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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Kathryn Huddleston and Associates, Ltd.

File: B-289453

Date: March 11, 2002

Kathryn Huddleston for the protester.

Judith P. Morrison for Act II Management Consultants, the intervenor.

Christopher J. Wood, Esq., and Craig R. Schmauder, Esq., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement under simplified acquisition procedures where the agency elected to establish a competitive range and conduct discussions, the agency improperly excluded the protester's low-priced quote from the competitive range and conducted discussions with only the awardee, where the protester's and awardee's quotes failed to satisfy the same solicitation requirements and the record did not support the agency's determination that the protester would not have had a realistic chance of receiving award if it had been afforded discussions.

DECISION

Kathryn Huddleston and Associates, Ltd. (KHA) protests the rejection of its quote and award of a purchase order to Act II Management Consultants under request for quotations (RFQ) No. DACW87-01-Q-0160, issued by the U.S. Army Corps of Engineers for educational services. KHA challenges the evaluation of its quote and complains that the agency conducted discussions with only Act II.

We sustain the protest.¹

¹ Because a protective order was not issued in connection with this case, the language in our decision, which is based in part upon source selection sensitive and confidential information, is necessarily general.

The RFQ was issued electronically as a combined synopsis and solicitation as a small business set-aside.² The RFQ identified the procurement as a commercial item acquisition under Federal Acquisition Regulation (FAR) part 12 and, as amended, provided that the agency would use simplified acquisition procedures under FAR part 13. Agency Report, Tab D-1, Combined RFQ/Synopsis (Sept. 13, 2001); Tab D-4, Revised Combined RFQ/Synopsis Amendment (Oct. 5, 2001).

The solicitation requested quotes for all services and material necessary to revise and present an instructional course entitled "Instructional Methods." Vendors were informed that the course was designed to "give students skill in developing and conducting any type of training, presentations, and briefings." Course topics included "Systematic Approach to Training, roles of the instructor, instructional objectives, communications skills, lesson planning, instructional aids, the adult learner, methods of instruction, classroom management, counseling, tests, and questioning techniques." In addition, the RFQ provided that the students in the Instructional Methods course would either have been identified by the Corps as potential instructors in the Proponent Sponsored Corps of Engineers Program or "have been charged with developing and conducting any type of training, presentations, or briefings." The RFQ provided for the award of a fixed-price order for four class sessions during a base year and for a specified number of classes in the 2 option years. Agency Report, Tab D-1, Combined RFQ/Synopsis (Sept. 13, 2001), at 1.

The RFQ required vendors to provide two instructors (a lead and an assistant instructor) for each session, and stated experience and educational qualification requirements for the instructors. Vendors were required to provide resumes for the proposed instructors with their quotes establishing the following:

The lead instructor should have 200 hours of teaching experience during the past 5 years in courses designed to teach instructional methodology to instructors and/or trainers.

. . . .

The assistant instructor should have 100 hours of teaching experience during the past 3 years in courses designed to teach instructional methodology to instructors and/or trainers.

For both instructors, the RFQ required that the teaching experience include:

² The combined RFQ/Synopsis was posted on-line on the electronic Commerce Business Daily (CBDNET) site (at www.cbdnet.access.gpo.gov) on September 13, 2001, and subsequently published in print form in the CBD on September 17.

development of learning objectives, test items, lesson planning, systematic approach to training, development and use of instructional aids and classroom management.

In addition, vendors were required to “[i]dentify proposed instructors scheduled to teach each course session . . . [and] identify proposed lead and assistant instructors scheduled to teach each course session.” *Id.* at 2.

