B-202132 20787

DECISION

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

FILE: B-202132 DATE: December 15, 1981

MATTER OF: Simpson, Gumpertz & Heger, Inc.

DIGEST:

1. It is neither the function nor the practice of GAO to independently evaluate technical proposals. GAO review of agencies' technical evaluations is generally limited to examining whether the evaluation was fair and reasonable.

2. GAO has no authority to direct an agency to release information withheld under the Freedom of Information Act. Controversies of that nature may only be resolved by resort to the Federal courts. However, GAO may conduct in camera examinations of the documents sought and consider them in reaching its decisions.

3. It is improper in a negotiated procurement to exclude some offerors from the competitive range, without considering price, because their proposals are technically inferior, though admittedly acceptable.

The General Services Administration (GSA) issued request for proposals (RFP) No. 3VRC-FL-80-50054 on August 29, 1980, for a 1-year, indefinite quantity contract for the provision of roofing consultant services. The RFP required offerors to submit technical and price proposals in separate sealed envelopes. First, the technical proposals were to be opened and evaluated to determine which proposals were within the competitive range. The price proposals of those offerors whose technical proposals fell outside of the competitive range were to be returned unopened by GSA with no further consideration to be given to those offerors. The price proposals from those offerors whose technical proposals fell within the competitive range were to be opened and evaluated to determine which offered the lowest price. Under

the terms of the RFP, the scores for the price proposals were to be combined with those of the technical proposals to produce composite scores. Award would be made to the offeror with the highest composite score.

After the proposals were received by GSA on September 30, 1980, they were evaluated by a Technical Evaluation Board (Board). The Board used three criteria in its technical evaluation which were weighted as follows: (1) firm experience - 10 percent; (2) staffing plan - 20 percent; and (3) the qualifications and experience of the firm's employees - 70 percent. Based upon the technical scores, the Board eliminated seven of the 14 proposals as not within the competitive range. On October 21, 1981, GSA notified each firm of the firm's failure to make the competitive range and returned the unopened price proposals. By letter dated October 24, 1980, Simpson, Gumpertz & Heger, Inc. (SGH), contested GSA's determination that its proposal was not "technically competitive." SGH submitted additional materials and requested a reevaluation. GSA (although it believed it did not have to do so) arranged for the conduct of what it called a "reevaluation" of SGH's technical proposal. On January 30, 1981, GSA notified SGH of the results of the "reevaluation" of its proposal. GSA stated that despite consideration of the additional information submitted by it, SGH had received the same score and still fell outside the competitive range. Following receipt of best and final price proposals (no technical discussions were held nor were technical proposals rescored) GSA awarded the contract to one of SGH's competitors.

SGH maintains that it was improperly excluded from the competitive range and requests GAO to review, in detail, the methods and substance of the GSA's findings. In particular, SGH alleges that numerous improprieties, which will be discussed below, were or may have been committed by GSA.

GSA contends that the procedure which it followed was reasonable and consistent with the RFP. GSA notes that it is aware of GAO decisions which indicate that

a determination of whether a proposal is within the competitive range should include both technical and price considerations, except where a proposal is technically unacceptable. GSA concedes that none of the rejected proposals were found to be technically unacceptable, but argues that although it may have been improper to exclude an acceptable technical proposal without considering price, none of the rejected firms (including the protester) were prejudiced because GSA believes that they had no reasonable chance of selection. In support of this contention, GSA explains that even if SGH had offered the lowest price and thereby obtained the best score in the pricing evaluation, it could not have made up for the awarded company's high technical evaluation score. In conclusion, GSA advises us that, in the future, it will employ a two-step negotiation procedure, essentially as provided for in Federal Procurement Regulations (FPR) § 1-3.805-1(c) (1964 ed.). Using that approach, GSA will evaluate those proposals which are acceptable to GSA, or which can be made acceptable after discussion. Award will then be made to the low offeror whose bid is acceptable.

