

DECISION



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

J. Cohen
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FILE: B-190792

DATE: December 19, 1978

MATTER OF: Leon Whitney, Certified Public Accountant

*[Protest concerning Department of Commerce Award of a Requirements Contract
for Auditing Services]*

DIGEST:

1. Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to "specifically request ruling by Comptroller General" as required by section 20.1(c)(4) of GAO's Bid Protest Procedures.
2. Despite agency interpretation, under competitive RFP evaluation criterion, protester should have received 10 points simply for being minority firm and did not have to subcontract to minority firms to receive points. GAO agrees with agency's reservations as to propriety of such preference for primes in competitive procurement.
3. RFP awarded up to 5 points to firms that submitted plans to reduce long-distance travel costs. GAO agrees with protester that it would appear incongruous to penalize firm whose location eliminated need for long-distance travel, a situation of which procuring agency was aware.
4. Notwithstanding GAO agreement with protester as to proper evaluation of proposals, corrective action with respect to subject procurement is not necessary, since, at best, protester's evaluated score, including cost consideration, would still be lower than awardee's.
5. Failure of contracting agency to formally notify unsuccessful offeror of award until more than 2 months after award date is procedural irregularity not affecting validity of award.

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Leon Whitney, Certified Public Accountant (Whitney), protests the award by the United States Department of Commerce (Commerce) of a requirements contract for auditing services in Commerce Region 4 to Banks, Finley, White & Co. (BFW). ————— DLG00396

The solicitation for the services, which concern contracts and grants involving the Office of Minority Business Enterprises (OMBE), required the submission of both technical and cost proposals. Paragraph 29C, "Technical Content," provided in pertinent part:

AGC 00525

"(1) Plan for Accomplishing Work:

* * * * *

"(b) Use of minority public accounting firms. One (1) objective of the OMBE program is to assist minority firms in entering the mainstream of business. A program/contract plan is required to ensure that a portion of the audit assignment(s) is/are accomplished by such firms and the extent of the activity. Include the name(s), address, and experience of the minority firm(s) expected to be used, the percentage of the work expected to be performed by this firm, details of subcontractor agreements/procedures for review of subcontractor's work.

* * * * *

"(c) Plan to minimize travel costs. A portion of the audit work may be at locations requiring long distance travel. In order to assure that all the necessary audits of OMBE contracts and grants are accomplished, it is

essential that travel costs be minimized to the greatest extent possible. A plan is required for accomplishing, through subcontracting or through the use of regional offices, work in those areas (over 250 miles from main office) so as to minimize travel costs. This plan should include basic subcontractor data as in paragraph (b) above."

Under the solicitation's evaluation scheme (paragraph 30), proposals could receive a maximum of 100 points. The plan for accomplishing work described in paragraph 29C(1) was worth 25 points maximum under paragraph 30D(2), as follows:

- "(a) Expected staffing of jobs by classification of accountants (i.e. mix of accountants to perform the audit work), and overall plan to assure thorough and prompt response to audit requirements (i.e. 'calls') - 10 points;
- "(b) Plan for use of minority public accounting firms and the extent of this activity - 10 points (offerors that plan to have 50% of audit assignments performed by minority public accountants will receive the maximum - 10 points). Note: This subcontracting applies to all firms.
- "(c) Plans for accomplishing through subcontracts or use of regional offices the work to be performed in areas requiring extensive long distance travel (over 250 miles) by the home office, so as to minimize travel costs - 5 points."

As interpreted and applied by Commerce, under paragraph 30D(2)(b) firms that presented plans to subcontract work to minority businesses could receive up to 10 points, but minority firms submitting offers as prime contractors and not intending to subcontract would receive none.

Both Whitney and BFW are minority-owned firms. BFW stated in its proposal that it did not intend to subcontract any work to other minority firms and received none of the 10 points possible under paragraph 30D(2)(b). Regarding paragraph 30D(2)(c), BFW, which is located in Birmingham, Alabama, stated that it was opening an office in Region 4, which would minimize long-distance travel costs, and that, in any event, BFW would absorb any costs for travel over 250 miles. BFW received the maximum of 5 points under paragraph 30D(2)(c).

Whitney stated in its proposal that although it did not believe that subcontracting was necessary to contract performance, it would subcontract the audit in Pittsburgh, Pennsylvania, the most distant audit from Whitney's Baltimore, Maryland, location, to a minority firm not yet chosen. Subsequently, at the request of the contracting officer, Whitney provided the name and address of the selected subcontractor.

Of the 10 points possible for minority subcontracting, the Pittsburgh audit was worth a maximum of 3. Whitney received only 1 point because it did not include in its proposal all of the subcontractor information required by paragraph 29C(1)(b). In addition, since no audit would be located more than 250 miles from Baltimore, Whitney did not submit a plan to minimize travel costs. Whitney received 1 of the 5 points possible under paragraph 30D(2)(c), although the record does not show the reason.

Whitney's proposal received a total of 74 points out of the 100 possible. That score included 48 points for cost, expressed as a single fixed billing rate of \$18.50. BFW received 80.5 points, including 47.5 points for a billing rate of \$18.60.

