The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Fire Protection Association

File: B-224221, B-224221.2

Date: February 5, 1987

DIGEST

1. Protest that procuring agency did not grant preference to existing organizations in area, either by restricting competition or including an evaluation criterion reflecting preference, is dismissed as untimely because it was not filed until award was made since it was apparent from solicitation and amendment thereto that preference was not being granted.

2. The determination of the relative merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness or that the procuring agency otherwise violated procurement statutes or regulations. Protest is denied where the record shows a reasonable basis for the procuring agency's evaluation of the protester's technical proposal as unacceptable and therefore not in the competitive range.

3. Contrary to protester's allegation, clauses which were changed or added to awarded contract regarding use of consultants and release of information gathered during performance of contract did not alter evaluation criteria nor encourage occurrence of an organizational conflict of interest. Use of consultants was not prohibited by solicitation and clauses were merely added to ease contract administration.

DECISION

The National Fire Protection Association (NFPA) protests the award of a contract under request for proposals (RFP) No. EMW-86-R-2277 to Tri-Data Corporation by the Federal Emergency Management Agency (FEMA) for the investigation of major fires.

NFPA contends that its proposal was improperly excluded from the competitive range, that FEMA did not comply with the Fire Prevention and Control Act of 1974 (15 U.S.C. § 2201 et seq. (1982)) and that the provisions of the contract awarded to Tri-Data differ significantly from those contained in the RFP.

We deny in part and dismiss in part the protest.

The RFP was issued on July 2, 1986, and six proposals were received by the August 4, 1986, closing date. Four proposals, including NFPA's, were found technically unacceptable. Tri-Data's proposal was the only one placed in the competitive range because Tri-Data was rated 21 points higher technically (out of 100 points) and was 30 percent lower in cost than the other acceptable proposal.

Initially, we dismiss NFPA's allegation regarding FEMA's alleged violation of the Fire Prevention and Control Act of 1974 as untimely. NFPA contends that FEMA should have restricted competition to existing fire prevention organizations or given weight during the evaluation process to the fact that NFPA was such an existing organization, pursuant to 15 U.S.C. § 2218(3) which states:

> "To the extent practicable, the Administrator shall utilize existing programs, data, information, and facilities already available in other Federal Government departments and agencies and, where appropriate, existing research organizations, centers and universities. The Administrator shall provide liaison at an appropriate organizational level to assure coordination of his activities with State and local government agencies, departments, bureaus, or offices concerned with any matter related to programs of fire prevention and control and with private and other federal organizations and offices so concerned."

The RFP, as issued on July 2, 1986, contained no such evaluation factors and on July 21, 1986, amendment A001 was issued which provided the answers to questions posed by the offerors and included a list of the 92 firms which had been sent the RFP. Therefore, NFPA knew from the terms of the RFP that no special consideration was being given to existing fire prevention organizations and by amendment A001 that competition was not being restricted to such firms. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1986), protests based upon alleged improprieties which are apparent prior to the closing date for receipt of initial proposals

must be filed prior to the initial closing date. Therefore, this aspect of the protest should have been filed prior to the August 4, 1986, closing date. Since it was not filed until September 26, 1986, it is untimely and dismissed.

NFPA's proposal was found technically unacceptable and therefore excluded from the competitive range. NFPA argues that this finding of technical unacceptability is clearly arbitrary and capricious in view of NFPA's organizational experience which includes investigating fires for the United States since 1972. Moreover, NFPA contends that whatever problems may exist in the proposal could be easily cured with minor revisions, not a major rewrite as FEMA found would be necessary, and that through the conduct of discussions, the proposal would be acceptable for award.

In reviewing protests concerning the evaluation of proposals and competitive range determinations, our function is not to reevaluate the proposals and make our own determination about their merits. This is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Robert Wehrli, B-216789, Jan. 16, 1985, 85-1 C.P.D. ¶ 43. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we will examine the agency's evaluation only to ensure that it had a reasonable basis and was consistent with the stated evaluation criteria and applicable statutes and regulations. GTE Government Systems Corp., B-222587, Sept. 9, 1986, 86-2 C.P.D. ¶ 276.

