

# DECISION



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

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FILE: B-186169

DATE: August 25, 1976

MATTER OF: Worldwide Direct Marketing

## DIGEST:

1. GAO will consider protest by subcontractor on merits where Government directly participated in subcontract award selection by rejecting prime contractor's recommendation that award be made to protester.
2. Agency's determination that successful subcontractor may perform military recruiting services for its prime contractor and perform same type of work for another military department without a conflict arising between respective efforts is sustained. Fact that protester had been led by prime contractor to believe otherwise does not affect validity of award since protester was not intentionally misled. However, agency advised to coordinate its views with its prime contractor prior to solicitation of offers so that offerors will not be misled as to effect of provision in future
3. Contention that prime contractor should have allowed offerors more time to review and submit their final prices is not sustained where prime contractor had reasonable basis to conclude that time provided was sufficient.
4. A price reduction in a subcontracting proposal which is offered to the Government after the contracting agency had mailed a delivery order for the work to the prime contractor need not be considered.
5. Unsuccessful subcontractor's charge that agency usurped prime contractor's function because agency refused to accept prime contractor's recommended subcontractor is without merit, since prime contract provided for agency approval of subcontractors. Moreover, prime contractor has not complained of agency's action.
6. Although scope of work may have been relaxed since subcontract award has been made, such action is not subject to objection where contract modifications are designed to simplify contract work and are due in part to change in subcontractors. Moreover, it was unsuccessful incumbent subcontractor's responsibility to ascertain prior to submitting its proposal whether items not specified in the solicitation were required because such work was required the previous year.

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Worldwide Direct Marketing protests the award of the subcontract for the "REACT-FY77" program under Department of the Army contract MDA 903-75-D-0175 with N. W. Ayer ABH International. The award was made to LCS Industries, after the Army contracting officer rejected Ayer's recommendation that award be made to Worldwide, stating that it was in the Government's best interest for Ayer to award the subcontract to LCS. Under the circumstances, the Army acknowledges that this Office should consider Worldwide's subcontractor protest consistent with the standards set forth in Optimum Systems, Inc., 54 Comp. Gen. 769 (1975), 75-1 CPD 166, since the Government directly participated in the selection of the subcontractor.

Worldwide contends that the award to LCS is inconsistent with a conflict of interest clause in the Ayer request for proposals as interpreted by Ayer prior to the submission of proposals. Worldwide also contends that it was not given sufficient time to prepare a best and final submission, causing it to overstate its total price by a considerable amount because of mistake. In addition, the protester contends that the Army unilaterally directed award of the subcontract and thus usurped the prime contractor's function. Finally, it contends that the scope of the contract as awarded is considerably less than the scope of the contract called for in the RFP and "as bid by Worldwide."

As background, Ayer has a requirements contract with the Army covering advertising services for the U.S. Army Recruiting Command and other Army commands. The contract called for both in house performance of tasks and subcontracting subject to approval by the Government before award of any subcontract exceeding \$100,000. The Recruiting Command proposed that a delivery order be issued to Ayer to cover the FY 77 REACT recruiting program. REACT is an acronym for Rapid Electronic Advertising Coupon, a quick response program for submission of literature to potential recruits who mail in coupons from Army ads or who telephone requests to toll free numbers. The Army describes the program as a sophisticated, computer assisted, information storage and retrieval system, and

involves follow-on letters and data collection for Army recruiting managers. The incumbent contractor for the REACT program has been Worldwide.

In November 1975, Ayer solicited proposals for REACT 77 from a number of firms. Prices were requested based on a one year contract period (consisting of a 4 month start-up period in the case of a new contractor and an 8 month operational period) plus options for a 1 month and two 1 year follow-on extension periods. Offerors were advised that major consideration would be given to "the evaluation of technical proposals, as well as price." In addition, the "Special Provisions" of the RFP provided that:

"CONFLICT OF INTEREST." During the term of this contract Contractor shall not perform work for any other client which may be in conflict with this contract. Ayer Direct shall be the judge of what may constitute such a conflict of interest."

