



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DECISION FOR PUBLIC RELEASE

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Matter of: Mary Jo McDonough

File: B-270530; B-270530.2

Date: March 13, 1996

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Anna Chytla, Esq., U.S. Agency for International Development, for the agency.
Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement for personal services contract, the contracting agency's technical evaluation and scoring of competing applicants' resumes and qualifications has not been shown to be unreasonable where its scoring in two technical areas was reasonable and the remaining arguments and assumptions of the protester, ranked third of three applicants, would not displace the second-ranked applicant as eligible for award ahead of the protester.

DECISION

Mary Jo McDonough, the incumbent, protests the award of a personal services contract (PSC) to [deleted] under an unnumbered job announcement issued by the U.S. Agency for International Development (AID) for a program and communications specialist in Jakarta, Indonesia.¹ The protester principally argues that the agency violated its own hiring freeze, which, properly enforced, would have mandated a sole-source extension of the protester's contract; that the agency failed

¹The PSC is a contract that creates an employer-employee relationship between the agency and the contractor. See Federal Acquisition Regulation (FAR) § 37.101. Under an AID PSC for services abroad, the agency pays a portion of the contractor's health and life insurance, pays lodging and living allowances under specified circumstances, provides health rooms, and grants sick and annual leave, which is accrued on the same basis as government employees. The contractor is also eligible to receive benefits from injury, disability or death under the Federal Employees' Compensation Act administered by the Department of Labor. See AID Acquisition Regulation (AIDAR), 48 C.F.R. Ch. 7, App. D (1994). The position solicited here was limited to dependents of United States government employees.

to follow the "solicitation's" evaluation criteria; that the agency applied undisclosed requirements and evaluation criteria in selecting [deleted]; and that the agency otherwise misevaluated the qualifications of the PSC applicants.

We deny the protest.

STATUTORY AND REGULATORY BACKGROUND

Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2396(a)(3) (1994), authorizes AID to contract with individuals for personal services abroad. This statutory authority is generally implemented by provisions found in the AIDAR, 48 C.F.R. § Ch. 7, App. D. Section 5(c) of the AIDAR, App. D states:

"[PSCs] are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

- (i) offers are to be requested from as many potential offerors as is practicable under the circumstances. . . ."

While the applicable statutory and regulatory provisions envision the use of procurement contracts for the services in question,² and although 22 U.S.C. § 2396(c)(3) provides that individuals awarded personal services contracts "shall not be regarded as employees of the United States Government for the purpose of any law administered by the [Office of Personnel Management]," the regulations recognize that PSCs create essentially an employer-employee relationship, placing the individual under direct supervision of government employees. App. D, section 1(b)(1). The AIDAR, App. D, section 6 also states that "[n]egotiating a [PSC] is significantly different from negotiating a nonpersonal services contract because it establishes an employer-employee relationship; therefore, the selection procedures are more akin to the personal selection procedures."

In this regard, the agency's Project Officer prepares a written statement of duties and a statement of minimum qualifications for the position. This statement is incorporated into a procurement request, which is designated as a Project Implementation Order/Technical Services (PIO/T). Additionally, the PIO/T contains, among other things, the foreign location of the job, the length of the contract, and the basic education, training, experience, and skills required for the position. The contracting officer prepares a solicitation, which contains generally SF171s and

²Our Office thus has jurisdiction over this protest as it concerns a contract for the procurement of services. See 31 U.S.C. § 3551(1) (1994); FAR § 37.104.

SF171As, a detailed statement of duties or a completed position description for the position, and a copy of the prescribed contract cover page, schedule, and general provisions. The job announcement is then issued by the contracting officer, and resumes are received. Award of the PSC is strictly based on technical qualifications, not price. AIDAR, App. D, section 5(c)(3). The project officer is responsible for reviewing and evaluating the applications and, if deemed appropriate, may interview the applicants before submitting his selection of the successful candidate to the contracting officer. AIDAR, App. D, section 6(a). The contracting officer subsequently negotiates a fair and reasonable salary with the successful applicant, as previously selected by the project officer, based on the applicant's salary history. AIDAR, App. D, section 6(b). These procedures were generally followed here.

