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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ship Analytics, Inc. District 2; Marine Engineers Beneficial Association--Reconsideration

File: B-227084.3, B-227084.4

Date: December 15, 1987

DIGEST

1. General Accounting Office will consider challenge to award of a cooperative agreement where there is a showing that the agency was procuring goods or services and therefore instead was required to obtain the goods or services by means of a procurement.

2. Award to offeror proposing practical, low cost refurbishment of agency computer simulator, instead of to protester proposing more extensive refurbishment program, was reasonable where solicitation provided for capital improvements to be financed in part out of revenues from sale of time on simulator, and protester's more extensive refurbishment program was found to be based on unrealistically high sixfold increase in revenues.

DECISION

Ship Analytics, Inc. and District 2, Marine Engineers Beneficial Association, request reconsideration of our decision in Ship Analytics, Inc. et al., B-227084, et al., May 5, 1987, 87-1 CPD ¶ 475. In that decision, we dismissed their protests against the Maritime Administration's (MARAD's) selection of Marine Safety International (MSI) with which to enter into a cooperative agreement for the privatization (operation and maintenance by the successful offeror) of a government-owned ship maneuvering research simulator -- the Computer Aided Operations Research Facility (CAORF) -- at the United States Merchant Marine Academy.

We grant the request for reconsideration, but deny the protest on the merits.

BACKGROUND

The protesters, members of a consortium (hereafter the Consortium) that responded to the solicitation, No. MA-11973, complained in their original protests primarily about the evaluation of proposals. Although they also asserted

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that the privatization should have been conducted as a procurement and not as a cooperative agreement, there was no showing that a procurement should have been conducted, and we dismissed the protests. See Southeastern Michigan Business Development Center, B-222344, Mar. 28, 1986, 86-1 CPD ¶ 299 (General Accounting Office will consider challenges to award of a cooperative agreement only where there is some threshold showing that the cooperative agreement was used when a contract was required). The protesters thereupon requested reconsideration of our decision.

Subsequently, in response to a congressional inquiry, our Office considered in detail whether MARAD should have used a cooperative agreement instead of a contract for the continued operation of the computer simulator. After receiving additional information from MARAD, we concluded that the fundamental nature of the relationship between MARAD and MSI is that the facility will be operated for the agency by the company principally to serve the needs of MARAD and other government agencies, and that under the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6303 (1982), the proper instrument for this type of relationship is a contract and not a cooperative agreement. Since the agency in effect thus was procuring goods or services, we will now review the merits of the original protests.1/

FACTS

Operation and maintenance of the ship handling simulator had previously been provided by Ship Analytics and the Sperry Corporation under contracts with MARAD. The proposed budget for MARAD, however, did not provide for the continued availability of appropriated funds for this purpose after fiscal year 1987. Instead, the agency planned to privatize the facility by selecting a private organization to operate and maintain the simulator at no cost to the government in return for the right to market research and training on the simulator to government agencies and the private sector.

Further, as stated in the solicitation, MARAD believed that assuring the long-term viability of the facility required a reduction in operation and maintenance costs -- by refurbishing or replacing unreliable and outdated equipment --

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1/ MARAD has requested that we reconsider the view expressed in our opinion of October 15, 1987, that the agency's use of a cooperative agreement was inappropriate. We need not delay consideration of the protests pending a decision on MARAD's request since, as discussed below, we find no basis to object to the selection of MSI.

and the acquisition of state-of-the-art capabilities. Accordingly, the solicitation required the operator to contribute a minimum percentage of revenues into a capital improvement fund for use in refurbishing and upgrading the facility. Expenditures from the fund would require MARAD approval and title to any capital improvements (as with title to the facility as a whole) would vest in MARAD.

