

Morrow - PL



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Arlington Public Schools

File: B-228518

Date: January 11, 1988

---

### DIGEST

1. When an agency has actual notice of the basis of protest and delivers its report in a timely fashion, the General Accounting Office will not dismiss the protest because the protester failed to timely serve the contracting officer in the absence of a showing that the agency was prejudiced by the late receipt of notice.
2. Contracting agency's decision not to exercise an option involves a matter of contract administration that the General Accounting Office does not review.
3. Certificate of Independent Price Determination is not violated where former employees allegedly improperly used proprietary material absent collusion between bidders or an indication that a firm was prevented from bidding, since this involves a dispute between private parties.
4. Protester's contention that awardee was technically unacceptable is denied where the protester does not show that the procuring agency's evaluation of the proposal was clearly unreasonable.
5. Protester's allegation that awardee will not comply with clause H.7 of the solicitation, which governs the substitution of personnel after contract award, is not for consideration by this Office because it involves a matter of contract administration.

---

### DECISION

Arlington Public Schools (APS) protests the award of a contract to Strayer College for educational services under request for proposals (RFP) No. DAHC90-87-R-0005, issued by the United States Army Intelligence and Security Command, Arlington Hall Station. APS alleges that Strayer's proposal was technically unacceptable to the RFP.

We dismiss in part and deny in part the protest.

641012

The RFP was for the operation of the Army's Learning Resource Center, which is responsible for providing remedial and job-related programs to the Army. APS has operated the center since 1984. On the September 8, 1987, closing date, APS and Strayer submitted offers in response to the RFP. Following evaluation of the proposals, the Army rated APS and Strayer as technically equal and made the award to Strayer, on the basis of its lower price, on September 29, 1987.

APS initially filed an agency-level protest on October 8, 1987, and, subsequently, filed the same protest with our Office on October 13, 1987. The Army argues that we should dismiss the protest because APS did not provide a copy of the protest to the contracting officer within 1 day after filing here, as is required by our Bid Protest Regulations. See 4 C.F.R. § 21.1(d) (1987). The Army reports that it did not receive a copy of the protest until October 19, 1987. APS contends that the Army received a copy of the protest on October 15.

We will not dismiss the protest for failure to timely serve the contracting officer. The purpose of this requirement is to inform procuring agencies promptly of the basis of protest and to enable them to prepare their reports within the 25 working days allotted by the Competition in Contracting Act of 1984. 31 U.S.C. § 3553(b)(2)(A) (Supp. III 1985); Sec, Inc., B-226978, July 13, 1987, 87-2 C.P.D. ¶ 38. Here, the protest is identical to the protest filed at the agency. Further, our Office provided the Army with telephonic notice of the protest on October 14 and APS' certified mail receipt indicates that the Army received the protest on October 15. Even if we accept the Army's position that it did not become aware of the basis of protest until October 19, it delivered its report to our Office several days before the scheduled report date. In the absence of a showing that the agency was prejudiced by the late receipt of a copy of the protest, as here, dismissal is not appropriate. Sec, Inc., B-226978, supra.

Determining the technical acceptability of a proposal is within the discretion of the contracting agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation. Thus, it is our position not to question an agency's technical evaluation where the protester has not demonstrated that it was clearly unreasonable. Merely, disagreeing with the evaluation does not establish that it was clearly unreasonable. See Miller Printing Equipment Corp., B-225447.2, Mar. 24, 1987, 87-1 C.P.D. ¶ 337.

At the outset, APS argues that the Army should have exercised one of the 3 option years under its prior contract which could have saved the government \$77,785 compared to the awarded contract. We dismiss this aspect of the protest because it does not fall within our bid protest function. The contracting agency's decision not to exercise an option is a matter of contract administration. There is no obligation for the contracting agency to justify a decision not to exercise an option on the basis of a cost comparison. The regulations only provide that the agency cannot exercise an option without first determining that it is the most advantageous method of fulfilling the agency's needs, price and other factors considered. Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.207(c)-(e) (1986). Those who bid on contracts containing option provisions assume the risk that the agency might not exercise the option. Federal Contracting Corp., B-227269, June 5, 1987, 87-1 C.P.D. ¶ 577.

