



Decision

Matter of: Medical Service Corporation International

File: B-255205.2

Date: April 4, 1994

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DIGEST

1. Protest that awardee had an organizational conflict of interest and gained an unfair competitive advantage in procurement by proposing to use a subcontractor that had previously evaluated protester's performance on a prior contract for the contracting agency is denied where the record contains no evidence to support protester's speculative assertion that proposed subcontractor's employee obtained protester's proprietary or confidential business information and gave it to awardee for use in preparing its proposal for the present procurement.

2. Awardee's proposed use of a subcontractor that had performed evaluation services for the contracting agency on an earlier contract involving some of the same work required in the present procurement did not result in an organizational conflict of interest requiring the agency to exclude the awardee and its subcontractor from the present competition where the record shows that agency employees prepared the solicitation's statement of work (SOW) and the subcontractor's earlier work did not lead directly, predictably, and without delay to the present solicitation's SOW.

*The decision issued April 4, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

3. There is no requirement that all evaluators of initial proposals must reconvene to evaluate best and final offers.
4. Alleged improper downgrading of protester's initial technical proposal by two evaluators was cured during procurement process because protester was considered in competitive range, discussions were held with protester, and the two evaluators alleged to have improperly downgraded protester's initial proposal did not participate in evaluation of best and final offers.
5. Protest that agency failed to consider significant revisions contained in protester's best and final offer (BAFO) and to upgrade protester's technical score for those revisions is denied where the record shows that BAFO evaluators were aware of revisions and, as a result, upgraded protester's technical score for some evaluation factors but not for others; protester's mere disagreement with agency's evaluation does not render the evaluation unreasonable.
6. Contracting agency properly decided to award cost-type contracts to the offeror of the higher-rated, higher-cost proposal, where the request for proposals stated that technical factors were considered more important than cost, and the agency reasonably determined that the awardee's higher technical merit was worth the additional costs.

DECISION

Medical Service Corporation International (MSCI) protests the Agency for International Development's (AID) award of two contracts for an environmental health project to Camp Dresser & McKee International, Inc. (CDM) pursuant to request for proposals (RFP) No. OP/A/HRN-5994-93-001. Basically, MSCI contends that: (1) CDM gained an unfair competitive advantage in the procurement through the use of a subcontractor which had an organizational conflict of interest; (2) AID's evaluation of technical proposals was deficient; (3) AID refused to evaluate a significant amendment to MSCI's technical proposal submitted as part of MSCI's best and final offer (BAFO); and (4) AID failed to consider cost/price in making the award to CDM and thereby failed to evaluate offers in accord with the evaluation criteria set forth in the RFP.

We deny the protest.

Issued on May 7, 1993, the RFP solicited proposals for services related to AID's environmental health project--a new project including elements from two projects that had been carried out over the past several years. One of the predecessor projects was AID's water and sanitary health

project for which support services had been obtained under a contract with CDM. The other project was AID's vector biology and control project for which support services had been obtained under a contract with MSCI. Environmental health was defined as encompassing "those diseases and health problems that result from environmental conditions or are exacerbated by environmental degradation." The RFP contemplated award of two 5-year contracts to one contractor that would provide technical and advisory services to AID and foreign governments to create and improve effective environmental health programs to improve the health of people in developing countries.

The RFP stated that award would be made to the offeror whose proposal was considered most advantageous to the government. Estimated cost was not a numerically weighted factor and was considered less important than overall technical ability. The RFP also stated that AID "may elect to pay a price differential between offers to select a technically superior offer." The technical evaluation factors (worth a total of 950 evaluation points) and their respective weights were: qualifications of proposed personnel (420 points); general quality, responsiveness, and creativity of proposal and technical approach (280 points); and institutional/organizational and managerial capabilities (250 points).

Proposals were received from MSCI and CDM by the June 18, 1994, date set for receipt of initial proposals. Evaluation of initial proposals for technical merit and computation of total estimated costs in accord with the formula set forth in the RFP resulted in the following rankings:

<u>Offeror</u>	<u>Technical Score</u>	<u>Total Estimated Cost</u>
CDM	[DELETED]	[DELETED]
MSCI	[DELETED]	[DELETED]

The review committee recommended that MSCI's proposal not be considered further for contract award because of the proposal's "overwhelming inadequacies" regarding key personnel and because it showed a "highly superficial

¹The RFP stated that the selected offeror would be awarded a cost-plus-fixed-fee contract for the "core" services set forth in the RFP's statement of work and a time-and-materials requirements contract under which delivery orders would be issued for specific assignments not covered by the core contract.

