



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** NonPublic Educational Services, Inc.

**File:** B-245665

**Date:** September 27, 1991

Robert H. Crosby for the protester.  
Katherine I. Riback, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

## DIGEST

Protest concerning the evaluation of offers from firms which qualify for Status of Forces Agreement (SOFA) status and those which do not qualify is dismissed as it is either without merit as the solicitation provided for no evaluation factor concerning SOFA status or untimely as any protest to our Office that the solicitation should have included an evaluation factor for SOFA status should have been raised within 10 days of knowledge of initial adverse agency action on protester's agency-level protest.

## DECISION

NonPublic Educational Services, Inc. (NESI) protests the terms of request for proposals (RFP) No. DAJA37-90-R-0276, issued by the Department of the Army, United States Army Contracting Command, Europe for test examiner and support services. NESI argues that the solicitation favors offerors that have qualified under Article 71 of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) and that the agency should have provided an evaluation factor to equalize this benefit for those firms which cannot qualify under SOFA.<sup>1/</sup>

We dismiss the protest.

NESI, a non-SOFA status offeror, submitted a proposal by the December 3, 1990 due date set for receipt of initial proposals under the solicitation. The RFP was subsequently amended to inform offerors of the possible benefits available to offerors qualifying under SOFA. After discussing the matter with the agency during negotiations NESI concluded that it would be

<sup>1/</sup> According to the protester if a firm qualifies for SOFA status it will not be subject to German tax and labor laws.

difficult for it to qualify under SOFA. Therefore, the firm submitted a letter to the agency dated April 24, 1991, noting that SOFA status was a significant competitive advantage and suggesting, among other things, that the agency include an evaluation factor to equalize this. The agency did not amend the solicitation but instead on July 18 requested best and final offers (BAFO). NESI submitted a BAFO along with a request that the Army evaluate proposals from both SOFA and non-SOFA firms on an equal basis.

By letter dated July 29, the agency formally rejected the suggestions made by NESI in its April 24 letter and on September 11 made award to another firm which had SOFA status. NESI protested to our Office on September 16 essentially complaining that SOFA and non-SOFA firms were not treated equally.

Since the RFP did not contain an evaluation factor to equalize the impact of SOFA status on the procurement, the agency could not properly consider the matter in the evaluation of proposals. See Wyle Laboratories, B-239671, Sept. 19, 1990, 90-2 CPD ¶ 231. Therefore to the extent that NESI is arguing that the evaluation was improper, there is no legal merit to the protest.

To the extent that NESI is arguing that the solicitation should have contained such an evaluation factor, the protest concerns an apparent solicitation impropriety and it is untimely.

Our Bid Protest Regulations require that protests of apparent solicitation improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Where a protest has been timely filed with the contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the agency-level protest. 4 C.F.R. § 21.2(a)(3) (1991); Sletager, Inc., B-240789.2; B-241308; B-241318, Feb. 1, 1991, 91-1 CPD ¶ 101.

Here, even if we give NESI the benefit of the doubt and consider its April 24 letter to be an agency-level protest<sup>2/</sup>

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<sup>2/</sup> The statement concerning the evaluation of proposals from SOFA and non-SOFA firms submitted with NESI's BAFO cannot constitute a timely agency-level protest. See Americover Co., B-234352, Mar. 28, 1989, 89-1 CPD ¶ 320.

its subsequent September 16 protest to our Office is untimely because it was filed more than 10 working days after either adverse agency actions; the acceptance of BAFOs without amending the solicitation or the agency's July 29 letter denying the protest.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'John Brosnan', with a long horizontal flourish extending to the right.

John Brosnan  
Assistant General Counsel