Evans

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stanford University

File: B-241125

Date: September 20, 1990

Iris Brest, Esq., for the protester.
Catherine M. Evans, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Absent clear judicial precedent, the General Accounting Office will not consider protester's challenge to the constitutionality of agency's use of a confidentiality of information clause since issues involved are more appropriate for resolution by the courts.

DECISION

Stanford University protests the failure of the National Heart, Lung and Blood Institute, National Institutes of Health, to award to it a contract for research under request for proposals (RFP) No. NHLBI-HV-89-10. Stanford alleges that the agency improperly terminated negotiations with it upon Stanford's refusal to accept in its contract a Health and Human Services Acquisition Regulation (HHSAR) clause concerning confidentiality of information. Stanford contends that the clause, which controls public release of research findings, is unconstitutional because it limits free speech.

We dismiss the protest.

The contract clause at issue, found at 48 C.F.R. § 352.224-70 (1990), requires that a contractor provide the contracting officer with advance notice before releasing certain categories of research findings to the public, and that any disagreement regarding the releasability of information be resolved pursuant to the disputes clause of the contract. Use of the clause is warranted whenever there is a need to keep information confidential. 48 C.F.R. § 324.70. Stanford argues that the clause abrogates its freedom of speech by allowing the government to decide what Stanford may or may not publish, and therefore is unconstitutional.

We will not consider the matter. First, Stanford's protest essentially is untimely. Although Stanford complains about the agency's refusal to award a contract without the confidentiality clause, the protest actually concerns the clause itself, which was incorporated by reference in the RFP. Under our Bid Protest Regulations, Stanford should have protested the terms of the RFP prior to the submission of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990).

Regardless of the timeliness of the protest, however, it is inappropriate for us to consider Stanford's arguments here. Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (1988), our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. Stanford's argument regarding the impact of HHSAR § 352.224-70 on its exercise of free speech involves an alleged constitutional violation, not a violation of a procurement statute or regulation. The one case Stanford cites in support of its position, F.C.C. v. League of Women Voters, 468 U.S. 364 (1984), concerns the constitutionality of a statutory provision limiting editorializing by publicly-funded radio and television stations; the case does not relate directly to the rights of a prospective government contractor. In the absence of a clear judicial precedent on this issue, we will not consider Stanford's challenge to the RFP on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. See DePaul Hosp. and The Catholic Health Ass'n of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173.

The protest is dismissed.

John M. Melody
Assistant General Counsel