



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

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October 23, 1973

Weather Science, Inc.  
P.O. Box FF  
Norman, Oklahoma 73069

Attention: Mr. D. Ray Booker  
President

Gentlemen:

We refer to your letters of August 17 and April 5, 1973, protesting the award of a contract to Sierra Research Corporation (referred to in the record as SRI) by the Bureau of Land Management (BLM), Department of the Interior, under request for proposals (RFP) No. P-3-197.

The protest is premised on four grounds. First, you allege that the public opening of the proposals and disclosure of prices in this negotiated procurement was erroneous and led to an auction whereby SRI was able to "buy" the contract by reducing its price from \$475,620 to \$416,564. Second, you contend that the initial evaluation of the proposals, which resulted in your firm (WSI) receiving the highest point score for price and technical factors, was correct and in accordance with your understanding of the evaluation criteria, and that a change in the evaluation method which resulted in SRI becoming the highest scorer was improper and prejudicial to WSI. You state that you would have geared your proposal to give proper weight to technical considerations had you known the actual basis of the evaluation. Third, you believe that the procurement was biased to some extent against your concern by reason of a letter dated March 6, 1973, which SRI sent to the contracting officer questioning your ability to supply the required aircraft and which may have influenced the technical evaluation and the Government's decision to seek submission of revised proposals. Fourth, you contend that BLM failed to provide you with specific information as to the technical deficiencies in your initial proposal to enable you to prepare your revised proposal. For these reasons, you believe the award may have been illegal and that, as a minimum remedy, BLM should not exercise the options under the contract for 1974 and 1975. You also believe you should recover the expenses of preparing your proposal.

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The RFP was issued January 15, 1973, calling for services involving the use of four aircraft in weather observations and cloud seeding in Alaska during the 1973 summer five season, with options to renew the contract for the 1974 and 1975 seasons. The RFP provided that the proposals would be evaluated in accordance with the following weighted criteria:

	<u>Maximum Points Attainable</u>
A. Price	40 points
B. Personnel	20 points
C. Aircraft, instrumentation, and support equipment to be provided	10 points
D. Weather data analysis and use, performance of cloud seeding, and overall project management	15 points
E. Performance evaluation techniques	10 points
F. Optional equipment and/or support	<u>5</u> points
	100 points

Also, clause XXXII of the RFP provided:

"The lowest price responsive proposal received from a responsible offeror will be used as a datum level, and will receive the entire 40 points for price. All higher responsive proposals received from responsible offerors will receive proportionally fewer points for price."

Proposals were received from WSI, SRI and North American Weather Consultants (NAWC). On February 15, 1973, the contracting officer erroneously held a public opening of the proposals and disclosed the offerors' prices:

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WSX . . . \$396,388  
 NAWC . . . \$459,398  
 SRI . . . \$475,620

Upon realizing his error, the contracting officer determined that nothing would be gained by canceling the RFP and resoliciting since all solicitation requirements would remain the same and, in any event, the technical factors, representing 60 percent of the basis for award, "were to be evaluated by individuals who would not be given the offered prices." The results of the technical evaluation, conducted by a composite board made up of BLH, Bureau of Reclamation and U.S. Forest Service personnel, were as follows:

	<u>NAWC</u>	<u>SRI</u>	<u>WSX</u>
B. Personnel	17	20	13.3
C. Aircraft, etc.	7.3	10	8.6
D. Weather data, etc.	13.3	15	13.3
E. Performance, etc.	8	9.3	9.3
F. Optional equipment, etc.	<u>1</u>	<u>5</u>	<u>3.6</u>
Total Points	46.6	59.3	48.1

In calculating the points each offeror was to receive for price, the contracting officer assigned 40 points to WSI, the low offeror. He then divided the difference between the low and high offers, \$79,232, by 40 to arrive at a value of \$1,980.80 per deduction point. Applying this calculation to the offerors' prices led to these results:

<u>Offeror</u>	<u>Amount Over Low WSI Price</u>	<u>Points To Be Deducted</u>	<u>Net Points Assigned For Price</u>
1. NAWC	\$63,010.00 ÷ \$1,980.80 =	31.8	8.2 (40-31.8)
2. SRI	\$79,232.00 ÷ \$1,980.80 =	40	0 (40-40)
3. WSI	0 ÷ \$1,980.80 =	0	40 (40-0)

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The total scores of technical and price points in the initial evaluation showed that the WSI proposal attained the highest score with the following results on all offers:

1. NAWC      46.6 + 8.2 = 54.8 points
2. SRI        59.3 + 0    = 59.3 points
3. WSI        48.1 + 40   = 88.1 points

In this regard, the administrative report states that " \* \* \* the Contracting Officer revealed to the three offerors the point values listed above, for both price and technical considerations."

