



It's The Law

Office of the Assistant General Counsel for Finance and Litigation

Federal Assistance Law Division

Vol 2

March 21, 1995

Selection Procedures for Discretionary Grant Programs

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The origin of the requirement to seek competition in the award of grants and cooperative agreements is a little less clear in the Federal assistance arena than it is for government contracts. Indeed, it is the opinion of some of our clients that there is no competition requirement for grants. It is true that the Competition in Contracting Act mandates (with limited exceptions) competition for procurement contracts but does not apply to the award of grants and cooperative agreements. In addition, contractors have many forums within which to “protest” noncompetitive awards.

The Federal Grant and Cooperative Agreement Act *encourages*, but does not mandate, competition. 31 U.S.C. §6301(3). Grantees do not enjoy the same protest rights made available to contractors. The General Accounting Office (GAO) will only entertain protests of grant awards when the protest claims the agency acted in “bad faith” or that the awards should have been a procurement contract. (*Washington State Department of Transportation*, B-193600 (1979); *Burgos & Assoc., Inc.*, 58 Comp. Gen. 785 (1979). Federal courts have entertained suits challenging

agency decisions under the Administrative Procedure Act (APA) based upon claims they are contrary to law and regulation or “arbitrary and capricious” under 5 U.S.C. § 706(2), or assertions that the applicant’s Constitutionally protected “due process” rights have been violated (U.S. Const. amend V). See *Fordham University v. Brown*, No. 93-2120 (CRR) (D.D.C. June 29, 1994), *appeal docketed*, No. 94-5229 (D.C. Cir. Aug. 22, 1994). Because grantees can only challenge the propriety of a grant award in limited circumstances, most case law advising on how to obtain “full and open” competition relates to procurements, not grants. As you will see, we rely on these decisions for guidance on how to conduct a competitive assistance program.

The Department of Commerce (DOC), along with most agencies, established a policy that DOC discretionary grant program awards shall be made on the basis of competitive review. Department Administrative Order (DAO) 203-26 §4.02.h. We look to the guidance provided in DAO 203-26 on how to structure a competitive grant program.

We look to the Comptroller General opinions and Federal court cases for guidance on how to structure the competition to ensure “full and open” competition.

The Department of Commerce (DOC) established a policy of DOC discretionary grant program awards shall be made on the basis of competitive review. DAO 203-26 § 4.02.h. Two of the minimum requirements under DAO 203-26 provide that applications be treated fairly, and that each review panel use the selection criteria that apply to the program covered by the application notice. DAO 203-26 § 4.02.h.1.(b) and (e). The following paragraphs discuss ways to help ensure that applications are treated fairly under the review process.

Pursuant to DAO 203-26 § 4.02.b, each discretionary grant program must publish, at least annually, in the *Federal Register* the basic information for each discretionary grant program. In a competitive review program, an application should be reviewed *only* when it is submitted pursuant to a request for proposals published in the *Federal Register*, or other publication used by the program. DAO 203-26 §4.02.h.1.(a).

Initially, a selection plan and solicitation language must be developed. This selection plan will guide applicants in structuring their proposals and also serves to inform applicants about funding priorities, evaluation criteria, and the relative weight of each criterion. The Comptroller General advises that applicants should be advised of the evaluation factors to be used and the relative importance of those factors. See *Signatron, Inc.*, 54 Comp. Gen. 530, 535

(1974). With regard to evaluation subfactors, the Comptroller General has held that the relative weights of subfactors need not be disclosed so long as subfactors are “definitively descriptive” of the principal evaluation criteria whose relative weight has been disclosed. See *AEL Service Corp.*, 53 Comp. Gen. 800 (1974). However, under the recently enacted Federal Acquisition Streamlining Act, P.L. 103-355, agencies must now list “significant” subfactors as well as significant factors for procurements.

The selection process should prescribe scoring methods so that each proposal can be compared to the evaluation criteria and rated in comparison with other proposals. The method of comparison need only have a rational basis and be applied in a consistent manner. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976). The agency is given discretion in choosing how to score the proposals, and such discretion will not be disturbed absent a showing of arbitrariness or violation of a statute or regulation. *Pacific Consultants, Inc.*, Comp. Gen. Dec. B-198706 (1980).

