



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Universal Shipping Company, Inc.
File: B-223905.2
Date: April 20, 1987

DIGEST

1. Under the Competition in Contracting Act of 1984, agencies are not required to provide to protesters and other interested parties documents related to a protest that would give one or more parties a competitive advantage or which the parties are not otherwise authorized by law to receive. Nevertheless, decisions on bid protests are based on the entire record and not merely on those portions that have been released to the protester and other interested parties.
2. Where an initial proposal is not fully in accord with the requirements of an RFP, the proposal should not be rejected if the deficiencies are reasonably susceptible to being made acceptable through negotiations.
3. Where an offeror promises to comply with the requirements of a solicitation, a contention that the offeror will be unable to comply with the requirements constitutes an allegation that the offeror is not responsible. GAO does not review affirmative determinations of responsibility absent circumstances not applicable here.
4. Once an offeror promises to perform in accordance with a solicitation's requirements, whether the offeror actually does perform as contractually required is a matter of contract administration which is to be monitored by the procuring agency and is not a subject of GAO review as a part of its bid protest function.
5. The composition of technical evaluation panels is within the discretion of the contracting agency and GAO will not review the composition absent a showing of possible fraud, bad faith, or conflict of interest.
6. Protester's new and independent ground of protest is dismissed where the later-raised issue does not independently satisfy the rules of GAO's Bid Protest Regulations.

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7. Requirement that agencies generally must conduct "meaningful" negotiations or discussions with all responsible offerors within a competitive range was satisfied when the protester was advised in writing concerning the two major weaknesses in its initial proposal. When a proposal is acceptable and in the competitive range, an agency is not under an obligation to discuss every aspect of the proposal that has received less than the maximum possible score.

8. Agencies are required to document the relative differences among proposals and their strengths, weaknesses and risks in terms of the stated evaluation criteria. Where source selection is based upon the average of the scores given to proposals by three technical evaluators, the two top ranked proposals are within one percentage point, but the scores are not adequately supported by written narratives, the source selection official lacked a sufficient basis to make a reasoned award decision.

DECISION

Universal Shipping Company, Inc. protests the award of a contract to Daniel F. Young, Inc. under request for proposals (RFP) No. AID/MS-86-021 issued by the Agency for International Development (AID), for international ocean ship booking, chartering and freight forwarding services in connection with AID's responsibilities for the administration and shipment of commodities under certain food donation programs. The solicitation provides that the successful offeror will receive commissions directly from the ocean carriers with which it deals. Universal argues that Young's offer was "nonresponsive" to material solicitation terms and should have been rejected. In addition, Universal complains about the composition of AID's Technical Evaluation Committee (TEC) and about the evaluation procedures employed by the TEC. Finally, Universal contends that AID failed to conduct meaningful discussions with it, and that the source selection decision was made without a reasonable basis and was not adequately documented.

We deny the protest in part, dismiss it in part, and sustain it in part.

BACKGROUND

On July 7, 1986, AID issued the RFP for the services in question for a 2-year period to begin in January 1987. The RFP requested that proposals be submitted by August 26, 1986.

By that date, proposals were received from Young, Universal and a number of other offerors.

On August 5, 1986, Young filed a protest with our Office contending that the RFP's geographical restriction, that the selected contractor "perform the booking/charterings function in the Washington metropolitan area" unduly restricted competition. On November 19, 1986, we denied Young's protest because AID had shown that the restriction was needed to satisfy its minimum needs and because Young had submitted a proposal which satisfied the requirement and had not shown itself to have been competitively prejudiced by the restriction. Daniel F. Young, Inc., B-223905, Nov. 19, 1986, 86-2 C.P.D. ¶ 586.

In November, all of the firms found to be in the competitive range were advised of that fact, were notified of weaknesses in their proposals and were invited to meet with the TEC to discuss their proposals. The firms in the competitive range then submitted best and final offers by December 1, 1986. The revised proposals were evaluated and point scored by the three voting members of the TEC. The three scores for each offeror's proposal were averaged by the contract negotiator and award was made to Young on December 11 based upon its highest evaluated average point score.

