



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Test Pilot School

File: B-237503

Date: February 27, 1990

Wendell H. Shawler and Sean C. Roberts, for the protester.
John R. McCaw, Esq., Federal Aviation Administration, for
the agency.

James Vickers, Esq. and John Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Where solicitation contains technical evaluation factors and provides that award will be based on both price and technical factors and does not state that evaluation will be conducted on a "acceptable/unacceptable" basis, technical proposals should be evaluated on a relative basis and selection based on a price/technical tradeoff.

2. The fact that an offeror proposed to use an aircraft donated to it by a government agency, other than the contracting agency in its offer under a solicitation for pilot training does not constitute an unfair competitive advantage which the contracting agency was required to equalize.

DECISION

National Test Pilot School (NTPS) protests the award of a contract to the University of Tennessee Space Institute by the Federal Aviation Administration (FAA), under request for proposals (RFP) No. DTFA-02-89-R-00018. The RFP was for developing and conducting flight test pilot/engineer training courses.

The protester's main argument is that the evaluation conducted by the FAA was inconsistent with the criteria set forth in the RFP and that it was therefore misled into submitting a technically superior, but more costly proposal when in fact the agency chose the lowest-priced minimally acceptable proposal.

We agree with the protester and sustain the protest.

The RFP was issued on December 23, 1988, and called for fixed-priced proposals to develop and conduct an initial 6-week prototype course and after agency approval of the prototype, to conduct classes during the base year and, if the agency desires, for 2 option years.

The RFP contained the following statement regarding evaluation of technical proposals:

"(b) Evaluation Criteria: Evaluation of offers will be based on your training program and instructor's resume submitted with each offer. The following specific information, considered equal in importance, must be submitted with your proposal and will be the basis for technical evaluation:

(1) Depth of the course of instruction as determined through review of a copy of the curriculum outline.

(2) Availability of classes to meet FAA training needs as determined by review of company scheduling methods and policies.

(3) Experience of company in offering similar or identical training."

Regarding the evaluation of price, the RFP reads:

"(f) Price Evaluation: Evaluators shall consider pricing elements and total price per class in selecting the proposal which is most advantageous to the Government."

Section L of the RFP incorporated the standard Contract Award clause set forth at Federal Acquisition Regulation § 52.215-16 providing that the government will award a contract to the responsible offeror whose offer will be most advantageous to the government, cost or price and other factors specified in the solicitation considered.

Two proposals were received on the March 3, 1989, closing date, one from the University at a total price, including options, of \$1,481,645 and the other from NTPS at \$1,817,698. These initial proposals were evaluated from a technical standpoint. NTPS was given a "satisfactory"

rating in all of the evaluation categories while the University's proposal was considered "unsatisfactory" under a majority of them. This rating was largely the result of the evaluators' conclusion that the University had not included sufficient detail in its proposal to demonstrate that it clearly understood the RFP requirements. Consequently, when discussions were held with both offerors on May 3, a large number of issues were raised with the University while the protester was, among other minor matters, merely informed that its technical proposal was considered acceptable, that it should review its pricing and that best and final offers (BAFOs) would be due on May 19. Subsequently, the date for receipt of BAFOs was extended to May 24 at the request of the University because of a subcontractor problem. After the receipt of the initial BAFOs, the agency issued Amendment 002, which clarified the prototype course requirement and requested another round of BAFOs which were due on July 11.

Both offerors submitted BAFOs. NTPS offered a total price of \$1,719,141, while the University offered a price of \$1,640,759. This time the agency's technical evaluators concluded that the University's BAFO was satisfactory under the various evaluation categories and considered acceptable overall. Since both BAFOs were considered acceptable, the FAA made award to the University based on its low price.

NTPS objects to the FAA's method of evaluating the proposals and its selection of the University based on its status as the low-priced acceptable offeror. The protester argues that the RFP evaluation scheme contemplated a point-scored technical evaluation under which the superior technical proposal would receive the highest score. According to the protester, had it known that technical proposals would be rated only as either satisfactory or unsatisfactory and award made to the low-priced minimally acceptable offer, it would have submitted a different technical proposal and a lower price.

