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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Beckman Instruments, Inc.

File: B-246195.3

Date: April 14, 1992

C. Stanley Dees, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester.
James F. Trickett, Department of Health and Human Services, for the agency.
Richard P. Burkard, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of best and final offers (BAFO) and its subsequent award selection cannot be found reasonable where the evaluation record contains no rationale for agency's conclusion that proposal revisions in the protester's BAFO did not warrant a change to the scoring that was based on the initial proposal.

2. The composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object to the constitution of the panel absent a showing of fraud, bad faith, conflict of interest, or actual bias.

DECISION

Beckman Instruments Inc. protests the award of a contract to Tritech Field Engineering, under request for proposals (RFP) No. 263-91-P(64)-0029, issued by the Department of Health and Human Services, National Institutes of Health (NIH) for maintenance of government-owned laboratory equipment.

Beckman argues that NIH failed to properly evaluate both its own and Tritech's proposal. In this regard, the protester principally contends that it successfully responded to agency discussion questions which pointed out five weaknesses in its initial proposal such as its noncompliance with an emergency repair call requirement, but that the agency did not consider its responses. We sustain this aspect of the protest because the evaluation record supplied by the agency does not contain a rationale for its conclusion that the proposal revisions did not have an impact upon the initial evaluation results which rendered

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the subsequent source selection decision defective. We deny the remaining protest allegations.

BACKGROUND

The RFP was issued April 3, 1991, and requested offers to provide on-site full service maintenance and repair of Beckman instruments at NIH's, Bethesda, Maryland facility and other NIH facilities within a 50-mile radius for a base period and 4 option periods. The RFP provided that all "NIH users who have Government-owned Beckman-manufactured instruments of the type and quantities specified herein are authorized to place orders. . . ." The solicitation allowed the addition of instruments not listed in the RFP schedule if they were of the same type and model as those listed and noted that "not all types of instruments manufactured by Beckman are to be covered under this contract."

Also, section C.5 of the RFP, "Emergency Repair Calls," provided that the "contractor shall respond, inspect and restore each instrument to 100% of its original specified operating parameters within forty-eight (48) hours, excluding weekends and Federal holidays, after an emergency call has been placed. . . ."

The RFP contemplated the award of a firm, fixed-price indefinite quantity contract to the offeror whose proposal was determined to be the most advantageous to the government. Section M of the RFP provided that technical factors would be more important than cost, but noted that "should technical competence between offerors be considered approximately the same, then cost or price would become paramount."

The technical evaluation factors and subfactors listed in the RFP are summarized as follows:

- A. Evidence of the necessary skill qualifications
 - 1. Experience and educational background of individuals.
 - 2. Evidence of the organization's qualifications, experience, achievements with the maintenance and repair of Beckman brand instruments and accessories.
- B. Evidence of ability to respond to emergency situations and to remedy the problem with minimum down time.
- C. Evidence of sufficient stock of spare parts and ability to obtain spare parts.

D. Evidence/examples of a thorough understanding of the required reporting procedures.

The RFP stated that factors A. and B. were significantly more important than factors C. and D. Although the RFP did not indicate precise point scores, the record shows that the agency, in its evaluation, valued factors A. and B. at 35 points each and C. and D. at 20 and 10 points, respectively.

Three proposals were submitted by the closing date of May 20. The agency established a technical evaluation panel composed of a chairperson and five panel members which met on June 5 to review and evaluate the proposals. The agency determined that the proposals of Beckman and Trittech were acceptable; the third offeror's proposal was considered unacceptable.

The evaluators awarded Beckman's proposal 82 points. The panel's summary pointed out several weaknesses in Beckman's proposal, including: (1) Beckman failed to demonstrate "full compliance" with section C.10.3 of the RFP which limited the type of instruments which were to be covered under the contract; (2) Beckman proposed only a limited supply of parts for older equipment; (3) it was not clear from Beckman's proposal that, with respect to emergency repair calls, it would meet the RFP requirement that repairs be completed within 48 hours of the call; (4) Beckman failed to provide a resume for one of its proposed personnel; and (5) the firm failed to provide evidence of compliance with the RFP requirement that the awardee forward service copy reports to the project officer.