The solicitation provided that the prime consideration in the evaluation of proposals would be to determine which proposal offered the greatest likelihood for successful long-term operation of the CAORF facility as a viable, competitive, full-featured ship handling simulation research facility for the conduct of state-of-the-art research studies. In particular, the solicitation provided for evaluation of an offeror's understanding of maritime simulator research, maritime operational problems and the market for ship simulation research; plans for capital improvements and financial participation in improvements; business approach; financial stability and strength, management approach and ability; and status as a nonprofit organization. Evaluation was to be based upon numerical scores; although the relative weights of the criteria were set forth in the RFP, the precise numerical value of each criterion was not disclosed.

Proposals were received from MSI and the Consortium; after conducting written and oral discussions with both offerors, MARAD requested the submission of best and final offers (BAFOs). Based upon its evaluation of BAFOs, the agency selected MSI with which to enter into a cooperative agreement for the operation of the simulator. The Consortium thereupon protested to our Office.

In the evaluation of initial proposals, the Consortium received a score of 80.8 points, while MSI received only 56.2 points, with no points assigned to either offeror under the criterion for financial strength. After the submission of BAFOs, however, MSI's score increased to 91.5 points (or 84.5 points not including the criterion for financial strength), while the Consortium received only 84.1 points (or 78.8 points not including the criterion for financial strength).

ALLEGATION

The Consortium alleges that the increase in MSI's evaluation score could only have occurred as a result of a departure from the evaluation criteria; it believes that the agency made award essentially on the basis of an improper evaluation of the financial strength and participation of members of the Consortium. In addition, the Consortium suggests that its displacement as the highest-scored offeror may also have involved technical leveling or bias on the part of representatives of the Maritime Administrator's office.

DISCUSSION

Agency evaluators expressed concern that Ship Analytics (which would sign the cooperative agreement on behalf of the Consortium) maintained a ratio of current assets to current liabilities of less than 1.07-to-1 and had failed to submit an audited financial statement for the fiscal year ending June 30, 1986. Evaluators noted that MSI, on the other hand, maintained a ratio of current assets to current liabilities of 2.774-to-1, and that its shareholders' equity amounted to more than 200 times that of Ship Analytics'. Nevertheless, evaluators also took into account the proposed financial participation of other members of the Consortium; accordingly, the perceived financial superiority of MSI only accounted for 1.7 points of the 7.4 point difference in final scores.

The record shows that nearly all of the difference in the final scores is attributable to perceived weaknesses in the Consortium's plan for capital improvements. Although MARAD viewed the proposed capital improvements as "extensive and well thought out," it nevertheless considered the Consortium's plan to be fundamentally flawed because it was based on what evaluators perceived to be an unrealistic forecast of future revenues from marketing research and training. In this regard, the Consortium, which offered to contribute 10 percent of revenues to the capital improvement fund, estimated that total revenues would amount to approximately $12,739,000 in 1988, and total $55,471,000 over the 5-year base period of the agreement. In prior years, however, the simulator had generated approximately only $2,000,000 in revenue per year, and MARAD's marketing plan for the simulator (provided as an attachment to the solicitation) estimated that the revenue generated by research could be increased only from $1,400,000 in 1986 to $3,000,000 by 1988. MARAD's concern with the Consortium's revenue forecast was enhanced by the Consortium's reliance on what evaluators viewed as unrealistic expectations of the extent to which the agency could channel work for other agencies to the simulator on a noncompetitive basis.

MSI's approach, on the other hand, was viewed by MARAD as offering a far higher probability of success. The agency considered MSI's plan for capital improvements to be a "well thought out" program emphasizing "practical low cost refurbishment." MSI, which offered to contribute 10 percent of most revenues to the capital improvement fund, estimated that total revenues over 5 years would amount to approximately $14,550,000, a level the agency viewed as realistic and achievable with little risk. Although the Consortium proposed to spend somewhat more on capital improvements ($3,042,500) by the end of 1988 than did MSI ($2,550,000), agency evaluators noted that under the Consortium's proposal up to $942,720 of the capital improvement fund would be paid to Ship Analytics in the first quarter of the first year of the agreement as a license fee for the use of computer software owned by the firm. Not only were evaluators concerned that this would divert funds from the initial upgrade and refurbishment effort, but they also feared that because Ship Analytics did not plan to provide the government with the source code for the software, MARAD and any succeeding operator would be overly dependent on Ship Analytics for future software development. This appeared especially risky since it was presumed Ship Analytics would enter into competition with any successor operator of the simulator.