Agencies are required to include proposal evaluation factors, and their relative weights, in all RFPs and to make award on the basis of those factors. 41 U.S.C. §§ 253a(b)(1), 253b (Supp. IV 1986). When an RFP does not explicitly indicate the relative weight of the technical evaluation factors vis-a-vis cost, offerors are entitled to assume that cost and technical considerations are of essentially equal weight. Johns Hopkins University, B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240; Riggins Co., Inc., B-214460, July 31, 1984, 84-2 CPD ¶ 137. Similarly, when a solicitation providing for a technical evaluation of proposals does not indicate that the agency is seeking

proposals that are simply satisfactory or acceptable, offerors have a reasonable basis for expecting technical proposals to be evaluated and ranked in a way that reflects an offeror's relative technical superiority over a competitor, see Turner Int'l, Inc., B-232049, Nov. 3, 1988, 88-2 CPD ¶ 434, after which there will be an award selection based on a price/technical tradeoff determination. See Jack Faucett Assocs., B-236396, Nov. 9, 1989, 89-2 CPD ¶ 449. Accordingly, we think offerors were entitled to assume from this RFP that cost and technical considerations were weighted equally and that in the technical area the agency would in some way determine a relative ranking of proposals.

There is no indication in the record, however, that the agency evaluated proposals in this way. Instead, it appears, since there was no point scoring or adjectival rating of the technical proposals, that there was no determination by the FAA as to whether one of the proposals was superior from a technical standpoint, and that the FAA simply determined that the proposals were "satisfactory." Under this evaluation approach, of course, an offeror would have received no credit for submitting a technical proposal that was more than minimally acceptable. That, in our view, is inconsistent with the RFP evaluation scheme and could have been prejudicial to an offeror who, in reliance upon the announced evaluation scheme, proposed a superior technical approach. While it is not possible for us to conclude from the record whether the protester's more costly proposal was in fact technically superior, it is clear that the protester could have been prejudiced by the FAA's failure to evaluate proposals as it indicated it would in its RFP. Thus, we sustain the protest.

NTPS has raised numerous other grounds of protest which are either untimely or not necessary to resolve because we have sustained the protest because of the faulty evaluation.

However, there are two matters raised by NTPS which are timely and may be relevant to the corrective action we recommend, so we consider them below.

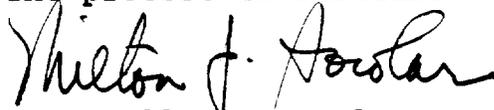
First, NTPS argues that the University's proposal was based on using two aircraft which had previously been donated by the government to the University, thereby giving it an unfair competitive advantage. We assume NTPS is referring to the donation of surplus aircraft program of the General Services Administration. See 41 C.F.R. § 101-44.108-2(b) (1989). The fact that a firm or organization may enjoy an advantage because of particular circumstances is only objectionable where it results from a preference or other

unfair action by the agency. See Holmes & Narver Servs., Inc., B-208652, June 6, 1983, 83-1 CPD ¶ 605. In this case, the University participated in a government program run by an agency other than FAA which was separate and distinct from this procurement and thus we do not believe that the FAA was required to take steps to equalize the alleged advantage.

Finally, NTPS has objected to the failure of the FAA to suspend contract performance during the pendency of the protest as required by Competition in Contracting Act of 1984 (CICA). Under CICA and our Bid Protest Regulations, a contracting agency is required to suspend contract performance if it is notified of a protest filed with our Office within 10 calendar days of award. 31 U.S.C. § 3553(d)(1) (Supp. V 1987); 4 C.F.R. § 21.4(b) (1989). Here, NTPS' protest was filed with our Office on October 19, and our records show that the FAA was notified the same day, more than 10 calendar days after the September 27 award. NTPS' agency-level protest, filed on October 10, did not invoke the suspension provisions of CICA; only a protest filed with our Office does so. Rainbow Technology, Inc., B-232589, Jan. 27, 1989, 89-1 CPD ¶ 66. Thus, no performance suspension was required.

Because performance has continued, it is not feasible to recommend terminating the University's contract at this time. However, the contract has 2 option years which we recommend not be exercised. A new competition should be held and the solicitation should clearly state the evaluation scheme to be used and the evaluation actually conducted should be consistent with the announced criteria. We find that NTPS is entitled to the costs of filing and pursuing the protest. Also, since NTPS will not be able to compete for the initial year of the contract, we find it entitled to be reimbursed for its proposal preparation costs. See 4 C.F.R. § 21.6(d)(2); Hydro Research Science, Inc.-- Recon., B-228501.2, Apr. 29, 1988, 88-1 CPD ¶ 418.

The protest is sustained.



Acting Comptroller General
of the United States