

DECISION

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

FILE: B-221385; B-221385.2
B-221385.4 **DATE:** May 15, 1986

MATTER OF: Designers and Planners, Inc.
Seatech Enterprises, Inc.
Stellar Technology Corp.

DIGEST:

1. Protest that award to selected contractor for technical advisory services for the Navy's Habitability Improvement Self-Help Program will create an organizational conflict of interest because of awardee's prior contracts to provide habitability hardware is denied where agency determines that barring the contractor from acquiring future contracts for the provision of habitability hardware is sufficient to avoid any potential conflict.
2. Allegation that RFP's conflict of interest clause should be amended is dismissed as untimely since allegation concerns an apparent solicitation impropriety which must be protested prior to the closing date for receipt of proposals.
3. Protest that agency's technical evaluation was improper and failed to adhere to stated evaluation criteria is denied where agency evaluation was consistent with the evaluation criteria and, despite protesters' disagreement, the record provides no basis to conclude that agency evaluation was unreasonable.
4. Protest that agency improperly awarded small business set-aside contract without any advance notice of the intended award is denied where agency determined that award was urgent, since agency is not required to follow 5-day notification rule where urgency determination is made.

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5. Protest that agency was biased and did not treat all offerors fairly is denied where record contains no evidence of bias or unfair treatment.

Designers and Planners, Inc. (D&P), Seatech Enterprises, Inc. (Seatech) and Stellar Technology Corp. (Stellar) protest the award of a cost-plus-fixed-fee contract to Commercial Building Services, Inc. (CBS) under request for proposals (RFP) No. N00024-85-R-4100(Q) issued by the Department of the Navy for technical advisory services for the Naval Sea Systems Command (NAVSEA) Habitability Improvement Self-Help Program on various ships. The purpose of the program is to assist Navy personnel in maintaining and improving shipboard conditions by making renovations within the capability of on-board ship personnel. Improvements are to be made in such areas as berthing spaces, sanitary spaces, dining facilities, crew lounges and recreational areas; the contractor is to provide technical assistance in solving habitability problems and installing, maintaining and removing habitability equipment such as furniture, air conditioning and waste disposal systems. The protesters allege that the award to CBS creates an improper organizational conflict of interest because CBS is a manufacturer of habitability hardware. Also, the protesters question the Navy's evaluation of their proposals.

We deny the protests in part and dismiss the protests in part.

Background

The RFP was issued on November 16, 1984 as a total small business set-aside and called for the performance of 333,334 manhours of technical services (approximately 1 year), with options for an additional 666,668 manhours. Offerors were requested to submit separate technical and cost proposals. The RFP provided that cost proposals would be evaluated for cost realism and that evaluated cost was significantly less important than technical merit, although it might become more important where the proposals were evaluated as being essentially technically equal. The technical evaluation factors specified were as follows: 1) Key personnel experience, 2) Understanding the scope of work, 3) Approach to technical instructions, 4) Corporate background and experience and 5) Management.

Six proposals were received by the December 18, 1984 closing date. The initial technical evaluation was completed by the Navy in July 1985. Two offerors were found outside the competitive range and, by letter dated July 24, the Navy advised the remaining offerors of the weaknesses and deficiencies in their proposals. Amendment No. 0002 to the RFP also was issued on that date, adding an organizational conflict of interest clause which prohibited the technical services contractor from furnishing any shipboard system or major component that is ordered under the contract through the life of the service contract and for 3 years thereafter. Amendments Nos. 0003 and 0004, issued in August 1985, revised this clause and replaced "shipboard systems and major components" with "furniture and other hardware for the Self-Help Program" and limited the prohibition to the life of the service contract.

