

Comptroller General
of the United States

Washington, D.C. 20548

Matter of: **American Association for the
Advancement of Science**

File: **B-250927**

Date: **March 12, 1993**

Anthony F. Essaye, Esq., and David D. DiBari, Esq., Rogers & Wells, for the protester.

Ronald S. Perlman, Esq., and **Daniel A. Bellman**, Esq., Porter, Wright, Morris & Arthur, **for Ohio State University**, an interested party.

Gail F. Baum, Esq., Department of Education, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency did not preclude protester from proposing two key subcontractors in its best and final offer (BAFO) where Inspector General's preliminary audit report indicated that the subcontractors were a financial risk and, as a result of this report, the agency reasonably required that the protester in its BAFO either rebut the preliminary findings or substitute new subcontractors.

2. Protest that agency did not give protester adequate time to revise its proposal by either demonstrating the financial viability of its proposed subcontractors or substituting alternative subcontractors is untimely where protest was not filed prior to the closing time for the receipt of best and final offers.

DECISION

American Association for the Advancement of Science (AAAS) protests the award of a contract to the Ohio State Research Foundation (OSU) under request for proposals (RFP) No. 92-032, issued by the Department of Education for the operation of the Eisenhower National Clearinghouse for Mathematics and Science Education.

We deny the protest in part and dismiss it in part.

The RFP was issued on June 8, 1992, for the award of a 60-month incrementally funded cost-reimbursement contract. The RFP is for the

planning, development, organization, and operation of the national clearinghouse for science and mathematics education materials. The RFP provided that award would be made to the offeror whose proposal is the most advantageous to the government, all factors considered. It further stated that technical quality was more important than cost, but that as proposals became more equal in merit, cost would be more important. The RFP contained the following four principal technical evaluation factors, worth a total of 285 points: (1) technical design, 120 points; (2) personnel/staffing, 50 points; (3) conceptual approach, 45 points; (4) baseline management plan, 40 points; and (5) corporate capabilities, 30 points. Concerning cost, the RFP required cost proposals to be fully supported by cost and pricing data adequate to establish the reasonableness of the proposed amount.

AAAS and OSU submitted proposals by the July 8, 1992, closing date for the receipt of proposals. The technical proposals were given to a technical evaluation panel which included experts in the subject matter of the procurement. The evaluation panel evaluated the proposals and determined that both proposals were technically acceptable or capable of being made technically acceptable. Based on the panel's findings, the contracting officer included both offerors in the competitive range.

*2 The agency held technical and cost discussions with both offerors and revised proposals were received on September 11. In the first round of discussions, AAAS was asked questions concerning its selection of subcontractors. AAAS was also asked to provide a cost and price analysis for each subcontract. In its September 11 response to the clarification request, AAAS stated that it selected its subcontractors based on proven leadership in the educational and technical fields, and it had begun the process of performing a cost and price analysis and would submit the information at the time of subcontract award. The evaluators found that both firms' responses to technical questions strengthened the proposals considerably although some weaknesses remained. The results of the evaluation of the revised proposals were as follows:

OFFEROR	SCORE	COSTS
-----	-----	-----
AAAS	239	\$30,233,442
OSU	233	27,524,539

During the course of the procurement, the agency's Inspector General's office was conducting field pricing reviews, which included pre-award audits of the offerors and their proposed subcontractors. The preliminary results of the Inspector General's audits were orally provided to the contracting officer on September 14. The Inspector General's preliminary reports raised questions concerning the accounting system and financial condition of two of AAAS' planned subcontractors, Educational Products Information Exchange of Hampton Bays, New York (EPIE) and the National Science Teachers Association of Arlington, Virginia (NSTA). [FN1]

On Friday, September 18, additional written discussion questions were faxed to both offerors. Offerors were to respond in writing to additional concerns and clarifications regarding each offeror's business proposals, including concerns raised in the oral reports of the Inspector General. This letter also requested best and final offers (BAFO) to be submitted by 2 p.m. on September 23.

Of particular relevance here, the letter to AAAS contained 12 specific concerns raised by the Inspector General about its proposed subcontract with NSTA, some of which related to the firm's financial responsibility. Nine specific questions related to financial concerns about EPIE. The request for BAFOs concluded by stating that, "[b]ased on the OIG's findings, the Government does not consent to AAAS subcontracting with EPIE and NSTA since both subcontractors have been determined by the OIG to be poor financial risks."

On Monday, September 21, AAAS contacted the contract specialist seeking clarification of the BAFO request since the letter contained numerous questions concerning the AAAS subcontractors, while at the same time stating that the government did not consent to their use. AAAS inquired whether, in light of the agency's disapproval of its proposed subcontractors, it should answer the questions concerning the subcontractors in the BAFO request. After checking with the contracting officer, the contract specialist advised that AAAS could retain the subcontractors if it could satisfactorily rebut the Inspector General's findings/information and that if it decided to refute the Inspector General's findings/information, it should answer the questions concerning the subcontractors.

