

DECISION



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

FILE: B-219985 **DATE:** December 16, 1985
MATTER OF: Southwest Regional Laboratory

DIGEST:

1. When a request for proposals is silent as to the relative importance of cost and technical factors, they must be considered approximately equal in weight.
2. Procurement officials have broad discretion in determining the tradeoff between cost and technical advantages in competing proposals, and GAO will only review such determinations for rationality and consistency with the established evaluation factors.
3. Protest that alleged conflict of interest by agency procurement personnel tainted the evaluation of proposals is denied where it is based only on inference and supposition.

Southwest Regional Laboratory (SWRL) protests the proposed award of a contract to Far West Laboratories (FWL) under request for proposals (RFP) No. NIE-R-85-0003, issued by the National Institute of Education (NIE). SWRL protests that it should have received the award since its proposal had been found technically acceptable and its price was low. SWRL also protests that the evaluation process was tainted by a conflict of interest because some members of the review panels that evaluated offers had impermissible connections with FWL.

We deny the protest.

Background

The RFP contemplated the award of a 5-year cost-reimbursement type contract for the operation of educational research laboratories to serve each of 8

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geographic regions of the United States. SWRL and FWL were the only firms that submitted proposals for the Western Region.

NIE assigned teams of reviewers to evaluate proposals in each of the regions. In the Western Region, three separate tiers of review were conducted. In "Tier I", a 6-member "peer review panel" conducted a detailed technical review of proposals, applying the evaluation criteria established in the RFP. The review panel scored the proposals in two ways: they assigned numerical point scores based on the RFP evaluation factors, and assigned a rank of first or second, according to their evaluation of the relative merits of the two proposals. The panel issued an initial decision memo which established that both offerors were in the competitive range and identified issues that required further clarification. At this point, the technical scores slightly favored the SWRL proposal.

The panel then submitted written questions to both offerors for clarification, and the offerors submitted their responses. Reviewers also conducted site visits with both firms at this time. The Tier I panel met to discuss the responses to the clarification questions and the site visit reports, and to reevaluate the proposals. The Tier I panel issued a final decision memo, summarizing the evaluations made by all of the reviewers. Every reviewer ranked FWL as first, and favored FWL slightly in the numerical score. FWL's final score of 92.17 points gave it a 9.33 percent advantage over SWRL's final score of 84 points.

"Tier II" of the review was conducted after the Tier I evaluation process was completed. Described by the agency as a program review, this stage was for the purpose of evaluating how NIE had conducted the technical peer review (i.e., Tier I).

After submission of best and final offers, "Tier III" was conducted by a review panel of independent consultants invited by NIE to further review all of the materials submitted in the competition and to respond to specific questions about the two offers. The results of this third stage of review were considered along with the results of the Tier I evaluation and cost as the basis for the agency's final selection. Although SWRL had initially proposed the higher cost, its best and final offer reflected a substantial reduction and was the low offer. With a total estimated cost of \$11,457,664 for the 5-year period, it was 5.89 percent lower than FWL's \$12,281,003.

The contracting officer concluded that award to FWL would be in the government's best interest. He determined that FWL's technical superiority outweighed SWRL's cost advantage.

Propriety of Source Selection

SWRL protests that its proposal was rated sufficiently high to mandate award to it on the basis of its low price. The protester bases this argument on two alternative theories: first, that the evaluation criteria expressed in the RFP make cost the paramount element in the evaluation, and second, that award must be made on the basis of cost, either because the proposals were essentially equal technically or because there was not a sufficient difference in the technical merits of the two proposals to justify paying FWL's higher cost.

Proposal evaluation criteria were set out in section VII of the RFP. Subsection "A", "Evaluation of Technical Proposals," listed specific selection criteria that would be used to evaluate technical proposals, advised offerors that the maximum number of points for all selection criteria was 100, and indicated the maximum number of possible points that could be awarded for each criterion. Subsection "B," "Evaluation of Cost Proposals," stated that cost proposals would be reviewed separately from technical proposals, and that cost would not be the sole factor in determining the award. It further stated that cost proposals would be reviewed to determine whether the budget for the project was adequate to support the project activities, and whether the costs proposed were reasonable in relation to the objectives of the project.

