



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jaycor
File: B-240029.2; B-240029.3; B-240029.4
Date: October 31, 1990

James D. Warren, Esq., Pettit & Martin, for the protester.
Kenneth S. Kramer, Esq., Fried, Frank, Harris, Shriver &
Jacobson, for Mantech Field Engineering Corp., an interested
party.
Dennis J. Gallagher, Esq., Department of State, for the
agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest that a member of contracting agency's evaluation panel had an employment arrangement with the eventual awardee and was biased against the protester is denied where, based on evidence in record, including sworn affidavits and testimony at hearing on the record, and based on General Accounting Office's (GAO) judgment as to the credibility of testimony, GAO decides that record does not include clear evidence of bias or a conflict of interest.
2. Agency evaluation and scoring of best and final offer (BAFO) that resulted in a deduction of points from protester's score was deficient where evaluators unreasonably concluded that protester had not offered required number of hours since evaluators reached that conclusion by relying on staff hour analysis that was designated in best and final offer as "superseded" and ignored other sections of BAFO that set out correct staff hours.
3. Contracting agency failed to conduct meaningful discussions with offeror where, prior to submission of best and final offers, agency evaluators were concerned about soon-to-be-retired active duty military personnel proposed by offeror but failed to raise the matter in discussions.

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DECISION

Jaycor protests the award of a contract to Mantech Field Engineering Corporation under request for proposals (RFP) No. 1111-820018MLB, issued by the Department of State (DOS), for operation, maintenance and repair of the agency's cryptographic/digital equipment. Among other allegations, Jaycor contends that a member of the agency's evaluation panel was biased against Jaycor with the result that the agency's evaluation of its proposal was deficient.

We do not believe that the record supports the allegations of bias and deny this aspect of the protest. Nevertheless, our review of the agency's evaluation leads us to the conclusion that it was performed improperly and we therefore sustain the protest on that basis.

BACKGROUND

The solicitation indicated that the contractor is to provide operational, maintenance and repair services for existing DOS cryptographic/digital equipment, and installation and moving of new and existing equipment. The contractor is also to furnish training services and maintain a spare parts inventory. The contractor is to provide these services 24 hours a day, 7 days a week at the main DOS building and various other locations, including overseas posts. The solicitation contemplated award of a combination firm fixed-price and labor hour contract for a base period running from the date of award until September 30 of the fiscal year in which the award was made, with 4 option years.

The solicitation indicated that award would be made to the offeror whose proposal conformed to the solicitation requirements and was evaluated as most advantageous to the government, price and cost and other factors considered. The RFP included three main evaluation factors, listed in descending order of importance: (1) corporate method of approach, (2) qualifications of proposed contract key personnel and of the offeror as a corporate entity, and (3) ability of the offeror to perform the project. The solicitation indicated that technical factors were to be weighted 60 percent and cost/price 40 percent. Also, in accordance with a mathematical formula set out in the RFP, each offeror's technical score was to be adjusted based on its relation to the highest technical score obtained and each offeror's price/cost was to be scored based on its relation to the lowest price/cost. Based on those calculations, which included a 60 percent weight for technical and 40 percent for price/cost, for each offeror the agency was to arrive at an "Offeror's Score for Selection Ranking."

Eight firms submitted nine proposals.^{1/} After technical and cost evaluations, proposal scoring and written discussions, only five proposals remained in the competitive range. DOS held oral discussions with those five firms at which time offerors were given amendment No. 8, which set forth the agency's staffing requirements. In this respect, as originally issued, the solicitation included position descriptions for key personnel and the government's estimated level of effort including calendar year staff hours by position and stated that the estimate was "provided for information purposes only and is not intended to influence the offeror in preparing its approach to performing the required services." According to DOS, as originally issued, the solicitation allowed offerors to propose innovative staffing plans to meet the agency's requirements. Agency evaluators determined, however, that the offerors who took advantage of this opportunity simply proposed staff numbers below that required for full contract coverage. Consequently, according to DOS, it issued amendment No. 8, and later amendment No. 9, to specify 89 key personnel by position and require offerors to propose full-time personnel to fill all 89 positions. Thus, offerors were no longer permitted to submit their own staffing plans.