Initially, we point out that it is neither our function nor our practice to independently evaluate technical proposals. Our review is generally limited to examining whether the agency's evaluation was fair and reasonable. See, e.g., Joule Technical Corporation, B-197249, September 30, 1980, 80-2 CPD 231, p. 4. In a protest, the protester has the affirmative burden of proving its allegations. We do not conduct investigations to establish the validity of the protester's speculations. Where the agency and the protester dispute facts in issue, mere assertions of these facts by the protester will not satisfy this burden. See, e.g., Rolair Systems, Inc., B-193405, November 9, 1979, 79-2 CPD 345, pp. 3-4; Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218.

In its first ground for protest, SGH alleges that GSA did not consider all of the materials SGH submitted in the initial evaluation, especially its Forms 254 (Architect-Engineer and Related Services Questionnaire) and 255 (Architect-Engineer and Related Services Questionnaire for Specific Project). GSA denies that

SGH filed forms 254 and 255 with its initial technical proposal or, for that matter, with its request for reevaluation, and maintains that the Board did consider all of the materials that SGH did submit with its proposal. SGH has provided us with no evidence to support its allegations in this regard. On this record, where the only evidence is conflicting statements, we cannot conclude that SGH has carried its burden of showing that GSA failed to consider in its initial evaluation all of the materials supplied by SGH.

We reach a similar conclusion with regard to SGH's allegation that its proposal was downgraded for failure to include unrequested information. SGH claims that one of its officers was told over the telephone by a member of the Board that SGH's score was not higher because (although SGH complied with the RFP) other offerors had supplied unrequested information relating to experience and were scored on that material. GSA denies that the Board member made those statements, or that such was actually the fact. SGH also claims that the Board considered information submitted by other offerors and downgraded SGH's proposal for failure to include information which was proscribed by forms 254 and 255. Those forms place certain limits on the listing of a firm's experience--one of the evaluation criterion. GSA denies the allegation that it considered unrequested information submitted by other offerors and we can find no provision of the RFP which mentions, let alone requires, use of forms 254 and 255. Consequently, there is nothing in the record to support this claim by SGH.

As to SGH's claim that GSA erroneously interpreted various parts of its proposal, we disagree. The explanations given in the record by GSA on the various interpretations contested by SGH appear reasonable and, at most, reflect differences of professional judgment or misunderstanding by SGH as to what it submitted or was required to submit. For example, SGH challenges GSA's conclusion that less than 2 percent of SGH's past experience was in lab analysis. SGH argues that GSA lacks any basis in fact for that conclusion and quotes from its form 254 to show that it has extensive experience in this area. However, GSA maintains, as noted above, that SGH did not submit a copy of that form with its initial proposal or with its request for a reevaluation. Therefore, we find this basis of protest to be without merit.

SGH challenges the qualifications of the Board. We have held that the composition of a technical evaluation panel is within the discretion of the contracting agency and, absent allegations of fraud, bad faith, or conflict of interest, is not a matter appropriate for review by our Office. Underwater Systems, Inc., B-199953, May 6, 1981, 81-1 CPD 350. While SGH has attributed improper motives to GSA in supplying our Office with wrong information regarding the membership of an evaluator in a professional association, we note that when GSA became aware the membership had lapsed, it promptly advised our Office. This basis of protest is denied.

SGH also protests GSA's refusal to release certain documents which it feels necessary to the prosecution of its protest. GSA states that the materials sought by the protester (which include detailed statements of the qualifications of the members of the Board and copies of other offerors' technical proposals) may be withheld pursuant to certain provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (1976). This Office has no authority to direct an agency to release information sought under the FOIA. Controversies of that nature may only be resolved by resort to legal action against the withholding agency in the Federal courts. See, e.g., Radiation Systems, Inc., B-194492.2, July 3, 1979, 79-2 CPD 6, p. 2. However, this Office does conduct in camera examinations of materials which are withheld by agencies under the FOIA. See, e.g., Radiation Systems, Inc., supra. In this case, our examination of those documents which were provided to us, but not to SGH, leads us to conclude that the information being sought by SGH does not alter our conclusions regarding the merits of this protest.

