

DOCUMENT RESUME

02684 - [A1792803]

[Award of Contract for the Development of a Handbook on Priority Service to the Elderly]. B-187625. June 15, 1977. 5 pp.

Decision re: Kirschner Associates, Inc.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law I.  
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of Health, Education, and Welfare; Community Research Applications, Inc.  
Authority: B-181845 (1974). B-179065 (1974). B-186513 (1977). 55 Comp. Gen. 1111. 52 Comp. Gen. 161.

The protester alleged that the successful offeror misrepresented in its best and final offer the facts concerning its proposed staff and that the award was eventually made on the basis of price. The evaluation of the successful offeror's proposed key personnel, even though changed after the award, was not objectionable since the names were submitted in good faith by the contractor and with the consent of the respective individuals. The award selection, among proposals essentially equal technically, based on price or cost cannot be regarded as prejudicial to the protester where the successful offeror was higher technically and lower in cost. The protest was denied.  
(Author/SC)

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L. Kozlakowski  
Pres. I



**DECISION**

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

**FILE:** B-187625      **DATE:** June 15, 1977  
**MATTER OF:** Kirschner Associates, Inc.

**DIGEST:**

1. Evaluation of offeror's proposed key personnel, even though changed after award, is not objectionable since names were submitted in good faith by contractor and with consent of respective individuals.
2. Award selection, among proposals essentially equal technically, based on price or cost cannot be regarded as prejudicial to protester where successful offeror was higher technically and lower in cost.

The Department of Health, Education, and Welfare (HEW) issued request for proposals (RFP) No. 105-76-3122 for the development of a handbook on priority service to the elderly. The solicitation assigned 55 points to soundness of approach and expertise in service areas and 30 points to personnel. Each offeror was required to identify the personnel proposed for each section of the handbook.

Community Research Applications, Inc. (CRA), the successful offeror, requested and obtained a change in two of the seven key personnel involved after award. The change was accomplished in conformity with clause 21 "Key Personnel" in the general provisions of the contract. It reads:

"Where 'key personnel' have been identified in this contract, it has been determined that such named personnel are necessary for the successful performance of the work under this contract; and the Contractor agrees to assign such personnel to the performance of the work under this contract, and shall not reassign or remove any of them without the consent of the Contracting Officer. Whenever, for any reason, one or more of the aforementioned personnel is unavailable for assignment for work under the contract, the Contractor shall immediately

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notify the Contracting Officer to that effect and shall, subject to the approval of the Contracting Officer without formal modification to the contract, replace such personnel with personnel of substantially equal ability and qualifications."

Kirschner Associates, Inc. (Kirschner), protested the change in personnel alleging that CRA misrepresented the facts concerning its proposed staff in the best and final offer. Additionally, Kirschner complains that award was eventually made on the basis of price notwithstanding the technical superiority of Kirschner's proposal and that CRA proposed a lesser level of effort which accounts for the difference in estimated costs.

CRA in its best and final offer revised part of its proposal by changing some of its key personnel. In this regard CRA stated:

"The resumes attached represent individuals who have had considerable experience in their respective areas, have been interviewed by CRA for the job, and have agreed to join CRA for the duration of contract activities. Each of them has been made aware of the number of days required to complete the work, the salary offered for their position, and the conditions of work at CRA."

One of the proposed staff members, who subsequently was not available for the project, states he had agreed that CRA could submit his resume. Further, he states:

"The submission of my name by CRA was in good faith, based on my meeting with the Drs. Holmes. Only after accepting an employment contract elsewhere did I decline to finalize an agreement with CR."

The other proposed staff member has indicated that he will be available to work on the project. However, certain tasks would be delegated to a research assistant, who under his direction would "search for citations, obtain copies of materials needed and do graphics and illustrations for the manual." The contracting officer has reviewed the matter and is confident that the individual will be available to properly accomplish his portion of the handbook.

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HEW accepted CRA's proposal at face value concerning key personnel. We recognize that, as set forth by the court in Rudolph F. Matzer & Associates, Inc. v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972), where in the course of a negotiated procurement, an agency evaluates a proposal based on an offeror's proposed use of certain resources (key employees) which the offeror neither contractually controls nor has an informal commitment regarding its use, the evaluation is "patently irrational."