Trittech's proposal received the highest technical rating of 85. The panel also noted several weaknesses in the Trittech proposal such as the lack of experience of its administrative coordinator, the proposal of a service engineer not currently employed by the firm, and a lack of precise understanding of the electronics and mechanics of certain components. Beckman's proposed price for the base and option periods was approximately \$10 million, while Trittech's was just under \$8.5 million.

After the initial proposal evaluation, the agency held discussions with these two firms. In addition to face-to-face discussions the agency provided Beckman and Trittech with written discussion questions. During discussions, the agency pointed out to Beckman the five weaknesses mentioned above. The firm responded by letter dated July 31.

The contracting officer states in the agency protest report that the evaluators reviewed the responses of both firms to the discussions and concluded that the responses did not

affect the original scores of either firm. This statement is based on a memorandum, dated August 12, from the chairperson of the evaluation panel to the contract specialist. This memorandum states that five of the original technical review panel members were contacted and that, after reviewing the firm's responses to the government's questions, they concluded that "no change in technical rating" was warranted.

The agency's Source Selection Determination, prepared by the contract specialist and signed by the contracting officer on August 23, noted that the technical scores or ratings did not change as a result of discussions and the submission of revised proposals. Since Tritech's proposal remained technically higher-rated than Beckman's and offered a significant price savings, the agency awarded the contract to Tritech.

PROTEST ALLEGATIONS

Beckman argues that the agency's final evaluation of its proposal failed to recognize the revisions offered by the firm in its revised proposal submitted in response to the agency's discussion questions.

In reviewing protests against allegedly improper evaluations, our Office will examine the record to determine whether the agency's determination was reasonable and consistent with the evaluation criteria listed in the solicitation. Hattal & Assocs., 70 Comp. Gen. 632 (1991), 91-2 CPD ¶ 90; American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53. Implicit in the foregoing is that the agency must document these judgments in sufficient detail to show that they are not arbitrary. U.S. Defense Sys., Inc., B-245563, Jan. 17, 1992, 92-1 CPD ¶ 89. In this regard, Federal Acquisition Regulation (FAR) § 15.608 requires that the evaluation of proposals be documented. This is to include the basis for evaluation and an analysis of the technically acceptable and unacceptable proposals, an assessment of each offeror's ability to accomplish the technical requirement, and a summary of findings.

It appears from the record that all of the five "weaknesses" which were discussed with Beckman were addressed in Beckman's proposal after discussions and the agency concedes in the protest report that Beckman eliminated two, concerning the types of instruments covered and the resume of the questioned Beckman employee. There is no meaningful documentation, however, concerning the agency's evaluation of these proposal revisions. The record contains only the single-page memorandum, unsigned by any of the evaluation panel members, which states that the firm's responses to the discussion questions had no impact on the evaluation scores.

For example, Beckman's initial proposal appeared to be noncompliant with the RFP requirement that it respond to emergency requests within 48 hours of notification of the problem, an area to which the RFP allocates more than one-third of all technical points. Even though Beckman revised its proposal to comply with this provision, there is nothing in the record to indicate that any evaluation panel member altered his or her evaluation of this aspect of Beckman's proposal. Under the circumstances, since the offeror clearly addressed this and the other matters raised in discussions, the evaluators should have provided a rationale for their conclusion that no scoring change was warranted. See Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482, recon. den., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211.

The apparent failure of the evaluators to consider the impact of Beckman's revisions carried over into the agency's source selection decision. The regulations require that the source selection decision be documented and that the record state the basis and reasons for the decision and show the relative differences among proposals and their strengths, weaknesses, and risks in terms of the evaluation criteria. FAR § 15.612(d)(2).

The Source Selection Determination in this case incorporates the findings of the evaluation panel's comparison of the initial proposals. It refers to the discussions but concludes only that there was no change in the technical scores or ratings as a result of the evaluation panel's review of the revised proposals. As we have noted earlier, Beckman's proposal revisions contain what appear to us to be substantive responses to the matters pointed out by the agency during discussions. There is nothing in the record which shows that the source selection official ever assessed the strengths and weaknesses of the revised proposals. The result is that there is inadequate supporting documentation for the award decision. Under the circumstances, we cannot conclude that the agency had a reasonable basis for its selection. U.S. Defense Sys., Inc., supra.

While we have at times accepted explanations in agency protest reports justifying a source selection in the absence of adequate, contemporaneous evaluation documentation, such explanations must provide sufficient detail by which the rationality of the agency's evaluation decision can be judged. Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88. In this case, the agency report fails to address with any specificity the reasons underlying either the final evaluation or the source selection decision.

The protester carefully analyzed the evaluation record of each panel member, constructing what it believes its score should have risen to following submission of revised proposals. Beckman contends that its score would have increased by at least 11 points to a total of 93 points, which the firm alleges would have established "clear technical superiority" over Tritech's proposal. We recognize that a higher score for the protester's proposal would not necessarily result in a different selection decision since the awardee's price was low and the revisions to its proposal might also warrant an increase in score. On the other hand, from this record it appears possible that the protester's proposal, when properly evaluated, could be scored higher than the awardee's and that the selection official could view that higher score as indicating technical superiority worth paying a higher price. Consequently, in view of the flawed evaluation and the possibility that the selection decision might be different under a proper evaluation, we sustain the protest. In view of our conclusion, we do not believe that it is necessary to consider in detail the protester's remaining allegations concerning the evaluation of the proposals. In this regard, the protester argues that it was improper for certain members of the evaluation panel to penalize Beckman twice for the same weakness and it challenges the evaluation of Tritech's proposal in the area of personnel.¹ We have carefully reviewed the remainder of the evaluation in the context of these arguments and conclude that these aspects of the evaluation were reasonable. We, therefore, deny this portion of the protest.

Finally, Beckman asserts that the evaluation panel included two NIH employees who may have been biased against it

¹The protester complains that the technical evaluation panel never saw information which Tritech was required by the RFP to include in its proposal concerning the availability of particular spare parts and the number of preventative maintenance calls to be offered, as this information was provided in a separate document with Tritech's business proposal. While it is true that the evaluators did not review this document, we find that Beckman was not prejudiced by this oversight. With respect to parts availability, the document merely confirmed that Tritech had the parts supply as reflected in its technical proposal. Concerning the preventive maintenance calls, the document showed that Tritech's proposal was virtually identical to Beckman's in this respect. The protester does not allege, nor does the record show, that Tritech's proposal should have been downgraded based on its proposed level of preventive maintenance calls. Consequently, we deny this protest ground.

because they would benefit from the award to a small firm like Trittech. The protester's argument is based solely on a NIH memorandum announcing the award of the contract to Trittech and providing answers to questions which may arise from users of the contract. The memorandum includes a statement that the contract is not mandatory and that users may secure service from "in-house" NIH sources including the Biomedical Engineering & Instrumentation Program (BEIP). The protester alleges that two of the evaluation panel members would perform "overflow" work from the contract for BEIP and contends that they may have been biased against Beckman since the firm would adequately staff the contract and provide little or no overflow work.

The composition of a technical evaluation panel is within the contracting agency's discretion and, as such, does not give rise to review by our Office absent a showing of possible abuse of that discretion, such as by ignoring a conflict of interest or actual bias on the part of evaluators. Herndon Science and Software, Inc., B-245505, Jan. 9, 1992, 92-1 CPD ¶ 46. We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.

Here, we find the protester's argument to be unsupported. First, the protester has not shown that these individuals stood to benefit from performing work which would otherwise be performed by the contractor. In this regard, there is nothing in the record to indicate that these individual's jobs were at all dependent on the work covered by this contract. Even assuming that it would be in the interests of these individuals to perform such overflow work, we fail to see how the selection of the awardee would affect BEIP's workflow, since use of the BEIP is at the user's choice and not a function of the contractor's capability to perform. Moreover, the record shows that the two allegedly biased panel members each awarded Beckman scores which were higher than those awarded by two other panel members.

RECOMMENDATION

We recommend that the agency reevaluate proposals in light of the proposal revisions and the RFP evaluation criteria and fully document the basis for the evaluation and selection decision. In the event that Beckman's proposal is determined to be most advantageous to the government, NIH should terminate the contract with Trittech and award it to

Beckman. We also find that Beckman is entitled to the costs of filing and pursuing this protest including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained in part and denied in part.

Milton J. Aorstar

Acting Comptroller General
of the United States