Around October 5, the Corps issued a solicitation amendment, which, for the first time, stated evaluation criteria. As amended, the RFQ provided, among other things, that quotes would be evaluated under three factors: (1) teaching experience, (2) educational qualifications, and (3) price. Factors (1) and (2) were stated to be equal in importance, and factor (3) was stated to be significantly less important than factors (1) or (2). Agency Report, Tab D-4, Revised Combined RFQ/Synopsis Amendment (Oct. 5, 2001), at 2. The agency states that the amendment was not directly distributed to vendors, but was published electronically on the *CBDNET* (www.cbdnet.access.gpo.gov) and the Federal Business Opportunities (FedBizOpps) (www.arnet.gov/FedBizOpps/) websites.³ Agency Legal Memorandum at 4. The amended solicitation extended the date for submission of quotes from September 27 to October 9.⁴ Agency Report, Tab D-4, Revised Combined RFQ/Synopsis Amendment (Oct. 5, 2001), at 3.

³ After October 1, 2001, the contracting officer was required to transfer notices to the governmentwide point of entry (GPE), which is the FedBizOpps website. *See* FAR § 5.003. When transmitting notices to the GPE before January 1, 2002, contracting officers were required to direct the GPE to forward the notice to the CBD. FAR § 5.201(b)(2).

⁴ The protester states that it never saw and was never apprised of this amendment prior to submitting its quote and that it submitted its quote believing that this was not to be a “best value” award. Protest at 1; Protester’s Comments at 7-8. The Corps states that although it “cannot confirm or deny that this amendment was published on the FedBizOpps [website]” (the Corps says nothing in this regard with regard to the *CBDNET*), its former contract specialist, to the “best of his recollection,” informed KHA that changes to the solicitation would be posted on the electronic bulletin board maintained by the Corps of Engineers, Engineering and Support Center, Huntsville, Alabama. Agency Legal Memorandum at 4; Agency Report, Tab H-8, Affidavit of Contract Specialist (Jan. 4, 2002). KHA denies that it was so informed. Protester’s Comments at 7. We need not resolve this dispute since we sustain the protest and recommend reopening discussions.

The Corps received eight quotes, including KHA's and Act II's, by the original September 27 date for submission of quotes.⁵ The quotes were evaluated by an "informal technical evaluation board." Contracting Officer's Statement at 6.

The agency found that KHA's quote did not show that its proposed lead and assistant instructors had the required experience in courses designed to teach instructional methodology to instructors and/or trainers. Specifically, the Corps found that, although KHA's quote identified numerous courses that the lead instructor had taught, these courses did not demonstrate relevant experience (that is, experience teaching instructional methodology to teachers). With respect to the proposed assistant instructor, KHA listed a number of courses the assistant instructor had conducted that appeared to be relevant, but those courses were not within 3 years, as required by the RFQ. Agency Report, Tab G-2, KHA Consensus Evaluation, at 1-2. KHA's quote received a red adjectival rating for teaching experience, which, according to the agency's source selection plan, reflected a proposal that "fail[ed] to meet standards and many requirements." *Id.*; Agency Report, Tab G-1, Source Selection Plan, at 4. KHA's quote was assessed as purple/very good, however, for the educational qualifications of its proposed instructors. Agency Report, Tab G-2, KHA's Consensus Evaluation, at 2.

The Corps found that Act II's quote also did not show that the firm satisfied all the solicitation requirements. Specifically, the evaluation board determined that although Act II's quote showed that the firm's proposed instructors had taught relevant "topics," the quote contained inconsistencies in the amount of experience claimed, did not show that the proposed instructors had the required amount of experience, and did not identify for each course session which instructors would be the lead and assistant instructors.⁶ Agency Report, Tab G-3, Act II's Consensus

⁵ On October 10, Act II "resubmitted its pricing information from its original quote," which the Corps did not utilize because it was after the amended date stated for submission of quotes and because it was identical to the pricing information submitted with Act II's original quote. Contracting Officer's Statement at 6.