Furthermore, it is well established that the determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion which will not be disturbed unless it is shown to be unreasonable or in violation of procurement laws and regulations. Metric Systems Corp., B-218275, June 13, 1985, 85-1 C.P.D. ¶ 682. The fact that a protester does not agree with an agency's evaluation does not render the evaluation unreasonable or contrary to law. Logistic Services International, Inc., B-218570, Aug. 15, 1985, 85-2 C.P.D. ¶ 173.

FEMA contends that while NFPA may be a capable offeror, the proposal which it submitted was inadequate and did not respond to the requirements of the RFP. The evaluation panel found the NFPA proposal weak in numerous areas. Under the evaluation criterion "Understanding of the Program Requirement," the overall proposal was found to be weak and poorly presented and lacking in detail and description. Under "Project Organization and Management," the panel felt there was only a limited description of capabilities for editing

and research, that the methodology for accomplishing the work was lacking and that the proposal was simplistic in light of the organization's past experience. Under "Experience and Qualifications of Key Staff," FEMA found the principal investigators lacked extensive, real-world experience and that the staff was suppression oriented, not multi-disciplinary. Also, the ability of the investigators to access key officials for fire investigations was not addressed. Under "Facilities and Equipment," the panel believed the proposal lacked detail regarding materials research and laboratory facilities and did not suggest outside contract support for lab work or computer assistance.

We have reviewed the NFPA proposal and find the characterization of the proposal by the FEMA technical evaluation panel to be reasonable. Much of the proposal deals with the past accomplishments of NFPA and recounts the experience gained in prior investigations. While Tri-Data's proposal was specific as to methodology and tasks to be accomplished, NFPA's proposal seemed to assume that the evaluation panel would recognize that NFPA had performed this contract in the past and had done an acceptable job. In this regard, for specifics of methodology and understanding of tasks, the proposal continually referred the reader to various appendices, which included copies of previously conducted investigative reports. For example, the proposal states "NFPA investigators will use the latest techniques in fire loss analysis in conducting the investigation and have experience in conducting and writing reports of this type of investigation (see Appendix B-2)." We believe such a description falls short of the detail required by the RFP.

A technical evaluation must be based on information submitted with the proposal. No matter how capable an offeror may be, if it does not submit an adequately written proposal, it will not be considered in the competitive range. Health Management Associates of America, Inc., B-220295, Jan. 10, 1986, 86-1 C.P.D. ¶ 26. Based upon our review of the proposal and evaluation sheets of the evaluation panel, we find the evaluation to have been reasonable and that FEMA did not abuse its discretion in excluding NFPA's proposal from the competitive range.

NFPA also protests that certain clauses now incorporated in the Tri-Data contract differ substantially from those contained in the RFP and affect the manner in which proposals were evaluated and raise a question of an organizational conflict of interest.

First, the "Services of Consultant's" clause, not contained in the RFP, is in Tri-Data's contract. It reads:

> "Notwithstanding the provision of the clause entitled, 'Subcontract,' the prior written approval of the Contracting Officer shall be required:
>
> > "A. Whenever any employee of the Contractor is to be reimbursed as a 'Consultant' under this contract; and
> >
> > "B. For the utilization of the services of the Consultant under this Contract except when the Consultant was proposed and accepted during the negotiations of this contract."
>
> "Whenever Contracting Officer approval is required, the contractor shall obtain and furnish to the Contracting Officer information concerning the need of such consultant services and the reasonableness of the fees to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by such consultant to others for performing consultant services of a similar nature."

NFPA alleges there was no express provision allowing the use of consultants in the RFP and, if there had been, NFPA would have explored the possibility of retaining consultants on a part-time basis rather than its full-time in-house personnel, which it did propose. NFPA argues it was prejudiced by this change because its personnel were found to be less qualified than the consultants proposed by Tri-Data.

