

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-186668

DATE: September 16, 1976

MATTER OF: UCE, Incorporated

01499

98024

DIGEST:

1. Agency determinations concerning merits of proposals are matters of agency discretion which will not be disturbed unless shown to be arbitrary or capricious. Protester's objection to only one of several grounds for finding that its proposal was unacceptable provides no basis for concluding that rejection of proposal was improper.
2. Solicitation provision requiring offeror to indicate if it is small business and clause requiring establishment of small business subcontracting program do not suggest that special consideration would be given small business in evaluation of proposals. Furthermore, contention that procurement should have been issued as a small business set-aside is untimely since it was filed subsequent to closing date for receipt of proposals.
3. Legality of prospective award unaffected by fact that awardee has received prior similar contracts.
4. Although agency's failure to numerically score all proposals received, as specified in solicitation, is inappropriate, protester was not prejudiced since evaluation board's narrative comments support agency's refusal to consider protester's proposal in competitive range.

UCE, Incorporated (UCE) protests the determination by the Energy Research and Development Administration (ERDA) that UCE's proposal was so technically inferior as to be outside the competitive range under request for proposals (RFP) No. E(04-3)-1203, issued by ERDA's San Francisco Operations Office. The protester further contends that the solicitation should have been issued as a small business set-aside and that award should not be made to one of the firms selected for award because that firm currently holds a major contract for similar work and award to it would concentrate an unfair proportion of ERDA research and development funds in that firm. The protester further complains its proposal was rejected partially on cost grounds even though it was told

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that cost "would not be part of the selection." UCE also asserts that the evaluation criteria of Appendix A of the RFP was not complied with because a numerical rating and scoring was performed on only 8 of the 13 firms submitting offers.

The RFP was issued March 16, 1976, as part of ERDA's National Photovoltaic Conversion Program for reducing the cost of converting electrical energy from solar radiation. The effort called for by the RFP involved the study of several types of heterojunction structures on single crystal silicon with the objective being the development of efficient photovoltaic conversion devices.

The 13 proposals received in response to the RFP were first screened by technical reviewers, and five proposals, including the protester's, were eliminated during this review as technically inferior, generally incomplete and/or as not sufficiently addressing major items specified in the RFP. The remaining eight offers were placed in a "competitive range" and numerically scored against the evaluation criteria set forth in the RFP. Three offerors, rated substantially higher than the other five finalists, were selected for the award of contracts.

The Contract Selection Board Report lists the following deficiencies in UCE's proposal:

- Proposal does not present an adequate program plan
- Proposal is not sufficiently well-written
- Cost projections are too high
- Expertise, background and experience of principals is not sufficiently outstanding
- The model described for silicon is not adequate
- Theoretical work seems to reflect available work and does not appear to be sufficiently innovative or original
- Proposed approach is considered too pragmatic and not strong enough in fundamental physical aspects

The protester takes exception to the determination that the expertise, background and experience of its principals was not sufficiently outstanding. The protester points out that its research and development team published numerous technical papers in this specific technology and that one of its collaborating sub-contractors proposed for the project gave a technical paper on the subject as recently as May 1976 at an ERDA-sponsored workshop. No exception is taken, however, to any of the other enumerated deficiencies.

The protest cannot be sustained on this basis. It is not our function to evaluate proposals in order to determine which should have been selected for award. TGI Construction Corporation, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. Rather, the overall determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the major burden of any difficulties incurred by reason of a defective evaluation. Training Corporation of America, B-181539, December 13, 1974, 74-2 CPD 337. Accordingly, we have consistently held that procuring officials enjoy a "reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. METIS Corporation, 54 Comp. Gen. 612, 614-15 (1975), 75-1 CPD 44; Riggins and Williamson Machine Company, Inc., et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168. The fact that the protester may not be in accord with that judgment does not render it invalid. See Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87. Here, although the protester disagrees with one conclusion of the evaluators, it does not object to the other conclusions and in fact admits that ERDA could have disqualified it for other "good reason." In view thereof, we cannot object to the rejection of UCE's proposal.

UCE next states that it should have been given consideration as a small business and suggests that the procurement should have been a small business set-aside. In this regard, the protester alludes to the RFP section requiring a representation as to whether or not a firm is a small business concern and clause 33 of the General Provisions pursuant to which the contractor agrees (if the contract exceeds \$100,000) to establish a small business subcontracting program.

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These provisions do not establish, however, that special consideration was to be given to small businesses. The small business representation is included in most solicitation packages to provide the agency with information regarding the extent of small business participation in procurements. Clause 33 deals only with subcontractors and does not imply any special consideration of small business status in connection with award of the prime contracts. With regard to the allegation regarding the non-set-aside nature of the procurement, this matter was first raised after the protester was notified of the rejection of its proposal. Our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1) (1976), require that protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to such date. Since the solicitation clearly failed to restrict the competition to small business concerns, this allegation is untimely filed and therefore ineligible for consideration on the merits. Octagon Process Inc., B-184669, August 27, 1975, 75-2 CPD 129.

UCE's objection to award of a contract to a firm already holding a contract for similar work is based on UCE's belief that this would be an "unfair and inefficient utilization of government funds." This contention is without merit. Government contracts must be awarded on the basis of the proposal determined most advantageous to the Government after evaluation on the basis of criteria set forth in the solicitation. The Government is not required to forego the advantages offered by a particular offeror merely because the firm may have received prior contracts. See Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404.

With regard to the protester's contention that it was advised by an agency official that "cost would not be part of the selection," we note that Enclosure 5 to the RFP clearly advised offerors that proposals were to be evaluated on the basis of Project Suitability Factors, Cost Factors, and Other Factors. It was further stipulated that cost factors were to be considered not only on the basis of the estimated cost of the project but also as to the realism of the estimate. Since offerors were clearly notified of the foregoing, we find nothing improper in the determination that the protester's proposal was deficient due, inter alia, to high cost projections.

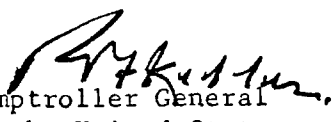
There is some merit to UCE's allegation regarding ERDA's failure to numerically score all proposals received, since Enclosure 5 stated that the "Technical and Organizational criteria of the Project Suitability Factors will be numerically weighted and scored for each proposal." We consider it

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inappropriate for an agency to deviate from the evaluation procedures set forth in its RFP, and we are so informing the administrator of ERDA.

We cannot conclude, however, that the protester was prejudiced by ERDA's failure to comply with Enclosure 5 in view of the evaluation board's narrative comments indicating why the UCE proposal was regarded as so lacking in merit as to preclude its inclusion within the initial competitive range. Accordingly, we do not believe that a numerical scoring of UCE's proposal would have produced a different result.

In view of the above, the protest is denied.


Deputy Comptroller General
of the United States