***3** On Tuesday, September 22, an NSTA official called the Inspector General auditor who performed the review of NSTA; he later called the regional Inspector General to challenge the conclusions. The regional Inspector General advised the NSTA official that the pre-award audits had raised several concerns suggesting the possibility of problems with the subcontractor's financial position, but that the Inspector General's findings did not conclude or imply that NSTA was a poor financial risk. At the behest of NSTA, the regional Inspector General then spoke to the contracting officer that same day. He stated that the review of NSTA was preliminary and that on the basis of this limited review, his office could not make a conclusive determination that NSTA was a poor financial risk. The contracting officer responded that her office had made the determination that the subcontractors were financial risks based on the information from the pre-award audit, and that AAAS would have the opportunity to refute those concerns.

On the morning of September 23, the regional Inspector General and the contracting officer again discussed NSTA. The regional Inspector General asked the contracting officer to notify AAAS that the Inspector General had not determined that NSTA was a poor financial risk. The contracting officer stated she would not do so because of the concern expressed by the Inspector General's auditor about the financial condition of NSTA, but that AAAS would be told that it could refute the concerns stated in the BAFO request. The contracting officer then advised AAAS, at approximately 10:20 a.m., that she had made the determination (in the BAFO letter) to exclude the subcontractors based on the information furnished by the Inspector General. She stated that she was reiterating what the contract specialist had told AAAS on September 21, that AAAS could use the subcontractors if AAAS or the subcontractors could refute the concerns stated in the BAFO request. AAAS responded that it was "unlikely we could rework the response" in time, but that NSTA would not be excluded in the response.

BAFOs were received from each offeror by the deadline of 2 p.m. on September 23. Each offeror submitted revised cost data. OSU made no changes to its technical proposal. AAAS stated that its BAFO included

the cover letter, a revised master budget, and responses to the issues and questions not involving the subcontractors, NSTA and EPIE. AAAS, in its BAFO cover letter, stated that because of the limited time available, it was unable to determine the accuracy of the conclusions reached by the Inspector General. AAAS stated that it reserved the right to use the organizations it originally proposed if the limited Inspector General investigation should prove incorrect as suggested by AAAS' conversations with the Inspector General's staff. It also stated that in order to meet the deadline and be responsive, it had modified its business and financial plan "under protest" and eliminated EPIE and NSTA as subcontractors. AAAS included in its BAFO a cost proposal from another proposed subcontractor for performance of EPIE's tasks but stated that the tasks to be performed by NSTA would be acquired competitively.

*4 The contracting officer did not consider AAAS' BAFO cover letter to be an agency protest. She also did not include the cover letter in the BAFO package sent to the technical evaluation panel for review. The evaluators found that the removal of EPIE and NSTA, which were to perform 40 percent of the work, significantly weakened the AAAS proposal. In the agency's evaluation of AAAS' initial proposal, one of the strengths recognized by the agency was AAAS' use of NSTA as a subcontractor. The evaluators believed that the use of NSTA provided influence with teachers, a network of contacts, connections to reform movements, the states, and NSTA's affiliates. The evaluators viewed the loss of NSTA, a major representative of the nation's science teachers, and AAAS' failure to provide information on how it would proceed without NSTA, as a serious matter and thus downgraded AAAS' proposal. The evaluators also found that EDC, the replacement for EPIE, provided inadequate detail concerning how it would collect and process data on instructional materials and programs, and the firm's experience in cataloguing was not clear.

Based on the absence of NSTA and the failure of AAAS to propose either a substitute or a detailed plan for finding one, all evaluators reduced their ratings of AAAS; three of the six evaluators changed their ratings from "technically acceptable" to "technically unacceptable." The results of the final technical evaluation were as follows:

OFFEROR	SCORE	COSTS
AAAS	219	\$27,953,097
OSU	233	23,001,926

OSU was selected for award based on its technical superiority and lower price. The report and recommendation did note however that had AAAS retained NSTA as its major subcontractor, its technical superiority would not have been great enough to warrant the additional cost. Award was made to OSU on September 30. AAAS was orally notified of the award on October 1. AAAS filed its protest with our Office on October 14. On October 15, AAAS received a debriefing and as a result filed an amended protest on October 28.

AAAS raises two major protest issues: (1) the agency's decision to withhold consent to contract with NSTA and EPIE lacked a reasonable basis because it was based on the incorrect premise that the regional Inspector General had decided that NSTA and EPIE were poor financial

risks, and (2) the agency failed to provide AAAS a reasonable opportunity to respond to the September 18 written discussions regarding the business portion of its proposal and that it was severely hampered in preparing its BAFO by the conflicting and confusing information it received during the short BAFO response time. The protester also claims that these two actions are not only improper in themselves, but evidence a bias against AAAS and resulted in an improper de facto sole-source award.

*5 As stated above, the Inspector General's preliminary audit raised several concerns about the financial condition of NSTA and EPIE. Specifically, the oral report concerning the audit of NSTA stated that NSTA was in a poor financial position because it had deficits in its equity and fund balance, and it had a cash flow problem. The report stated that NSTA would have a problem being able to pay its debts. The oral report concerning the audit of EPIE stated that EPIE had a poor financial position because of cash flow difficulties, prior substantial losses, and a substantial capital deficiency. The oral report specifically recommended that no award be made to AAAS unless it used a subcontractor other than EPIE because of EPIE's poor financial condition. On the basis of these preliminary findings of the regional Inspector General, we believe the contracting officer was reasonably concerned about the two subcontractors' financial status and the risk they posed to AAAS' successful completion of the contract work. The concerns raised by the agency in the BAFO request were reasonable and were supported by the pre-award audits.

