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FAX
COVER

To: Ann Aldrich
Fax#: 202/619-8365
From: David Ervin
Phone#: 301/469-3422

Date: February 6, 1997
Pages: 5
(includes this cover page)

COMMENTS:

Enclosed is a new Freedom of Information Act Request.

Re: *Source Selection Manual*

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VIA FACSIMILE TO 202/619-8365

February 6, 1997

**Ms. Ann Aldrich
Executive Secretariat
U.S. Department of Housing and Urban Development
Executive Secretariat's Office
451 Seventh Street, SW, Room 10139
Washington, D.C. 20410**

**Re: Freedom of Information Act Request
Source Selection Manual**

Dear Ms. Aldrich:

Enclosed are three pages of a Source Selection manual which were included in the SWAT administrative record recently produced for the U.S. District Court for the District of Columbia.

Over the past few years, Ervin and Associates has repeatedly seen contracts be directed to favorites of political appointees either by interference with the SEB or their decisions being overruled in the first place. In court, Counsel for HUD indicated that it is O.K. for the Source Selection Official to overrule the SEB recommendation. However, we have been unable to locate the laws or regulations regarding procurement integrity at HUD or the rules for the operation of the Source Evaluation Boards.

Considering this, please provide us with the entire copy of the enclosed manual under the provisions of the Freedom of Information Act. If it is available publicly and we need not request it under FOIA, please call me at (301) 469-3422 and inform me how to obtain a copy, at which time I will cancel the FOIA request.

Ervin and Associates agrees to pay up to \$50 for the processing of this request. If the anticipated fees exceed \$50, please call me so I may revise the request.

Very truly yours,
ERVIN and ASSOCIATES, INCORPORATED

DAJ
David J. Ervin

**SECRETARIAT
EXECUTIVE**

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A. Communication of Information

Once the evaluation process is completed, including the reevaluation and rescoring of BARS to reflect alterations made by offerors remaining within the competitive range, the final results of the evaluation must be communicated to the source selection official. There is a variety of ways that this can be done. See, for example, AFFARS Appendix AA (Attachment 2), which requires the evaluation team to prepare a Proposal Analysis Report. This report contains a detailed statement of the results of the evaluation, including a comparative analysis of the proposals, an analysis of each offeror's cost proposal, an assessment of the risks inherent in each proposal, an assessment of the past performance of each offeror, and a discussion of any significant contractual issues in any proposal. The report may also include a recommendation on the source selection decision if requested by the source selection official. This regulation also calls for the chairperson of the evaluation team to brief the source selection official. Members of the team may also be asked to participate in the briefing.

Other agencies such as the Department of Commerce and the General Services Administration require the preparation of a "final report" of the SSEB. The GSA Handbook, Source Selection Procedures, API P 2800-2, July 21, 1987 (Attachment 5) contains the following guidance on this report:

- a. The final evaluation report must be prepared and delivered to the contracting officer by the Chairperson of the SSEB after the responses to the questions and best and final offers are evaluated. The Chairperson and each SSEB member must sign the report. The final report, together with the initial report, will be used to make the final source selection decision.
- b. The report should rank each offeror's proposal from the most advantageous to the least advantageous. For each offeror, the report should provide the final score and a summary analysis of each proposal (initial, revised and best and final offer) including an assessment of the offeror's compliance with the requirements of the solicitation, any changes to the technical evaluation scores and a narrative to support the changes. If no substantive change has been made by the offeror to require a change in score, the report should so state. Copies of revised score sheets should be provided with the report.
- c. The final report should include a recommendation to the [source selection official] regarding the source(s) to be selected. A recommendation for award to a higher priced, higher scored offeror must be supported by a specific recommendation that the technical superiority of the higher priced offeror relative to other offers in the competitive range, warrants the additional

cost. The rationale for the finding of technical superiority must be documented in detail. Rave conclusory statements are not acceptable.

On major source selections, agencies use considerably more elaborate procedures. For example, the NASA Source Evaluation Board Handbook, Appendix I to NFS 18-303.70 (Attachment 4) calls for a "formal presentation" by the evaluation board to the source selection official in addition to a full written report. This formal presentation is preceded by a "dry run" which is required to ensure that the formal presentation is clear and complete.

These procedures, which communicate summaries of the evaluations to the source selection official, have been sustained as fully adequate to ensure rational source selection decisions. See, for example, Sabreliner Corp., Comp. Gen. Dec. B-242023, 91-1 CPD ¶ 326, where the Comptroller stated:

The SSA [source selection authority] is not required to personally review the proposals or the complete evaluation documentation, but can rely upon a briefing that presents the results of the proposal evaluation. See *Systems & Processors Eng'g Corp.*, B-234142, May 10, 1989, 89-1 CPD ¶ 441. Here, the SSA, in addition to receiving a technical evaluation briefing, reviewed the proposal analysis report, which set forth, among other things, a description of the evaluation standards and criteria, a description of the competing proposals; a comparative evaluation analysis of the proposals; the offerors' proposed prices/costs; and the performance risk assessment.

