



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Johnson, Basin and Shaw, Inc.

File: B-240265; B-240265.2

Date: November 7, 1990

Douglas L. Patin, Esq., Kilcullen, Wilson and Kilcullen, for the protester.
Stephen H. Mims, Esq., Kinosky & Mims, for CSR, Inc., an interested party.
Mike Colvin and Richard Brown, Esq., Department of Health and Human Services, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of alleged conflict of interest resulting from the agency project officer's prior affiliation with the awardee's proposed subcontractor is denied where the project officer's affiliation occurred 3 years ago and the record does not show that any improper influence was exerted in procurement on behalf of awardee.
2. Protest that agency's prejudicial questions--during discussions and an agency site visit--violated prohibitions against technical leveling, auctions, and improperly altered the evaluation criteria is denied where record shows that agency asked questions in an effort to alert the protester to deficient areas of its technical proposal.
3. Protest that agency failed to conduct meaningful discussions is denied where protester's proposal was considered acceptable and in the competitive range, and where agency's questions were sufficient to direct protester to areas of its proposal which could have used strengthening.

DECISION

Johnson, Basin and Shaw, Inc. (JBS) protests the award of a contract to CSR, Inc. under request for proposals (RFP) No. 277-90-4001, a total small business set-aside, issued by the Department of Health and Human Services (HHS), Office for Substance Abuse Prevention, for operation of the National

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Clearinghouse for Alcohol and Drug Information.^{1/} CSR was the incumbent contractor.

Initially, JBS contended that HHS improperly manipulated the negotiation process to rationalize an award to CSR despite JBS' higher initial technical ranking. JBS speculated that HHS' project officer prompted this shift in the agency's attitude toward JBS' proposal because of the project officer's allegiance to former colleagues now employed by CSR and its subcontractor. Later, after JBS learned more about the agency's evaluation of its proposal, JBS protested the agency's failure to provide meaningful discussions, arguing that it was entitled to clearer notice of its proposal's perceived deficiencies during discussions.

In the course of its protest JBS has alleged that HHS has manifested a bias in favor of CSR by (1) CSR's premature receipt of copies of the RFP and the government cost estimate, (2) CSR's inclusion in the competitive range despite its lower ranked technical proposal, (3) HHS' improper questions in written and oral discussions with JBS and during an agency site visit violated prohibitions against technical leveling, auctions, and improperly altered the evaluation criteria, (4) no meaningful discussions of JBS' proposal deficiencies, and (5) improper post best and final offer (BAFO) discussions limited solely to CSR. JBS subsequently withdrew its contentions (1), (2), and (5).

We deny the protest.

The RFP solicited a cost-plus-award-fee type contract for a 3-year period with a 1-year option. The Clearinghouse contract supports a multiplicity of services including user inquiry and data analysis, marketing and dissemination of information products, operation of a computer data base, accessing other computer data bases, and the provision of graphic, messenger, warehouse, exhibit, information management, and other services.

^{1/} The Clearinghouse is a national information center for alcohol and drug abuse education and prevention. The Clearinghouse develops, collects and disseminates material concerning alcohol and drug abuse curricula and programs to governmental units, healthcare/treatment personnel, educators, researchers, populations at risk, and the general public.

The RFP had five evaluation criteria:

- Understanding the Project (5 points);
- Technical Approach (40 points);
- Management Plan and Corporate Capability (20 points);
- Personnel (30 points); and
- Facilities (5 points).

The solicitation advised offerors that "[p]aramount consideration shall be given to technical quality rather than cost," but warned that, "[s]hould technical quality between offerors be considered approximately the same, then cost may become the determining factor in award selection."

HHS received four proposals by the January 12 solicitation closing date. A technical review committee^{2/} evaluated the technical proposals and ranked them as follows:

	<u>AVERAGE SCORE</u>	<u>TOTAL ESTIMATED COSTS</u>
JBS	90.4	\$20,671,933
CSR	82.3	\$19,428,979
Offeror #3	66.4	\$21,222,276
Offeror #4	60.7	\$14,356,415

The committee unanimously found JBS and CSR technically acceptable under all of the criteria, but split on the acceptability of the third and fourth offerors. The committee's participation in the procurement ended here.