A system of objective scoring is not necessary. Also, the disclosure of precise numerical weight to be used in the evaluation process is not required. 50 Comp. Gen. 565, 575 (1971). There are mixed views on whether such scoring is, in fact, more objective. The Comptroller General has approved of agencies implementing a numerical scoring system to rate proposals for government contracts. *Shapell Government Housing, Inc.* 55 Comp. Gen. 839 (1976). It is often argued, however, that objective scoring systems often lead to distorted

results and is not anymore “objective” than use of adjectival ratings.

The Comptroller General recognizes that adjectival rating systems “may be a more direct and meaningful method” than numerical scoring, provided that the evaluation criteria aid the program in evaluating the merits of a proposal. *Maximus*, Comp. Gen. Dec. B-195806 (1981). The Comptroller General has approved the use of adjective rating systems, provided that neither the regulations nor any internal agency policy basis of numerical scores. *Metropolitan Contract Services, Inc.*, Comp. Gen. Dec. B-91162, *aff’d on reconsider.* (1978). The use of numerical point scores to rate proposals often times is nothing more than an attempt to quantify what is essentially a subjective judgment. *Didactic Systems, Inc.*, Comp. Gen. Dec. B-190507 (1978). Therefore, an adjective scoring system may be used as long as the program does not have any regulations or internal agency policy which precludes it from using an adjective scoring system.

As part of the competitive selection process, the program must ensure that each application receives an “independent, objective review by one or more review panels qualified to evaluate the applications submitted under the program.” DAO 203-26 § 4.02h.1. (c). What is vitally important when the panelists review the proposals is that the evaluation criteria are clear and that the panelists understand and apply them consistently. With regard to evaluation criteria in the area of government contracts, the Comptroller General requires that offerors be informed of the broad scheme of scoring to be used and the method for distributing weights. 50

Comp. Gen. 390, 411-412 (1970). The Comptroller General does not require that an agency disclose precise numerical weights. 56 Comp. Gen. 835 (1977). We apply these same principles to the competitive selection procedures for assistance programs to ensure fair competition. The *Federal Register* notice or regulation and the evaluation sheets provided to the panelists must contain the specific evaluation criteria and the relative importance assigned to each of those criteria. The evaluation criteria must be the same as that contained in the rule.

The panelists’ discretion is described in the notice of availability of funds. Just as a procuring agency has great discretion in selecting evaluation factors for evaluating government contract proposals, the Comptroller General will not disturb the evaluation of those factors absent a finding that the degree of discretion exercised in evaluating the proposals was arbitrary or capricious. *Buffalo Organization for Social and Technological Innovation, Inc.*, Comp. Gen. Dec. B-196279 (1980).

Based on the panelists’ evaluations, the program must prepare a rank ordering of the applications. DAO 203-26h.1.(e). This rank ordering will be presented to the selecting official. The selecting official is given a great deal of discretion in making the final selection. In the area of government contracts, an award will not be overturned unless there is no “rational basis” for the decision, or if the published evaluation criteria are not adhered to. *See* 51 Comp. Gen. 272 (1971). One court has indicated that a decision would be without a rational basis if “there is no rational basis in applicable law” or if the official has

exercised his discretion “in an abusive, unlawful or irrational manner.” *Rudolph F. Matzer & Associates v. Warner*, 348 F. Supp. 991 (M.D. Fla. 1972).

Often the rankings are provided to a selecting official which may be the Director of the Program or an Assistant Secretary. The selecting official is not bound by the rankings, ratings, or scores of the reviewers, so long as he has a rational basis for the differing evaluation. The Comptroller General recognizes that point scores, narratives, and adjective ratings may well indicate technical superiority of one proposal over another, and should be considered by the selecting official, but selecting officials are not bound by the recommendations made by evaluation and advisory groups. *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975). If the selecting official wishes to retain certain discretion, that discretion must be reserved and provided for in the *Federal Register* notice or regulation. Generally such discretion is reserved for the funding priorities for that year, geographical disbursement, or availability of funds. When a selection is made out of the rank ordering, the basis for that decision should be documented by the selecting official and maintained by the grants officer. This will be the supporting documentation for the award. This provides an adequate administrative record in support of the agency’s decision to make that award should a disgruntled applicant decide to challenge the award before the GAO or in Federal court.