⁶ In response to our request, made after receipt of the agency's report, the Corps submitted to us a typed transcription of the nearly illegible hand-written contemporaneous consensus evaluation of Act II's initial quote. Agency Submission (Feb. 4, 2002), Tab AB-4. The typewritten document purports to show that Act II's quote does not contain any deficiencies (only disadvantages), whereas the handwritten evaluation documents appeared to indicate evaluated deficiencies as well as disadvantages. Nonetheless, the differences between the two documents are not significant, since both documents establish that Act II's quote did not satisfy all of the solicitation requirements, and this fact is not altered by the agency's characterization of Act II's failure to meet the requirements as a disadvantage rather than a deficiency. *See Bank of America*, B-287608, B-287608.2, July 26, 2001, 2001

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Evaluation, at 3-4. Act II's quote received a yellow adjectival rating for teaching experience, which was stated to reflect a "proposal that has numerous weaknesses and does not meet several requirements." *Id.*; Agency Report, Tab G-1, Source Selection Plan, at 4. Act II's quote was assessed as "green+" for the educational qualifications of its proposed instructors.⁷ Agency Report, Tab G-3, Act II's Consensus Evaluation, at 5.

The agency established what it characterized as a "competitive range" that consisted of only Act II's quote because, according to the contracting officer, only Act II's quote "was determined to meet the minimum requirements of the solicitation," and that the "eliminated quotes [including KHA's] could not be cured with clarifications or discussions." Contracting Officer's Statement at 6. Discussions were conducted with Act II, which provided further information to establish that its proposed instructors satisfied the solicitation's experience requirements and to identify which instructors would teach what courses and who would be lead instructors and who would be assistant instructors. Agency Report, Tab G-6, Act II's Revised Quote. A purchase order was awarded to Act II, and KHA protested to our Office, after receiving a letter explaining why KHA had not received the award. Agency Report, Tab H-5, Notification of Unsuccessful Quote (Nov. 27, 2001).

KHA raises numerous challenges to the conduct of this procurement. Specifically, KHA complains that the Corps conducted discussions only with Act II, despite KHA's lower proposed price. KHA challenges the evaluation of its quote, arguing variously that its proposed instructors actually have the required experience that the Corps found lacking and that the Corps failed to contact its listed references to ascertain the extent of its instructors' experience.⁸ KHA also provides further information that it asserts it could have provided during discussions to establish that its instructors have the requisite experience. Protester's Comments at 9, 11-13.

As noted above, the Corps conducted this acquisition using simplified acquisition procedures. Simplified acquisition procedures are designed to, among other things, reduce administrative costs, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR § 13.002; Sawtooth

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CPD ¶ 137 at 12 n.21 (an agency's characterization of a proposal's failure to satisfy solicitation requirements as not being a deficiency is not controlling).

⁷ A green adjectival rating was said to reflect a "proposal that meets the minimum contractual requirements required by the solicitation." Agency Report, Tab G-1, Source Selection Plan, at 4.

⁸ KHA admits, however, that, at least with respect to one of its proposed assistant instructors, the firm "erred in not clarifying" that person's experience in its quote. Protester's Comments at 9.

Enters., Inc., B-281218, Dec. 7, 1998, 98-2 CPD ¶ 139 at 3. These procedures provide discretion to contracting officers to use one or more of the evaluation procedures in FAR parts 14 and 15, and do not require formal evaluation plans, the establishment of a competitive range, or the conduct of discussions. See FAR § 13.106-2(b). Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. Nunez & Assocs., B-285666, Feb. 10, 1995, 95-1 CPD ¶ 62 at 2. Although an agency is not required to establish a competitive range or conduct discussions under simplified acquisition procedures, we think that where an agency avails itself of these negotiated procurement procedures, the agency should fairly and reasonably treat quoters in establishing the competitive range and conducting discussions. See Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 8-10.