After the submission of best and final offers (BAFOs), DOS reevaluated and rescored the proposals.^{2/} The result was that both Mantech and Jaycor received technical scores of 72. When the cost score was factored in Jaycor received a total score of 95 and Mantech 97. The protester and the awardee received the highest scores by a significant margin.

In making the award to Mantech, the contracting officer noted that Mantech's offer included no questioned costs, its direct labor hour rates and proposed indirect cost rates had been verified and approved by the Defense Contract Audit Agency, and Mantech was paying salaries in accordance with the Department of Labor's wage determination schedule. Citing these circumstances, and the fact that Mantech's technical proposal, with Jaycor's, was one of the two highest scored, and the fact that Mantech offered a lower cost, the

^{1/} One firm submitted an alternate proposal along with its main proposal.

^{2/} The agency's evaluation record, which does not include clear summaries of the proposed scoring, was very difficult for us to interpret. It appears that the initial proposals were scored twice and that the best and final offers were scored another time.

contracting officer determined that it was in the government's best interest to award the contract to Mantech.

Subsequent to the filing of the protest by Jaycor, DOS determined in accordance with 31 U.S.C. § 3553(d)(2)(A)(ii) (1988) that urgent and compelling circumstances significantly affecting the interests of the United States did not permit delaying performance of the contract by Mantech. Mantech began performance on July 1.

PROTEST ALLEGATIONS

Jaycor argues that its proposal was not evaluated in a fair and impartial manner because a member of the DOS technical evaluation panel expressed bias against Jaycor. Also, according to the protester, this evaluation panel member may have had an employment arrangement with Mantech while he was a member of the panel and, therefore, he had a conflict of interest.

Jaycor also argues that the evaluation was flawed since DOS misapplied the evaluation criteria and considered factors not listed in the solicitation, and failed to conduct meaningful discussions. Further, Jaycor states that immediately after the contract was awarded, in order to fill key personnel requirements under the contract, Mantech hired 15 Jaycor employees who worked on Jaycor's previous contract covering some of the services under the new contract. According to the protester, this action indicates that DOS failed to enforce the RFP requirement that each offeror submit a resume and a signed agreement for all key personnel proposed. Finally, Jaycor argues that DOS was required but failed to request an amendment to its Delegation of Procurement Authority (DPA) from the General Services Administration (GSA) when the basis upon which the original DPA for this procurement was changed.

ANALYSIS

Alleged Bias and Conflict of Interest

We first address Jaycor's position that a member of the agency's evaluation panel, Mr. Robert Kegley, was biased against Jaycor, and that he may have had an employment arrangement with the eventual awardee, Mantech, during the evaluation of proposals. In order to resolve these issues, we conducted a formal conference on the record. At that conference, six witnesses testified and were subject to cross-examination. The witnesses were Mr. Robert Kegley, a member of the evaluation panel and Chief of DOS' Communications Center Division until his retirement on August 3; three DOS employees, Mr. Wardell L. Jenkins, Mr. Stephen D. Oliver and Mr. Norris B. Watts; and two Jaycor employees working on that

firm's DOS contract that covered some of the services included under the new contract, Mr. Thomas R. D'Arcy and Mr. Douglas A. Way. Our conclusions as to the facts relating to these issues are based on the testimony and various affidavits submitted to our Office.

According to the record, Mr. Kegley held a meeting on March 27, 1990, with Mr. Watts, Mr. Martin and Mr. Jenkins, in order to discuss the number of employees needed for the new contract. Conference transcript (Tr.) at 70, 91, 114. According to Mr. D'Arcy, on March 29, Mr. Watts related to Mr. D'Arcy that at the March 27 meeting, Mr. Kegley said, "the competition did not look good for Jaycor," and that "if he (Mr. Kegley) had his way, Jaycor would not win the contract and he would do what he could to make sure Jaycor did not win." Tr. 11-12. On the other hand, all four individuals who were present at the March 27 meeting denied that Mr. Kegley expressed bias against Jaycor or that he said he would do what he could to prevent Jaycor from getting the award. Tr. 70-71, 91, 115; Kegley affidavit ¶ 5-6; Watts affidavit ¶ 3, 4, 7; Jenkins affidavit ¶ 3; and Martin affidavit ¶ 2. Mr. Kegley testified that at the March 27 meeting, he said, "if Jaycor did not win the contract, the Communications Center would be in trouble because Jaycor had the expertise." Tr. 70. Another participant at the March 27 meeting testified that Mr. Kegley said, "things did not look good for Jaycor." Tr. 91, Watts affidavit ¶ 3.

With respect to the allegation that Mr. Kegley had an employment arrangement with Mantech during the evaluation of proposals, Mr. D'Arcy testified that after the contract was awarded, he overheard an unidentified gentleman say to someone else, who also was not identified: "Did you hear the sweet deal that Mr. Kegley supposedly got with Mantech?" Tr. 24, D'Arcy affidavit ¶ 9. Also, Mr. Way and Mr. D'Arcy testified that Mr. Kegley asked them about the possibility of employment with Jaycor on other DOS contracts which, according to Jaycor, brings into question the credibility of Mr. Kegley's denial that he was seeking employment. Tr. 14, 52; D'Arcy affidavit ¶ 10; Way affidavit ¶ 13. Mr. Way also testified that Mr. Oliver told him that "Mr. Kegley had employment plans with Mantech after his retirement from DOS." Tr. 52-53, Way affidavit ¶ 3-4.

Mr. Kegley, on the other hand, testified that he had no employment discussions with anyone and never submitted a resume to a contractor or any other organization before or after his retirement. Tr. 69, 71; Kegley affidavit ¶ 7. Also, although Mr. Oliver admitted that he told Mr. Way that he (Mr. Oliver) had heard that Mr. Kegley had discussed employment with Mantech, Mr. Oliver testified that he does not

know where he heard the rumor and he had no knowledge of whether it was true. Tr. 104-105; Oliver affidavit ¶ 5.

Government officials are presumed to act in good faith and, therefore, for us to conclude that bias existed, the record must contain convincing evidence that contracting officials had a specific and malicious intent to injure the protester. See Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. While the evidence in the record on this issue, including the testimony at the hearing and the affidavits, does contain some contradictions, based on our review of the record and our judgment as to the credibility of the testimony, we conclude that there is no convincing evidence of bias or a conflict of interest on the part of the Mr. Kegley.

The four individuals who were present at the March 27 meeting all denied under oath in their affidavits that Mr. Kegley expressed bias against Jaycor and three of the participants testified to the same effect.^{3/} There are minor inconsistencies in the recollection of those four individuals as to what Mr. Kegley in fact said; Mr. Watts recalled that he said, "things don't look good for Jaycor," Tr. 91, Mr. Kegley recalled that he said Jaycor's failure to win the contract would be a problem for the agency, Tr. 70, while Mr. Jenkins recalled no mention at all of Jaycor by Mr. Kegley at the meeting. Tr. 114-115. Nonetheless, giving appropriate weight to the direct testimony offered by those at the March 27 meeting, as opposed to the hearsay evidence offered by Jaycor, we conclude that the testimony of those present at the meeting is more credible. Moreover, even if we were to conclude that Mr. Watts told Mr. D'Arcy that Mr. Kegley expressed bias against Jaycor, this would not prove that the statement was actually made, since everyone present at the meeting denies that Mr. Kegley made any statement of bias against Jaycor.

With respect to Mr. Kegley's alleged employment arrangement with Mantech, this allegation is based on: (1) a conversation Mr. D'Arcy testifies that he overheard between two unidentified individuals, Tr. 24; (2) a report to Mr. Way by Mr. Oliver of a rumor that Mr. Oliver had heard, Tr. 104-105, Oliver affidavit No. 5; and (3) testimony by Mr. D'Arcy and Mr. Way that Mr. Kegley had in the past raised with them the possibility of employment with Jaycor. Tr. 14, 52. Weighed against this evidence is Mr. Kegley's unequivocal denial that he sought employment with Mantech, Tr. 69, 71; Kegley affidavit ¶ 7, denials by cognizant Mantech employees that they discussed employment with Mr. Kegley, affidavits of George J. Pedersen, Edwin M. Jaehne, James W. Van Luven,

^{3/} The fourth, Mr. Martin, was not called to testify.

Michael M. Torbert, Richard P. Gregory, William L. Bethea, Richard M. Budwee, John A. Moore, Kenneth J. Jones and Richard A. Pomory, and the lack of evidence in the record that Mr. Kegley took a position with Mantech or any other contractor upon retiring from DOS. There is nothing in the record beyond rumors and hearsay to substantiate the allegation that Mr. Kegley had an employment arrangement with Mantech and we conclude that Jaycor has not presented convincing evidence to support this allegation.

Technical Evaluation

While we conclude that the record does not contain evidence of a conflict of interest or of bias against Jaycor, we do find that DOS' evaluation was flawed for two principal reasons to be explained in detail below. First, it is our view that the evaluators misconstrued Jaycor's BAFO and as a result failed to consider a major increase in that firm's level of effort first proposed in its BAFO. Second, DOS failed to point out during discussions its concern regarding Jaycor's inclusion of active duty military personnel in its proposed workforce. Since the agency did not make its concern known to the protester the firm continued to offer such personnel in its BAFO and was accordingly penalized in the evaluation.^{4/}

In the initial evaluation, the evaluation panel was concerned that Jaycor did not propose full-time hours for its employees since most of Jaycor's personnel were proposed for less than 2,080 hours annually (52 weeks multiplied by 40 hours per week equals 2,080 hours). In other words, the evaluators were concerned that Jaycor had not proposed a sufficient number of staff hours to provide the coverage needed by the agency. The record shows that Jaycor would have had an overall technical rating of 76 but for the evaluation panel's concern over its level of effort. That concern caused the initial rating to be reduced to 72.5/^{5/} After the initial evaluation and during discussions, DOS amended the RFP to no longer allow offerors

^{4/} Jaycor's proposal includes information that is considered proprietary by the firm. For this reason, our discussion of these issues will be limited.

^{5/} The reduction occurred under one of three subfactors under the "Corporate Method of Approach" evaluation factor. The subfactor, which related to staffing and labor categories, was worth a total of 10 points in the evaluation. Jaycor was initially given a score of ".6" on that subfactor which, under the weighted scoring used by DOS, was worth 6 points. That score was reduced to ".2," because of the evaluators' concern over the number of hours proposed per employee which was worth 2 out of the possible 10 points under the subfactor.

to prepare their own staffing plans; rather, offerors were required to propose 89 full-time employees in various labor categories.

In response to the amended RFP, in its BAFO, Jaycor proposed 89 employees, an increase in both employees and in the total number of staff hours over what it initially had offered, and stated:

"Our approach to team planning was first to determine the workload requirements in each of the functional areas referenced in the SOW. Second, we explored areas in which economies could be realized through management and planning efficiencies without sacrificing performance. Results of this workload analysis are depicted in Table 1-2.

We modified our staffing plan to reflect the personnel requirements specified in amendments 8 and 9. This change supersedes our work-load analysis presented in summary in Table 1.2. The proposed staffing is shown in Figures 1-1 through 1-3."

The superseded workload analysis in table 1-2 had been included in Jaycor's initial proposal and was also included in the BAFO on the page immediately following the explanation set out above. That table includes a breakdown of staff hours by labor category and DOS location under the contract. The table indicates the total number of labor hours Jaycor initially proposed for each full year of the contract.

The BAFO also, however, referred to new staffing levels proposed; these, as explained, were set out in Figures 1-1 through 1-3. Those three figures, or charts, one for the main DOS building and two for the other locations under the contract, included various labor categories under the contract, the number of employees in each labor category and total staff hours for each location. These charts clearly show that the level of effort proposed was substantially increased over that offered in Jaycor's initial proposal. Thus, although Jaycor's BAFO referred to the initially proposed but superseded total staff hours, it also offered a greater number of staff and the required 89 employees.