APS further argues that Strayer violated the RFP's Certificate of Independent Price Determination by contacting APS personnel before the RFP was issued concerning proposal pricing, employee benefits, course costs, and resumes which it utilized in proposing APS staff members. The purpose of the Certificate of Independent Price Determination is to prevent collusive bidding. It sets forth a statement that the bidder has arrived at its price independently, has not disclosed its price to other competitors before bid opening, and has not attempted to induce another concern either to submit or not to submit a bid for the purpose of restricting competition. See FAR, 48 C.F.R. § 52.203-2.

We have held that the transfer of an employee from one bidder to another will not constitute a violation of the certification absent collusion between bidders or an indication that a firm was prevented from bidding. Genasys Corp., B-213830, Jan. 23, 1984, 84-1 C.P.D. ¶ 102. APS, save its own speculation, and has not shown that Strayer was engaged in this kind of collusion. Further, to the extent that APS is protesting that some of its employees may have provided Strayer with proprietary information and failed to meet their employment obligations, this is a dispute between private parties which we do not consider. Id. Moreover, the question of collusive bidding is not within our jurisdiction. In the first instance, it is a matter for the contracting officer in the context of the responsibility determination. If there is evidence of collusion, the matter is properly to be referred to the Attorney General. Connelly Containers, Inc., B-227539, July 14, 1987, 87-2 C.P.D. ¶ 44.

APS contends that Strayer was technically unacceptable because the RFP, in section C.2.6, stated that the contractor had to submit resumes of current staff and Strayer proposed utilizing APS staff. We, however, find that this is an unreasonable interpretation of that section and that section C.2.6 was not intended to limit contractors from proposing resumes of potential employees that met the RFP's requirements. There was nothing in the RFP that precluded offerors from submitting resumes of proposed hires and a subsequent change in personnel was permitted by clause H.7, Substitution of Key Personnel, following approval from the contracting officer.

Also, APS argument that Strayer's substitution will violate clause H.7 is not for our consideration because clause H.7 involves a matter that occurs after the award of the contract. Our office is only concerned with matters that involve the award or proposed award of a contract. Any violation of clause H.7 by Strayer would be a question of contract administration to be resolved by the contracting agency. Ship Analytics, Inc., B-225798, June 23, 1987, 87-1 C.P.D. ¶ 621.

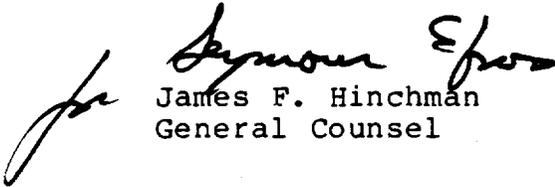
Further, APS alleges that Strayer's teachers were not certified by the state of Virginia and that Strayer cannot meet section C.8.3 of the RFP which requires that the contractor insure that soldiers receive a diploma or certificate from the state of Virginia because Strayer is not authorized to issue diplomas in Virginia.

Strayer did not take exception to the requirement that teachers be certified in the state of Virginia. Moreover, APS is mistaken about the requirement in section C.8.3. That section does not require that the contractor be authorized to issue a General Education Development (GED) certificate or diploma. Rather, it requires that the contractor assure that soldiers meet the GED certificate and diploma requirements, are tested, and receive a diploma from the state of Virginia. The Army reports that Strayer is authorized to administer the GED test and that it agrees to make sure that successful candidates receive certificates from the state of Virginia. Thus, we find that this allegation is without merit.

APS states that the RFP erroneously reversed paragraphs 1-10e and 1-10g of Army Regulation 621-5 which lists institutions that are authorized to accredit secondary and postsecondary institutions. APS argues that, by virtue of the error the Army scored its proposal lower than Strayer's proposal because it only is accredited as a secondary school and Strayer is accredited as both a secondary and

postsecondary institution. However, APS states that it was aware of the paragraph reversal well before the closing date. We find this allegation is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for the receipt of initial proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1). Further, our review of the evaluation data indicates that the Army did not separately award points for secondary or postsecondary accreditation and the overall point totals do not indicate that APS was scored lower vis-a-vis Strayer due to the fact that it is only accredited as a secondary institution.

The protest is dismissed in part and denied in part.

James F. Hinchman  
General Counsel