FACTUAL BACKGROUND

Ms. McDonough is the spouse of an employee of the United States Embassy in Jakarta. Her incumbent contract expired September 30, 1995. Previously, on July 3, 1995, AID imposed a freeze on personnel hiring in Washington, D.C. and abroad (the freeze included civil servants and PSCs). Under the terms of the freeze, Mission Directors (such as the one in Jakarta) were authorized to permit exceptions to the freeze. Extensions of contracts like Ms. McDonough's PSC were permitted under the freezes; however, new PSCs could only be awarded if the Mission Director authorized an exception to the freeze.

On August 1, the agency's Program and Project Support (PPS) Office requested an exception to the freeze to recomplete this position because this

"position will differ significantly from the previous scope [inasmuch] as half the contractor's effort will focus on a new activity: the design, conduct, and assessment of the Mission's first annual 'Customer Survey' [which will require] strong skills in survey design, interpretation and data manipulation [which were not previously required]."

The Mission Director authorized PPS to proceed with the competition. At that time, Ms. McDonough was so advised.

On August 2, the agency published a notice of employment opportunity which described the following duties:

"(1) prepare public information on Mission activities and coordinate with various offices of the United States Government as well as the offices of the Indonesian Government;

(2) design, conduct, and analyze the first annual USAID/Indonesia customer survey; and

(3) manage and coordinate Mission-wide performance-based monitoring systems with tracks, benchmarks and progress indicators of the program's strategic objectives and related results packages."³

Additionally, the notice described the minimum qualifications for the position, including: (1) skills and knowledge (documented ability to edit and write summaries of technical reports in fluent English, command of Wordperfect and LOTUS 123 spreadsheet software); (2) prior work experience (three or more years of professional work experience in positions requiring extensive writing, data collection, and analysis for the consumption of technical and managerial personnel and the public); and (3) academic training (an undergraduate degree in a relevant field).⁴

Five applications were received. On September 12, the Dependent Employment Committee (DEC) interviewed all candidates. DEC is an informal committee consisting of AID and Department of State employees and has no contracting or hiring authority. DEC found that all candidates met minimum requirements, but ranked, without scoring, the top three applicants as Ms. McDonough, [deleted], and [deleted], respectively.⁵ Subsequently in September, the agency created a technical evaluation committee (TEC) composed of three individuals who reviewed the

³The employment notice also contained other duties that could be assigned to the successful applicant, including program backstop for the Office of Human and Institutional Resource Development, and to assist the Women in Development and Evaluation Officer. This list of duties was not intended to be exhaustive.

⁴Although the agency's PIO/T contained the length of the contract (12 months--starting approximately September 30, 1995), the employment notice itself did not specify the period of the PSC. The agency states that Ms. McDonough knew at this time that AID contemplated awarding a contract for the full 12-month period. Ms. McDonough was scheduled to definitely leave Jakarta in June 1996 (approximately 3 months before the new PSC would expire) and states that she was not aware or made aware by the agency that her shorter job availability would be a detriment in any way to her securing the position.

⁵The DEC noted that Ms. McDonough's "scheduled departure from post in less than 12 months is a disadvantage for long-term continuity, but she has the advantage of knowledge already acquired of PPS specifically and USAID [which should put her in the] best position to be able to carry out the survey project by the stipulated deadline of April 1." [Deleted]

applications, interviewed the applicants and then evaluated them on a numerical scoring basis.⁶

The initial evaluation encompassed skills and knowledge ([deleted] points out of a possible [deleted] points), prior work experience ([deleted] points), academic training ([deleted]), and language abilities ([deleted] points). The TEC ranked the applicants as follows: (1) [deleted] ([deleted] points); (2) Ms. McDonough ([deleted] points); and (3) [deleted] ([deleted] points). During a second, revised evaluation shortly thereafter, the TEC, at the request of the contracting officer, added and evaluated another criterion, availability for a 12-month contract, which was worth an additional [deleted] points. The latter criterion was not evaluated as a go/no go factor, but as one of the several relative and comparative evaluation factors to be weighed and scored. The final rankings for the second evaluation were as follows: (1) [deleted] ([deleted] points out of a possible [deleted] points); (2) [deleted] ([deleted] points); and (3) Ms. McDonough ([deleted] points). The agency awarded the PSC to [deleted] on September 30, 1995. This protest to our Office followed an agency-level protest filed with AID by Ms. McDonough.

