



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: OMNIPLEX World Services Corporation--Reconsideration and Protest

File: B-278105.2; B-278105.3

Date: November 13, 1997

Katherine S. Nucci, Esq., Timothy Sullivan, Esq., and Martin R. Fischer, Esq., Adduci, Mastriani & Schaumberg, L.L.P., for the protester. Stuart B. Nibley, Esq., Trisa J. Thompson, Esq., Fredric S. Singerman, Esq., and Ronald L. Sigworth, Esq., Seyfarth, Shaw, Fairweather & Geraldson, an intervenor. Philip Luci, Jr., Esq., Central Intelligence Agency, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of dismissal of earlier protest on the basis that the protester is not an interested party is denied where the protester's proposed and evaluated costs exceeded the available funding for this project, and the proposed and evaluated costs of at least one other eligible offeror are below the funding limitation.
 2. Contention that agency was required to alert offerors to the presence of a limitation on available funding is denied as there is no requirement for agencies to reveal budgetary information in solicitations.
-

DECISION

OMNIPLEX World Services Corporation requests reconsideration of our dismissal of its protest challenging award of a contract to HRB Systems, Inc. pursuant to request for proposals (RFP) No. 97-W004, issued by the Central Intelligence Agency (CIA) to support its Records Declassification Program. OMNIPLEX argues that our Office wrongly concluded that it was not an interested party to challenge the award to HRB. In addition to asking reconsideration of our earlier decision, OMNIPLEX also contends that the CIA improperly failed to disclose in the solicitation the amount of the funding limitation that OMNIPLEX exceeded in its initial proposal.

We deny the request for reconsideration and the protest.

Our Office dismissed OMNIPLEX's initial protest after the CIA explained that it had a fixed amount budgeted for the Records Declassification Program, and that the evaluated costs of four of the seven proposals received--including the proposal submitted by OMNIPLEX--exceeded the amount funded. Since there were three

eligible offerors whose proposals were within the funding limitation for this effort, we concluded that OMNIPLEX lacked the requisite economic interest to pursue its protest. See Eagle Mktg. Group, B-242527, May 13, 1991, 91-1 CPD ¶ 459 at 2-3 (protester found to be an interested party despite the fact that its price exceeded available funds because there were no other offerors eligible for award other than the awardee and the protester would be eligible to participate in a resolicitation if its protest was upheld); Consolidated Constr., Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529 at 3 (same).

OMNIPLEX requests reconsideration of our dismissal of its protest on the basis that its protest challenged the acceptability of two of the three proposals with evaluated costs beneath the funding limitation, and that the CIA's request for dismissal did not clearly establish that the remaining offeror was eligible for award.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(a) (1994) and our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1997), a protester must qualify as an interested party in order to have its protest considered by our Office. An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a). Determining whether a party is sufficiently interested to maintain a bid protest involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Seas and Seven Winds Travel, Inc., B-244916, Nov. 15, 1991, 91-2 CPD ¶ 463 at 3.

In our view, OMNIPLEX's economic interest in this procurement is too remote to support a bid protest under our interested party requirements. We reach this conclusion for the reasons set forth below.

In its initial protest filed with our Office on September 19, 1997, OMNIPLEX challenged the evaluation of both its own proposal and the proposal submitted by the awardee, HRB. Of particular relevance here, OMNIPLEX argued that the CIA had failed to perform a reasonable cost realism review of HRB's proposed costs because HRB had been permitted to improperly classify its employees as independent contractors. As a result, OMNIPLEX argued, the CIA wrongly permitted HRB to bypass payment of statutory taxes and insurance, and fringe benefits.

On October 3, the agency requested dismissal of the protest on the basis that OMNIPLEX was not an interested party because OMNIPLEX was not next in line for award even if its challenge to the evaluation of HRB's proposal were successful, and because OMNIPLEX's proposed costs exceeded the funding available for the Records Declassification Program. OMNIPLEX was not next in line for award because another offeror--referred to by the agency as "offeror A"--was rated second in overall value, and had lower proposed costs than HRB. In addition, the CIA

explained that, unlike HRB, offeror A's proposed costs were based on using its own employees. Further, the agency explained that there was another offeror--referred to as "offeror B"--whose proposal was under the funding limitation. Thus, the CIA contended that with three proposals under the funding limitation, OMNIPLEX lacked the direct economic interest necessary to pursue this protest.