Before discussing Whitney's protest, we note that in a report to our Office, Commerce points out that Whitney's submission does not "specifically request a ruling by the Comptroller General," as required by section 20.1(c)(4) of our Bid Protest Procedures, 4 C.F.R. part 20 (1978) (Procedures). Rather, Whitney submitted a letter to our Office, attaching a protest of the same date to the contracting officer, which requested that we "consider this a formal protest of the circumstances surrounding award of the * * * contract [to BFW] and a request for a formal review * * *." Since a request by a disappointed offeror for our review of procurement procedures need not contain the exact words of protest before it can be characterized as a formal protest, Johnson Associates, Inc., 53 Comp. Gen. 510 (1974), 74-1 CPD 43, Whitney's submission to our Office, which clearly lodges specific exceptions to the questioned procedures, is appropriate for review under our Procedures. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61.

Whitney argues that based on the actual language of paragraph 30D(2)(b), as well as the solicitation's stated objective to assist minority businesses, Whitney as a minority prime contractor should have received all 10 evaluation points. In the alternative, Whitney contends that even with Commerce's interpretation and application of the paragraph, Whitney should have received a full 3 of the 10 points possible thereunder. As stated above, Whitney received only 1 point because it failed to supply all the subcontractor information necessary under the RFP. Whitney argues that when the contracting officer contacted Whitney to request the subcontractor's name and address, he

should also have requested all other information necessary for compliance with the relevant RFP requirement.

In response to Whitney's disagreement with the application of paragraph 30D(2)(b), Commerce states:

"* * * Since this is a 100% set aside for small business, minority and majority, majority-owned firms would be unduly penalized if they did not subcontract, whereby minority firms would not be, based on the protester's comment. If this condition prevailed, true competition would not exist. Also, by having the criteria in the solicitation, minorities with little or no government experience are afforded a greater opportunity to participate in Government contracts as subcontractors, and as such invaluable experience can be achieved which will allow them to compete on a more equal basis with other firms in the future."

We do not agree with Commerce's interpretation of paragraph 30D(2)(b) to the effect that the only way to be awarded points thereunder is for an offeror to propose to subcontract to minority firms. We believe that under a reasonable reading of the subject paragraph in view of the objective of the OMBE program as stated in paragraph 29C(1)(a) "to assist minority firms in entering the mainstream of business," a "minority public/accounting firm" submitting a proposal as a prime contractor would be entitled to 10 points, while other offerors, presumably not minority-owned, could mitigate the effects of such preference by planning to subcontract 50 percent of the audit assignments to minority firms. Accordingly, we agree with Whitney that it should have received the 10 points available under that paragraph. Whitney's alternative argument on this

issue is, therefore, academic. Nevertheless, since BFW is also minority-owned and received no points under paragraph 30D(2)(b), Whitney was not prejudiced by Commerce's interpretation and evaluation. In fact, since as indicated above Whitney received 1 point and BFW none under this paragraph, the difference in their evaluated scores now would increase to 7.5 points.


It is clear that Commerce did not intend to provide preferential treatment to minority primes in the evaluation process because of the serious reservations expressed in the above quote concerning competitive procurement. We agree with those reservations, and by separate letter we are advising the Secretary of Commerce that future solicitations should more clearly provide for the evaluation preferences intended.

Whitney also disputes Commerce's application of paragraph 30D(2)(b), contending that it should have received all 5 of the evaluation points possible since it would have no long-distance travel. Whitney's proposal stated its location and that it was "well within 250 miles of any point in Region 4." We agree with the protester that it would appear incongruous to award up to 5 evaluation points to firms that find it necessary to submit plans to minimize long-distance travel costs, and, thereby, penalize firms such as Whitney that do not need such a plan. However, while the subject paragraph seems to preclude granting any points to Whitney, even awarding Whitney an additional 4 points (as indicated above, Whitney received 1) and taking into consideration our above discussion concerning the evaluation under RFP paragraph 30D(2)(b), Whitney still would have been scored a total of 3.5 points lower than BFW. Accordingly, and since the evaluated scores already include consideration of cost, we cannot say that Whitney was prejudiced by Commerce's evaluations under this solicitation. See National Puerto Rican Forum, Inc., B-189338, November 23, 1977, 77-2 CPD 400. Nevertheless, we are including reference

to the evaluation under paragraph 30D(2)(c) in our letter to the Secretary of Commerce.

Whitney also states that although the contract was awarded to BFW on June 19, Whitney was not notified of the award until August 23. Whitney suggests that "the effect of this action was to substantially diminish any chance of successful protest by mere passage of time." In view of our discussion above, we cannot agree with Whitney's suggestion. We also note that the record indicates that Whitney was aware of the contract award by July 5. In any case, a notification deficiency of this type is a procedural irregularity which does not affect the validity of the award. LaBarge, Incorporated, B-190051, January 5, 1978, 78-1 CPD 7.

Finally, Whitney states that Commerce improperly failed to submit a report to our Office on the protest within 25 working days of our request therefor, in accordance with section 20.3(c) of our Procedures. However, we are advised that our request was received by Commerce on July 14. The report was submitted on August 18, which is 25 working days thereafter.


Deputy Comptroller General
of the United States