HHS' staff conducted the procurement from this point forward. HHS' staff used the results of the committee's evaluation to establish a competitive range of two--JBS and CSR--finding that they were the only offerors with a realistic chance of receiving an award. The record shows that HHS' staff were concerned about certain aspects of the committee's evaluation of the two proposals, specifically, the significance accorded to equipment/technology used in the Clearinghouse, as opposed to the significance accorded management/personnel that would operate the Clearinghouse. HHS sought, during discussions, to alleviate those concerns with supplemental information from the offerors.

On April 17, HHS opened written discussions asking both offerors to respond to a list of comments and questions. HHS' staff reviewed the responses. The staff did not formally document its consideration of each offerors' response to

^{2/} The committee was in the nature of a peer review panel made up of outside experts.

questions during the discussion process. Instead the staff annotated the offerors' submissions with underlining and marginal notes respecting its concerns. On April 23, the offerors made oral presentations to HHS' staff, which were followed by HHS staff site visits to CSR on May 11 and JBS on May 15. The staff did document the conclusions drawn from the site visits. HHS conducted two more rounds of written discussions, and a May 29 round of telephone negotiations concerning cost matters which culminated in a request for BAFOs to be submitted by May 31.

There was no further rescoring of the technical proposals, however, HHS did find the proposals technically equal. On June 29, HHS awarded CSR the contract on the basis of CSR's technical equality with JBS and its lower total proposed cost.^{3/}

TOTAL ESTIMATED COSTS

CSR	\$19,826,272
JBS	\$20,956,971

Later the same day, JBS filed its protest with our Office. On July 11, HHS determined, pursuant to Federal Acquisition Regulation (FAR) § 33.104(c)(2)(ii), that it was in the best interest of the government to continue performance notwithstanding the protest.

Our review of the parties' arguments, proposals, written submissions, committee and staff source selection and evaluation documentation, the agency report and other HHS submissions, discloses no basis for finding that any HHS' employee had a conflict of interest, that the evaluation and negotiations were biased or unreasonably deviated from the stated evaluation criteria, that the agency failed to conduct meaningful discussions, or that the agency erred in finding the awardee's and the protester's proposals technically equal.

JBS contends that the project officer's "prior close working relationship with key officials of CSR and/or . . . [CSR's subcontractor]" from 1984 through 1987 should have disqualified the project officer from any role in evaluating the proposals. The record shows that HHS relied heavily on the project officer's expertise throughout the procurement. Specifically, JBS contends that the project officer "has an inherent favoritism toward this company's [CSR's] method of

^{3/} CSR's offer represented a savings of \$1,130,699 over the 4-year period which increased to a saving of \$1,208,815 following the correction of an error in CSR's BAFO concerning the calculation of indirect costs.

operation and its personnel," and that CSR's chief executive officer once supervised the project officer at a time when the project officer worked for CSR's subcontractor. JBS claims that it first learned of the project officer's significant role both in evaluating offerors' responses to agency questions during discussions and ultimately in determining the awardee when it received the agency report. According to JBS, the "tone and tenor" of the project officer's comments in the agency report reflect other than an impartial attitude toward JBS.

Generally, our review of conflict of interest allegations centers on whether the individuals involved in the alleged conflict exerted improper influence in the procurement on behalf of the awardee. See Louis Berger & Assocs., Inc., B-233694, Mar. 28, 1989, 89-1 CPD ¶ 347. We do not attribute unfair or prejudicial motives on the basis of mere inference or supposition, and require evidence that the individual alleged to have the conflict of interest may be subject to undue influence likely to result in favoritism toward the awardee. See National Council of Teachers of English, B-230669, July 5, 1988, 88-2 CPD ¶ 6.

The record shows that since 1972 the project officer has worked in both commercial and governmental capacities in a small, specialized field. As a consequence of that experience, the project officer knows and has worked with many of the people in that field including employees of JBS, CSR and the other offerors. The project officer denies ever being supervised by CSR's chief executive officer, although at one time they both worked for CSR's subcontractor.