By letter of March 6, 1973, to the contracting officer, SRI questioned WSI's ability to provide the required aircraft. Also, on March 12, 1973, SRI challenged the method used to compute points for price, contending that it differed from the method used in previous solicitations. The contracting officer determined that this complaint was justified. In this regard, the administrative report states:

"After discussing the matter with personnel who had evaluated proposals received for the 1972 RFP, the Contracting Officer found that SRI was correct. It was not desired that the high price offeror (who could be very close to the low price offeror) lose the entire 40 points for price. The technique intended was that once the datum level was established by the low price, all higher proposals would receive proportionally fewer points. Thus, if a price was 25% higher than the datum price, a 25% deduction would be made from the possible 40 points. This would allow  $40 - .25(40) = 30$  points for such a proposal."

Reevaluation of the point totals showed that SRI's score was now highest:

<u>Offeror</u>	<u>Points For Technical Factors</u>		<u>Points For Price</u>		<u>Points Total</u>
1. NAWC	46.6	+	35.9	=	82.5
2. SRI	59.3	+	32	=	91.3
3. WSI	48.1	+	40	=	88.1

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At this point in the procurement, the U.S. Forest Service advised BLH that due to funding problems it might be unable to contribute funds to cover the cost of the fourth aircraft. By letter of March 16, 1973, the contracting officer requested best and final offers from the offerors on a four aircraft basis, and alternatively on a three aircraft basis. All offerors responded with timely offers on both bases. The best and final offers for the four aircraft operations were as follows:

SRI	\$416,564
WSI	420,899
NAWC	459,398

Resolution of the funding problem led to a decision to contract for a four aircraft operation, as had been originally planned. A technical reevaluation was conducted, which effected no change in SRI or NAWC's point score, but which raised WSI's score from 48.1 to 52.0. Since SRI was now the low offeror, points for price were recalculated. In the final ratings, the SRI proposal scored highest:

	<u>Point For Technical Factors</u>	<u>Points For Price</u>	<u>Total Points</u>
1. NAWC	46.6	35.92	82.52
2. SRI	59.3	40.00	99.30
3. WSI	52.0	39.58	91.58

Contract B500-CTJ-283(II) was awarded to SRI on March 30, 1973, in the amount of \$416,564.

The disputed issue in regard to the points allocated for price in the evaluation of the initial proposals does not, as you have contended, involve a change in the evaluation factors themselves during the evaluation. Rather, the question is one of the correct interpretation of the provision which specified that the low offeror would receive 40 points for price and that higher proposals would receive proportionally fewer points for price. We think that the reasonable interpretation

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of this provision is the one adopted by the contracting officer in his revised calculation, namely, that a higher price proposal would receive a point score lower than 40 in proportion to the amount such proposal was higher than the lowest price proposal. The initial method of calculation adopted by the contracting officer would have the effect of allocating to the highest offer, regardless of its dollar amount, zero points for price in every instance, a result which is clearly in conflict with evaluation criteria stating that technical considerations were to constitute 60 percent of the basis for an award decision. We think it was proper for SRI to object to the initial calculation of points for price and for the contracting officer to act upon this objection. Cf. 49 Comp. Gen. 98 (1969). Further, any uncertainty which you may have had concerning the meaning of this provision and the proper weight to accord to price vis-a-vis technical considerations in preparing your proposal should have been raised with the contracting officer prior to the closing date for receipt of proposals.