Revised technical and cost proposals were received by the Navy on August 30 and, by letters dated November 29, best and final offers (BAFOs) were requested. The final technical scores and proposed costs were as follows:

	Technical Score	Proposed Cost
CBS	91.9	\$15,448,897
D&P	79.4	\$12,570,336
Seatech	79.4	\$12,269,503
Stellar	75.6	\$14,307,656

The proposed costs were adjusted to compensate for underestimated and overestimated costs, and the Navy also normalized the cost proposals by excluding those costs (travel, subsistence and related expenses) which would be the same for all offerors; the technical scores were not adjusted. The resulting final adjusted combined scores and evaluated costs were:

	Adjusted Combined Scores	Evaluated Cost
CBS	90.54	\$11,949,502
Seatech	87.64	\$10,573,006
D&P	86.08	\$11,000,986
Stellar	83.24	\$11,167,589

The contracting officer determined that CBS' technical superiority outweighed its additional cost and the contract was awarded to CBS on January 2, 1986. Based on a determination that an immediate award was urgently needed, the contract was awarded without advance notification to the other offerors.

Conflict of Interest

The protesters allege that the award to CBS, a habitability hardware manufacturer, creates an improper organizational conflict of interest. The protesters indicate that CBS has been awarded prior contracts to provide habitability equipment and that CBS should therefore be excluded from this competition. In addition, the protesters argue that significant amounts of habitability hardware will be procured during this project and that under the contract CBS' technical advisors are to direct and guide ship personnel in the procurement of these materials. As a result, the protesters contend that CBS will be in a position to influence the procurement process and favor the habitability equipment that it manufactures.

In addition, Stellar complains that CBS is currently acting as a warehouseman for habitability equipment procured by the Navy. Stellar contends that it is a conflict of interest to have the same firm responsible for the storage, inspection and handling of the materials it manufactures. Stellar argues that CBS, through breakage and loss at the warehouse and also their relationship with ship personnel, will be able to affect the need for additional material. The protesters contend that the Navy successively amended the RFP's conflict of interest provision in order to permit CBS to be considered for award and that more stringent provisions should have been included.

The Navy argues that it was not necessary to exclude CBS because of CBS' prior contracts; CBS will not be in a position to favor its own equipment since the majority of its work under the technical services contract will be technical advice, training and assistance in the installation and removal of habitability equipment. The Navy contends that the technical services contractor has no input on what equipment is to be procured and that this decision is made by the Naval Regional Contracting Center which contracts for the equipment. The Navy argues that CBS' work involves little or no evaluation of its own or a competitor's equipment, except for advising on physical space preparation in installation or repair procedures for the equipment and that under these circumstances, CBS will not be in a position to favor its own products or disparage those of a competitor.

With respect to the warehouse facility and operation, the Navy indicates that the warehouse is jointly administered by CBS and an unaffiliated contractor. The Navy contends that CBS' physical control of the warehouse

facility is supervised by the other contractor and that safeguards are in place to prevent the potential abuse alleged.

The Navy argues that it recognized the organizational conflict of interest which might exist if the technical advisory contractor also acted as a prime contractor or advisor for the procurement of habitability hardware and that the conflict of interest provision contained in the RFP is adequate to avoid any potential abuse.

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 competing, rests with the procuring agency and we will not overturn such a determination unless it is shown to be unreasonable. NAHB Research Foundation, Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248. 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 Inst., B-218538, June 26, 1985, 85-1 CPD ¶ 726.

Here, the Navy concluded that restricting the technical advisory contractor from future contracts for habitability hardware and precluding the contractor from acting as an advisor on procurements for habitability hardware would be sufficient to avoid any potential conflict. The Navy indicates that the Habitability program is run under three separate contracts, none of which can be held by the same firm. The first contractor recommends new designs and equipment for the program, the second contractor prepares detailed specifications and installation instruction, and the third contractor, CBS, provides advice and trains ship personnel in installing and maintaining the equipment.

Under these circumstances, we do not find that CBS will be in a position to evaluate its own equipment or advise the Navy on which equipment is to be procured.

In this regard, we note that Stellar itself acknowledges that the majority of the habitability hardware procurements are made before any ship project commences and are accomplished by independent Navy personnel. Although the protesters complain that additional equipment is procured after a project begins and that CBS will be able to influence the procurement of these materials, CBS is

precluded from being awarded any new contracts during the term of the technical services contract. In addition, while Stellar questions the adequacy of the controls on CBS' warehouse operation, it has provided no evidence which would indicate that the Navy is acting unreasonably in relying on the warehouse controls to prevent any potential conflict. Accordingly, we see no basis to question the Navy's decision to allow CBS to compete.