The protester argues that since the RFP stated that cost would not be the sole factor in making the award determination, but did not indicate either what "other factors" (in addition to cost) were to be considered, or state the relative importance of cost to the technical factors, cost must be the paramount element in the evaluation of proposals.^{1/} We disagree. Where an RFP indicates that price will be considered, without explicitly indicating its importance in relation to technical factors, cost and technical factors must be considered approximately equal

^{1/}To the extent SWRL is protesting that the RFP was improperly drafted, the protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), provide that a protest based on alleged improprieties that are apparent on the face of a solicitation must be filed prior to the closing date for receipt of initial proposals.

in importance. Fabrics Plus, Inc., B-218546, July 12, 1985, 85-2 CPD ¶ 46. In our view, the RFP statement here, that cost would not be the sole factor for award, is clearly consistent with such a result. Accordingly, we find no merit to the protester's position concerning the relative importance of cost.

We turn then to SWRL's argument that the competition was so close that the proposals were essentially equal technically, and that cost should therefore be considered as the determinative factor, or, alternatively, that FWL's slightly higher technical score does not justify paying the firm's higher proposed cost.

In considering protests such as this, we do not conduct a de novo review of technical proposals or make an independent determination of their acceptability or relative merit, as the evaluation of proposals is the function of the contracting agency. Cadillac Gage Co., B-209102, July 15, 1983, 83-2 CPD ¶ 96. Our review is limited to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. Id. The fact that the protester disagrees with the selection official's conclusion does not in itself render the evaluation unreasonable. Kaman Sciences Corp., B-190143, Feb. 10, 1978, 78-1 CPD ¶ 117.

Here, while it is apparent that the agency considered both offerors to be qualified to perform the contract, the record does not indicate that they were evaluated as essentially equal technically. Rather, each member of the Tier I review panel scored FWL's proposal higher than SWRL's proposal, and recommended FWL for award. The results of the Tier III review supported this conclusion. Thus, the record indicates that the agency analyzed each proposal for areas of strengths and weaknesses and concluded that FWL's proposal was superior technically. We find, therefore, that the record simply does not support the protester's claim that the two proposals were of equal technical merit.

However, SWRL argues further that even if the offers were not essentially equal technically, the difference between them was not significant enough to allow the agency to accept FWL's higher price. Again, we disagree.

We have recognized that in a negotiated procurement, procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be

sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976) 76-1 CPD ¶ 325. Furthermore, in a dispute between the protester and the contracting agency over the technical superiority of the awardee's proposal, we will not disturb the agency's decision as to which of the two proposals is better suited to complete the project contemplated by the RFP unless the protester shows that decision to be unreasonable or in violation of the procurement statutes or regulations. Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607.

Here, the record includes a detailed account of the various stages of review. The contracting officer has, for example, summarized in a memorandum the factors he considered in selecting FWL for award.^{2/} He states that both offerors remained in the competitive range throughout the review process, but points out that each reviewer deemed FWL's proposal to be superior in the final analysis. He indicates that FWL's offer fully responded to the requirements of the RFP and surpassed the protester's proposal by offering unique and innovative features, and that FWL more satisfactorily addressed issues raised in negotiation, while SWRL was considered less responsive to the concerns raised by the government. In summary, the contracting officer states that the high technical quality of FWL's proposal, the nature of the proposed work, and FWL's greater responsiveness to the agency's requests combine to outweigh the cost advantage offered by SWRL. In these circumstances, we find no basis to conclude that the contracting officer has abused his discretion, or that his award determination was not rationally based.

SWRL also alleges that the contract award was improper because the Tier II and Tier III panels were given different criteria for judging the Tier I findings than the ones established in the RFP.

It is a well-established principle of federal procurement law that once evaluation criteria are set forth in a solicitation, the agency must adhere to these criteria or inform all offerors of any significant changes and give

^{2/}We note that SWRL questions the validity of this memorandum as support for the source selection because the memorandum was prepared after the protest was filed. However, this does not affect the validity of the award as long as the record reflects that a proper basis for the award actually existed at the time the selection was made. Cadillac Gage Co., B-209102, supra.

them an opportunity to revise their offers. York Industries, Inc., B-210756.2, Apr. 24, 1984, 84-1 CPD ¶ 463. However, agencies are required to identify only the major evaluation factors applicable to a procurement and need not explicitly identify the various aspects of each major factor that might be taken into account. All that is required is that those aspects not identified be logically and reasonably related to, or encompassed by, the stated evaluation factors. Arltec Hotel Group, B-213788, Apr. 4, 1984, 84-1 CPD ¶ 381.

