



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Danoff & Donnelly; Kensington Associates

**File:** B-243368; B-243368.2

**Date:** July 26, 1991

Allen S. Danoff, Esq., for Danoff & Donnelly, and John E. Rayburn for Kensington Associates, the protesters. Susan Grimes for Susan Grimes Associates, and Tama Zorn, Esq., for Delany, Siegel, Zorn & Associates, Inc., interested parties. James K. White, Esq., Department of Commerce, for the agency. James Cunningham, Esq., Glenn Wolcott, Esq., and Paul Lieberman, Esq., Office of the General, GAO, participated in the preparation of the decision.

### DIGEST

1. RFP reasonably provided that cost proposals will be evaluated by applying proposed labor rates to government estimates of hours required where government's estimates are based on past contract performance of the solicited requirements and the RFP's evaluation scheme provides for consideration of offerors proposing comparatively more efficient personnel.
2. RFP properly does not provide for evaluation of travel and transportation costs where agency cannot predict with any certainty the locations where contract performance will be required.
3. Contracting officer is authorized to make cost/technical trade-offs in selecting the proposal which is most advantageous to the government.
4. RFP requirement that contractor obtain approval for employment of key personnel does not create a personal services contract.
5. Protest alleging that RFP is ambiguous with regard to security requirements is denied where RFP expressly provides that agency will not subject an offeror's personnel to a security determination as part of the evaluation process.

## **DECISION**

The law firm of Danoff and Donnelly (D&D) and Kensington Associates (KA) protest several provisions in request for proposals (RFP) No. 52SAAA100016, issued by the Department of Commerce. Commerce intends to award an indefinite quantity, fixed-price contract to investigate employee discrimination complaints within its Department.

We deny the protests.

The RFP contemplated award of an indefinite quantity contract for a 4-month base period with five 1-year option periods, and sought submission of both cost and technical proposals. With regard to technical proposals, the RFP required offerors to submit resumes for not more than seven investigators and stated that the qualifications of these personnel would be the most important technical evaluation factor. Regarding cost proposals, offerors were required to propose fixed-priced labor rates and the RFP provided that cost proposals would be evaluated by applying the proposed labor rates to the estimated quantities of hours listed in the RFP.<sup>1/</sup> The RFP stated that, in selecting the successful offeror, technical factors would be considered more important than cost and provided that award could be made to other than the low-cost offeror if the technical merit of another offeror's proposal justified the additional cost.

### **D&D'S PROTEST**

D&D asserts that it employs highly qualified personnel and uses advanced technology which permits it to perform investigations significantly more efficiently than the 155 hour average on which Commerce's estimates of maximum hours per contract period are based. Accordingly, D&D protests that Commerce's estimation of labor hours under this solicitation is erroneous and asserts that the RFP's evaluation provisions fail to provide for proper evaluation of proposals that offer comparatively higher priced, but higher qualified, personnel.

Commerce responds that its estimates of labor hours are based on its most recent contract experience, that this experience constitutes the best information available, and that the estimates represent a reasonable approximation of what its

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<sup>1/</sup> Commerce estimated a maximum of 15,000 hours of work annually would be required under the contract. This estimate was based on Commerce's experience over the last 4 years during which the average length of an investigation was 155 hours.

actual needs will be. Commerce further notes that the qualifications of the personnel proposed to perform the investigations is the single most important factor in evaluating technical proposals, that the RFP requires technical factors to be given greater weight than cost, and that the RFP expressly provides that award may be made to other than the low-cost offeror. Accordingly, Commerce maintains that proposals offering comparatively higher qualified, higher priced personnel will be properly considered.

When a contracting agency requests competition for a requirements contract on the basis of estimates, the agency must base its estimates on the best information available. However, there is no requirement that the estimates be absolutely accurate; rather, the estimated quantities must only be reasonably accurate representations of anticipated actual needs. Natural Landscape Contractors, Inc., B-209745 et al., June 28, 1983, 83-2 CPD ¶ 32.

The record shows that Commerce's estimates are based on its most recent contract experience. D&D has not demonstrated that this historical information is faulty or that Commerce's reliance on its recent contract experience is otherwise unreasonable. In order to evaluate cost proposals, we find it reasonable for Commerce to establish a "baseline" against which proposed costs may be compared. Application of the offerors' proposed labor rates against such estimates provides such a "baseline."

More significantly, as Commerce notes, the qualifications of the personnel proposed by each offeror will be the most important factor in evaluating technical proposals, and technical factors will be given greater weight than cost in making the source selection decision. Thus, under the provisions of the RFP, Commerce is required to consider the proposed investigators' capabilities, including their capacity for efficiency, in evaluating technical proposals and in making the source selection decision. Since the RFP expressly provides for consideration of an offeror's superior capabilities in evaluating proposals, D&D's assertion that the RFP evaluation scheme fails to give proper credit to offerors that are comparatively more efficient is without merit.