Finally, we note that to the extent the protesters are alleging that the conflict of interest provision contained in the RFP should not have been utilized, this allegation is untimely since it concerns an alleged solicitation impropriety and should have been protested prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1985).^{1/}

Technical Evaluations

Before addressing the specific issues raised by each protester, we point out that it is neither the function nor practice of our Office to determine independently the acceptability or relative technical merits of proposals. Our review of an agency's evaluation is limited to examining whether the evaluation was fair, reasonable and consistent with the evaluation criteria. We will question an agency's assessment of the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. Georgetown Air & Hydro Sys., B-210806, Feb. 14, 1984, 84-1 CPD ¶ 186. Moreover, since the contracting agency is in the best position to assess the "realism" of each offeror's cost

^{1/} D&P asserts that it did protest the conflict of interest clause contained in the RFP by its letters dated July 3 and July 30, 1985 to the agency. To the extent these letters are viewed as protests, it was incumbent upon D&P to protest here within 10 working days of its learning of adverse agency action on its protest. 4 C.F.R. § 21.2(a)(3). At the very latest, the Navy's receipt of best and final offers on December 6, 1985, without any revision to the conflict of interest clause as requested by D&P, clearly constituted adverse agency action; D&P did not protest within 10 working days of that date. 4 C.F.R. § 21.2(a)(3).

and technical approaches and must bear the consequences of a defective cost analysis, we will not disturb an agency's determination in this regard unless it clearly lacks a reasonable basis. Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309. With these general principles in mind, we turn to the specific allegations raised.

(1) Seatech's Protest

Seatech alleges that it should have been awarded the contract because all offers were evaluated as essentially equal technically and Seatech was the lowest cost offeror. Seatech contends that the Navy failed to follow the RFP's evaluation criteria by not awarding to the lowest cost offeror with a technically acceptable proposal. In its comments to the agency report, Seatech questions the addition of more than \$400,000 to its evaluated costs due to the agency's cost adjustments. Seatech argues that CBS' proposal was only 3 points higher than Seatech's and that the award to CBS resulted in a significantly higher cost to the government.

The record shows that the proposals were not evaluated as technically equal and that CBS' proposal was considered technically superior. In addition, we point out that the RFP indicated that cost was significantly less important than technical merit and there is nothing in the RFP which suggests that award would be made to the lowest cost, technically acceptable offeror. Also, the three point difference between CBS' and Seatech's point scores takes into account the cost difference between the proposals; the actual difference in technical merit score was much greater. We thus find no basis to conclude that Seatech's proposal was not properly evaluated or that the award to CBS was not consistent with the RFP's evaluation factors.

Concerning the cost adjustment to Seatech's proposal, Seatech acknowledges that it was advised of this fact during the debriefing conducted by the Navy on January 14. Seatech, however, first raised this issue in its comments to the agency report filed with our Office on March 3. Protests must be filed within 10 working days of the date the protester becomes aware of the basis for protest and Seatech's allegation in this regard, filed approximately 2 months after it became aware of the basis for protest, is untimely and will not be considered. 4 C.F.R. § 21.2(a)(3).

(2) D&P's Protest

D&P argues that the Navy did not adequately evaluate its proposal and did not follow the RFP's evaluation criteria. D&P alleges that a representative of the contracting office advised D&P that all offers were evaluated as being technically equal. D&P contends that the award to CBS at a substantially higher price was therefore improper. In its comments to the agency report, D&P further complains that the scoring of its proposal was biased against D&P because Seatech, a related company, also submitted a proposal in its own name. D&P argues that the evaluation scheme was tailored to ensure award to CBS and that the entire process was distorted. D&P contends that award was made to CBS at a substantially higher price and that the award will result in higher costs to the government.

