

Van Schaik

DECISION



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

FILE: B-220868

DATE: March 5, 1986

MATTER OF: Associations for the Education of the Deaf,
Inc.

DIGEST:

1. Where an agency regards proposals as essentially equal, cost or price may become the determinative factor in making an award notwithstanding that in the evaluation criteria cost was of less importance than technical considerations. A protester's mere disagreement with the determination that proposals are essentially equal does not render the evaluation objectionable.
2. Source selection officials are not bound by the recommendations and conclusions of evaluators and, as a general rule, we will defer to such officials' judgment even when they disagree with assessments made by working level evaluators or individuals who normally would be expected to have technical expertise.
3. Unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition and even where bias is shown, if there is no indication that the protester's competitive position was adversely affected, the protest will be denied.
4. There is no impropriety in requesting a second round of best and final offers where a valid reason, such as a change in the work requirements, exists for such action.

The Associations for Education of the Deaf (AED) protests the award of a contract for selection and captioning of educational films by the Department of Education (DOE) under request for proposals No. 85-039, to Modern Talking Pictures Services, Inc. (Modern). AED's

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principle complaint is that DOE did not adhere to the evaluation plan and evaluation criteria in awarding the contract, and that the agency should have awarded AED the contract because its proposal was superior to Modern's.

The protest is denied.

I. Background

The RFP contemplated a cost reimbursement type contract to select, evaluate, and caption educational films for hearing-impaired learners, and to develop lesson guides to accompany such films. The RFP contemplated a 3-year project, including 21 tasks, to be conducted in 3 one-year phases.

The evaluation criteria listed in section M of the RFP advised that award would be made to the offeror whose proposal represented the combination of technical merit and cost most favorable to the government, and that technical considerations would be of paramount importance. The technical evaluation criteria and their weights were set forth as follows:

	<u>Maximum Points</u>
I. Procedural Plan	40
II. Personnel Plan	20
III. Management Plan	25
IV. Resources, Facilities and Equipment	15
Total Points	100

The only proposals submitted were from AED, the incumbent contractor, and Modern, the current contractor for a related film distribution contract. A 5-member technical review panel, chaired by a project officer whose responsibility was to summarize the panel ratings but not rate proposals himself, reviewed the technical proposals. The panel gave Modern an average technical score of 82.2 and AED an average score of 82.4. Four evaluators found both proposals acceptable while the other evaluator found

both "unacceptable but susceptible to being made acceptable." The evaluation panel forwarded both proposals to the contract specialist with questions for use in discussions.

The selection officials considered the results of the technical review and the offerors' cost proposals to determine the competitive range for the purpose of conducting discussions. The initial proposed costs were \$1,840,077 for Modern and \$1,497,346 for AED. Although the project officer recommended award to AED based on initial proposals, the selection officials, after determining both proposals to be in the competitive range, decided to conduct discussions with both offerors and requested best and final offers. In their best and final offers, Modern reduced its costs to \$1,692,301, while AED increased its costs to \$1,597,101.

After reviewing the best and final offers, the project officer again recommended an award to AED, but later recommended that a second round of best and final offers was necessary because one of the tasks was not needed and another lacked the necessary detail to obtain competition on an equal basis. Specifically, the agency discovered that Task 17, "Publication of Lesson Guides," should not have been included in this RFP since Modern already was performing that task under its separate distribution contract. Also, Task 9, regarding film evaluation, failed to specify the number of films to be evaluated, resulting in the proposed evaluation of approximately 480 films by AED while Modern proposed approximately 900 films. The agency therefore orally advised both firms that task 17 was deleted and task 9 entailed evaluating 500 films, and subsequently requested a second round of best and final offers. Modern responded with an offer of \$1,332,390 and AED with an offer of \$1,478,966.

After reviewing the entire procurement file, the Assistant Secretary for Special Education and Rehabilitation Services, having final authority to make the program office's recommendation, recommended Modern for the contract award. On September 30, the contracting officer and contract specialist executed a memorandum of negotiation concluding with a recommendation of award to Modern because Modern's offer represented the best combination of technical factors and price.