Nothing in the record before us indicates that the project officer was subject to any influence from either former employers or former colleagues, or that the project officer has any financial or other ties to either former employers or former colleagues. We think it necessary to distinguish between improper external influence on a government employee that may result in the employee's questionable performance of official duties and an individual employee's proper exercise of personal influence on agency actions. While JBS views the project officer as responsible for its initially higher rated proposal falling from favor and questions the propriety of the project officer's influence on the procurement, we think HHS reasonably afforded the project officer's views significant weight since the project officer's expertise in Clearinghouse operations--derived from commercial and governmental experience--is clear. Our review of the record shows no evidence of either bias or conflict of interest. Although JBS objects to the tone of the project officer's comments, we read the same comments as consistently reflecting a strong concern

for the efficient delivery of Clearinghouse services to the intended recipients. This ground of protest is denied.

JBS contends that:

"The questions posed by the agency to JBS and CSR was an attempt by the agency to give special weight and value to CSR's status as an incumbent. The questions were framed to highlight CSR's value as an incumbent and to highlight JBS's lack of contact with sources and experience which could only be gained by being the incumbent for the contract."

JBS buttressed this argument with general allegations of technical leveling and the employment of improper auction techniques. JBS, asserting that its proposal offered the government both technical superiority and the lowest proposed cost, further contended that there was no rational basis to conclude that CSR presented the overall best value to the government.

Technical leveling occurs when an agency endeavors to bring an unacceptable proposal up to the level of other proposals by pointing out the proposal's weaknesses in successive rounds of discussions. FAR § 15.610(d)(1) (FAC 84-16). HHS denies engaging in any form of technical leveling stating that it neither suggested any proposal improvements to CSR nor disclosed technical information to either offeror. HHS held successive rounds of discussion, but we do not think they can be considered technical leveling since both offerors were highly evaluated and both offerors had numerous proposal weaknesses which had to be addressed before HHS could confidently award the contract.

Regarding JBS' auction allegation, we agree with HHS' observation that there is no basis for the allegation where CSR offered the lowest proposed cost throughout the procurement.

The record also does not support JBS' argument that HHS fashioned the discussion questions to highlight the incumbent's strengths and JBS' weaknesses, or that HHS in any way changed the weight assigned to the evaluation criteria. The record instead reveals that HHS' thorough and detailed discussions with both offerors generally tracked the technical review committee's listed concerns about weaknesses in both proposals. While many of HHS' questions were the same for both offerors, other questions specifically addressed each offeror's unique proposal weaknesses. Even if it were assumed that JBS' weaknesses received more attention during discussions than CSR's weaknesses, we do not see how this would prejudice JBS since notice of a weakness, if heeded,

affords an offeror an opportunity to effect a cure and improve its overall evaluation.

JBS urges that a sign of bias inherent throughout the evaluation process was HHS' failure to use "objective technical scores" and to use offerors' responses to questions during discussions to change technical scores. We do not agree. The record shows that HHS properly used the committee's initial point scoring of the technical proposals as a guide for decision-making during the negotiation process. During discussions HHS developed further information bearing on the validity of the scores initially assigned to the two offerors' proposals. It is not objectionable that an echelon of HHS higher than the committee elected to consider and act on the new information in determining the awardee the technical equal of the protester without revising the original scoring. Moreover, once the two proposals were found to be technically equal the selection of CSR on the basis of its lower proposed costs was proper. See generally Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In any event, we have reviewed all of the relevant documents and find no basis for JBS' contention that HHS improperly considered its proposal.

Following its receipt of the agency report,^{4/} JBS supplemented its protest with the argument that HHS had failed to provide meaningful discussions. The crux of JBS' argument is that HHS never mentioned the concerns about JBS' proposal enumerated in the document. Specifically, JBS says it was unaware of HHS' concerns regarding: (1) the experience of JBS' proposed senior level personnel; (2) the lack of required experience in JBS' proposed staff; (3) JBS' lack of understanding with the area of bring "research findings and other knowledge back to the field," and (4) JBS' apparent lack of a sense of urgency relative to the need to reduce drug related street crime. JBS also objects to HHS' conduct and use of the site visit during discussions.

The governing provision of the Competition in Contracting Act of 1984, 41 U.S.C. § 253(b)(d)(2) (1988), as reflected in FAR § 15.610(b) (FAC 84-16), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on recon., B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. However, while agencies generally must conduct discussions with all offerors

^{4/} The agency report included a June 25, 1990, HHS document entitled "Addendum to Review of Proposals - Best and Finals" which listed HHS' remaining concerns with JBS' technical proposal.

in the competitive range, advising them of deficiencies in their proposals and offering them the opportunity to submit revised proposals, this does not mean that offerors are entitled to all-encompassing discussions. Agencies are only required to lead offerors into areas of their proposals considered deficient. Moreover, where a proposal is considered to be acceptable and in the competitive range, an agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible score. Mech El Inc., B-233092, Feb. 21, 1989, 89-1 CPD ¶ 175.