The Navy indicates that it evaluated D&P's and Seatech's proposal independently, notwithstanding the fact that the proposals submitted by the two firms were virtually identical. Also, the record shows that the Navy's evaluation conformed to the criteria specified in the RFP. We see no evidence which indicates that the scoring of D&P's proposal by the Navy evaluators reflected anything other than their reasoned judgment concerning the merits of the proposal. See Martin Miser Assocs., B-208147, Apr. 8, 1983, 83-1 CPD ¶ 373. With respect to D&P's assertion of bias, we point out that prejudicial motives will not be attributed to contracting officials on the basis of inference or supposition. Eaton-Kenway, B-212575.2, June 20, 1984, 84-1 CPD ¶ 649. D&P's allegation in this regard is supported by no evidence and, in our view, is pure speculation.

Furthermore, while D&P states that it was advised that all proposals were rated technically equal, as indicated above the record shows that this was not the case. Moreover, we point out that the contract awarded CBS is a cost-plus-fixed-fee contract and we note that the Navy properly considered CBS' evaluated costs rather than its proposed costs since in a cost-reimbursement-type contract, an offeror's evaluated costs provide a sounder basis for determining the most advantageous proposal to the government. Norfolk Ship Systems, Inc., B-219404, supra.

Concerning D&P's allegation that the RFP evaluation criteria were biased towards CBS, we find this allegation untimely since it concerns an apparent solicitation impropriety and should have been protested prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

(3) Stellar's Protest

Stellar argues that the evaluation process was influenced by the fact that CBS was providing warehouse space to the Navy. Stellar contends that awarding the current contract to a firm other than CBS would pose a dilemma because the Navy would not have a direct means to pay CBS for the warehouse space and that this had to be a major factor in the evaluation process. In addition, Stellar notes that it was advised that its only significant technical deficiency was the firm's lack of experience in the "Habitability Self-Help Field." Stellar contends that this specific experience was not required by the RFP and with only one significant deficiency, its proposal should not have been scored 16 points below that of CBS. Also, Stellar contends that it offered a fixed ceiling on its overhead costs which precluded any type of cost overruns and that as a result, its offer was more advantageous to the Navy. Stellar complains that normalizing its cost proposal, by eliminating the other direct costs contained in its BAFO, would reduce its proposal by \$3.5 million dollars and that the Navy's normalized cost for its proposal is approximately \$360,000 more than it should be. Finally, Stellar complains that the Navy's request for BAFOs did not permit changes to its technical proposal and that Stellar was precluded from adding to its proposal additional corporate experience obtained by the firm.

The Navy indicates that the RFP made no mention of warehouse facilities and that the availability of warehouse space was not considered in the evaluation of proposals.^{2/} In addition, the Navy indicates that its cost evaluation did take into account Stellar's proposed fixed ceiling on overhead and gave credit to Stellar for this aspect of its proposal. With respect to the technical evaluation, the Navy argues that CBS' proposal was technically superior to Stellar's and that the award to CBS therefore was proper.

^{2/} The Navy also argues that Stellar is not an interested party because the firm would not be in line for award even if its protest were upheld. Stellar, however, has protested the evaluation of its proposal and if Stellar's technical proposal is found to be improperly evaluated, Stellar may then be in line for award. Consequently Stellar has the requisite direct interest to maintain this protest.
National Capital Medical Foundation, Inc., B-215303.5,
June 4, 1985, 85-1 CPD ¶ 637.

Our review of the record indicates that Stellar's proposal was evaluated in conformance with the RFP's evaluation factors and we see no evidence that the availability of warehouse space was considered in the scoring of proposals.^{3/} While Stellar's only significant deficiency may have been in corporate experience, the record shows that CBS' proposal was considered much stronger overall. CBS offered the best group of experienced supervisors, the most experienced group of technical experts and demonstrated a keen understanding of the technical requirements. In addition, although the RFP did not explicitly state that experience in the "Habitability Self-Help Field" was required, an agency need not specifically identify the various aspects of each evaluation factor which will be considered. The Liberty Consortium, B-215042, Apr. 12, 1985, 85-1 CPD ¶ 416. The RFP indicated that corporate experience would be considered and in our view the evaluation of Stellar's experience in this area of contract performance was clearly proper. Based on our review, we conclude that the record reasonably supports the Navy's technical evaluation.