II. Protest Grounds

AED argues first that the technical evaluation of its proposal was flawed because DOE did not follow the RFP's evaluation criteria, under which technical considerations were of paramount importance. The protester also complains that DOE improperly failed to rescore proposals after the receipt of best and final offers and that selection officials ignored the evaluation panel's award recommendation. AED also alleges that the evaluation and award decision were tainted by the bias of one evaluator and an inadequate summary of the evaluation panel's comments.

Further, AED argues that the award was improper because Modern's proposal was overrated technically as a result of that firm's misrepresentation of the commitment of certain personnel. In addition, AED alleges that the award may cause a conflict of interest since Modern is a film distributor and thus has an interest in selecting its own clients' films for this contract. The protester also contends that DOE should not have requested a second round of best and final offers since its proposal met the solicitation requirements and was lower priced after the first round of best and final offers.

Finally, AED also alleges a number of other improprieties with the evaluation and award.

III. Analysis

A. Conformance with the Evaluation Criteria

AED contends that its technical proposal was clearly superior to Modern's and was initially higher rated so that it should have received the award since technical considerations were of paramount importance under the RFP. The protester also complains that the agency failed to follow the project officer's recommendation of an award to AED, and that the best and final offers were not rescored.

We first note that DOE has denied the protester access to its competitor's proposal and to much of the evaluation material, but has provided all of the requested material for our review. We have reviewed both proposals and the evaluation material in camera but our discussion of their contents is limited because of the agency's restriction on their disclosure. E.R. Johnson Associates, Inc., B-217059, May 8, 1985, 85-1 CPD ¶ 513.

In considering protests against an agency's evaluation of proposals, we will not evaluate the proposals anew and make our own determination as to their acceptability or relative merits. Bendix Field Engineering Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496. However, we will examine the record to determine whether the evaluation was consistent with the evaluation criteria. See Deuel and Associates, Inc., B-212962, Apr. 25, 1984, 84-1 CPD ¶ 477.

DOE states that the selection officials considered the proposals essentially equal based on the initial evaluation scores of 82.2 for Modern and 82.4 for AED, and on the review of the best and final offers that did not change the relative technical ranking of the offerors. The technical evaluations are supported by extensive comments noting the strengths and weaknesses of both proposals.

These comments indicate that AED's slightly higher technical ranking was attributable to the experience AED had gained as the incumbent contractor. The selection officials basically determined that AED's technical advantage in this respect was insignificant, and therefore decided to award Modern the contract on the basis of its lower costs.

Where, as here, the RFP did not include a formula assigning precise weights to technical factors and cost, upon which a selection would be based, the selection officials retain considerable discretion in determining the significance of technical point score differentials in making technical/cost tradeoffs. Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 CPD ¶ 229. Their decision, the manner in which they use the results of technical and cost evaluations, and the extent, if any, of technical/cost tradeoffs are governed only by the tests of rationality and consistency with established evaluation criteria. Advanced Technology Systems, Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315. In this regard, we have recognized that source selection officials may consider a numerical scoring advantage based primarily on the advantages of incumbency as not indicating a significant technical advantage that would warrant significant additional costs. Ecology and Environment, Inc., B-209516, supra. Furthermore, source selection officials are not bound by the recommendations of evaluators or individuals who normally may be expected to have technical expertise. Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607; aff'd, Bank Street College of Education --Request for Reconsideration, B-213209.2, Oct. 23, 1984, 84-2 CPD ¶ 445.

Where selection officials reasonably regard proposals as being essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121. The designation of cost as a subsidiary evaluation factor does not mean that where proposals are considered equal technically, cost is precluded from becoming the determinative factor. Id. We have upheld determinations that technical proposals were essentially equal despite differentials significantly greater than the one here. E.g., Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where the differential was more than 15 percent).

Our review of the record indicates no basis to object to the agency's determination that the technical proposals were essentially equal. As stated above, the source selection officials were not bound by the project officer's recommendation. Regardless of how much AED agrees with the recommendation and disagrees with the selection decision, AED's mere disagreement with DOE's determination does not render the evaluation objectionable. IMODCO, B-216259, Jan. 11, 1985, 85-1 CPD ¶ 32. The agency therefore properly, and consistently with the RFP's evaluation criteria, awarded a contract to Modern on the basis of its lower costs.