The Corps contends, citing to the FAR part 15 rules, that it fairly and reasonably established the competitive range. See Legal Memorandum at 15-16. Under those rules, the determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. Dismas Charities, Inc., B-284754, May 22, 2000, 2000 CPD ¶ 84 at 3. FAR § 15.306(c) allows an agency to establish a competitive range consisting of only the most highly-rated proposals. Under the regulation, agencies properly may eliminate proposals that are deemed to have no realistic prospect for award. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5-6. Judgments regarding which proposals are included in the competitive range must be made in a relatively equal manner. An agency cannot reasonably exclude a proposal from the competitive range where the strengths and weaknesses found in that proposal are similar to those found in proposals included in the competitive range. Columbia Research Corp., B-284157, Feb. 28, 2000, 2000 CPD ¶ 158 at 4; Nations, Inc., B-280048, Aug. 24, 1998, 99-2 CPD ¶ 94 at 6-10.

In this case, the Corps included only Act II's quote in the competitive range based upon its determination that only that firm's quote was acceptable. However, this determination is based upon an error of fact. The record establishes that Act II's initial quote was not technically acceptable, as the agency now asserts. That is, the contemporaneous evaluation documents show that Act II's quote received a yellow/marginal adjectival rating because the quote did not satisfy all the solicitation requirements. Specifically, the evaluators found that Act II's quote, like KHA's, did not show that its proposed instructors satisfied the experience requirements. In addition, Act II (unlike KHA) failed to identify which instructors would teach which courses.

The record also does not support the Corps's determination that KHA's quote, unlike Act II's initial quote, was not susceptible to being made acceptable through discussions. As explained above, KHA's and Act II's initial quotes were similarly flawed; that is, both firms failed to demonstrate that their respective proposed instructors satisfied all the solicitation experience requirements. The Corps has not explained why Act II's failure to satisfy the experience requirements could be cured

by discussions and KHA's similar failure could not. Also, the Corps has not rebutted KHA's protest statements that KHA could provide further information or revise its quote, such that KHA's quote would become acceptable.

The Corps nevertheless argues that KHA's lower-priced quote could reasonably be excluded from the competitive range because KHA had no realistic prospect of receiving award. Legal Memorandum at 15-16. We do not find any support for this conclusion at this stage in the procurement. While it is true that Act II's quote received a higher adjectival rating than KHA's quote under the teaching experience factor (a yellow/marginal rating as compared to KHA's red/unacceptable rating), KHA received a higher adjectival rating under the equally important educational qualifications factor (a purple/very good rating as compared to Act II's green+/acceptable rating). Also, KHA quoted a much lower price than did Act II. Assuming that KHA could provide information, or revise its quote, to establish the acceptability of its quote, the Corps would be required to perform a cost/technical tradeoff analysis to determine which quote represented the best value to the government. Given KHA's much lower price and higher educational qualification rating (at the time of initial quotes), we find no reasonable basis for the conclusion that KHA would have had no realistic chance of receiving award.

In sum, we find unreasonable the Corps's competitive range determination that included only Act II's quote. In making this judgment, the Corps apparently mistakenly believed that Act II's quote satisfied all the solicitation requirements and was acceptable. Instead, the record shows that two firms' quotes suffered from similar informational weaknesses that were susceptible of correction through discussions. We sustain KHA's protest because the Corps failed to treat the two firms fairly and equally with respect to conducting discussions.

We recommend that the Corps include KHA's quote in the competitive range, conduct discussions with KHA and Act II, request revised quotes, and make a new source selection decision. If KHA's quote is selected for award, the Corps should terminate the purchase order issued to Act II and issue a purchase order to KHA.⁹

⁹ Given our recommendation to open discussions with KHA, we do not address KHA's other complaints regarding the evaluation of the firm's quote and the failure to advise KHA of the amended solicitation. KHA also complains that the Corps's actions in this case reflected bias against KHA. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Ameriko Maint. Co., B-253274, B-253274.2, Aug. 25, 1993, 93-2 CPD ¶ 121 at 5. Thus, the protester must provide credible evidence clearly demonstrating bias and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17. KHA has not shown that the agency's conduct of this procurement was motivated by bias.

We also recommend that KHA be reimbursed its reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2001). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the Corps within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel