DCCUMENT RESUME

02105 - [A1322287]

[Protest of the Award of a Contract for Survey of Illegal Aliens]. B-187756. May 5, 1977. 8 pp.

Decision re: Development Associates, Inc.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Immigration and Naturalization Service; J. A. Reyes Associates, Inc.
Authority: 18 U.S.C. 201; 3 C.F.R. 156; Executive Order 11,222. 4 C.F.R. 20. 45 C.F.R. 73. F.P.R. 1-3.805-1(a)(5). 54 Comp. Gen. 468. 55 Comp. Gen. 839. B-186547 (1976). B-184318 (1976).

The protest of a contract award to conduct a residential survey of illegal aliens was based primarily upon the contention that the evaluation procedures on the procurement were conducted in a vague, misleading, and biased manner. Protest was denied. (Author/SS)

DECISION

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

Cunningham
P.L.F.

FILE: B-187756 DATE: May 5, 1977

MATTER OF: Development Associates, Inc.

DIGEST:

1. Protest concerning defects in successful proposal is untimely filed since received more than 10 working days after protester received debriefing on proposal. Other bases of protest are timely filed.

2. Notwithstanding position that enforcement of standards of conduct is responsibility of each agency, GAO has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement.

3. Although it would have been appropriate for proposal evaluator to have disqualified himself completely from proposal evaluation upon notice that proposal had been received from former employer who had previously fired employee, fact remains that evaluator insists he did not discuss former employer's submitted proposal until fellow evaluators completed evaluation. Since protester has not submitted probative evidence contesting evaluator's statements and because relative standing of offerors is unchanged by excluding questioned evaluator's scores, new evaluation panel need not be convoked to rescore proposals to remedy irregularity.

4. Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals.

5. Since successful offeror's superior-rated proposal was properly considered for initial proposal award in that tests for award were met, it was proper for procuring agency not to have discussed with protester deficiencies noted in protester's proposal--indeed if discussions had been entered into initial award would not have been authorized.

Development Associates, Inc. (DA), questions the award of a contract to J. A. Reyes Associates, Inc., under request for proposals (RFP) No. CO-48-76, issued by the Immigration and Naturalization Service, Department of Justice. The RFP described a requirement for a "residential survey to estimate the illegal alien population in the twelve most populous states and to obtain and analyze characteristics and impact data."

DA's protest which was filed with the General Accounting Office on November 3, 1976, or nearly 7 weeks after the date (September 17, 1976) on which the award was made is based primarily upon the contention that the "evaluation procedures on this procurement were conducted in a vague, misleading, and biased manner." Specifically, DA contends that: (1) a former DA employee (who is alleged to be biased against DA because the company fired the employee) evaluated DA's proposal to DA's disadvantage; (2) the discharged employee failed to disclose the "potential conflict with DA" until the contract award panel met on September 13, 1976--shortly before the protested contract was awarded; (3) "Parts of the methodology of the winning proposal are contradictory and in one instance in violation of the Office of Management and Budget regulations" (--this ground of protest raises 18 criticisms of the Reyes' proposal); and (4) the "reasons why the panel found the DA proposal to be unacceptable are vague, unfounded, untrue, and were not checked out by the panel with [DA]."

The Department asserts that DA's criticisms of Reyes' proposal are untimely filed under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. § 20 (1977)) which provides that protests concerning non-solicitation improprieties are to be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. The Department points out that on October 12, 1976, DA was permitted to read Reyes' proposal and that DA "could easily have extracted" any material needed to submit an informed protest concerning Reyes' proposal.

DA asserts that it was not in a position to submit an informed protest about the lack of merit of Reyes' proposal until November 1, 1976, at the earliest, when the Department provided DA with a copy of the Reyes' proposal, and copies of various documents evidencing the rationale which prompted the rejection of DA's proposal.

The Department has informed us that it afforded DA's representative an unlimited time on October 12, 1976, to study the Reyes' proposal and that it would have allowed the representatives to make copies of pages of the proposal on that day had the representatives so requested. Additionally, the Department says that it gave DA a copy of a chart showing the relative scores of all offerors under each of the evaluation criteria. These acts constituted, in the Department's view, an adequate "debriefing" of the merits of Reyes' proposal. Consequently, the Department insists that DA was in a position to submit an informed protest about any alleged lack of merit in the successful proposal as of October 12.

A protester may reasonably withhold filing a protest concerning the lack of merit in a successful proposal until it is given sufficient information as to why the proposal was considered to be superior--provided the request for the information was made within a reasonable time from the date of award. Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312.