Regarding the agency's failure to formally rescore the best and final offers, there generally is no requirement that an agency do so. See CRC Systems, Inc., B-207847, May 2, 1983, 83-1 CPD ¶ 462; The Advantech Corp., B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3. While AED maintains that the agency's evaluation plan required reconvening the technical evaluation panel and rescoring, the agency is under no obligation to conform to a plan that was not announced to offerors or made a part of the RFP. See Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. Since the two firms' best and final offers did not materially affect their relative technical standing, we do not see how rescoring could have altered the agency's judgment of essential technical equality.

B. Alleged Bias of Technical Evaluator and Project Officer

With regard to the allegation of bias, unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Technical Services Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152. Even where bias is shown, we will deny a protest if there is no indication that the bias adversely affected the protester's competitive standing. Reliability Sciences, Inc., B-205754.2, June 7, 1983, 83-1 CPD ¶ 612. AED has not carried its burden of proof. AED argues that the disparity between the point scores given by one evaluator and the others supports its allegation of bias. The evaluator in question, however, gave low scores to Modern also, and the scores were supported by criticisms shared with other panelists. Moreover, relatively low scoring by one member of an evaluation panel does not establish bias. Digital Radio Corp., B-216441, May 10, 1985, 85-1 CPD ¶ 526.

AED also finds support for its allegation of bias in the written comments of the same evaluator under the criteria "Resources, facilities and equipment." That evaluator questioned whether it would be appropriate to award the contract to a professional organization like AED that is involved in advocacy, certification and other issues that could cause a conflict of interest. There is no indication, however, that the evaluator intentionally underscored AED's technical proposal because of this concern.

AED maintains that the project officer, who chaired the technical evaluation panel, inadequately summarized the comments of the five evaluators and that this summary tainted the final award decision. This is an unpersuasive argument considering that the project officer urged an award to AED. In any event, regarding the quality of the summary, the selection officials had access to the rankings and the complete comments of the evaluators, and their decision was consistent with those materials and the evaluation criteria.

C. Evaluation of Modern

AED also contends that the award to Modern was improper because Modern's proposal received a higher score for the personnel criteria than it should have, since Modern allegedly overstated the commitment of certain personnel.

Contrary to AED's allegation, we find no impropriety in the evaluation of Modern's proposal. AED has not detailed the positions to which it refers, while DOE points out that during discussions Modern identified proposed key personnel and submitted a transition plan for obtaining approval of its staff that satisfied DOE's questions concerning personnel. Absent any evidence that Modern purposefully misstated its intention to use certain personnel, this aspect of AED's protest is rejected as speculative. See SETAC, Inc., 62 Comp. Gen., supra. Reliability Sciences, Inc., B-205754.2, supra.

Finally, AED alleges that an award to Modern may cause a conflict of interest because Modern, a commercial film distributor, will give preferential treatment to its film distribution clients in the submission of films to be selected and captioned under the contract. AED bases this allegation on a statement in Modern's proposal that it would attempt to propose at least fifty films each year from its film distribution clients for screening under the captioning contract.

DOE points out that the RFP does not restrict the origin of films to be selected under the contract and that all films would have to go through the entire selection and evaluation process before being recommended for captioning. DOE is involved at every stage of that process to assure that selected films meet the identified needs of the education community and to preclude any unfair advantage by any particular film distributor or producer.

The determination as to whether a sufficient possibility exists that an award to a particular firm would result in a conflict of interest must be made by the procuring activity, with which lies the responsibility for balancing the government's competing interest in (1) preventing bias in the performance of certain contracts which would result from a conflict of interest, and (2) 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 CPD ¶ 726.

We find DOE's conclusion that there is no conflict of interest to be reasonable, since Modern's submission of films donated by its film distribution clients for possible selection does not mean that those films will be chosen for captioning.

D. Second Round of Best and Finals

AED also disagrees with the decision to request a second round of best and final offers. As explained, after receipt of the first best and final offers, DOE determined that competition would have to be reopened to eliminate Task 17 and to specify in Task 9 that 500 films were to be evaluated. AED maintains that its first best and final proposal to evaluate approximately 480 films met the ultimate requirement to evaluate approximately 500 films, and, since its price at that time was lower than Modern's even with Task 17, it should have received the award without a second round of best and final offers.