Universal filed its protest against the award to Young on December 22, 1986. By letter filed with our Office on January 16, 1987, pursuant to 4 C.F.R. § 21.4(b) (1986), AID notified our Office that urgent and compelling circumstances significantly affecting the interests of the United States would not permit AID to wait for GAO's decision on Universal's protest before authorizing the commencement of AID's contract with Young. In addition, AID stated that allowing the performance of Young's contract was also in the best interest of the government because Young was taking steps to ensure a smooth transfer of responsibilities from the incumbent (Universal) to Young and because much time and effort would be wasted if AID was required to suspend Young's performance.

On January 22, Universal filed a civil action (No. 87-0156) in the United States District Court for the District of Columbia seeking injunctive relief to prevent AID from allowing Young to commence performance of the contract awarded December 11, 1986. By order dated February 3, 1987, the court requested that GAO resolve the protest before it and ordered AID to stay performance of Young's contract until GAO decided the protest or until AID could show the court why a stay of the Young contract would be contrary to the best interests of the United States.

In Camera Review

Initially, Universal complains that its ability to prove the merits of its protest is hampered by AID's refusal to permit Universal to have access to certain source selection and evaluation documents and Young's technical and business proposals.

AID states that Young's technical and business proposals contain restrictions against disclosures, as authorized by the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 15.413-1(c) and 52.215-12 (1986), and therefore AID is precluded from disclosing this information. In addition, AID states that the specific point scores awarded to each firm, and information pertaining to the relative standing of firms other than Universal and Young are protected from disclosure to the public pursuant to the deliberative process privilege of the Freedom of Information Act, 5 U.S.C. § 552.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), government agencies are not required to provide to protesters and other interested parties documents related to a protested procurement action that would give one or more parties a competitive advantage or which the parties are not otherwise authorized by law to receive. Nevertheless, consistent with our practice, we have reviewed and based our decision on the entire record, not merely those portions that have been provided to the protester. S&O Corp., R-219420, Oct. 28, 1985, 85-2 C.P.D. ¶ 471.

"Responsiveness" of Young's Offer

Universal argues that Young's offer is "nonresponsive" to the RFP requirement (found in paragraphs H.6 and M.2(a)(3)) that the "booking and chartering functions must be performed in the Washington metropolitan area." Universal contends that because on August 5, 1986, Young protested against this geographical restriction, Young has evidenced that it "was resisting compliance" with the restriction. In addition, Universal argues that Young's proposal was "nonresponsive" because Young admits that it was not authorized to conduct business in Washington, D.C. until September 11, 1986, after its proposal was submitted.

Young counters Universal's arguments by stating that its proposal was in strict compliance with the geographical restriction and all other RFP requirements. Young states that its proposal clearly indicates that the booking and chartering functions will be performed by itself and its

subcontractor in its Washington, D.C. office. Finally, although Young admits that it did not obtain a certificate of authority to transact business in Washington, D.C. until September 11, 1986, Young argues that under the District of Columbia Business Corporation Act, the failure of a foreign corporation to obtain a certificate of authority to transact business in the District of Columbia does not preclude the corporation from fully conducting business in the District and does not impair the validity of the corporation's contracts entered into in the District.

AID argues that "the rigid rules of bid responsiveness in formally advertised procurements do not apply to negotiated procurements" such as this. Self Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 C.P.D. ¶ 195. AID states that it properly treated the acceptability of Young's plan to meet the requirements of the RFP's geographical restriction as a subject for negotiation and discussion. AID states that whatever deficiencies may have existed in Young's plan were resolved through negotiation, and under Young's contract Young will be required to fully comply with the geographical restriction. AID concludes that Young's proposal should not have been and could not have been rejected on the grounds that Young failed to meet the geographical restriction.