However, we do not believe that an offeror must in every instance have contractual relationships with key employees, subcontractors, etc. However, for those employees, subcontractors, etc., to be considered in the evaluation of the offeror's proposal absent such contractual relationship, the agency must reasonably be assured that the employee, subcontractor, etc., is firmly committed to the offeror. See Procurement Methods, GTE Information Systems, Inc., B-181845, December 12, 1974, 74-2 CPD 331. This is especially true where the consideration of the factor in question may be determinative of award. Serv-Air, Inc., B-179065, April 22, 1974, 74-1 CPD 206. We do not believe that an offeror's mere proposed use of a certain person or subcontractor constitutes such a commitment. Indeed, if this was all that was required, there would be no way to preclude an offeror from proposing an impressive array of employees and/or subcontractors, to be evaluated on that basis, and perhaps receive award, even where the persons or companies proposed had never committed themselves to the offeror and had no intention of doing so.

The case at hand is easily distinguished from Matzer, supra. In that decision, the court noted that the successful offeror was essentially a "broker" submitting resumes over a several-year period from persons looking for work. It would not appear that in the cited case the successful offeror had contacted the persons whose resumes it submitted to ascertain their willingness to participate in the contract work. Indeed, one of the personnel proposed was deceased.

Here, as stated earlier, the key personnel whose names were submitted by the successful offeror, while without employment agreements, had indicated their willingness for submission of their resumes. After award, one individual accepted an employment contract elsewhere rather than finalize an agreement with CRA. The other individual under question is in fact working on the project, although not as an employee. The distinction Kirschner attempts to make between an employee or subcontractor is at best strained. In its best and final offer CRA indicated only that the individuals would "join CRA for the duration of the contract activities." CRA did not state that these individuals would be hired as employees, as contended by Kirschner. Further, the RFP did not require a statement of commitment from persons not presently employed by the offerors. See I System, Inc., B-186513, January 27, 1977, 77-1 CPD 65.

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Based on the above, the submission of the individual resumes was done in good faith. The fact that after award key personnel were changed does not lead to the conclusion that submittal of the resumes was a misrepresentation. In fact, the contract provision quoted above anticipated that exact event happening.

Kirschner protests the award on two additional bases: (1) CRA proposed a lesser level of effort and (2) award was made on the basis of price notwithstanding the technical superiority of Kirschner.

The record reflects that CRA not only proposed a higher level of effort than Kirschner but achieved a higher score.

The technical evaluation of the three offerors was:

National Council on the Aging, Inc.	77.25
CRA	74.75
Kirschner	74.50

Due to the minor differences in evaluation point scores, all three proposals were considered to be of equal technical merit. Award was made to CRA on the basis of the lowest estimated cost. It is well settled that where an agency regards proposals as essentially equal technically, cost or price may become the determinative factor. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CFD 325. Consequently, an award selection based on cost difference cannot be regarded as prejudicial to Kirschner.

However, we note that the RFP failed to indicate the relative weight of cost as an evaluation factor. The failure of the RFP to indicate the relative importance of price is contrary to sound procurement policy which requires that offerors be advised of the evaluation factors to be used and their relative importance. 52 Comp. Gen. 161 (1972). By separate letter we are advising HEW of the deficiency and recommending that steps be taken to preclude a recurrence.

After the agency report was submitted to our Office, Kirschner raised an additional basis of protest concerning yet another individual in CRA's proposal. Contrary to the protester's allegation, the individual is not one of the seven key personnel but rather one of the five experts in the legal services area to be interviewed by CRA. In this regard, the Scope of Work under Task 2 in the RFP provided:

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"Task 2: Discussion With Experts - The contractor shall provide the project officer with a list of five experts in each of the seven service areas. AoA will review and, if necessary, modify the list. The contractor shall then arrange to meet with at least four of the experts in each area. \* \* \*"

Of the five legal service experts CRA proposed, only one was approved. AoA, then, supplied CRA the name of four replacements, including the individual in question. This procedure was fully consistent with the provisions in the Scope of Work.

Although Kirschner proposed the same individual as one of its key personnel, the individual was well known to AoA prior to Kirschner's proposal as he had done considerable work for AoA in the past several years. It should also be noted that AoA requested CRA to use the individual in an expert capacity as opposed to Kirschner's proposed use as one of its seven key personnel.

Accordingly, the protest is denied.

  
Acting Comptroller General  
of the United States