The evaluation panel's BAFO consensus evaluation report again gave Jaycor a total technical score of 72 and, under the "Corporate Method of Approach" subfactor relating to staffing and labor categories, a .2 out of a possible 1.0 points which, under the weighting scheme used by the panel, resulted in Jaycor's receiving 2 points out of 10 possible points for that subfactor. Under that subfactor, and on the cover page of the

BAFO consensus evaluation report, the evaluation panel listed as a weakness:

"The contractor's lack of 40 hour work week is unacceptable. Based upon the [deleted] hours provided in BAFO documents, panel finds that the total number of personnel is good but man-years based on 2,080 hours is lacking."

Jaycor argues that its technical score was improperly lowered based on the agency's failure to evaluate its complete BAFO. In response to Jaycor's contentions regarding the evaluation, DOS maintains that Jaycor's BAFO did not clearly offer the 89 required personnel on a full-time basis. DOS refers to the first paragraph from Jaycor's BAFO set out above and table 1-2 which included Jaycor's "workload analysis," and argues that although Jaycor says that it was superseded, that table remained physically incorporated in the BAFO and included the only total figure for the level of effort for all locations in Jaycor's technical BAFO. Thus, DOS takes the view that Jaycor did not adequately revise its proposal and it did not appear to the evaluation panel that Jaycor proposed the required level of effort.

In reviewing protests of allegedly improper evaluations, we will not substitute our judgment for that of the agency's evaluators but rather we will examine the record to determine whether the evaluator's judgments were reasonable and in accord with listed criteria and whether there were any violations of procurement statutes or regulations. Spectra Technology Inc.; Westinghouse Elec. Corp., B-232565; B-232565.2, Jan. 10, 1989, 89-1 CPD ¶ 23. Here we find that the evaluators misconstrued a major element of Jaycor's BAFO; therefore, we are unable to find that the evaluation of the proposal had a reasonable basis.

We have reviewed Jaycor's BAFO and in our view it clearly states that the "workload analysis" in table 1-2, which included the initial total level of effort, was superseded and that the new proposed staffing was shown in figures 1-1 through 1-3, each of which contained a total number of staff hours for its particular location or locations. Although it is true, as DOS argues, that Jaycor's new proposed staff hours "are not totalled or explained anywhere in its technical proposal," the hours were totaled in Jaycor's cost BAFO and it is clear to us that one has to merely add the level of effort proposed in each of the three figures to find the total level of effort proposed. While it would have been better had the Jaycor technical BAFO included a figure representing the total level of effort proposed for all locations, we simply fail to understand how the agency's evaluators could have misconstrued Jaycor's BAFO as offering the same total number

of staff hours as included in its initial proposal. Nevertheless, the record shows that the evaluators did misread Jaycor's BAFO and in fact scored Jaycor's BAFO as if it offered the same deficient level of effort proposed earlier. We therefore view the evaluation of Jaycor's BAFO as defective; since both Jaycor and Mantech received the same technical score and were close as far as cost/price is concerned, that defect could well have had an impact on the award selection. We therefore conclude that this portion of the evaluation was not done reasonably and we sustain the protest on this basis.

Jaycor next expressed its concern about the evaluators' downgrading its proposal because the protester offered soon-to-be-retired active duty military personnel. The protester argues that it was improper for the agency to consider this because the RFP evaluation factors did not encompass the origin of proposed staff members. In the alternative, Jaycor argues that if this were indeed a legitimate deficiency in its proposal it should have been pointed out during discussions.

The evaluation panel was concerned that Jaycor proposed active duty military personnel since such military personnel are in DOS' view not always able to retire when they expect. In this respect, in the BAFO evaluation report the panel noted in connection with the same evaluation category under which the level of effort was scored--Corporate Method of Approach--that "10 personnel are active military and therefore cannot be primary employees of the contractor." Despite the protester's argument to the contrary, we think this concern was reasonably encompassed within this evaluation factor, since this factor included subfactors concerning staffing of the program and availability of the proposed staff. This obviously is a staffing matter. See Unidynamics/St. Louis, Inc., B-232295, Dec. 21, 1988, 88-2 CPD ¶ 609.

It appears to us from the rather sketchy evaluation record that the DOS evaluators were concerned about the proposed active duty military personnel prior to the submission of Jaycor's BAFO but did not raise the matter with Jaycor in discussions. Since the evaluation panel's concern was not discussed with Jaycor, the firm did not remove the active duty military personnel from its proposal and, in fact, included additional military personnel in its BAFO.