There is no question that DA requested (on September 27, 1976) a "debriefing" of the Reyes' award within a reasonable time from the date of the award (September 17). It is our view, however, that the Department gave sufficient information at the debriefing (held on October 12, 1976) as to why Reyes' proposal was considered to be superior. DA was furnished a detailed chart showing Reyes' scores under all the evaluation criteria. For example, the chart showed that Reyes' proposal received a score nearly 30 percent higher than DA in technical approach. Having this scoring difference in mind, DA should have realized that significant defects were not considered to be present in Reyes' technical proposal (the source of the bulk of the criticisms subsequently advanced by DA) as compared with DA's technical proposal. Consequently, upon being allowed an extended period of time to study the Reyes' proposal, DA should have also realized that it was being given an opportunity to note defects in Reyes' technical proposal (and in all other areas of the proposal). DA must, therefore, be held to have had notice of any basis of protest concerning defects in Reyes' proposal as of October 12, 1976. Since DA's protest concerning defects in Reyes' proposal was not received until November 3, 1976--or more than 10 working days after the October 12 debriefing--this ground of protest is untimely filed under section 20.2(b) of our Bid Protest Procedures and will not be considered.

Reyes also asserts that all other bases of DA's protest are untimely filed and should not be considered. Specifically, Reyes says that on September 14, 1976, the Department sent "DA a memorandum advising, in substance, that DA's proposal had been determined to be outside of the competitive range and that the contract would not be awarded to DA." Because of the transmission of this memorandum, Reyes argues that DA had knowledge of all bases of protest concerning the award in mid-September.

The Department has informed us that it has no record of any memorandum sent to DA. Instead, the Department maintains that the September 20 letter to DA was the first communication informing DA that it had not received the award.

In any event, Reyes mistakenly assumes that the mere communication of notice of award automatically serves to convey all possible bases of protest against an award. This is not so. So long as an offeror requests a debriefing of the rationale supporting an award within a reasonable time from the date of hearing of the award, the offeror is not foreclosed from filing a timely protest under our Bid Protest Procedures. See Lambda Corporation, supra. (Of course, if the offeror learns of the proposed rejection of its proposal prior to award and obtains the agency's rationale for rejecting the proposal before award, the offeror will be held to have had knowledge of the bases of protest against the rejection from the date it learned of the agency's rationale. Singer Company, 56 Comp. Gen._____, B-186547, December 14, 1976, 76-2 CPD 481.)

There is no question that DA requested a timely debriefing of the Reyes award. And it is clear that DA was not furnished information giving rise to grounds of protests Nos. 1, 2 and 4 until November 1, 1976--the date on which it obtained several procurement documents from the Department specifically relating to these grounds of protest. Consequently, we find these other bases of protest to have been timely filed.

Responding to the first ground of DA's protest, the Department explains that the allegedly biased evaluator, a current employee of the Department of Health, Education, and Welfare (HEW) "on loan" to the Service for the procurement, was given copies of all the technical proposals in question on September 2, 1976. From that date until the evaluation panel convened on September 13, 1976, the evaluator reportedly read all but DA's proposal. On September 13, the evaluator informed the other panel members of his "former, albeit brief, association with DA, and disqualfied himself from the initial evaluation of [the company's] proposal on the basis of a possible conflict in interest." The Department says that this disqualification lasted until the other evaluators had completed their evaluations and collectively

found the DA proposal to be unacceptable. After this finding was made, the evaluator made an evaluation of the proposal to insure that "all proposals were evaluated by the complete panel." The Department further notes that the questioned evaluator "did not assign the greatest or least amount of points." Finally, the Department is of the view that, although the failure of the evaluator to disqualify himself was improper, his actions were "honorable."

The evaluator, who admits he had previously been fired by DA, insists that his dismissal was "predicated strictly on specific professional differences." Further, he states that, although he "elected not to review the DA submission and refused to participate in the review and discussions of the DA proposal," he decided not to disqualify himself from involvement in the panel since he felt this would be an "abdication of [his] responsibilities as a Federal official."

There is no statutory or regulatory authority for our Office to issue formal opinions on conflict of interest questions concerning officers and employees of other agencies. The basic provisions setting forth standards of conduct for Government employees are found in Executive Order No. 11,222, 3 C.F.R. § 156 (1974), 18 U.S.C. § 201 (Supp. IV 1974). Each agency head is required by section 702 of Executive Order No. 11,222 to issue implementing regulations concerning the activities of the agency. Ultimately, each agency head must take responsibility for executing the standards of conduct program.

Notwithstanding our position that the enforcement of standards of conduct is the responsibility of each agency head, we have, on occasion, offered views about considerations bearing on alleged violations of standards of conduct as they relate to propriety of particular procurement. See, for example, Ackco, Inc., B-184518, September 14, 1976, 76-2 CPD 239. In the cited case we announced our reservations about the practice of permitting a proposal evaluator who believed there was a conflict of interest with regard to one offeror to participate in the deliberations and to rate other proposals since the evaluator could potentially influence the selection by indirect action. Here, however, the evaluator in question insists that he did not rate any of the submitted proposals until after the other two evaluators completed ranking all proposals.