Award to an offeror which does not propose to meet specific RFP requirements is improper since the basis for an award must be the same, in its material terms, as that on which the competition is conducted. McCotter Motors, Inc., B-214081.2, Nov. 19, 1984, 84-2 C.P.D. ¶ 539. However, if an initial proposal is not fully in accord with the requirements of an RFP, the proposal should not be rejected at that time if the deficiencies are reasonably susceptible to being made acceptable through negotiations. Self-Powered Lighting, Ltd., 59 Comp. Gen. 298, supra.

Young's initial proposal, at a number of locations, indicates Young's intention to comply with the requirement that the booking and chartering functions be performed in Washington, D.C. Young's chartering subcontractor is based in Washington, D.C., and Young states that it has established a Washington, D.C. office to perform the booking function. Young's best and final offer (BAFO) confirms its intent to perform the booking and chartering functions in Washington, D.C. Although Young filed a protest against the geographical restriction, in our decision in the matter we found that, notwithstanding its protest, Young offered to satisfy the requirement in question and Young stated that it had in fact established a Washington, D.C. office for that purpose. See Daniel F. Young, Inc., B-223905, supra.

It is clear from both Young's initial proposal and its BAFO that Young promised to comply with the geographical restriction and from AID's evaluation sheets that the TEC evaluated Young's proposed facilities in Washington and found them to be satisfactory. Where, as here, an offeror promises to comply with the requirements of a solicitation, the contention of a protester that the offeror will be unable to comply with the requirements constitutes an allegation that the offeror is not responsible. Enidine, Inc., B-222617, June 5, 1986, 86-1 C.P.D. ¶ 528. Specifically, we have held that whether an offeror has the necessary permits and licenses to conduct business is a matter of responsibility and an initial proposal should not be rejected automatically, based on a failure to meet licensing requirements not specified in the solicitation. Recyc Systems, Inc., B-216772, Aug. 23, 1985, 85-2 C.P.D. ¶ 216.

Here, in making award to Young, AID impliedly indicated that it had found Young to be a responsible offeror, since before a contracting officer can make an award he must make an affirmative determination of responsibility. See FAR, 48 C.F.R. § 9.105-2(a)(1) (1986); The ARO Corp., B-222486, June 25, 1986, 86-2 C.P.D. ¶ 6. Our Office will not review a contracting officer's affirmative determination of responsibility absent circumstances not applicable here. Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 C.P.D. ¶ 153.

Moreover, to the extent that Universal is arguing that Young will actually not perform in accordance with the RFP's geographical requirement incorporated into the contract awarded to Young, Universal's contention constitutes a matter of contract administration which is to be resolved by AID, not by our Office as a part of our bid protest function. See 4 C.F.R. § 21.3(f)(1) (1986); Motorola Communications & Electronics, Inc., B-223715, Sept. 19, 1986, 86-2 C.P.D. ¶ 325.

Composition of the Technical Evaluation Committee

Universal argues that the TEC was improperly constituted and that members of the TEC held discussions with Universal and other offerors in violation of AID regulations. Universal states that "on numerous occasions during the course of the procurement one or more members of the evaluation committee made contact and even held meetings with some of the offerors in direct violation of the AID acquisition regulations" (AIDAR). Universal states that on November 7, 1986, it met with the entire TEC, but Universal did not acquiesce in this "improper meeting" because it did not realize at that time that it was TEC members with whom it was meeting.

AID states that the composition of its TEC was in full compliance with AIDAR § 715.608-70, which provides, in relevant part, that TEC's:

"shall be composed of a chairman representing the project office, a representative of the contracting office, and representatives from other concerned offices as appropriate."

We have held that the composition of technical evaluation panels is within the discretion of the contracting agency and we will not review the composition absent a showing of possible fraud, bad faith, or conflict of interest. Eyring Research Institute, Inc., B-221349, Apr. 23, 1986, 86-1 C.P.D. ¶ 397. None of these is alleged here.

In its comments on the agency report on the protest, filed more than 5 weeks after the protest was filed, Universal raised for the first time the argument that AID committed "violations of the evaluation process and AID regulations by having the contract negotiator institute meetings between offerors and the TEC." Universal's comments contain an affidavit from its president which states that on at least one occasion he met with all the members of the TEC to discuss Universal's proposal, and he believes "that similar discussions were held by [the TEC] with other offerors."