FEMA states that while the "Services of Consultants" clause was added to the contract, it has no impact and was added to make the administration of the contract easier. The RFP did not prohibit the use of consultants, contends FEMA, and it was left to the discretion of the offerors as to what mix of personnel would be most effective in performing the contract. Consultants under the clause are approved in the same manner that subcontracts need to be approved by the contracting officer, unless the consultants were proposed and accepted previously. Also, the clause was added because FEMA's appropriation limits the amount that consultants may be paid.

Our review of the RFP reveals no prohibition against the use of consultants and we do not see how clause G-9 changed the outcome of the evaluation of the personnel proposed by either

offeror. The clause merely requires contracting officer approval of any new consultants and the rate at which they will be paid if any are added to the contractor's work force.

In this same area, NFPA also objects to the addition of clause H.2 "Non-Personal Services," to Tri-Data's contract. This clause merely states that the contractor and his personnel shall not be subject to relatively continuous supervision and control of a government officer or employee. NFPA seems to object on the basis that Tri-Data's consultants would not be subject to government control but NFPA's full-time employees would be. This ground is without merit as neither type of personnel would be subject to such control or the contract would be an improper personal services contract.

Also, the RFP, at section H.1 "Publications," contained the following clause, which was deleted from Tri-Data's contract:

> "Information and products from the performance of this Contract shall not be published or divulged in any form, nor shall they appear in any thesis, writing, public lecture or presentation, and the like without prior submission of the manuscript, materials, or product to the Contracting Officer and Project Officer for clearance. The Contractor agrees to be bound by the decision of said officials . . . ."

NFPA contends that this deletion allows a contractor or its consultants to utilize information gained during an investigation at a later date by a consultant as an expert witness in litigation.

FEMA states the "Publications" clause was deleted because both the RFP and the resulting Tri-Data contract contained a similar clause, "Publications," found at 48 C.F.R. § 4452.2227-72 (1985). The only significant difference in the clauses is that the deleted clause had no time limit for required approval while the now incorporated clause requires contracting officer approval for the first 6 months after a report is submitted. FEMA contends that a major purpose of this contract following the conduct of a major fire investigation is the public dissemination of the information gained. Accordingly, the government has substantially the same protection under either clause.

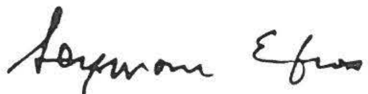
NFPA's alleges that the deletion of the clause and the use of consultants will lead to an organizational conflict of interest. In this regard, NFPA argues that the expanded use of consultants, rather than full-time employees, and the

deletion of a prior limitation on a contractor's ability to utilize the information gained from an investigation, permits Tri-Data to pay its consultants lower wages because the consultants will be able to make up the difference in salary by testifying as expert witnesses in private litigation. This ability to use information at a later date, the protester argues, may affect the objectivity of the investigation and therefore lead to an organizational conflict of interest.

The Federal Acquisition Regulation, 48 C.F.R. § 9.504 (1986), states that an organizational conflict of interest may exist when the nature of the work to be performed may, without some restriction on future activities, impair the contractor's objectivity in performing the contract work. As noted above, there was no restriction on proposing consultants under the RFP. Also, the only difference in the "Publications" clauses is the time limitation. We do not believe that the "Publications" clause, which merely gives the contracting officer power to stop publication of the data collected, is the powerful vehicle portrayed by NFPA to stop conflict of interest. It will be the responsibility of FEMA during administration of the contract, including its review of the submitted reports, to be alert to any potential conflicts. Moreover, Tri-Data recognized this issue in its proposal, wherein it stated:

> "Our working assumption is that it is USFA/FEMA's prerogative to release information as it sees fit during and after each investigation. Where there is life lost and large property loss, liability suits are almost sure to follow nowadays. The project team is sensitive to the need not to obstruct criminal or civil proceedings or to cause damage to anyone's reputation through premature release of information. It is also necessary to protect individuals' rights to privacy. Unless otherwise instructed by USFA/FEMA, our project team and in-house staff will be instructed to release information only to USFA/FEMA."

Accordingly, the protest is denied in part and dismissed in part.



for Harry R. Van Cleve
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