



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Regional Environmental Consultants

File: 8-223555

Date: October 27, 1986

DIGEST

1. Offeror's employment of a former government employee is not improper where there is no evidence in the record that actions of the employee, either before or after he left the agency, resulted in prejudice for or bias on behalf of the offeror. Although the employment of such an individual may benefit the offeror as a result of the employee's familiarity with the required work, where there is no evidence that the employee was privy to agency information concerning the procurement that was not available to other offerors, any competitive advantage is not the result of preference or unfair government action.

2. Where a proposal to conduct historical archaeological studies reflects a level of effort significantly less than and markedly different in emphasis from that which the agency believes is necessary to perform the contract, the agency does not act unreasonably in eliminating the proposal from the competitive range, because it has no reasonable chance for award without major revisions.

DECISION

Regional Environmental Consultants (RECON) protests the award of a cost-plus-fixed-fee contract to Dames & Moore under request for proposals (RFP) No. 6-SP-30-04360, issued by the Department of the Interior, Bureau of Reclamation, for historical archaeological studies. RECON alleges that the agency improperly eliminated its proposal from the competitive range. We deny the protest.

The procurement represents an effort by the agency to mitigate the adverse effects on historic cultural resources resulting

from the construction or modification of four dams in Arizona. The dams are a part of the Central Arizona Project, which will supply water to central and southern Arizona and southwestern New Mexico. The solicitation requested proposals for detailed archaeological data recovery and related historical documentary studies of specified sites for the purpose of achieving a better understanding of social and technological developments in the late 19th and early 20th centuries.

Three firms, including Dames & Moore and RECON, submitted proposals by the January 14, 1986 closing date. Based upon its evaluation of these, the agency determined that only Dames & Moore had submitted a technically acceptable proposal and had a reasonable chance for award. The Bureau of Reclamation therefore conducted discussions only with Dames & Moore and, on June 19, 1986, made an award to the firm. Upon learning of the award and obtaining a copy of Dames & Moore's proposal, RECON protested to our Office. Performance has continued notwithstanding the protest so that three related construction contracts can be completed on schedule.

CONFLICT OF INTEREST

RECON protests Dames & Moore's employment of a former government employee as its project manager/co-principal investigator. Until leaving the Bureau of Reclamation in May 1985, the employee was project archaeologist for the Arizona Projects Office. In this capacity, he was responsible for development of a 1984 "Stage III Report Addendum" for the Central Arizona Project. This addendum documented the cultural resources in the project area, analyzed the potential effects from the development, and suggested general research directions and means of mitigating adverse effects. The document was the basis for the statement of work for the protested procurement, and the agency reports that it used it to determine the appropriate cost and level of effort for the contract. The RFP states that the Stage III Report Addendum "shall provide general guidance for the research and data recovery undertaken as requirements of this contract."

The protester argues that the individual's role with Dames & Moore may violate post-employment restrictions on government employees. The statute and regulatory guidance cited by RECON, however, do not appear to apply, since they address a former employee's actions in connection with a particular government matter "involving a specific party" during his employment. See 18 U.S.C. §§ 207(a) and 207(b)(i) (1982);

5 C.F.R. §§ 737.5 and 737.7 (1986).^{1/} In this case no "specific party," i.e., an offeror for the procurement, was involved in the matter under the former employee's responsibility. In any event, the interpretation and enforcement of the post-employment restrictions are primarily matters for the Department of Justice, not this Office. Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 C.P.D. ¶ 60. Our interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. Wall Colmonoy Corp., B-217361, Jan. 8, 1985, 85-1 CPD ¶ 27.

We find no evidence of such prejudice here. The individual's government employment ended before issuance of the solicitation and submission of proposals. Nothing in the record demonstrates that he was accorded access to inside agency information concerning the procurement or that his

^{1/} 5 CFR § 737.5(a) summarizes the basic prohibition of 18 U.S.C. § 207(a) as follows:

"No former Government employee, after terminating Government employment, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government Employee." (Emphasis supplied.)

5 CFR § 737.7(a) summarizes 18 U.S.C. § 207(b)(i) as follows:

"No former Government employee, within 2 years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within period of 1 year prior to the termination of such responsibility." (Emphasis supplied.)

prior employment otherwise improperly influenced the evaluation and award.