Since the questioned evaluator is an employee of HEW the standards of conduct issued by that agency are for review. HEW's

standards of conduct are found at part 73 of Title 45, C.F.R. (1976). Nothing in these regulations expressly bears on the situation involved here other than a general exhortation found at section 73.735-305 of the part which provides:

> "An employee shall avoid any action, whether or not specifically prohibited by this part, which might result in, or create the appearance of:
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> * * * * *
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> "Losing complete independence or impartiality * * *."

It would have been appropriate under the quoted regulation for the employee to have disqualifed himself from the evaluation panel immediately upon learning of DA's participation in the procurement. Notwithstanding this observation, the fact remains that the evaluator insists that he did not even discuss the DA proposal with the other evaluators, let alone formally evaluate the proposal or any other of the proposals, until a final judgment had been made to find the DA proposal unacceptable. DA has not furnished any specific probative evidence which contradicts these recitals. Consequently, and since the relative ranking of offerors, when the ratings of the questioned evaluator are excluded, is not changed, we do not agree with DA's assertion that a new panel must be convened to reevaluate proposals and test the soundness of the original ranking of proposals merely because of the presence of this evaluator on the evaluation panel.

The other timely ground of protest relates to the reasons why the Department's evaluators found DA's proposal to be "unacceptable" and to the Department's failure to discuss the unacceptable rating with the company prior to award.

The specific reasons why the evaluators found DA's proposal "unacceptable" were:

(1) Reservations about inducements to be offered illegal aliens to participate in the survey;

(2) Specific analytic techniques not detailed;

(3) Questionable corporate capability;

(4) Questionable availability of key personnel; and

(5) Proposed level of effort questionable.

As to point (1), DA insists that this was a tentative suggestion only and that it could have been remedied, together with all other criticisms, had discussions been entered into.

DA further insists that the criticism concerning analytic techniques is not supported by a consultant's analysis of submitted proposals.

The consultant's analysis, supplied under a separate contract for the benefit of the Government evaluators, was not considered to be binding on the evaluators. That analysis--which described DA's proposal as having given "good thought to analysis" questions--also noted (in agreement with the final departmental evaluation) that DA had not called out specific analytic techniques and noted that DA's "whole analysis will be [emphasis supplied] well thought out and sound." Since the consultant found lack of detail concerning DA's proposed analytic techniques, the consultant's opinion that DA had the capability of preparing a well-thought-out proposal does not necessarily contradict the evaluators' criticisms and rating of DA's proposal in this area.

The main point of DA's protest concerning the rating of its proposal involves the Department's refusal to conduct discussions with DA--so as to permit modifications to its proposal in the areas relating to the criticisms. This refusal was made in view of the Department's decision to award a contract under initial proposal contracting authority. "Initial proposal award" authority is described in Federal Procurement Regulations (FPR) § 1-3.805-1 (a)(5) (1964 ed. amend. 153), which provides:

> "After receipt of initial proposals, * * * discussions shall be [held] * * * except [in] * * *:
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> * * * * *
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> "(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition * * * that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price: Provided, That the request for proposal contains a notice * * * that award may be made without discussion * * *. In any case where there is uncertainty as to the pricing or technical aspects of any proposals the contracting officer shall not make award without further * * * discussion prior to award."

"Adequate competition," sufficient to support the award of a negotiated contract without discussions, exists when several offerors submit independent cost and technical proposals, as was the case here, and the offeror with the most favorable initial proposal, price and other factors considered, is selected for award at a "fair and reasonable" price. See Shappell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161, and cases cited in text.

Determining that a "fair and reasonable" price would result from an "initial proposal" award requires an independent cost projection of the proposed cost. See Shappell, supra. Here, the record contains a detailed cost estimate showing seven items of proposed direct labor, seven items of other direct costs, and a fixed fee estimate totaling $757,500--or $6,000 more than the award cost of the challenged contract. Consequently, we conclude that the Reyes award was made at a "fair and reasonable" price.

Finally, the record does not show that there was any "uncertainty as to the pricing or technical aspects of any proposals" which would have otherwise prevented the initial proposal award. Thus, the tests for an "initial proposal" award were met.

Since Reyes' superior-rated proposal was properly considered for an initial proposal award, it was proper for the Service not to have discussed the deficiencies in quesiton with D.A. Indeed, had it entered into discussions with D.A. there would have been no authority for an initial proposal award and the Service would have been required to enter into discussions with all other competitive offerors.

Protest denied.

For the Comptroller General
of the United States