²The figures in this chart, as well as those for the BAFO rankings which follow, are derived from the contracting officer's September 25, 1993, memorandum of negotiations.

understanding" of project issues. Nonetheless, the contracting officer included both offerors in the competitive range even though inclusion of MSCI was considered "questionable" because of its low technical score.

Letters identifying technical and cost questions/issues were provided each offeror, and face-to-face discussions were held. An amendment clarifying that key personnel would be funded under the core contract was issued and revised proposals were received in late August. BAFOs were received on September 14 and were ranked as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Total Estimated Cost</u>
CDM	[DELETED] ³	[DELETED]
MSCI	[DELETED] ³	[DELETED]

It was the consensus of the technical evaluation panel that CDM's proposal had remained consistently technically excellent and MSCI's had remained consistently technically marginal throughout the procurement process. The panel considered MSCI's proposed [DELETED] to be generally "poor quality" and stated that MSCI's overall technical approach "would result in a product so poor that award to MSCI would not be in the Government's best interest at any price." Therefore, based upon the technical superiority of CDM's proposal, the panel recommended that the contracts be awarded to CDM. On September 25, 1993, the contracting officer awarded the contracts to CDM. By letter dated October 4, 1993, MSCI protested to our Office.

MSCI contends that CDM, through a subcontractor, has an organizational conflict of interest that gave CDM an unfair competitive advantage in the procurement. MSCI points out that CDM's proposal included the use of John Snow Incorporated (JSI) as a subcontractor. According to MSCI, JSI obtained MSCI's confidential and proprietary information when, in 1992, JSI evaluated MSCI's work under the vector biology and control project contract for AID. Basically, MSCI argues that at least one JSI employee gained access to MSCI's confidential business information,⁴ that CDM

³[DELETED]

⁴MSCI asserts that JSI might have obtained and given to CDM information about MSCI's organization, personnel, internal procedures, composite rate structure, cost rate burden multipliers, salary data, key personnel, document coding and retrieval system, consultants and subcontractors, as well as AID's evaluation of MSCI's performance under the vector biology and control project contract.

gained access to the same MSCI proprietary information by proposing to use JSI as a subcontractor for the environmental health project contract, and that CDM used the improperly obtained MSCI confidential information to gain a competitive advantage in the present procurement. The protester also contends that CDM might have benefitted from the organizational conflict of interest because JSI, acting as a consultant to AID in the past, may have contributed to the RFP's statement of work (SOW). MSCI alleges that the contracting officer completely ignored his duty to avoid, neutralize, or mitigate significant potential conflicts of interest before contract award. Therefore, the protester asserts that AID should have excluded CDM from the competition for the present contract.

The record shows that the JSI evaluation team--comprised of one JSI employee and three independent consultants--evaluated the vector biology and control project in April and May 1992. Prior to the evaluation, MSCI's attorneys met with AID contracting officials and expressed concern that MSCI proprietary information might be released during the evaluation. To assuage MSCI's concerns, the contracting officer wrote to JSI and stated that evaluation team members were not to obtain any MSCI proprietary data. However, in case the evaluation team inadvertently received MSCI proprietary data, the contracting officer required all evaluation team members to sign non-disclosure agreements certifying that information received during the evaluation would only be used for evaluation purposes, that no proprietary data from MSCI would be passed on to JSI officials, and that all documents and notes would be turned over to the AID contracting officer upon completion of the evaluation. The president of JSI also certified that he had received no MSCI proprietary information nor would he solicit such information from evaluation team members.

More than a year later, MSCI complained to AID that JSI had an organizational conflict of interest and should be precluded from participating in the present procurement in either a prime contractor or subcontractor capacity. AID investigated the matter and, since CDM was proposing to use JSI as a subcontractor, solicited CDM's views. In response, CDM's attorneys submitted a legal opinion concerning the alleged conflict of interest as well as declarations from several JSI employees. The JSI employee/evaluation team leader declared that he had not discussed the vector biology and control project evaluation with anyone at JSI and that: "I did not have any role whatsoever in the preparation of any proposal involving the Environmental Health Solicitation." Additionally, two CDM vice presidents who had participated in preparing CDM's proposal in the present procurement declared that "no information of any type or nature" was obtained from any JSI employee concerning the

vector biology and control project evaluation. Based upon its investigation, AID determined that CDM would gain no unfair advantage in the competition via its proposed use of JSI and refused to disqualify either CDM or JSI.

The Federal Acquisition Regulation (FAR) generally requires contracting officials to avoid, neutralize, or mitigate significant potential conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504 and 9.505. The FAR states that an unfair advantage exists when a contractor possesses source selection information relevant to the contract but not available to all offerors. FAR § 9.505(b)(2). The contracting agency's obligation is to identify and resolve any potential conflict of interest and to prevent one competitor from gaining a competitive advantage. International Resources Group, Ltd., B-234629.2, Aug. 31, 1989, 89-2 CPD ¶ 196. The FAR admonishes that:

"Each individual contract situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." FAR § 9.505.

The FAR states that when a contractor gains access to proprietary information of other companies in performing advisory or assistance services, the contractor must agree to protect the other companies' proprietary information from unauthorized use or disclosure and refrain from using the information for any purpose other than that for which it was furnished. FAR § 9.505-4(b).

The record shows only one specific piece of information in the hands of the JSI evaluation team that is claimed as proprietary data by MSCCI. The evaluation team leader's notes of a conversation he had with an AID employee refer to a "hypothetical composite overhead rate" of [DELETED]. MSCCI argues that this figure is obviously a rounded off version of MSCCI's actual burden rate multiplier of [DELETED]. The agency argues that MSCCI's [DELETED] multiplier is not proprietary information because it is set forth in MSCCI's vector biology and control contract which states that the multiplier will be applied to the labor rates quoted for various specialists to determine the daily rates AID must pay and appears in at least three work orders issued under that contract.

We need not decide whether MSCI's burden rate multiplier from the prior contract is proprietary or publicly available information or whether the [DELETED] figure is merely a hypothetical rate or a rounded-off version of MSCI's actual rate because, as stated above, there is no evidence that this information was given to CDM for use in preparing its proposal. If anything, it appears from the record that CDM and its subcontractor did not know and were certainly not influenced by the figure contained in the evaluation team leader's notes. The record shows that CDM's proposal used a [DELETED] multiplier while JSI's subcontract proposal used a [DELETED] multiplier--[DELETED]. Moreover, MSCI's allegation is not supported by the offerors' BAFOs which, as noted above, show that CDM's proposed costs were approximately [DELETED] dollars more than MSCI's. In view of the fact that evaluation team members signed nondisclosure agreements and relevant CDM and JSI officials signed statements to the effect that no MSCI proprietary data was used in preparing the proposal for the present procurement, we have no reason to believe that MSCI proprietary data was used improperly in this procurement.

In any event, when MSCI complained that JSI had an organizational conflict of interest, AID investigated the matter, allowed CDM to present its views, and examined JSI and CDM employee declarations before it was satisfied that CDM could use JSI as a subcontractor without gaining a competitive advantage. In view of the fact that AID had required non-disclosure agreements from all members of the JSI evaluation team before JSI even began to review MSCI's work in mid-1992, and because AID received declarations from cognizant JSI and CDM employees stating that they neither received nor used MSCI's business confidential information in preparing CDM's proposal, we believe that AID contracting officials fulfilled their duty to identify and resolve any potential conflict of interest and to prevent any competitor from gaining a competitive advantage. Thus, we have no reason to disagree with AID's handling of the situation or to require that CDM or JSI be disqualified. See International Resources Group, Ltd., supra. The protester's mere allegations of possible impropriety, unaccompanied by supporting evidence, amount to speculation and do not provide a basis for sustaining the protest. See Person-System Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546; Sierra Technology and Resources, Inc., B-243777.3, May 19, 1992, 92-1 CPD ¶ 450.

The protester also asserts that, as a prior consultant to AID, JSI may have written or made significant contributions to the present RFP's SOW and, therefore, JSI and CDM must be disqualified. MSCI requests that our Office ascertain whether a December 1992 draft project paper that was the basis for the SOW was authored by a JSI employee.

The FAR states that, except in certain limited situations, a firm should be excluded from a competition, if the contractor: (1) "prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services," or (2) "provides material leading directly, predictably, and without delay to such a work statement." FAR § 9.505-2(B)(1).

Here, AID reports that: "It [the project paper] was not written by CDM or any firm associated with CDM." Our review of the project paper shows that only 1 paragraph out of more than 90 pages deals with JSI's evaluation of the vector biology and control project. The agency has provided the names of the AID staff members who wrote the report and we have no reason to believe that these staff members were assisted by JSI. Other than stating that JSI worked as a consultant for AID in the past, MSCSI has not provided any support for its assertion that JSI wrote the RFP's statement of work.⁵ As there is no evidence supporting the allegation, it appears to be mere speculation on MSCSI's part. See Sierra Technology and Resources, Inc., supra. Because there is no evidence that JSI assisted AID in preparing the RFP requirement or provided material leading "directly, predictably, and without delay to such a work statement," we have no reason to overturn AID's decision to allow CDM to compete using JSI as a subcontractor. See Abt Assocs., Inc., B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269; compare GIC Agricultural Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263 (firm had an organizational conflict of interest where materials it prepared for the contracting agency led directly, predictably, and without delay to the RFP's work statement).

The protester next argues that the evaluation of technical proposals was deficient in a number of ways and that it was "replete with errors, inconsistencies, and impertinent statements." We deny this protest ground because we believe that the allegations either are not supported by the record or, even if true, the mistakes made were trivial and of no legal consequence and did not affect the outcome of the competition.

⁵The same could truthfully be said of both CDM and MSCSI (i.e., they both did extensive work for AID on predecessor projects that have now been combined in the present contract). Moreover, the record shows that MSCSI had a copy of JSI's vector biology and control project evaluation report, including recommendations, no later than June 1992, but did not direct us to any specific portions of that report that were incorporated into the current SOW.

Evaluating the relative merits of competing proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and best method of accommodating them. Simms Indus., Inc., B-252827.2, Oct. 4, 1993, 93-2 CPD ¶ 206. In reviewing an agency's evaluation, we will not reevaluate proposals but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Id.

The protester complains that AID improperly reduced the size of the technical evaluation panel from five members for evaluation of initial proposals to just two members for evaluation of BAFOs, contrary to AID's original evaluation plan which called for evaluation of BAFOs by all members of the evaluation team. The agency responds that, although it might have preferred that all five original evaluators evaluate BAFOs, three members were unavailable because they were transferred to distant geographical locations and BAFOs were evaluated by the two original panel members that were still available.

We recognize that government employees may not always be available throughout an entire procurement, especially where, as here, they have been transferred in furtherance of the agency's mission. There is no requirement that the entire original evaluation panel must reconvene to evaluate revised proposals. Pelavin Assocs., Inc., B-222556, July 24, 1986, 86-2 CPD ¶ 104. Hence, this allegation provides no showing of impropriety on the part of contracting officials.

The protester contends that the evaluation was deficient because two of the evaluators downgraded MSCI's initial proposal's technical score improperly. According to MSCI, one of the evaluator's narrative comments about MSCI's proposed key personnel contained a number of unprofessional remarks (e.g., "[DELETED]"). A second deficiency alleged by MSCI is that another evaluator changed some of the scores she initially gave proposals to MSCI's detriment; MSCI alleges that she may have been unduly influenced by the other evaluators.

In our opinion, even assuming that these allegations are true, MSCI suffered no competitive prejudice--an essential element that must be shown by a protester if it is to prevail in its protest--as a result of them. See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-252799 et al., May 4, 1993, 93-1 CPD ¶ 366. In spite of the alleged deficiencies in the initial technical evaluation, MSCI was considered to be in the competitive range. The agency held discussions with MSCI, allowed the firm to revise its proposal in response to the RFP

amendment, and received a BAFO from MSCI. Moreover, the two evaluators who supposedly improperly downgraded MSCI's initial proposal were unavailable and did not participate in the evaluation of BAFOs. In our view, the alleged improper downgrading concerned MSCI's initial proposal only and was cured during the procurement process, especially because the two relevant evaluators were not involved in evaluating BAFOs. See Spectra Technology, Inc.; Westinghouse Elec. Corp., B-232565; B-232565.2, Jan. 10, 1989, 89-1 CPD ¶ 23.

The protester next contends that the evaluators deviated from AID's evaluation plan which directed them to include narratives describing the strengths and deficiencies of each proposal in addition to the point scores they assigned for each evaluation factor. MSCI contends that several of the evaluators' score sheets do not contain the required narratives.

We examined all of the evaluation documents. Every evaluator did not include a narrative for each evaluation factor, but the score sheets generally included notations for the most significant evaluation factors and key personnel. To the extent that some of the score sheets supporting the initial technical evaluation did not include narratives for some evaluation factors, as noted above, such deficiencies were cured when AID evaluated BAFOs. See Spectra Technology, Inc.; Westinghouse Elec. Corp., supra. The two BAFO evaluators did include narratives for most factors and for key personnel. When they did not, they sometimes noted that they perceived no change from the initial proposal. Furthermore, the gaps in documenting the point scores given appear sporadically throughout the evaluation of both offerors' proposals and no pattern of bias for or against either offeror is apparent. We have no basis to conclude that the evaluation records were inadequate to support the selection decision. See PHF Healthcare Corp.; Sisters of Charity of the Incarnate Word, supra.

The protester also alleges that AID's evaluation of BAFOs was deficient because the evaluators did not evaluate significant revisions MSCI made to its initial proposal. For example, MSCI changed a number of the key personnel in its BAFO, but asserts that AID did not upgrade its technical score to reflect these changes. The evaluation documents do not support MSCI's claim.

The record shows that the BAFO evaluators were aware of changes made by MSCI and that the scores were often upgraded as a result. For example, one of the evaluators upgraded MSCI's score from [DELETED] to [DELETED] points based upon MSCI's expanded discussion demonstrating its understanding of the environmental health project's

worldwide activities; the evaluator noted, however, that the BAFO was "still weak on response." In other cases, the evaluators noted the revisions but decided that they did not merit increases in technical scores. For example, both evaluators noted that MSCI changed [DELETED], but they did not upgrade MSCI's score; in fact, one evaluator downgraded MSCI's score because [DELETED]. As a result of the revisions, MSCI's BAFO received a technical rating that was [DELETED] higher than its initial technical evaluation score. While MSCI obviously disagrees with the agency's evaluation, mere disagreement does not render the agency's evaluation unreasonable. Simms Indus., Inc., supra.

Finally, MSCI contends that AID's award decision was improper because the agency failed to give due consideration to cost in making that decision. The protester argues that both MSCI and CDM were incumbent contractors with extensive experience in the field of environmental health. Therefore, MSCI believes that award to CDM at a significantly higher proposed cost was not justified.

In a negotiated procurement, a procuring agency has the discretion to select a more highly-rated technical proposal if doing so is reasonable and is consistent with the evaluation scheme set forth in the RFP. Systems Eng'g Assocs. Corp., B-231597, Oct. 4, 1988, 88-2 CPD ¶ 315. We have upheld awards to higher-rated offerors with significantly higher-proposed costs where it was determined that the cost premium was justified considering the significant technical superiority of the selected offeror's proposal. Id.

Here, the RFP stated that the contract would be awarded to the offeror whose proposal was considered most advantageous to the government and that estimated cost was less important than technical ability. The RFP specifically reserved to the government the right to pay a premium for a technically superior offer. The contracting officer considered whether it was worth the additional expenditure to obtain the extra technical merit represented by CDM's offer and decided that it was. We think that the decision to award the contract to CDM was both reasonable and consistent with the RFP's evaluation scheme.

The contracting officer considered both the technical merit and the costs represented by both offerors' BAFOs. In selecting CDM for award, the contracting officer cited the technical evaluation panel's conclusion that the CDM proposal was excellent while MSCI's was only marginal and the panel's recommendation that MSCI not be considered further for award. The contracting officer also examined the cost differential and determined that award to CDM would be most advantageous to the government even if cost and

technical factors were considered equal in value. The contracting officer examined CDM's estimated costs and found them to be realistic, fair, and reasonable. The contracting officer selected CDM for award concluding that:

"[CDM's] technically superior proposal justifies the price differential. More importantly, the very poor technical quality of the MSCI proposal prevented it from being advantageous to the government at any realistic price."

As noted above, CDM's BAFO received [DELETED] points for technical merit while MSCI's received only [DELETED] points.⁶ Thus, CDM's offer was rated approximately [DELETED] percent better than MSCI's on technical merit. In this regard, CDM's BAFO was rated technically better than MSCI's BAFO overall and on every evaluation factor by both evaluators. In these circumstances, notwithstanding MSCI's lower evaluated costs, we believe that award to CDM was reasonably justified under the RFP's evaluation scheme which emphasized that technical ability would be considered more important than cost. See Stewart-Warner Flecs. Corp., B-235774.3, Dec. 27, 1989, 89-2 CPD ¶ 598; Systems Eng'g Assocs. Corp., B-231597, Oct. 4, 1988, 88-2 CPD ¶ 315.

The protest is denied.

Robert P. Murphy
Acting General Counsel

⁶As noted in footnote 3 above, several mistakes were made by the evaluators when reporting to the contracting officer, causing MSCI's score to be underrepresented by [DELETED] points. As CDM's BAFO was actually rated [DELETED] points, as corrected, better than MSCI's, and because the inaccuracy represents only [DELETED] percent of the technical points available, the errors were de minimis and did not affect the overall evaluation. Moreover, where it is clear from the record that the agency did not rely solely on the difference in technical merit points in the source selection, inaccuracies in the point scores do not render the source selection decision fatally flawed. Met-Pro Corp., B-250706.2, Mar. 24, 1993, 93-1 CPD ¶ 263.