Comptroller General
of the United States

Washington, D.C. 20548

452279

Decision

Matter of: Cleveland Telecommunications Corp.

File: B-257294

Date: September 19, 1994

Carl E. Anderson, Esq., Walter & Haverfield, for the protester.
Kenneth M. Bruntel, Esq., Paul Shnitzer, Esq., and Heidi J. Stock, Esq., Crowell & Moring, for Gilcrest Electric and Supply Company, an interested party.
Deidre A. Lee and Walker L. Evey, National Aeronautics and Space Administration, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The agency properly downgraded the protester's "very good" technical proposal for lack of detail in its description of certain tasks.

2. Protest that two agency employees disclosed proprietary information of the incumbent contractor (protester's proposed subcontractor) to the awardee is denied where record shows that, although they had signed letters of intent to work for the awardee, the agency employees were still working for the government when best and final offers were submitted, and there is no evidence that they participated in the preparation of the awardee's proposal.

DECISION

Cleveland Telecommunications Corp. protests the award of a contract to Gilcrest Electric and Supply Company under request for proposals (RFP) No. 3-508206, issued by the National Aeronautics and Space Administration (NASA) for technical and fabrication support services at Lewis Research Center, Cleveland, Ohio. The protester contends that the agency improperly evaluated its proposal, that NASA employees disclosed proprietary information about its proposed subcontractor to the awardee, and that the agency was biased against it or otherwise favored Gilcrest.

We deny the protest in part and dismiss it in part.

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The RFP, issued as a competitive set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 & Supp. V 1993), contemplated the award of a cost-plus-award-fee task order contract with a 2-year base period and three 1-year options.[1] Proposals were to be evaluated based on the following four factors: (1) mission suitability, (2) cost, (3) relevant experience and past performance, and (4) other considerations. The RFP provided that mission suitability and cost were the most important factors and were approximately equal in importance, while the other considerations factor was of considerably less importance than the relevant experience and past performance factor. The mission suitability factor was divided into four subfactors to be point scored as follows:

(1)	Understanding of the statement of work	275
(2)	Management plan	475
(3)	Key personnel and key positions	150
(4)	Corporate and/or company resources	100
	TOTAL	1,000

Each of the foregoing subfactors identified additional sub-subfactors. With respect to cost, the RFP provided that the agency would "evaluate what the offeror's proposal will probably cost the Government."

NASA received six proposals by the closing date; only the proposals submitted by the protester and Gilcrest were included in the competitive range. Following discussions with these firms, the agency requested and received best and final offers (BAFO).

Both the protester's and the awardee's proposals were rated "very good" under the mission suitability factor, with Cleveland's proposal receiving 809 points and Gilcrest's receiving 841 points. Concerning cost, NASA determined that $70.3 million would be the probable cost to the government of an award based on Gilcrest's proposal. Cleveland's proposed cost was $71.2 million with a probable cost of $71.7 million; much of the projected increase in Cleveland's

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[1]Section 8(a) of the Small Business Act authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1994). We review competitive 8(a) procurements to ensure that they conform to applicable federal procurement regulations. See Communication Network Sys., Inc., B-255158.2, Feb. 8, 1994, 94-1 CPD ¶ 88.

cost was based on NASA's concern that Cleveland had not adequately capped its reimbursable general and administrative (G&A) costs.

Both offerors were considered to have "very good" relevant experience and past performance. Concerning the "other considerations" factor, NASA rated Gilcrest "very good" and the protester "good," based on their respective award fee plans and their records and experience in labor relations. While noting that both Cleveland and Gilcrest had submitted viable proposals, the source selection official (SSO) concluded that Gilcrest's proposal had a slight technical and management advantage as well as a cost advantage. Accordingly, the agency awarded the contract to Gilcrest.

The protester argues principally that the agency failed to follow the RFP's evaluation criteria by downgrading its proposal under the mission suitability factor for lack of detail. The protester states that while the agency downgraded its proposal for failing to address in sufficient detail its proposed support of the "wood model and thermocouple shops," it specifically discussed its support of these shops in its proposal; that it provided the same detail in these areas as in the other aspects of its proposal.