The BAFO request letter was confusing because it both asked numerous questions about the subcontractors and stated that the agency did not consent to AAAS' contracting with them. The letter was clarified when the contract specialist advised AAAS that it could retain the subcontractors if it could satisfactorily rebut the Inspector General's findings/information, and that if AAAS decided to refute the Inspector General's information, it should answer the questions concerning the subcontractors. The contracting officer reiterated this position 2 days later. The agency's requirement that AAAS either rebut the preliminary findings of the Inspector General by showing that its subcontractors were financially viable or substitute new subcontractors was reasonable in light of the agency's legitimate concerns about the subcontractors' financial condition. AAAS decided to substitute subcontractors instead of responding to the agency's specific concerns about the financial condition of NSTA and EPIE.

AAAS argues that the contracting officer's decision to question the use of the two subcontractors was unreasonable because the regional Inspector General advised the contracting officer that his findings were preliminary and incomplete and ultimately might not support the finding that the subcontractors were a financial risk. As stated above, the preliminary audit findings raised legitimate concerns regarding the financial status of the subcontractors and reasonably supported the contracting officer's actions.

In retrospect and given the full record before us, we recognize that the time provided for BAFO preparation may have been inadequate for AAAS to either respond to the BAFO questions or find satisfactory new subcontractors. In this connection, the protester had an obligation to request the time it believed necessary to adequately respond prior to the closing time for receipt of BAFOs, and/or to protest the agency's failure to provide sufficient time.

*6 To be timely, a protest concerning insufficient time to prepare a BAFO must be filed either with this Office or with the contracting agency before the next closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992); Hollingsead Int'l, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372. Nowhere in the record, including both parties' accounts of discussions between representatives of AAAS and agency contracting officials on September 21, 22, and 23, is there any evidence that AAAS requested more time to submit its revised proposal. AAAS did not protest to our Office or the agency the time available to prepare its BAFO prior to the closing time for receipt of BAFOs. [FN2] Consequently, AAAS' protest on this basis is untimely. In this regard, AAAS had adequate time to prepare and submit its protest prior to the closing time for receipt of BAFOs. See R&B Equip. Co., B-219560.2, Sept. 5, 1985, 85-2 CPD ¶ 272.

Since the agency's request of AAAS was reasonable and the protester's complaint of insufficient time is untimely, AAAS' alternative characterizations of these actions as bias and an improper de facto sole source award are without merit for the same reasons. [FN3]

The protest is denied in part and dismissed in part.

James F. Hinchman

General Counsel

FN1 The report concerning EPIE, as recorded by the contract specialist, includes the following:

"It is recommended that an award not be made to the Prime Contractor AAAS, unless they use another subcontractor other than EPIE. EPIE has a poor financial position. They may not be in business in the future. EPIE's accounts payable of . . . is deficient by EPIE has cash flow deficiencies. The company has taken a substantial loss in prior years. Their current assets are 1/3 of what they should be. This subcontract is a poor risk to the Government. EPIE is a nonprofit organization and indicates that its business depends on getting Government contracts. They have no other Government contracts." With respect to NSTA, the written account of the oral report includes the following: "NSTA has a poor financial position and would have a problem being able to pay their debts. NSTA has a deficit in its equity, its fund balance is in a deficit position and NSTA has a cash flow problem."

FN2 AAAS' BAFO cover letter stated that: "In the limited time available AAAS has not been able to determine the accuracy of the conclusions reached by the OIG." It also stated that in order to meet the BAFO deadline and be responsive, "AAAS has modified its business and financial plan under protest." (Emphasis in original.) While we do not consider the BAFO letter to constitute a protest of the time to revise proposals, if it were, a protest included in a proposal is not a timely pre-closing protest. Paramount Sys., Inc., B-229648.2, Dec. 30, 1987, 87-2 CPD ¶ 646.

FN3 Two additional issues raised by the protester do not warrant full discussion. AAAS' argument that the solicitation's requirement for super computer capability shows bias in favor of OSU is a protest against a solicitation impropriety that was not raised prior to the receipt of initial proposals and is therefore untimely. 4 C.F.R. § 21.2(a)(1). we

also do not agree with AAAS' argument that the contracting officer's failure to submit its BAFO cover letter to the technical evaluators unreasonably prejudiced consideration of its proposal. AAAS effectively eliminated NSTA and EPIE from consideration by electing to substitute new subcontractors rather than respond to the concerns listed by the agency, even though AAAS claimed to reserve the "right" to subcontract to these organizations if the subcontractors were found financially stable. We also note that the selection official stated that had AAAS retained NSTA as its major subcontractor (in its BAFO, AAAS replaced EPIE with another subcontractor; NSTA was to be replaced after award), its technical superiority would not have been great enough to warrant the awarding to AAAS at a higher cost.