SGH alleges that GSA seriously prejudiced SGH's rights through excessive and unnecessary delays in responding to its protest. SGH complains that a more expeditious handling of its appeal and protest by GSA would have made it possible to resolve the problem prior to the date of award. Agency delays in the filing of responses to a protest are generally procedural matters which cannot affect our determination

of the merits of a protest. See, e.g., Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 CPD 223. Nonetheless, we agree with the protester that GSA's delays in responding to requests for information related to the protest (totaling approximately 24 weeks) seem excessive and, in the absence of any explanation by GSA, appear unjustified. Expeditious handling of bid protests is indispensible to the orderly process of Government procurement and the protection of protesters and other parties. Accordingly, this matter will be brought to the attention of the Administrator of General Services. See, e.g., Alderson Reporting, B-195009, March 5, 1980, 80-1 CPD 172, p. 6.

Regarding SGH's claim that it was excluded from the competitive range through the use of improper evaluation techniques, we agree. As GSA has acknowledged, it is improper, in a negotiated procurement, to exclude an offeror from the competitive range solely on the basis of technical considerations, unless the proposal is technically unacceptable. Exclusion from the competitive range is not justified merely because a proposal is technically inferior, though not unacceptable. 45 Comp. Gen. 417 (1966). Furthermore, under FPR § 1-3.805-1, supra, contracting officers are required, with certain exceptions not applicable here, to conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range. In those discussions, the Government should identify any deficiencies or ambiguities in the proposals, and provide an opportunity for the offerors to respond to the points raised by the Government. 52 Comp. Gen. 409 (1973); 52 Comp. Gen. 466 (1973).

Since, in this case, GSA found that the rejected technical proposals were acceptable, it was improper for GSA to exclude the seven rejected offerors from the competitive range and deny them the benefit of negotiations merely because they were comparatively inferior. However, where, as here, the array of technical scores for 14 offerors ranges from 91.9 to 41.9, with the protester having the ninth lowest score of 56.3, we think that to characterize all the proposals acceptable so dilutes the usual meaning of the word "acceptable" that the extent of the competitive range

is uncertain Nonetheless, accepting GSA's determination as to SGH's acceptability, it was improperly denied the opportunity for negotiations.

We also find that GSA has incorrectly concluded that no prejudice occurred as a result of the improper exclusion of SGH from the competitive range. In concluding that SGH's price proposal could not realistically have made up for the awardee's superior technical score, GSA makes two errors. First, GSA compares SGH's initial proposal to the awardee's best and final offer. Second, GSA failed to consider the possible impact of the discussions which, as pointed out above, must be conducted with each offeror in the competitive range. The Board's "back-up" to its evaluation states in many places that low scores were assigned to SGH's technical proposal on the basis of informational deficiencies. Appropriate discussions would have apprised SGH of those deficiencies and afforded SGH the opportunity to correct them. Nor is the fact that GSA apparently did not conduct discussions with any of the offerors sufficient to cure this prejudice. GSA requested best and final offers (with specific reference to an amendment which might have affected price proposals) from each of the offerors in the competitive range. Although we do not know if any of those offerors actually revised their technical proposals, the fact remains that any of them could have done so. We cannot know whether, given the same opportunity, SGH or any of the other excluded offerors would have corrected deficiencies in their technical proposals in their best and final offers. Therefore, it is not possible to know what prejudice, if any, SGH suffered.

The protest is sustained on the latter point.

Although we have concluded that SGH was improperly excluded from the competitive range by GSA, we do not recommend that the contract be terminated. This is because the contract has been substantially completed (the majority of the services were required in the spring and summer in order to permit construction to be completed before the onset of winter) and GSA has

represented that the services were urgently needed in order to protect Federal property from imminent damage. Nonetheless, we are advising GSA of this impropriety.

for Milton J. Socolar
Comptroller General
of the United States