atlantic contends that the agency's price analysis was deficient in not questioning why Midwest's price on the Osceola survey was (with the discount if both contracts were awarded) 25 percent below the next low offer. In addition, the protester states that the agency should have questioned why Midwest offered identical unit prices for both the Osceola and Apalachicola surveys despite substantial differences between the two forests in site conditions and the number of woodpecker colonies. The protester also states that the agency should have questioned how the awardee could move 26 people from Illinois to Florida, pay for labor, overhead, supplies, and travel expenses for only \$7.97 per man-hour. The protester states that although it is raising these points about Midwest's price, it is not challenging Midwest's responsibility.

We find no merit to Mid-Atlantic's argument. The solicitation and award to Midwest were made on a fixed-price basis. Cost realism bears little relationship to a fixed-price contract where the prime concern is cost quantum. Los Angeles Community College District, B-207096.2, Aug. 8, 1983, 83-2 C.P.D. ¶ 175 at 4. Although in some instances an agency may seek to evaluate fixed-price proposals in terms of cost realism in order to measure offeror understanding of the solicitation's requirements, there is nothing in the RFP which would indicate that was the case in this procurement. Furthermore, we have held that the fact that an offeror may have submitted a low or even a below-cost proposal does not provide a basis to challenge an award where the contracting officer finds the offeror to be responsible. See Ted L. Biddy and Associates, Inc., B-209297, B-209297.2, Apr. 22, 1983, 83-1 C.P.D. ¶ 441.

The protester also objects to the contracting officer's refusal to advise it of the government's estimates of the cost of the surveys. The protester states that it believes that such refusal was unfair since the awardee had prior experience under a similar contract so that it probably had a reasonable idea of the government's cost estimate. Mid-Atlantic points out that our Office has stated that it is not improper for an agency to disclose such estimates. This contention is also without merit.

We have stated that we are aware of no statute or regulation which prohibits an agency from revealing its estimate of costs, provided the same information is given

to all offerors at approximately the same time. Fresh Flavor Meals, Inc., B-208965, Oct. 4, 1982, 82-2 C.P.D. ¶ 310. However, while an agency may disclose its cost estimates to offerors, we are not aware of any regulation which would require that an agency disclose this information, and we note that the government is not obligated to equalize the competitive advantage that an offeror may have gained as a result of its prior experience under a similar government contract. See Avitech, Inc., B-214760, July 30, 1984, 84-2 C.P.D. ¶ 125.

The protester also contends that its best and final offer did not receive a fair evaluation because it had been misplaced by the contracting officer. Mid-Atlantic advises that 15 minutes before the end of the workday on September 28, 1984, the last workday of the 1984 fiscal year, the contracting officer discovered as a result of a telephone call from Mid-Atlantic that its best and final offer had been accidentally misplaced. Since the award had to be made on that day because of the end of the fiscal year, the contracting officer--whose scheduled workday ended at 3:30 p.m.--remained at work until 4:15 p.m. when he completed his evaluation of Mid-Atlantic's best and final offer and reevaluated the relative standing of the best and final proposals submitted. The contracting officer determined that Mid-Atlantic's offer did not change the prior determination to make award to Midwest. The contracting officer subsequently advised Mid-Atlantic that award was made to the successful offeror on the basis of price since the technical evaluation of Mid-Atlantic's proposal as compared with Midwest's revealed no significant technical differences. The contracting officer assured Mid-Atlantic that its best and final offer was not evaluated in a perfunctory manner but that it was given a fair evaluation in accordance with the solicitation criteria.

The protester states that it does not question that the contracting officer did the best job possible under the circumstances in reevaluating the best and final offers but that it believes that the circumstances made a fair evaluation of its proposal impossible.

The contracting officer reports that he was capable of fully evaluating the contents of Mid-Atlantic's best and final offer in a relatively short time, 40 to 45 minutes, since it only consisted of a 3-1/2-page supplement to the original offer (together with a price summary sheet).

We have stated that the contracting agency and not our Office is in the best position to determine the amount of time necessary to conduct a satisfactory evaluation in a particular procurement; our Office is only concerned that the time is sufficient to allow a fair and reasonable evaluation in accord with the criteria set forth in the RFP. See IMODCO, B-216259, Jan. 11, 1985, 85-1 C.P.D. 32. In view of the brevity of the new information provided in Mid-Atlantic's best and final offer, we cannot disagree with the agency's position that about 45 minutes allowed for a full and fair review of Mid Atlantic's best and final offer. The fact that Mid-Atlantic's technical proposal received the highest technical score--96 points out of 100 points--and that the contract was awarded on the basis of price further persuade us that Mid-Atlantic was not prejudiced by the circumstances of the evaluation of its best and final offer.

The protester also objects to our consideration of the agency report since the report was not received within the 25-day goal provided for in the applicable Bid Protest Procedures. See 4 C.F.R. § 21.3(c) (1984).<sup>1/</sup> Mid-Atlantic argues in part that given the rigid enforcement of the time deadlines for the submission of bid protests, the same standards must also be applied to the submission of the agency's report on a protest. We have held that a delivery beyond the 25-day period set forth in 4 C.F.R. § 21.3(c) (1984) for the submission of a report to our Office is a purely procedural matter and does not provide a basis for us to disregard the report. Le Prix Electrical Distributors, Ltd., B-211201, July 6, 1983, 83-2 C.P.D. ¶ 63. Moreover, we have recognized that due to the seriousness of protests against award of government contracts, timeliness standards for the filing of protests must be more strictly construed than filing requirements during intermediate case development. See Armidir, Ltd., B-205890, July 27, 1982, 82-2 C.P.D. ¶ 83.

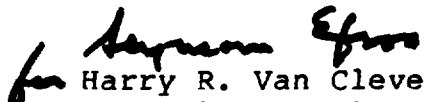
Last, Mid-Atlantic has claimed payment of anticipated profits and reimbursement of its proposal preparation costs. Even if Mid-Atlantic's protest had been sustained,

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<sup>1/</sup> Our current Bid Protest Regulation, 4 C.F.R. § 21.3(c) (1985) provide, pursuant to the Competition in Contracting Act of 1984, that the "contracting agency shall file a complete report" within 25 days.

it could not have been paid for its anticipated profits since anticipated profits may not be awarded to an unsuccessful offeror who is not a party to a contract. See Richard Hoffman Corp., B-212775.3, Apr. 9, 1984, 84-1 C.P.D. ¶ 393. Furthermore, claims for costs associated with the preparation of bids or proposals will be denied where we find no merit to the underlying protest. Jarrett S. Blankenship Co., B-212167, Nov. 1, 1983, 83-2 C.P.D. ¶ 509.

The protest under RFP No. R8-N-84-18 is dismissed and the protest under RFP No. R8-N-84-22 is denied in part and dismissed in part.

  
for Harry R. Van Cleve  
General Counsel