In addition, our review of the Navy's cost analysis shows that no adjustments to Stellar's proposed costs were made by the Navy. We note that although Stellar argues that the other direct costs in its BAFO totaled \$3.5 million, its BAFO actually shows a total of \$3.14 million for these costs. The Navy normalized Stellar's cost by subtracting \$3.14 million from its BAFO and this figure equals the normalized costs utilized by the Navy. Consequently, there is no discrepancy as alleged by Stellar.

Furthermore, Stellar's argument that it should have been selected because its cost proposal was more advantageous is without merit. The RFP indicated that cost was less significant than technical merit and in light of the

^{3/} Stellar has also requested our Office to conduct an independent evaluation of the scoring of its technical proposal and a detailed investigation of the procurement. It is not our function, however, to conduct investigations pursuant to our Bid Protest Regulations nor do we evaluate technical proposals de novo or resolve disputes over the scoring of technical proposals. See Bobnreen Consultants, Inc., B-218214.4, Sept. 27, 1985, 85-2 CPD ¶ 558; Air Flight Service, B-216996, Apr. 12, 1985, 85-1 CPD ¶ 420.

technical difference between Stellar's and CBS' proposals, we see no basis to object to the award decision. See Airtronix, Inc., B-217087, Mar. 25, 1985, 85-1 CPD ¶ 345.

Concerning Stellar's complaint that it was not allowed to revise its technical proposal in its BAFO, this allegation is untimely. To the extent Stellar considered the Navy's BAFO request improper, Stellar was required to raise this issue prior to the closing date for receipt of BAFOs. See Crown Point Coachworks and R&D Composite Structures et al., B-208694 et al., Sept. 29, 1983, 83-2 CPD ¶ 386.

Remaining Allegations

The protesters argue that the Navy improperly failed to give them advance notice of the award in order to prevent any timely protest of CBS' small business size status. Also, the protesters contend that the Navy refused to schedule promptly a debriefing in order to delay the filing of a protest and to avoid the suspension of contract performance. The protesters argue that full disclosure of all relevant information was not made and that the Navy's actions demonstrate that the protesters were not treated equally and fairly.

The Navy awarded the contract to CBS without any advance notice to the protesters because it believed the services were urgently needed. In this regard, the contracting officer made a written determination that more than 20 ongoing ship overhaul projects would be jeopardized if the award to CBS was delayed. Under the regulations, when the need to award is urgent and is supported in writing, the agency is not required to follow the 5-day notification rule to enable unsuccessful offerors to file a small business size protest. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.1001(b)(2) (1984); Triple A Shipyards, B-213738, July 2, 1984, 84-2 CPD ¶ 4. The protesters have not shown that the perceived urgency did not exist or that the award prior to notice to the offerors was motivated by a desire to avoid a size status protest. We therefore find no basis to object to the Navy's actions.

With respect to the debriefing, the FAR requires agencies to provide unsuccessful offerors with a detailed debriefing after contract award. FAR, 48 C.F.R. § 15.1003. The contract was awarded to CBS on January 2 and debriefings were held with Seatech and D&P on January 14 and with Stellar on January 17. We have recognized that the effectiveness of the stay provision contained in the

Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(d)(1) (West Supp. 1985), could be diminished considerably if debriefings are routinely scheduled more than 10 days after award and we have recommended that agencies schedule debriefings as soon as possible. GTT Industries, Inc., B-220824, Nov. 5, 1985, 85-2 CPD ¶ 527. However, there is no evidence that the Navy intentionally delayed the debriefings in this case and in any event, this is a procedural matter which does not affect the propriety of the award. Systems Research Laboratories, Inc., B-219780, Aug. 16, 1985, 85-2 CPD ¶ 187.

The protests are denied in part and dismissed in part.

for Raymond S. Van Cleve
Harry R. Van Cleve
General Counsel