D&D also complained that it did not receive an amendment to the RFP until after it had submitted its proposal. However, the agency report indicates that D&D received all RFP amendments prior to the final closing date, as extended, and that it had ample opportunity to submit a revised proposal after receiving those amendments. D&D did not rebut, or even respond to, this information in its comments.

## KA's PROTEST

KA protests that the RFP's ceiling on proposed investigators (no more than seven) is improper and that travel costs, incident to investigations, should be evaluated as part of proposal evaluation. KA also protests that the RFP improperly permits the contracting officer to choose between awarding a contract on the basis of low cost or technical superiority, that the award of a contract under this RFP will result in an improper personal services contract, and that the RFP is unclear regarding the applicability of certain security requirements.

## CEILING ON PROPOSED INVESTIGATORS

The RFP estimated that "not more than" seven experienced investigators should be proposed to perform the contract. KA protests that the limit is unreasonable because, if Commerce orders the maximum number of work hours permitted in a given year (15,000), each of the seven investigators would be required to work more than 2100 hours during that year.

Commerce responds that it chose to limit the evaluation to seven investigators to avoid the problems experienced under previous RFPs for similar services in which Commerce was required to evaluate up to 30 proposed investigators for each offeror. Commerce further states that if, during performance, additional investigators are found necessary to do the work, they may be added subject to approval by the contracting officer. Finally, Commerce points out that the total estimate of 15,000 work hours includes not only investigative time but secretarial and clerical processing time as well.

When a protester challenges RFP specifications as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are reasonably related to the agency's minimum need. Glock, Inc., B-236614, Dec. 26, 1989, 89-2 CPD ¶ 593. We will conclude that an agency has established a reasonable basis for an allegedly restrictive specification, if the explanation supporting the specification withstands logical scrutiny. Worldwide Primates, Inc., B-227146, July 7, 1987, 87-2 CPD ¶ 21.

The record indicates that seven investigators is a reasonable approximation of the number that will be necessary to perform the contract requirements. This limitation is similar to a requirement that offerors submit resumes only for a specified number of "key personnel" that are vital for contract performance. Here, we find it reasonable for Commerce to limit the number of individuals it must evaluate to the number of investigators it reasonably estimates will be required to perform the contract. Further, KA has not suggested that the

limitation in any way precludes it from submitting a proposal. KA's protest challenging the limitation on the number of investigators it may propose is denied.

#### TRAVEL COSTS

KA next protests that the RFP improperly fails to provide for evaluation of travel and transportation costs. KA maintains that this improperly favors offerors located in the Washington, D.C. area.

Commerce responds that the RFP does not provide for evaluation of travel and transportation costs because it is impossible to predict where investigations will have to be performed. Commerce explains that in the past there has been no significant correlation between the numbers of Commerce employees working at various locations around the country and the number of complaints which arose at those locations.

Since it is impracticable to predict where performance will be required, Commerce's position that it is not feasible to evaluate travel and transportation costs is reasonable. This portion of KA's protest is denied.

#### IMPORTANCE OF COST

The RFP provided that technical evaluation factors were more important than cost. Nonetheless, cost was stated to be an "important" evaluation standard under the RFP and prospective offerors were specifically informed that Commerce reserved the right to award a contract to other than the "lowest priced technically qualified offeror if another offeror's technical merit justify[d] the additional cost."

KA protests that given the wording of the RFP, Commerce has "reserve[d] the right to choose whether to award the contract to the lower [cost] offeror or the most technically qualified [offeror]" and asserts that "this discretion is not authorized by [the procurement statutes and regulations]."

KA is essentially asserting that procuring agencies are precluded from performing cost/technical trade-offs in making source selection decisions. KA's assertion in this regard is erroneous. In negotiated procurements cost/technical trade-offs may--and generally, must--be made in order to determine which proposal is most advantageous to the government. The extent to which one factor (cost or technical) may be sacrificed for the other is governed only by the test of rationality. See, e.g., United Engineers & Constructors Inc., Stearns-Roger Division, B-240691; B-240691.2, Dec. 14, 1990, 90-2 CPD ¶ 490; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. KA's protest that the RFP improperly


permits the contracting agency to make cost/technical trade-offs is denied.

#### PERSONAL SERVICES CONTRACT AND SECURITY REQUIREMENTS

KA protests that the RFP's reference to each offeror's proposed investigators as "key personnel" creates a prohibited personal services contract. We have held, however, that there is no general statutory or regulatory prohibition against agency approval of key employees, and requiring agency approval does not have the effect of creating a personal services contract. Minority Communications, Inc., B-228230.2, Jan. 29, 1988, 88-1 CPD ¶ 88. Consequently, we deny this ground of protest.

Finally, KA protests that the RFP is not clear as to whether security requirements will be considered in proposal evaluations. Contrary to KA's assertion, the RFP clearly informs prospective offerors that these requirements will not be considered as part of proposal evaluations. Specifically, amendment No. 3 to the RFP stated, "[Commerce] will not subject any offeror's personnel to a security determination as part of the evaluation process."

The protests are denied.

  
James F. Hinchman  
General Counsel