Dames & Moore may, of course, have benefited under the RFP evaluation criteria from their proposed use of the archaeologist as co-principal investigator. Contracting agencies, however, are not required to compensate for the experience, resources, or skills enjoyed by a particular offeror where such competitive advantage is not the result of preference or unfair action by the government. Information Ventures, Inc., B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234. The mere employment of a former government employee who is familiar with the type of work required but not privy to the contents of the proposals or to other inside agency information does not confer an unfair competitive advantage. See Walker's Freight Line, B-220216.2, Jan. 15, 1986, 86-1 CPD ¶ 45; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 83-1 CPD ¶ 17. Consequently, we deny this basis of RECON's protest.

COMPETITIVE RANGE DETERMINATION

RECON contends that the elimination of its proposal from the competitive range was improper, arguing that its proposal was equal or superior to that of Dames & Moore.

In reviewing complaints about the reasonableness of the evaluation of a technical proposal and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of procurement laws and regulations. Pharmaceutical Systems, Inc., B-221847, May 19, 1986, 86-1 CPD ¶ 469. Where an agency's evaluation results in only one offeror being included in the competitive range, we will closely scrutinize that evaluation. Forecasting International Ltd., B-220622.3, Apr. 1, 1986, 86-1 CPD ¶ 306.

The solicitation here set forth four technical evaluation criteria, specifying the numerical importance of each. It provided that these technical criteria would be worth 70 percent and cost would be worth 30 percent in the overall evaluation. Contracting officials awarded the proposals at issue here ^{2/} the following technical scores:

^{2/} The scores of the third offeror, Scientific Resource Surveys, Inc., were lower overall and are not at issue here.

	<u>Maximum Points</u>	<u>Dames & Moore</u>	<u>RECON</u>
Technical quality of the preliminary research design	35	26	21.8
Understanding of scope and objectives of the required work as indicated by a proposed plan of work	25	22.5	16.8
Professional qualifications, experience, and capabilities of the personnel to be assigned to the project	25	20	19
Quality and extent of organizational support	15	12	11.5
	<u>100</u>	<u>80.5</u>	<u>69.1</u>

Understanding the Scope and Objectives of the Required Work

The disparity in scores under "understanding of scope and objectives of the required work as indicated by a proposed plan of work" accounts for approximately half of the difference between RECON and the awardee. One of the major deficiencies that the agency found in RECON's plan of work concerned its proposed level of effort, which evaluators found that RECON had seriously underestimated. The Stage III Report Addendum, which, as noted above, the solicitation instructed offerors to consult for general guidance, estimated that at least 22 person-years of effort would be necessary. While Dames & Moore initially proposed 19.65 person-years over a 3-year period, and the third offeror proposed 26 person-years, RECON proposed only 15.4 person-years over a 2-year period.

The technical evaluation committee was also concerned about RECON's plan to commence fieldwork before completing the contract research design. In addition, the committee considered the ratio of field time to laboratory time to be so high that

there would be insufficient time for an adequate "synthesis of historic documentation, lab analysis and write-up." The Stage III Report Addendum estimated that, apart from historical analysis, the effort required for laboratory analysis, report preparation, and study management would equal 150 to 200 percent of the effort required for fieldwork. While the effort proposed by Dames & Moore for other than fieldwork (data recovery) and documentary (historical) research totaled approximately 142 percent of the proposed fieldwork, the corresponding figure for RECON's proposal was only approximately 95 percent.

This difference in the estimated level of effort and the ratio of field to laboratory time in large measure resulted from a difference in the effort Dames & Moore and RECON allocated to reporting the results of the research. Dames & Moore proposed approximately three times the amount of non-clerical effort for report preparation that RECON proposed. While RECON's plan of work required completion of the final report within approximately 6 months after conclusion of the fieldwork, Dames & Moore envisioned more than 10 months for completion of the final report.

In addition to proposing, without explanation, a level of effort substantially less than that suggested in the Stage III Report Addendum, RECON was deficient in addressing the solicitation statement that a crucial goal was to produce not only thorough professional reports, but also materials for disseminating new information to the general public. Dames & Moore proposed to document and disseminate the research results in a final technical report and in an article and book directed to the general public. These publications will describe the social and cultural life in the historic camps for the construction of dams in central Arizona. RECON, by contrast, failed to propose any special efforts for assuring dissemination of research results to the general public and instead confined its proposal to a discussion of the required technical report. We therefore consider reasonable the agency's finding that Dames & Moore's proposal was clearly superior with respect to the firm's understanding of the scope and objectives of the required work.

Preliminary Design Concept

The remainder of the difference between the two offerors' technical scores is almost entirely attributable to evaluation of "technical quality of the preliminary design concept." RECON received a much lower score under the subcriteria covering (a) familiarity with relevant research and project area resources and (b) a novel and imaginative approach.