Thus, in most cases the source selection official can rely on the scores of the evaluators and the evaluation board's conclusions. However, such reliance will not be upheld if the evaluators have not followed rational procedures. For example, an award was overturned in *Programmatic, Inc.*, Comp. Gen. Dec. B-228916.2, 88-1 CPD ¶ 35, because a review of the narrative statements prepared by two evaluators indicated that there was no rational support for the scores given by the evaluators and adopted by the source selection official. Thus, the source selection official is ultimately responsible for any mistakes made in the evaluation process.

B. Corrective Action

The source selection official can order a complete reevaluation if there are doubts about the validity of the initial evaluation, *PRC, Inc.*, Comp. Gen. Dec. B-233361.8, 92-2 CPD ¶ 215. In that case, a new evaluation panel was constituted after questions were raised about the propriety of the initial evaluation. The Comptroller stated:

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supported a finding of technical equality between Verify and the lower cost awardee. In most cases, such determinations of equality are made without explicitly rescoring the proposals. For example, in *Jack Faucett Assoc., Request for Reworks*, Comp. Gen. Dec. B-233224.2, 89-1 CPD ¶ 551, the contracting officer properly awarded the contract to the low priced offeror after concluding that Faucett's higher price offer, with a technical score of 8.56 out of 10 points, was substantially equal to the lower priced offeror's technical score of 8.24. In *Systems Integrated*, Comp. Gen. Dec. B-225055.87-1 CPD ¶ 114, the low priced awardee's technical score of 66.7 out of 80 points was properly considered by the contracting officer to be equal to the 68.1 technical score of the higher priced offer.

Such a determination of equality has also been supported in a case where the RFP called for precise numerical scores for technical and cost factors and stated that award would be made to the offeror with the highest number of points. The Comptroller stated that the source selection official would not have been permitted to alter the cost/technical tradeoff announced in the RFP but was entitled to rescure the proposals by determining that the technical proposals were equal. *Harrison Sys., Ltd.*, 63 Comp. Gen. 379 (B-212675), 84-1 CPD ¶ 572. Accord *Crowley Maritime Salvage*, Comp. Gen. Dec. B-234555, 89-1 CPD ¶ 555.

The Comptroller has permitted determinations of equality even though the technical factors are weighted more heavily than cost. *F.J. Richardson Assoc., Inc.*, Comp. Gen. Dec. B-250951, 93-1 CPD ¶ 185 (technical scores of 93.3 and 90.0 found substantially equal when technical factor "slightly more important" than cost); *WB, Inc.*, Comp. Gen. Dec. B-250954, 93-1 CPD ¶ 173 (technical scores of 88 and 87 found essentially equal when technical factor was "primary" and price/cost was "least important"); *Systems Research Corp.*, Comp. Gen. Dec. B-237008, 90-1 CPD ¶ 106 (technical scores of 48.15 and 54.63 found equal where technical factors had weight of 60%); *DDI, Onni Eng'g & Corp.*, Comp. Gen. Dec. B-220075, 85-2 CPD ¶ 684 (technical scores of 6.61 and 6.96 found equal where the technical score was "of paramount importance" but variable).

A frequently upheld reason for finding equality of technical scores is where technical evaluators can give no cogent reasons explaining the technical point differential between two proposals. This was permitted in *DLM&A, Inc. v. United States*, 6 Cl. Ct. 329 (1984), where the selection official determined on this basis that the proposals were "substantially equal" and, therefore, awarded to the low cost proposal.

altering the technical scores. The Comptroller approved this intervention into the selection process finding that the director properly concluded that the awardee's proposal was actually technically superior because the level of effort in the protester's proposal deviated significantly from the RFP's estimated level of effort. In *NKF Eng'g, Inc.*, Comp. Gen. Dec. B-232143, 88-2 CPD ¶ 497, the Comptroller found that the contracting officer properly considered the protester's score an exaggeration of its technical superiority because the evaluation committee did not consider relevant factors in management and employee transition when giving the scores. Implicit rescoring is not sound practice and should be avoided. When the source selection official concludes that rescoring is necessary, the contract file should contain a clear indication of the rescoring that has occurred and the justification for that rescoring.

IV. DETERMINATIONS OF EQUALITY IN SCORING

As a result of the power to rescure proposals, source selection officials have the authority to decide that the differences in scores are insignificant and, as such, determine the proposals to be equal. A wide amount of discretion is allowed in making these determinations of equality. A finding of cost equality was upheld, for instance, in *Sun Ship, Inc. v. Hidalgo*, 484 F. Supp. 1356, 1367-70 (D.D.C. 1980), where the technical proposals were scored the same and the cost proposals were as follows:

Proposal	Proposed Cost	Government Estimate
A	\$102.81M	\$116.323M
B	\$107.153M	\$121.434M

On the basis of this finding of equality of cost, despite a \$5 million difference, the source selection official was permitted to use "tie-breaker" criteria, which were not included in the RFP, to make the source selection decision.