AID states that its internal regulations do not prohibit the entire TEC from meeting with offerors, it only prohibits individual members of the TEC from having ex parte discussions.

Universal's newly raised protest contention is untimely. Our Bid Protest Regulations require that a protest be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1986). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy these timeliness requirements. Siska Construction Co., Inc., B-218428, June 11, 1985, 85-1 C.P.D. ¶ 669. Our Regulations do not contemplate the unwarranted piecemeal development of protest issues. See Little Susitna Co., 65 Comp. Gen. 651 (1986), 86-1 C.P.D. ¶ 560. Since Universal met with members of the TEC in November 1986, and was aware of the identity of the TEC members by the time Universal filed its protest in December 1986 (because in its protest Universal complained about the composition of the TEC), this protest basis, founded upon the belief of Universal's

president that the TEC met with other offerors, could have been raised when Universal filed its protest in December and was therefore untimely raised, more than 5 weeks later. Therefore, we dismiss this basis. Little Susitna Co., 65 Comp. Gen. 651, supra.

Meaningful Discussions

Universal argues that at the conference which it had with AID on November 7, 1986, AID did not conduct "meaningful discussions" with Universal. Universal states that in a November 11 letter to it from AID, AID noted two areas perceived as deficiencies or areas needing clarification even though Universal allegedly addressed these matters at the conference on November 7, "to the apparent satisfaction of AID." Universal states that if there were other areas (than the two referenced in the November 11 letter) which required a response by Universal, they should have been identified to Universal by AID. Universal argues that "in this context, with the clear inference from the Agency that no other areas existed in which USC [Universal] needed to supply information, the failure to identify open issues was a failure to conduct meaningful discussions with USC."

AID argues that it did conduct meaningful discussions with Universal. AID held a conference with Universal on November 7 to discuss the weaknesses in Universal's proposal. Further, as Universal admits, AID's November 11 letter to Universal specifically points out the two weaknesses which the TEC members found in Universal's proposal. The letter of November 11 requests a BAFO and states that Universal's BAFO should address the two areas which were perceived as deficiencies or needing clarification: (1) names and biographical data of alternate (backup) personnel for the booking/chartering function; and (2) ability of Universal's proposed standby overseas network to respond to problems. The November 11 letter warned that the BAFO must include all revisions to the original proposal and that Universal should "not rely on information given during oral discussions to modify your original proposal."

Agencies generally must conduct written or oral discussions with all responsible offerors within a competitive range, and this includes advising offerors of deficiencies in their proposals, so that they have an opportunity to satisfy the government's requirements. FAR, 48 C.F.R. § 15.610 (1986). This requirement can be satisfied only when discussions are "meaningful," which means that negotiations should be as specific as practical considerations will permit. Tracor Marine Inc., B-207285, June 6, 1983, 83-1 C.P.D. ¶ 604.

Agencies are not obligated, however, to afford offerors all-encompassing negotiations. Training and Management Resources, Inc., B-220965, Mar. 12, 1986, 86-1 C.P.D. ¶ 244. The content and extent of discussions in a given case are matters of judgment primarily for determination by the agency involved and are not subject to question by our Office unless they are shown to be clearly without a reasonable basis. Training and Management Resources, Inc., B-220965, *supra*; Information Network Systems, B-208009, Mar. 17, 1983, 83-1 C.P.D. ¶ 272. Where a proposal is considered to be acceptable and in the competitive range, the agency is under no obligation to discuss every aspect of the proposal that has received less than the maximum possible score. Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 C.P.D. ¶ 380.

The record shows that AID did conduct meaningful discussions with Universal by advising Universal first at the November 7 conference and then in its November 11 letter that Universal's proposal contained two weaknesses that should be addressed in the BAFO. Our in camera review of the technical evaluators' narrative comments concerning Universal's initial proposal shows that the two weaknesses described in the November 11 letter were the only ones labeled by the evaluators. Therefore, there was not any requirement for discussions concerning other areas of Universal's proposal. See Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, *supra*.