As for the technical evaluation of the initial proposals, the record shows that it was completed by late February or early March 1973, prior to SRI's letter of March 6, 1973, which questioned your ability to provide the necessary aircraft. On its face, the initial technical evaluation report does not show bias or prejudice against your concern. No question is raised in the report as to your concern's ability to provide aircraft. Further, we consider it significant that the technical evaluation was conducted by a composite board—more precisely, separate technical evaluation reports were submitted by BLM, Bureau of Reclamation, and Forest Service teams, a procedure which by its nature would help to insure independent judgment and fairness. We cannot say that the technical evaluators had no knowledge of the prices which had been publicly disclosed, or, if they had such knowledge, that they were uninfluenced by it. However, we do not find a sufficient basis on the record to state that the initial technical evaluation was conducted in bad faith or that favoritism was shown to any one offeror.

Your contention that the contracting officer erroneously disclosed the prices in this procurement has been admitted by BLM. Such action was in violation of Federal Procurement Regulations (FPR) 1-3.805-1(b), which proscribes the disclosure to an offeror of his relative standing or of the prices offered by other offerors, and which prohibits the use of auction techniques. We have stated that there is nothing inherently illegal about an auction in the context of a competitively

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negotiated procurement. 48 Comp. Gen. 536, 541 (1969). However, our Office has never approved of any procedure whereby information which would give an unfair competitive advantage to any offeror would be disclosed during the negotiation process. 50 Comp. Gen. 619 (1971). Each situation of this type must be judged in light of the particular circumstances to determine if an unfair competitive advantage to an offeror has resulted.

We believe sufficient justification was shown for not cancelling the solicitation after disclosure of the initial prices. In this regard it is stated that, in view of the lead time necessary for the successful offeror to prepare for performance during the summer of 1973, and the fact that a resolicitation of the services would necessarily be of the same requirements, it was considered best to continue with the procurement. However, we are of the view that it would have been desirable in these circumstances to have made an award on the basis of the initial proposals immediately after evaluation had been completed, although this point is moot in view of the contracting officer's error in his initial calculation of the evaluation points for price and his action in revealing these point scores to the offerors. For our present purposes, it is sufficient to note that, as discussed above, the record does not demonstrate that the disclosure of prices prejudiced your concern in connection with the evaluation of the initial proposals.

In considering whether disclosure conferred an unfair competitive advantage on SRI in connection with the submission of best and final offers, it is significant that SRI would have been entitled to award, had award been made on the basis of the initial proposals. Arguably, SRI stood to lose most by a second round of negotiations. Furthermore, in submitting best and final offers both your concern and SRI had an opportunity to make technical revisions to your proposals and to re-quote prices. In these circumstances, we believe this would tend to negate any unfair advantage which may have accrued to either your concern or SRI through disclosure of price or technical information. B-160575, March 10, 1967; B-167054(1), January 14, 1970. In this regard, we believe that the contracting officer's statement of the technical deficiencies in the proposals, which consisted merely of a listing of the evaluation criteria under which the offerors had lost points, could have been more detailed. However, it appears that all offerors were advised of their deficiencies in the same manner.

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In its best and final offer, SRI reduced its price for the four aircraft operation substantially, which increased its overall point score from 91.3 to 99.3. Your concern increased the offered price, but by receiving additional technical points, likewise raised its score from 88.1 to 91.6. In short, SRI was able to increase its point margin by a price reduction in its best and final offer; this is not a situation where an offeror's price reduction resulted in a displacement of another concern as high point scorer.

The circumstances described above amounted to the use of an auction technique. Although this procedure was in violation of FPR 1-3.805-1(b), under the circumstances we do not believe that the resulting contract award can be considered illegal. Accordingly, the protest is denied. However, in view of the procedural deficiencies in this procurement, we are recommending to the Secretary of the Interior by letter of today, copy enclosed, that steps be taken to avoid a repetition of such deficiencies in future procurements.

Lastly, it has been held that bid or proposal preparation costs may be reimbursable where the Government has breached its implied obligation to fairly consider a bid or proposal. Continental Business Enterprises, Inc. v. United States, 452 F. 2d 1016 (C. Cls. 1971). In this case, while deficiencies in the procurement procedures are evident, we do not believe that the facts warrant a finding of such a breach as to support your claim for proposal preparation costs.

Sincerely yours,

Paul G. Denbling

For the Comptroller General  
of the United States

Enclosure