Agencies are required to conduct meaningful discussions. Federal Acquisition Regulation § 15.610; Techniarts Eng'g, B-234434, June 7, 1989, 89-1 CPD ¶ 531. Although agencies are not obligated to afford all encompassing discussions or to discuss every element of a technically acceptable competitive range proposal that receives less than the maximum possible score, they still generally must lead offerors into the areas

of their proposals which require amplification or correction. Presentations South, Inc., B-229842, Apr. 18, 1988, 88-1 CPD ¶ 374.

The agency does not now argue that this matter was not a serious concern^{6/} of its evaluators; nor does it explain why the matter was not included in the discussions conducted with Jaycor. Under the circumstances, it is our view that by failing to raise with Jaycor the evaluators' concern with the firm's proposal of active duty military personnel, DOS failed to conduct meaningful discussions.

The effect of this on the scoring and the selection decision is unclear. Jaycor lost evaluation points under the staffing evaluation subfactor beyond the points which it lost because of the misunderstanding regarding its level of effort. Nonetheless, because of the confusing evaluation record, we are unsure whether points were actually deducted from Jaycor's technical score as a result of its proposal of active duty military personnel. Considering the criticism of this aspect of Jaycor's proposal in the narrative portion of the evaluation report, it is reasonable to assume that this matter had an impact on the scoring. Thus, we also sustain this aspect of the protest.

There are two remaining contentions: (1) that Mantech's substitution of personnel under the contract indicates that DOS failed to enforce the RFP's key personnel requirements and (2) that DOS did not have authority to award the contract because it lacked a valid DPA. First, we have carefully reviewed Mantech's BAFO and the records concerning the employee substitutions and while we are indeed concerned that such a significant number of substitutions did occur so soon after award, we have no legal basis upon which to conclude that Mantech proposed individuals it had no intention of providing or to object to the agency's approval of the substitutions after award. See Development Alternatives Inc., B-217010, Feb. 12, 1985, 85-1 CPD ¶ 188.

Second, Jaycor's contention that DOS lacked a proper DPA is untimely. In this respect, under our Bid Protest Regulations, protests must be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1990). Jaycor received a copy of the agency's original request to GSA for the DPA as well as a copy of the DPA itself on July 23 with the original agency report on the protest. Since Jaycor did

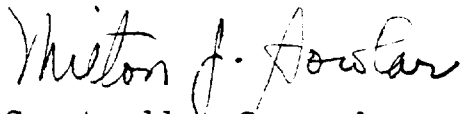
^{6/} The agency did indicate in its initial report that the matter "had nothing to do with the evaluation," but it treats the matter in its final submission as a deficiency.

not file a protest on this issue until August 15, its protest concerning the matter is untimely and will not be considered.

CONCLUSION

We sustain the protest based on DOS' erroneous evaluation and scoring of Jaycor's proposal, and its failure to raise in discussions Jaycor's proposal of active duty military personnel. We think that both these procurement deficiencies adversely impacted upon the evaluation of Jaycor's proposal. In the first instance, the firm failed to get any credit for the increase in its proposed level of effort and second, it was not provided the opportunity to remove a defect from its proposal and possibly improve its rating. Each of these procurement deficiencies is particularly significant in a situation such as this where the protester and the awardee received identical technical scores and similar overall scores. At the same time, since Mantech did submit a lower price/cost proposal and as it is not our role to actually score the Jaycor BAFO, nor is it possible for us to predict what improvements Jaycor could have made had adequate discussions been conducted, it would not be appropriate for us to recommend award to Jaycor. Therefore, we recommend that DOS reopen discussions with the offerors in the competitive range (based on the final scores this would include only Jaycor and Mantech), request another round of BAFOs and carefully evaluate them. If after the reevaluation, the agency concludes that Jaycor should have received the award under the solicitation's evaluation scheme, the contract should be terminated and, if otherwise proper, award made to Jaycor. Further, Jaycor is entitled to the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

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

for 
Comptroller General
of the United States