In this case, the record indicates that the purpose of the Tier II stage of review was the evaluation of the review process itself, and not the evaluation or selection of a proposal for award. Further, Tier III's purpose was not to conduct a separate technical evaluation of the proposals, but to weigh all of the evidence in the file, focusing on areas where questions remained. The record indicates that although the panel was given a series of questions to guide their review, rather than simply the evaluation factors in the RFP, the questions did not introduce any criteria that were not already encompassed by the scope of the major evaluation factors. Moreover, the Tier I panel had applied the RFP evaluation factors in selecting FWL, and the Tier III panel agreed with the Tier I evaluation. In these circumstances, we have no basis for objecting to the selection of FWL for award.

FWL alleges that the contracting officer and other government procurement personnel engaged in technical leveling during discussions with FWL. The protester cites section 15.610(d)(1) of the Federal Acquisition Regulation (FAR), which prohibits technical leveling and defines it as "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." 48 C.F.R. § 15.610(d)(1) (1984).

The record does not indicate that the agency engaged in successive rounds of discussions to help FWL bring its proposal up to SWRL's level, but rather that the site visits, clarification questions and negotiations with the offerors were for the purpose of advising both offerors of deficiencies in their proposals and resolving uncertainties about the proposals, as required by the FAR. See 48 C.F.R. § 15.610(c)-(d). Moreover, we find nothing to show that the deficiencies found in FWL's proposal resulted from a lack of diligence or competence, or that the agency provided improper assistance to overcome any weakness in FWL's proposal.

Accordingly, we find no merit to the protester's contention that the agency engaged in technical leveling.

SWRL also argues that the substantial price reduction in its best and final offer was arbitrarily evaluated as a negative factor by the agency. SWRL effected the reduction by proposing a guaranteed indirect cost rate not to exceed 30 percent, which represented a \$2.8 million reduction from the firm's initial proposal. NIE reports that this raised a serious concern about the potential impact the price reduction would have on SWRL's financial solvency and ability to perform efficiently. SWRL contends that the agency's concerns about SWRL's price reduction were unfounded because SWRL's proposal set a cost ceiling on indirect expenses, thus guaranteeing to NIE that this rate would not be exceeded. The contracting officer's report indicates, however, that the technical factors in FWL's proposal out-weighed the cost advantage that SWRL's offer presented, notwithstanding any concerns about the cost reduction in SWRL's best and final offer. Therefore, we need not consider whether NIE's concerns about SWRL's proposed costs were proper.

Alleged Conflict of Interest

SWRL contends that the evaluation process was tainted by a conflict of interest because two technical review panel members had "close ties" to FWL. Specifically, SWRL alleges that the team leader of the panel that reviewed FWL's proposal (the panel for the Western Region) is a former FWL employee. The protester also contends that the team leader of a review panel for another region is currently a paid consultant to FWL, and had an opportunity to influence the evaluation of FWL's proposal because all the team leaders met to discuss various aspects of the evaluation process.

Our review of SWRL's protest concerning these alleged conflicts of interest is limited to determining whether the individuals involved improperly exerted prejudice or bias on behalf of FWL. Harry Kahn Associates, B-216306.2, June 28, 1985, 85-1 CPD ¶ 739. Moreover, the protester has the burden of proving its case, and unsupported allegations or assertions of the potential for impropriety do not satisfy this burden. Id.

The only evidence submitted by SWRL of any improper influence on the evaluation results here is that based on SWRL's study of the reviewers' score sheets, the team leader for the Western Region was reviewer No. 6, and

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reviewer No. 6 was the sole reviewer who rated FWL ahead of SWRL in the initial scoring. At the outset, we note that SWRL has provided no support for its contention that reviewer No. 6 in fact was the team leader.^{3/} However, the record before us does demonstrate that reviewer No. 6 did not give FWL the highest initial score, but in fact two other reviewers scored FWL higher.

While reviewer No. 6 was the only reviewer that initially scored FWL higher than SWRL, there was only a 1 point difference in the two scores. We do not find this sufficient to support a conclusion that the team leader improperly influenced the evaluation here. Accordingly, we find that at best, FWL's allegations rest on conjecture and supposition. We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference on supposition. Lighting Location and Protection, Inc., B-215480, Feb. 21, 1985, 85-1 CPD¶ 216.

Conclusion

The protest is denied.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel

^{3/} The record before this Office also does not disclose the identify of reviewer No. 6.