

13847

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

[Protest of NIH Cost Reimbursement Limitation]

FILE: B-196353 DATE: May 29, 1980

MATTER OF: Stanford University

4721

DIGEST:

1. Protest filed before next closing date after protester knew contracting activity would insist upon allegedly restrictive requirement is timely. Earlier discussion of agency's policy was not sufficient to make protest untimely because protester was merely advised of policy never incorporated into solicitation, was asked to amend proposal, but was not told that compliance was mandatory.
2. Condition imposed after competitive range determination which confirmed decision to award multiple contracts to award to any firm which would agree to limit indirect costs for purposes of contract administration is not protestable. Limitation was applied uniformly to all offerors and no offeror's relative position vis-a-vis others was affected.

28 - Stanford University protests the refusal of the National Institutes of Health (NIH) to allow reimbursement of indirect costs exceeding eight percent of total direct costs in connection with the negotiation of a contract under RFP N01-CN-95433-05.

NIH proposed to award multiple contracts to develop courses on cancer prevention for nurse practitioners and physician assistants. Pointing out that it has customarily included notice of the eight percent limitation in NIH procurement contracts, NIH indicates that the eight percent restriction has been used as a matter of longstanding practice in grants and contracts with non-profit institutions where training projects were involved. Evidently a reflection of limited availability of training funds, the eight

112391

010563

percent rule has not been defended per se, and indeed, the Office of the Secretary of Health, Education, and Welfare (now Health and Human Services) evidently had since determined that the rule would not be applied to future procurements.

The eight percent limitation inadvertently was omitted from the solicitation in this instance. Instead, NIH states that all offerors initially found to be within the competitive range, including Stanford, were told of the eight percent rule and were asked to amend their proposals accordingly. Specifically, in addition to other deficiencies discussed, Stanford was advised that:

"The first three years of the proposed contract is for a training program. It is the policy of * * * NIH that indirect costs on training agreements be limited to the lesser of an institution's actual indirect costs or 8% of total direct cost. Your proposal includes an indirect cost rate of 45% [.] * * * Your proposal should be amended to reflect the correct indirect cost rate. (NOTE: For the option period the indirect cost rate proposed should be the appropriate rate contained in your latest [Department of Health, Education and Welfare] negotiation agreement.)"

The agency argues that Stanford's protest is untimely because it was not filed before the time permitted for proposal revision.

We disagree. Stanford did file its protest with NIH promptly after learning that "the limitation was absolute" during a visit of an NIH contract specialist at Stanford on August 22, 1979. It filed its protest with our Office on October 4, 1979, within ten working days after learning that NIH had denied its protest. In the circumstances, we do not believe Stanford was required to file earlier. NIH never amended its solicitation to require that offerors comply with the eight percent limitation. It merely advised the protester of

its policy, instead of clearly advising Stanford prior to August 22 that compliance was considered mandatory.

Having considered the nature of Stanford's complaint carefully, however, we have concluded that the propriety of the eight percent limitation is not a protestable issue. At least in context here, NIH did nothing more than impose a policy condition on its willingness to make awards. Having decided that it would award a contract to every firm within the competitive range, NIH insisted on agreement that for purposes of contract administration indirect costs in excess of eight percent of direct costs would not be reimbursable. The eight percent limitation, we understand, was applied uniformly to all offerors which submitted competitive proposals. No firm's relative standing vis-a-vis other firms was affected.

Stanford's protest is dismissed.



For the Comptroller General
of the United States