We think HHS conducted appropriate and meaningful discussions with JBS particularly considering that JBS was the highest rated offeror (90.4 out of 100) in the competitive range and agencies are not obligated to discuss every element of a technically acceptable proposal that has not received the maximum possible rating (i.e., 100). Id. For example, concerning the experience of JBS' proposed senior level personnel, HHS' May 21 questions focused almost entirely on the experience of JBS' proposed Project Director and Associate Project Director, a fact which JBS acknowledged in its May 23 response:

"Our responses to these questions highlight specific experiences of the JBS proposed Project Director and Associate Director for Programs. The responses also briefly list relevant experiences of other key staff."

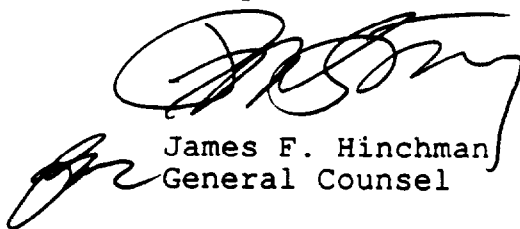
HHS also asked questions concerning the experience of proposed staff in areas required by the RFP--"What is the current experience of staff in addressing AOD information and issues?" and "Please detail the backgrounds of the proposed staff who will work with media advocacy outreach efforts?" While HHS may not have identified all areas of weakness in JBS' proposal, we do not find that it erred in failing to make them part of the discussions. We note that HHS asked JBS questions about the experience of proposed personnel on more than one occasion during discussions. Since JBS appeared wedded to the proposed team and gave no indication of a willingness to offer substitutes the question of the experience of the proposed personnel became an informational matter, not subject to change, which HHS was not obligated to discuss further. See Scientex Corp., B-238689, June 29, 1990, 90-1 CPD ¶ 597.

Concerning JBS' objection to HHS' conduct and use of the May 15 site visit, JBS states that it relied on HHS advice that the site visit would be a tour of the warehouse and computer facilities and without warning HHS improperly changed the announced agenda by asking JBS to discuss the question: "What is your model for strategic and tactical planning?" JBS contends that HHS' documents cite JBS' difficulty in responding to the question as a reason for finding JBS and CSR

technically equal. HHS states that it confronted both offerors with unannounced questions to test their "flexibility" and "response under pressure." HHS takes the position that the surprise question was not prejudicial since it was asked of both offerors and HHS gave both offerors an opportunity to respond in writing after the site visit to its question.^{5/} We view this as simply one more instance of HHS attempting to resolve its concerns about the quality of JBS' proposed personnel. Personnel was a major evaluation criterion (30 out of 100 points) and we do not find objectionable HHS' innovative efforts to resolve its concerns regarding the quality and experience of the proposed JBS personnel.

We find reasonable HHS' determination that CSR's proposal was technically equal to JBS' proposal. The technical review committee's scoring ranked JBS' proposal 8 points higher than it ranked CSR's proposal, but the committee noted numerous weaknesses in both offerors' proposals. During discussions JBS' weaknesses in large measure remained unresolved--particularly in the heavily weighted (30 points) personnel area--while CSR affirmatively resolved the matters that had been perceived as weaknesses in its proposal. Even without a formal rescoring of technical proposals, there is, in our view, sufficient evidence in the record to support HHS' determination of technical equality and we cannot question HHS' position that CSR's proposal was at least 8 points stronger and that JBS' proposal, at best, remained the same. Where an agency reasonably finds two offerors technically equal it may make award to the lower cost offeror. Ferguson-Williams, Inc., 68 Comp. Gen. 25 (1988), 88-2 CPD ¶ 344; Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427.

The protest is denied.



James F. Hinchman
General Counsel

^{5/} To the extent JBS is objecting to the agency's surprise question tactic, it is untimely raised and will not be considered on the merits when protested on August 17, more than 10 working days after the May 15 site visit. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990); American Seating Co., B-229915, Apr. 26, 1988, 88-1 CPD ¶ 408.