HIRING FREEZE

The protester argues that the agency violated the personnel freeze and wrote a justification for an exception "that does not withstand even cursory analysis." For example, the protester argues that the hiring freeze was based on a budget crisis that the agency described as "so much more severe than we expected [that] even those exceptions [previously granted] must cease." Also, the protester contends that the agency completely failed to adequately document the request for exception to reflect the "severe negative impact" on the agency that would result if the exception were not granted. The protester also states that competing this contract "costs more than renewing an existing one," especially since the successful

⁶We will limit our discussion to the evaluation of the three top applicants.

contractor's salary here was ultimately negotiated at a salary rate [deleted] higher than the protester's incumbent salary.⁷

The basic thrust of the protester's arguments is that her contract should have been extended on a sole-source basis. However, we will not generally question an agency's decision to procure services competitively rather than to obtain them on a sole-source basis since the objective of our bid protest function is to ensure competition for government contracts. See generally Sentinel Elecs., Inc., B-212770, Dec. 20, 1983, 84-1 CPD ¶ 5. We also think that a general agency hiring freeze (applicable, as here, to agency civil servants and PSCs) and any exceptions to such a hiring freeze are matters of executive policy within the agency's discretion and do not constitute a procurement issue cognizable under our bid protest function. See American Airlines, Inc., B-258271, Dec. 29, 1994, 95-1 CPD ¶ 5.

EVALUATION OF RESUMES

As stated above, the protester was third ranked in the final selection results. In her protest submissions, the protester challenges the agency's evaluation of the qualifications of both the top-ranked candidate, [deleted], and the second-ranked candidate, [deleted]. The protester has submitted to our Office specific adjustments to the TEC's scoring (lowering [deleted] and [deleted] numerical technical scores and raising the protester's numerical technical scores in specific areas) that she believes would correct the agency's allegedly improper and erroneous scoring. In this regard, the record shows that the agency, along with the protester, considered and treated the technical scoring results as dispositive for the selection decision. Neither the protester nor the agency argues that the rankings based on the technical

⁷The protester also argues that the agency did not have funds to pay the successful applicant's salary based on the fact that [deleted] contract, as awarded, shows only \$46,388 obligated, while the total contract price was [deleted]. The contracting officer states that he obligated only fiscal year 1995 budget funds since the contract was signed in that year and the remainder would be funded by 1996 fiscal year funds. The agency also states that this type of incremental funding is common. Although the protester argues that there is no 1996 fiscal year budget in effect, the agency has been operating under a continuing resolution for 1996 fiscal year which provides funding for that year.

scoring should not control the selection decision.⁸ Consequently, we need only resolve the reasonableness of the agency's scoring in two specific evaluation areas to determine that the protester is not in line for award regardless of all her other arguments.

First, the protester contends that scoring for experience should have placed her ahead of any candidate. She notes that the DEC, which ranked her first, stated:

"Ms. McDonough was top-ranked [because] she already is performing several job elements successfully and has the necessary background in survey design, data collection and analysis to take on the customer survey recently added as the top priority for this position over the next six months."

Based solely on her examination of the resumes (written submissions) of the other candidates and the scoring sheets obtained when she received the agency report on her first protest, the protester claimed that "[deleted] has very little experience with data survey and manipulation, and [deleted] has less." In fact, the record shows that the TEC rated Ms. McDonough the highest in this evaluation area ([deleted] out of [deleted] points); [deleted] received [deleted] points; and [deleted] received ([deleted] points). Further, contrary to the protester's assumptions, the TEC's evaluation was not limited to the written submission of candidates. The TEC interviewed in depth each candidate concerning, among other things, the candidates' writing, analytical, and data collection skills. The agency states as follows with respect to these interviews:

"Ms. McDonough did have certain strengths, such as prior survey and [AID] experience. But the other candidates also had exceptional professional experience which was comparable to Ms. McDonough's. . . . [deleted] explained during [deleted] interview that [deleted] was performing an extensive national survey [deleted]. [Deleted] also confirmed to the Committee during [deleted] interview that over the past [deleted] requiring the assessment of customers' viewpoints. . . . This experience included survey work for [AID] overseas."