On October 10, OMNIPLEX amended its bid protest with two new issues: (1) it argued that the funding limitation in this procurement was a latent solicitation defect; and (2) it claimed, in essence, that offeror A could not possibly have complied with the solicitation using its own employees, while proposing lower costs than HRB and OMNIPLEX. On October 15, our Office dismissed the initial protest and one of the issues in the supplemental protest on the basis that OMNIPLEX is not an interested party. We agreed that OMNIPLEX could pursue its contention that the solicitation was defective for its failure to advise offerors of the funding limitation. This request for reconsideration followed.

Our conclusion that OMNIPLEX's economic interest in this procurement is too remote to support a bid protest is based on the multiple hurdles between OMNIPLEX and the award. In contrast to its detailed challenge to the awardee's evaluation, OMNIPLEX's challenge to offeror A's evaluation is very general in nature. In essence, OMNIPLEX appears to be arguing that if the awardee's proposed and evaluated costs were too low to adequately perform this effort--as OMNIPLEX argued in its initial protest--then offeror A's even lower proposed and evaluated costs are even more suspect. Moreover, even if OMNIPLEX prevailed in its cost realism challenges to the evaluation of both the awardee and offeror A, there would remain a third offeror, offeror B, in line for award with proposed and evaluated costs beneath the funding limitation.

Although OMNIPLEX contends that offeror B is ineligible for award without discussions because its proposal received an overall rating of marginal, we disagree. Under the evaluation scheme here, unacceptable proposals were to be rated unsatisfactory. The agency explains that although offeror B's proposal received a marginal rating and contained significant weaknesses, the proposal was "responsive from a technical/management perspective" and contained no deficiencies. Source Selection Authority Affidavit, Oct. 23, 1997 at 2. In short, we are unaware of any bar to an agency's decision to award to an offeror with a rating of marginal, and therefore we find no basis for OMNIPLEX's contention that the proposal was ineligible for award. The presence of offeror B--and the fact that, at this juncture, offeror B's "acceptable" proposal priced below the funding limitation appears closer in line for award than does OMNIPLEX's proposal--leads us to conclude that OMNIPLEX lacks the direct economic interest necessary to pursue a bid protest. 4 C.F.R. § 21.1(a); see Four Seas and Seven Winds Travel, Inc., *supra*. Accordingly, we deny the request for reconsideration.

With respect to the merits of OMNIPLEX's remaining protest issue, *i.e.*, that the solicitation was defective for failure to advise offerors of the funding limitation, we deny the protest. The pleadings here show that the agency had a 5-year funding limit for its Records Declassification Program. Three of the offerors submitted proposals with evaluated costs below this level; four submitted proposals with evaluated costs above it. In its supplemental protest on this issue, OMNIPLEX contends that "[b]y not fully informing offerors of the actual funding limitation, or at least of an estimated ceiling, the CIA misled offerors and deprived them of the opportunity to prepare proper, intelligent and fully-conforming proposals."¹ OMNIPLEX Supplemental Protest, Oct. 10, 1997, at 5.

To the extent that OMNIPLEX is arguing that the funding limitation here was an unstated evaluation factor, we have held that such limitations are not evaluation factors within the meaning of the Federal Acquisition Regulation. Energy and Env'tl. Research Corp., B-261422, B-261422.2, Aug. 23, 1995, 95-2 CPD ¶ 81 at 9. In addition, there is no requirement that an agency include budgetary information in a solicitation. Computer One, Inc.--Recon., B-249352.7, Sept. 27, 1993, 93-2 CPD ¶ 185 at 6; Charles Trimble Co., B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77 at 3. As in Trimble, the agency here has decided that its needs can be met within the amount budgeted, and the record shows that several offerors submitted initial proposals with proposed costs below the budgeted figure. *Id.* at 4.

The request for reconsideration and the protest are denied.

Comptroller General
of the United States

¹Despite this language, in its final reply to the agency request for summary dismissal or denial OMNIPLEX argues that it "is not contending that the CIA had a legal obligation to disclose its funding limitation in the RFP for, indeed, no such obligation is imposed on agencies." OMNIPLEX Reply to Agency Request for Dismissal, Oct. 29, 1997, at 15. Instead, OMNIPLEX argues that the RFP did not reflect the agency's true needs, which OMNIPLEX describes parenthetically as calling for "award to the best 'technically acceptable' offeror within a certain price ceiling." *Id.* In our view, this is no different from an assertion that agencies must include budgetary information, which OMNIPLEX concedes is not the case. Further, such limitations are inherent in every procurement, since all procurements are subject to some kind of budgetary ceiling.