In addition, we do not agree with Universal's allegation that the issues raised in the November 11 letter were already resolved by oral discussions on November 7. The November 11 letter clearly advised Universal that the two areas of deficiencies needed clarification, stated that Universal's BAFO must include all revisions to the original proposal, and warned Universal that it should not rely on information given during oral discussions to modify its original proposal. In fact, Universal addressed the two areas of deficiencies in its BAFO. Because Universal was clearly advised of the deficiencies found in its initial proposal, we conclude that AID conducted meaningful discussions with Universal.

Rationale for Award Decision

Universal states that its final concern is that the evaluation committee failed to adequately support its findings with rationale and that the source selection decision to award to Young is inadequately supported by documentation showing the relative weaknesses and strengths among the proposals, as required by FAR, 48 C.F.R. § 15.612(d)(2) (1986).

We agree with Universal's concern that the file lacks adequate documentation showing the relative weaknesses and strengths of proposals to support the award decision. For example, evaluator "A" gave Universal 8 points less than the 100 possible but did not, by way of narratives, describe the weaknesses found in Universal's proposal. In addition, evaluator "B" subtracted 5 points from a possible 35 under the area of program management even though this evaluator, under the narrative heading "strengths," states that "the program management section of the proposal was clearly defined," and does not describe any "weaknesses" in Universal's program management plan.

AID argues that evaluator "A" did not include a narrative with Universal's final evaluation score sheet because he saw no need to repeat the comments that he set out in the score sheets when he evaluated Universal's initial proposal.

We question AID's analysis here. The only weakness listed by evaluator "A" in scoring Universal's initial proposal is "ocean booking personnel and system." Universal supplemented its proposal in response to AID's request for a BAFO by listing the names of alternate (backup) personnel for the booking/chartering function. Because there are no narratives by evaluator "A" concerning Universal's final proposal we question how the source selection official could assess the reasonableness of the scoring decision, nor can we conclude that the evaluator found the same weaknesses in the final proposal that were found in the initial proposal.

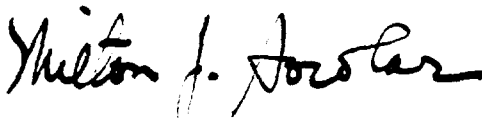
The record before us lacks any indication that the source selection official did anything more than average the scores of the three evaluators in order to determine which offeror should be awarded the contract. Because there was only a one-point average difference between Young's and Universal's proposal, and because there is inadequate documentation to support the point scores given to the offerors, we cannot conclude that the source selection decision, apparently based only upon the point scores, was a reasoned one. In these circumstances, the source selection decision is inadequately supported by documentation as required by FAR, 48 C.F.R. § 15.612(d)(2),^{1/} and therefore the record lacks adequate evidence to assure its reasonableness. See Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 C.P.D. ¶ 253. We sustain the protest on this basis.

^{1/} Although the FAR applies to acquisitions using appropriated funds (see FAR, 48 C.F.R. § 2.101), it appears that AID is using the FAR to conduct this no-cost procurement.

Accordingly, we recommend that the source selection official review the evaluation records to determine whether the scores given to the offerors accurately reflect the relative merits of the proposals. In this regard, we suggest that the source selection official reconcile the inconsistencies between the point scores and the narrative descriptions discussed above. In addition, the source selection official should ascertain why points were deducted from the offers in certain areas. For example, evaluator "A" downgraded Universal's proposal under all four of the evaluation areas without explaining why. While we recognize that the point scores may accurately reflect a reasonable evaluation of the proposals, it is not possible for the source selection official to verify this fact without the additional information discussed above.

If AID can document its decision to award to Young, it need not terminate Young's contract. However, if AID concludes that the award to Young is not supportable, we recommend that AID terminate Young's contract and award the contract to the proper party based on the above recommended review. Tracor Jitco, Inc., 54 Comp. Gen. 896, supra. In any event, AID should advise us and the interested parties of its actions.

The protest is denied in part, dismissed in part, and sustained in part.

for 
Comptroller General
of the United States