We find no merit to this contention. There is no impropriety in requesting a second round of best and final offers, where, as here, there exists a valid reason to do so; the need to change the work requirements, or the need to obtain more information to form a sufficient basis for an award selection, provides a valid reason. Robnreen Consultants, Inc., B-218214, Feb. 27, 1985, 85-1 CPD ¶ 251.

E. Other Objections

AED alleges that there were a number of other improprieties in the procedures used by DOE to evaluate proposals and make the award. We dispose of these issues, however, with only brief comments since AED has not shown how any of these alleged deficiencies could have affected its competitive position. National Capital Medical Foundation, Inc., B-215303.5, June 4, 1985, 85-1 CPD ¶ 637.

AED alleges that the agency conducted a defective preaward audit that deprived AED of the award. Specifically, AED charges that the DOE auditors did not prepare a written report on AED, but instead verbally conveyed their recommendations through the contract specialist and the project officer to the Assistant Secretary that made the final recommendation for the program office. According to the protester, the audit information conveyed to the Assistant Secretary was incorrect and distorted AED's management approach and accounting system, resulting in the Assistant Secretary's unwarranted concern about these areas.

The purpose of the preaward audit was to provide the contracting officer with sufficient information to permit a determination of the reasonableness of the proposed cost. See Federal Acquisition Regulation (FAR) 48 C.F.R. § 15.805-5 (1984); AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419. We know of no requirement that the results be put in writing. See FAR, 48 C.F.R. § 15.805-5. Moreover, AED has not shown that it was prejudiced by the audit. The final award decision was based on Modern's significantly lower cost after the two technical proposals were determined essentially equal. Even after the audit, AED's initial score under the Management Plan evaluation factor was not changed and remained practically equal to Modern's score (both firms received approximately 20 of a possible 25 points under this factor). Since AED's competitive position was unaffected, DOE's use of the audit report was unobjectionable. National Capital Medical Foundation, Inc., B-215303.5, supra.

AED also maintains that DOE's evaluation plan required that a final recommendation for award be made by no later than May 15, but this was not done until September. As previously stated, the agency was not obligated to adhere to the plan. See Bunker Ramo Corp., 56 Comp. Gen., supra. Also, we do not see how AED was prejudiced by the delay which was apparently caused by the need to request two rounds of best and final offers. In any event, an agency's failure to meet procurement milestones is generally a matter of procedure and does not provide a valid basis for protest. Roller Bearing Co. of America, B-218414.2, May 14, 1985, 85-1 CPD ¶ 542.

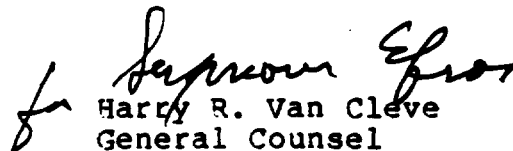
According to AED, DOE also violated a memorandum dated April 24 that required that information in proposals be maintained in strict confidence. AED objects that this rule was violated when technical proposals were sent to a DOE official "outside of the official procurement process." The full text of the April 24 memorandum, however, indicates that the contracting officer was merely advising procurement officials not to reveal to offerors information such as the number of proposals received, proposed costs or the government cost estimates. AED has not alleged that this rule was violated. This allegation, therefore, is denied.

Finally, AED protests that Modern knew that Task 17 was to be eliminated before the first round of best and final offers but AED was not given this information until later. AED, however, was informed and given an opportunity to adjust its proposal. Since there is no indication that AED was afforded an inadequate opportunity to revise its proposal, DOE's elimination of Task 17 was not objectionable.

IV. Conclusion

As explained, DOE's decision to make an award to Modern on the bases of its lower cost was unobjectionable since the proposals were essentially technically equal and therefore cost became the determinative evaluation factor. Further, we find no merit to AED's allegation of bias on the part of technical evaluation officials, or to numerous other allegations raised by the protester.

The protest is denied.


Harry R. Van Cleve
General Counsel