In reviewing an agency's technical evaluation, we will not reevaluate the technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated criteria. MAR Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367. The offeror has the burden of submitting an adequately written proposal, and an offeror's mere disagreement with the agency's judgment concerning the adequacy of the proposal is not sufficient to establish that the agency acted unreasonably. Lucas Aerospace Communications & Elecs., Inc., B-255186, Feb. 10, 1994, 94-1 CPD ¶ 106.

We point out initially that Cleveland's proposal was rated "very good" under the mission suitability factor; that the SSO recognized that "[a]ll of the weaknesses were correctable and significantly overshadowed by areas of the proposal which exceeded the requirements of the RFP." Nonetheless, the record shows that the evaluators thought that in Cleveland's proposal "[t]ypical tasks and function areas are not described in sufficient detail." While during the debriefing, the agency noted the wood model shop and thermocouple shop as examples of proposal areas that were not described in sufficient detail, contrary to the protester's contentions, the record shows that the evaluators did not single out the proposal's treatment of these areas or evaluate these areas "using a different set of criteria." Based on our review, we have no basis to

question the evaluators' judgment that the proposal lacked an optimum description of tasks or the "very good" rating assigned to Cleveland's proposal. In this regard, the record supports NASA's position that Cleveland's proposal basically addressed work items through diagrams without supporting narrative.

The protester argues for the first time in its comments on the agency report that the agency improperly failed to discuss with Cleveland NASA's concerns about Cleveland's failure to address statement of work items. We dismiss this issue as untimely. Under our Bid Protest Regulations, a protest not based on an apparent solicitation impropriety must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1994). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the new allegations must independently satisfy our timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. Palomar Grading and Paving, Inc., B-255382, Feb. 7, 1994, 94-1 CPD ¶ 85. Cleveland first became aware that the agency determined that its proposal "failed to address other potential statement of work items" on May 16 at its debriefing. If Cleveland believed that this weakness should have been the subject of discussions, it had until May 31--10 working days later--to raise this protest issue. Its protest on this basis, raised for the first time in its July 5 comments on the agency report, is untimely and will not be considered. Id.

The protester also argues that its proposal was improperly downgraded under the mission suitability factor for not meeting certain cultural diversity goals since, according to the protester, such "goals" were not defined either in the RFP or during discussions. The RFP provided that the plan would be evaluated based upon "how well the goals represent the cultural demographics of the greater Cleveland area and how quickly those goals would likely be achieved." During discussions, NASA specifically requested from Cleveland "additional details regarding your plans to achieve demographically appropriate cultural diversity throughout your entire staff." In our view, the agency's desired end for cultural diversity was sufficiently clear; namely, it sought a contractor with a culturally diverse staff which reflected the demographics of the greater Cleveland area.

The protester also contends that the agency acted improperly by including in its past performance evaluation of Cleveland an assessment of the capabilities of its proposed subcontractor rather than limiting the evaluation to Cleveland. In addition, Cleveland argues that the agency should not have considered the labor relations history of

its proposed subcontractor under the "other considerations" factor. We see nothing improper in NASA's approach here. Contrary to the protester's assertion, an agency may consider an offeror's subcontractor's capabilities and experience under relevant evaluation factors where, as here, the RFP allows for the use of subcontractors and does not prohibit the consideration of a subcontractor's experience in the evaluation of proposals.[2] FMC Corp., B-252941, July 29, 1993, 93-2 CPD ¶ 71.

The protester also complains that the agency should not have considered the awardee's award fee plan to be superior to its own under the "other considerations" factor based on the fact that the awardee proposed to share a higher percentage of its award fee with its employees than that proposed by Cleveland. Cleveland asserts the evaluation was improper because the RFP did not specifically state that the amount of the fee to be shared with employees would be evaluated; rather, the RFP provided that the plan would be evaluated based upon the proposed effort to maximize award fee earnings through efficient and effective technical performance and cost management. We think that the agency's evaluation was consistent with the RFP; the agency viewed Gilcrest's plan to be stronger than Cleveland's because it was more likely to motivate employees to improve performance.