The solicitation provided that the preliminary design should demonstrate familiarity with the current status of relevant research and with the nature of the cultural resources available within the project area. Agency evaluators found that RECON's proposal demonstrated no more than a passing familiarity with comparable research. By contrast, the technical evaluation committee reported that Dames & Moore's proposal demonstrated the firm's knowledge of and insight into the resources to be studied.

Although RECON acknowledges that Dames & Moore's proposal demonstrated "some familiarity with regional and national studies," it characterizes the proposal as including only a "general discussion" of the development of water resources in the Southwest. RECON contrasts this approach with what it describes as its own "research-specific presentation" focusing on those aspects of national and regional history that best augmented its proposed research design. Furthermore, RECON maintains that it demonstrated its familiarity with the resources in the project area in its discussion of proposed research by references to individual historic sites.

Our examination of the proposals reveals that Dames & Moore's proposal cited a number of works on the history of water development in the Southwest that RECON did not address. Also, RECON described its visits to the area as being only "brief field examinations of the sites." By contrast, Dames & Moore had conducted earlier environmental investigations for the Central Arizona Project, with a subcontractor investigating historic sites in the project area. The Stage III Report Addendum cites seven relevant reports submitted by Dames & Moore in this regard. Moreover, Dames & Moore recharacterized in its proposal the nature and relevance of the sites, vis-a-vis those suggested in the solicitation, based on its "site-by-site consideration." This led one of the evaluators to conclude that "the reassessment of site significance, and the proposed new selection of sites, indicates very high familiarity with the resources of the area."

The technical evaluation committee also found Dames & Moore's proposal of a popular book to be "both appropriate and innovative." Agency evaluators described the book as representing "a direct public benefit" and providing "much mileage to Reclamation." By contrast, they considered RECON's proposal to be "[p]retty standard" and "[n]ot a particularly innovative, or creative approach." Given the importance that the solicitation accorded to the dissemination of new information to the general public, we are unable to find the agency evaluation under this criterion to have been unreasonable.

CONCLUSION

As a general rule, the competitive range in a negotiated procurement consists of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. However, even if a proposal is technically acceptable or capable of being made so, it need not be included in the competitive range when the agency properly determines that it has no reasonable chance of being selected for award. Information Systems & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30. Nor must proposals that are technically unacceptable as submitted and that would require major revisions to be acceptable be included in the competitive range. See Forecasting International Ltd., B-220622.3, Apr. 1, 1986, 86-1 CPD ¶ 306.

Although the evaluation scores appear relatively close, the scores do not fully reflect the conclusions of the technical evaluation committee, which found a significant difference between the proposals. In particular, RECON proposed a level of effort significantly less than and markedly different in emphasis from that recommended in the solicitation, and the firm failed to explain this disparity in its proposal. We share the agency's view that this was a major deficiency, and we find that the agency properly considered it to establish a lack of understanding. Thus, while the agency offers no explanation as to why RECON's numerical score was as high as it was, we find that the record does reflect a reasonable basis for the Bureau of Reclamation's conclusion that RECON had "no reasonable chance to be awarded the contract without a major technical rewrite."

Additionally, we believe it improbable that including RECON in the competitive range and conducting discussions would have improved other deficient areas of the proposal. See Joule Engineering Corp., 64 Comp. Gen. 540 (1985), 85-1 CPD ¶ 589. An agency should not conduct discussions likely to result in "technical transfusion", i.e., the disclosure to a competitor of an offeror's innovative approach or solutions to problems. See The Aerial Image Corp.; Comcorps, B-219174, Sept. 23, 1985, 85-2 CPD ¶ 319. Thus, the Bureau of Reclamation was not required to conduct discussions that could result in the disclosure to RECON of Dames & Moore's innovative approach to meeting the requirement for distribution of the research results to the general public. Similarly, the agency was not required to conduct discussions with RECON concerning its relative lack of familiarity with the project area resources, since this was inherent in the actual experience of the firm. Cosmos Engineers, Inc., B-220000.3, Feb. 24, 1986, 86-1 CPD ¶ 186.

RECON also believes that the agency acted improperly in excluding it from the competitive range without first evaluating its cost proposal, which was substantially less than Dames & Moore's. The agency properly disregarded the possible lower cost of RECON's proposal, however, since the firm's technical proposal was unacceptable. ALM Inc. Technology, Inc., B-217284, et al., Apr. 16, 1985, 85-1 CPD ¶ 433. We note that RECON's initial lower proposed cost was largely due to its lower proposed level of effort, and the firm would have had to increase both to perform the work in a manner acceptable to the agency.

The protest is denied.

for *Seymour Elio*
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General Counsel