Because of her alleged superiority in prior work experience, the protester requests that we adjust the TEC's scoring and award her an additional [deleted] technical evaluation points, [deleted] from one evaluator and [deleted] from another. In this regard, the protester contends that she could have furnished the TEC with

⁸The TEC did prepare short narrative support for the scores it awarded to each candidate. The agency, however, relies only on the reasonableness of the scoring, as reflected in the evaluation record, to support its selection decision.

numerous other customer surveys, in addition to the information she provided to the TEC, but was told by the TEC not to do so. We think the agency's scoring was reasonable. Despite the protester's admitted strengths in conducting surveys (prior experience), the protester has offered nothing to rebut the findings by the TEC, based on the interviews which the protester did not attend, that the other candidates had similar and comparable experience. Since the protester received the highest score in this area, and since the agency has shown that the other candidates also had comparable experience, we see no reason to disturb the agency's scoring and findings, which rated the other applicants below the protester in this area but at a comparable level nonetheless.⁹

Second, the protester argues that in the evaluation area of academic training [deleted] score from one evaluator of [deleted] points out of [deleted] points should be reduced to 14 points because the protester claims that the agency used undisclosed criteria in evaluating the candidates by giving credit for academic degrees that were not directly relevant to the PSC position.¹⁰ [Deleted] resume showed the following academic training:

[Deleted]

[Deleted]

[Deleted]

In comparison, Ms. McDonough's resume showed the following academic training:

"B.A. English Literature, Vassar College
M.B.A. Management Science, University of Rhode Island
Hindi, 24 weeks, Foreign Service Institute
South Asian Studies, 4 weeks, Foreign Service Institute
Bahasa Indonesia, 24 weeks, Foreign Service Institute
Southeast Asian Studies, Foreign Service Institute"

⁹There was also a LOTUS test given during the interviews, but the record does not show that the results of this test (with only a [deleted]-point difference between the candidates) had any determinative effect on the overall selection decision.

¹⁰According to the protester, "[b]oth [deleted] and [deleted] were given improper credit for [deleted] by [deleted]. . . . Accordingly the scores for these two individuals must be reduced by the amount of the improper credit (in this case, [deleted] points each)."

The agency, in its evaluation scoring sheets, evaluated, in addition to "relevant" graduate and undergraduate degrees, each candidate's "undergraduate degree in nonrelevant field," and gave [deleted] [deleted] points for [deleted]. The protester disputes this because the agency itself, on the scoring sheets, categorized the [deleted] as a "nonrelevant field." We think that, whatever terminology is employed, the agency's evaluation here of a candidate's [deleted] was rational and relevant to the evaluation for a position requiring extensive written English. In this regard, the protester states that if she had been on notice from the solicitation that [deleted] would be evaluated, she would have advised the TEC that she possessed a minor in mathematics. However, we find that a reasonable candidate applying for a competitive position requiring, among other things, extensive data and survey work would, on her own initiative, list all educational qualifications she possesses, including especially any mathematical academic training. The protester's failure to do so, in our view, was solely her responsibility.

The protester also complains that one evaluator valued the [deleted] degree of [deleted] as more valuable than the [deleted] of Ms. McDonough from the University of Rhode Island. The short answer is that since different people and experts can reasonably agree or disagree as to the eminence or value of different university degrees, we will not disturb the scoring or the award on this basis in the absence of a showing that it was unreasonable.

Finally, the protester insists that there should never have been any evaluation of 12-month availability or language ability as evaluation criteria because they were not listed in the job announcement. For purposes of this decision, we accept the protester's arguments. However, given our finding as to the reasonableness of the agency's scoring on prior experience and academic training, and given no other challenge by the protester to [deleted] scoring and ranking, the record shows that even if we eliminate, as requested by the protester, the 12-month availability and language ability as criteria for selection, the protester would still not be in line for award. Rather, under the protester's arguments and assumptions, the record shows that [deleted] would be in line for award. We therefore see no useful purpose to be served by considering the protester's additional arguments concerning the agency's evaluation or [deleted] selection. See Dimensions Travel Co., B-224214, Jan. 13, 1987, 87-1 CPD ¶ 52.

The protest is denied.

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of the United States