Cleveland also argues that NASA's cost evaluation, which found that the protester had not capped its G&A costs, was unreasonable. The agency states that while Cleveland's BAFO stated that its "G&A billings will not exceed" a specified amount, it was unclear whether the protester was agreeing to cap all G&A expenses under the contract. The protester asserts that the agency misinterpreted its proposal and that, in fact, the proposal established a cost ceiling concerning all G&A expenses for the life of the contract.

We need not resolve the dispute concerning the proper interpretation of the protester's proposal that assertedly caps its G&A billings since even if we were to accept the protester's position concerning the cap, its probable cost would still be higher than the awardee's, and, as discussed above, there is no basis to question the agency's judgment

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[2]Cleveland also argues that NASA's consideration of the capabilities of Cleveland's subcontractor in the evaluation of Cleveland's proposal violated provisions of FAR subpart 9.1, "Responsible Prospective Contractors." There is no merit to this allegation. FAR subpart 9.1 prescribes policies, standards, and procedures for determining prospective contractor and subcontractor responsibility. FAR § 9.100. Cleveland was not found to be nonresponsible.

that Gilcrest's proposal was slightly superior to Cleveland's in the non-cost factors. Under the circumstances, we fail to see, nor has the protester shown, how NASA's adjustment of its cost prejudicially impacted Cleveland.

Cleveland next alleges that two former NASA employees who had signed letters of intent to work for Gilcrest, if that firm was awarded the contract, violated a prohibition on personal conflicts of interest by conducting employment discussions with Gilcrest while they had access to proprietary information of the incumbent contractor, Calspan--a firm which Cleveland proposed as a subcontractor. The interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employees may have resulted in prejudice for, or on behalf of the awardee during the award selection process. Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132.

We find nothing per se improper in the NASA employees' conditional acceptance of employment while still agency employees. Although procurement officials are prohibited from engaging in employment negotiations during the conduct of a procurement, FAR § 3.104-3(b), the NASA employees concerned here were not procurement officials: they had no involvement with drafting, reviewing, or approving the RFP specifications; evaluating proposals; selecting sources; conducting negotiations; or approving the award to Gilcrest. FAR § 3.104-4(h). Further, while any government employee is prohibited from "participating personally and substantially" in any matter that would "affect the financial interests of any person with whom the employee is negotiating for employment," 18 U.S.C. § 208 (1988); FAR § 3.104-1(b)(2), there is no evidence that either of these NASA employees participated in any way in the procurement on behalf of NASA or Gilcrest. See RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213.

The protester asserts that these employees exploited their positions by obtaining confidential and proprietary information of Cleveland's proposed subcontractor for the "sole purpose of utilizing such information to the competitive advantage of Gilcrest." Contrary to the protester's assertions, there is no evidence that anyone at Gilcrest was provided impermissible access to procurement sensitive information. While the two former NASA employees were involved with administering the prior contract, the record shows that they were promptly recused from this procurement, as well as the incumbent Calspan contract, when

they were approached concerning employment by Gilcrest. Also, while these employees accepted conditional offers of employment with Gilcrest, there is no evidence that they had any involvement in the preparation of the awardee's proposal--indeed, the record shows that at the time of submission of BAFOs, both of these individuals were still employed by NASA. We therefore have no basis to conclude that they provided the awardee with an unfair competitive advantage. In any case, we note that while an agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, such a determination must be based on facts and not mere innuendo or suspicion. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ ___; RAMCOR Servs. Group, Inc., supra.

Finally, there is no evidence to substantiate Cleveland's allegation that the contracting officer or agency evaluators were biased against Cleveland or unfairly favored Gilcrest. Cleveland has not furnished any evidence to support this allegation and we will not attribute bias in the evaluation of proposals on the basis of inference or supposition. See TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37. The protester's speculation notwithstanding, the record contains no evidence of bias in the evaluation of its proposal; instead, the record shows that NASA conducted its evaluation reasonably and in accordance with the evaluation criteria and concluded that Cleveland's proposal was "very good."

In sum, the record shows that NASA's selection of the technical superior, low cost offeror was proper.[3]

The protest is denied and dismissed in part.

James A. Spangenberg
for Robert P. Murphy
Acting General Counsel

[3]While our decision does not specifically discuss each and every argument or subargument raised by the protester challenging NASA's conduct, each has been considered.