In addition, agency evaluators considered it a weakness of the Consortium's approach that it proposed to shut down the simulator for up to 6 months for refurbishment. In the cover letter to the solicitation, MARAD had advised offerors that the operator should "maintain continuity of CAORF operations to minimize the disruption to client research programs." Evaluators concluded that the proposed shutdown could pose serious problems both for some CAORF clients and for the Merchant Marine Academy, which used the simulator to train cadets. By contrast, MSI proposed keeping the simulator operational throughout the refurbishment and upgrading, an approach viewed by the agency as a strength.

We note that the Consortium has failed to provide any evidence refuting MARAD's conclusions in regard to the deficiencies in the Consortium's capital improvement program. Although the Consortium has been denied access by the agency to most evaluation materials, the record indicates that it was aware or should have been aware of the most important of MARAD's concerns. In this regard, during discussions prior to submission of BAFOs, MARAD challenged as unrealistic the Consortium's revenue projections and degree of reliance on noncompetitive interagency procurement requests. MARAD also specifically questioned the Consortium on how it planned to service the agency's requirement for cadet (and mariner) training and ongoing research projects during periods of reduced availability or shutdown.2/

2/ MARAD appears to have learned only during post-BAFO discussions with both offerors of the consortium's proposal to pay $942,720 to Ship Analytics in the first quarter of

Moreover, the agency record of the post-award debriefing provided by the agency indicates that the Consortium again was advised in some detail of the perceived deficiencies in its proposal.

Based upon the record before our Office, we find that the agency had a reasonable basis for perceiving relatively significant deficiencies in the Consortium's proposal.

Although we recognize that MARAD's evaluation of BAFOs appears to represent a significant departure from its evaluation of initial proposals, the displacement of the Consortium's proposal is explainable without reference to technical leveling or bias. The Federal Acquisition Regulation, 48 C.F.R. § 15.610(d) (1986), defines technical leveling as helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness. There is no indication that the improvement in MSI's proposal as revised in its BAFO resulted from any improper coaching by MARAD through successive rounds of discussions. Similarly, there is no evidence that the improvement in MSI's score resulted from bias or impropriety in the evaluation process.

It appears from the record that the improvement in MSI's score actually followed from a clarification by the agency of the assistance that would be available to the successful offeror. In answer to a question raised at the preproposal conference as to whether the agency would provide any capital improvement funds "as suggested in past announcements," MARAD had cautioned offerors that the availability of fiscal year 1987 appropriations was uncertain and that the agency desired to minimize the cost to the government to achieve privatization. Relying on this, MSI apparently initially based its capital improvement program on the assumption that in the near future no MARAD funds would be available for capital improvements; as a result, MSI's correspondingly modest proposal for capital improvements suffered in comparison to the Consortium's more intensive and extensive program (the Consortium assumed that $2,000,000 in MARAD funds would be available). In its subsequent discussions with offerors, however, MARAD advised offerors that it would in fact contribute up to $1,700,000 to the capital improvement fund; MSI responded by basing its BAFO on the availability of MARAD's contribution, as had the

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the first year as a license fee, so MARAD was unable to raise this concern during discussions.

Consortium, resulting in a significant improvement in MSI's plan for capital improvements.

In view of the importance placed by the solicitation on capital improvements as a means for assuring the continued viability of the simulator, we believe that MARAD properly selected MSI for award.

The protest is denied.

Seymour Efros
for James F. Hinchman
General Counsel