When RFPs allow for cost/technical tradeoffs, contracting officers often determine that technical scores are equal, allowing contracts to be awarded to the lower cost offeror. In *Verify, Inc.*, 71 Comp. Gen. 158 (B-244401.2), 92-1 CPD ¶ 107, for example, the contracting personnel and evaluators agreed that the original technical scores given to Verify were an overstatement of merit and that rescoring was necessary to achieve accuracy. The final score given by the contracting officer was actually lower than the original score and

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¶ 465, the Comptroller found an award to a higher technically rated, higher price firm to have been improper where the awardee's offer was scored only eight points higher than the protester's proposal (on a scale of 100 possible points), but the awardee's proposed price was more than 50% higher and the record contained no justification for paying a much greater cost for a proposal only slightly better in terms of quality. See also *Bell Technical Prods. Group*, Comp. Gen. Dec. B-224394, 86-2 CPD ¶ 465, where it was held improper to award to an offeror with an "excellent" technical proposal when its price was 53% higher than another offeror with an "acceptable" technical proposal. It appears that protests were sustained in these cases because the agency did not present detailed evaluations of the technical benefits that justified paying the higher prices.

Selection of a lower priced proposal is justified if the source selection official determines that the technical and management benefits offered by the high priced offeror are not worth the higher cost. See, for example, *United Eng'g & Constructors, Inc.*, Comp. Gen. Dec. B-240691, 90-2 CPD ¶ 490, where the Comptroller agreed with a decision to award to an offeror that was \$11 million lower in probable cost even though a competitor had submitted a clearly superior technical and management proposal. The RFP had stated that management and technical factors were more important than cost but that award would be made to the most advantageous proposal. The Comptroller stated:

If [even if cost is the least important evaluation criterion, an agency may properly award to a lower-cost, lower-scored offeror if it determines that the cost premium involved in awarding to a higher-rated, higher-cost offeror is not justified given the acceptable level of technical competence available at the lower cost. *Carrier Joint Venture*, B-233702, Mar. 13, 1989, 89-1 CPD ¶ 248, *aff'd*, B-233702.2, June 23, 1989, 89-1 CPD ¶ 394. The determining element is not the difference in technical merit, *per se*, but the contracting agency's judgment concerning the significance of the difference. *Dayton T. Brown, Inc.*, B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation criteria.

Similarly, in *Ecology & Env't, Inc.*, Comp. Gen. Dec. B-209516, 83-2 CPD ¶ 229, the Comptroller held that a selection official, finding a particular percentage differential in technical scores insignificant, was not compelled to find a lower percentage cost differential insignificant, stating: "Contracting agencies generally need a degree of discretion in weighing the significance of the relationship between technical scores and cost differentials, and reserve

to themselves such discretion by not including rigid evaluation formulas in the RFP." See also *Training & Management Resources, Inc.*, Comp. Gen. Dec. B-220965, 86-1 CPD ¶ 244, permitting a selection based on a qualitative judgment when the protester had the lowest price and the proposals were technically equal; *Wyle Lab., Inc.*, 69 Comp. Gen. 648 (B-239113), 90-2 CPD ¶ 107, finding reasonable a determination that the difference in technical merit was not worth the difference in price; and *ERC Envtl. & Energy Servs. Co.*, Comp. Gen. Dec. B-241549, 91-1 CPD ¶ 155, holding that an award to the low cost proposal was rational when the difference in price was significant and the difference in technical factors was relatively small.

Award to a lower priced offeror will be overturned if the source selection official cannot state a reasonable basis for giving up the technical benefits offered by the higher priced, technically superior offeror. For instance, *Dewberry & Davis*, Comp. Gen. Dec. B-247116, 92-1 CPD ¶ 421, a protest was sustained because the agency did not provide justification of its selection of the lower priced proposal where the RFP had stated that technical was more important than cost. The Comptroller stated that it would uphold such a decision only if the agency provided a "cogent rationale" in the documentation for such a decision. Similarly, in *PharmChem Lab., Inc.*, Comp. Gen. Dec. B-244385, 91-2 CPD ¶ 317, the Comptroller sustained a protest where the source selection official had determined two technical proposals equal and awarded to the low cost offeror in the face of evaluations indicating that the high cost offeror was clearly superior. The Comptroller reasoned that the small difference in cost was not worth the difference in technical merit and recommended award to the high cost, technically superior offeror. See also *Haital & Assoc.*, 70 Comp. Gen. 632 (B-243357), 91-2 CPD ¶ 90, where an award was overturned because it was made to a lower cost offeror when the two competitors were both determined to be "technically acceptable." The Comptroller stated at 637:

When an RFP provides that the technical factors will be considered more important than cost, a procuring agency may not make its award decision as though the RFP provided for award to the lowest cost, technically acceptable offeror. *RCA Serv. Co.*, B-219406.2, Sept. 10, 1986, 86-2 CPD ¶ 278. It is improper for an agency to induce an offeror to prepare and submit a proposal emphasizing technical excellence, then fail to consider technical factors and award solely on the basis of cost. Such action clearly disregards the RFP's evaluation criteria. . . . *Kepler-Rouman Int'l.*, B-220772, Feb. 4, 1986, 86-1 CPD ¶ 127; *Applied Financial Analysis, Ltd.*, B-194388.2, Aug. 10, 1979, 79-2 CPD ¶ 113.

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