At an offerors briefing conference in December 1975, at which Army representatives were not present, Ayer explained in response to a question concerning the effect of the conflict of interest clause that:

"\* \* \* if any bidder were to be performing fulfillment for another military service, I think that we would see it not being in the best interest of our client, because there could be, understandably, confusion in the activities."

An attendee requested further amplification, asking what would be Ayer's reaction if an offeror wanted to compete for both the Army and Navy contract at the same time. The response was "As far as we are concerned \* \* \* [y]ou must take one or the other."

Nine proposals were submitted in January 1976, of which only 4 were considered responsive, including proposals from LCS and Worldwide. The four offerors were then evaluated by Ayer. On February 9, 1976, Ayer reported to Army that although LCS was the lowest offeror, award to Worldwide (second low offeror) was recommended because, among other advantages, "it was most knowledgeable and experienced in Army fulfillment--a known quality." On the other hand, Ayer listed among LCS's disadvantages that it had a possible conflict in priorities with another service fulfillment contract. (LCS is performing fulfillment services for the Department of the Navy).

However, the Army did not agree with Ayer's recommended choice of subcontractor. It asked Ayer to submit additional justification for its recommendation of Worldwide but still concluded that Ayer had failed to make a convincing case for its choice. To Army, it appeared that LCS was not only the low offeror, "but was fully capable of performing the subcontract." Moreover, the Army concluded that no conflict of interest problem would arise by reason of LCS' work for the Navy. Thus, on March 2, 1976, the Army advised Ayer that award to Worldwide was not justified.

At this point Ayer decided to request best and final prices from the four offerors since, in its prior discussions with the offerors, Ayer had stressed the initial contract year pricing, whereas on March 2, the Army indicated to Ayer that option pricing also was important.

By mailgram of March 2, 1976, Ayer instructed Worldwide to submit final and best prices for the basic contract period as well as option periods. Ayer's mailgram was preceded by a telephone call on March 2 to advise Worldwide of the call for best and final prices by "12:00 noon 4 March." Actually two telephone calls were made by Ayer to Worldwide on March 2, since during the first call Ayer mistakenly advised Worldwide that final prices were due March 3. The second telephone call was made about 30 minutes later to indicate that March 4 was the correct date.

Worldwide's final total price was \$2,232,696 (reduced from \$2,607,416) while LCS raised its price by \$499, to \$1,764,915. By letter of March 5 Ayer reported these results to the Army, stating that its prior recommendation "has not changed." Nevertheless, on March 17, 1976, the Army approved award of the 1977 REACT program to Ayer in the amount of \$516,319.80 (which amount was based on a subcontract award to LCS plus percentage mark-up.)

On March 18, Worldwide orally advised Ayer of a mistake in its final prices. On March 19, Ayer received a letter from Worldwide stating that it had "discovered" a substantial error which "should result in a reduction in the range of \$300,000 to \$400,000 for the total contract." Worldwide further states that this information was transmitted to the Army Recruiting Command on the morning of March 19. However, the contracting officer states that by the time the cognizant procurement officials at the installation received Worldwide's March 19 letter, a delivery order for REACT 77 had already been mailed to Ayer earlier that day. Additionally, the contracting officer notes that even with a \$300,000 to \$400,000 reduction in Worldwide's total price, "LCS is still the responsive low bidder."

The initial question is whether proper consideration was given to the conflict of interest clause in awarding a subcontract to LCS. The clause itself provides that the contractor shall not perform work for any other client which may be in conflict with its REACT contract. Ayer's concern with a contractor performing this contract and similar work for another military service was not that any conflict of interest laws or regulations would be violated by the award but rather that the work might become intermingled or mixed-up. It also pointed out to the Army that a possible conflict in priorities could arise. The Army felt, however, that the work could be kept separate and that the proper priorities could be maintained. In our opinion this is a matter of agency judgment which we see no reason to question. Moreover, since the work consists of information storage and retrieval, the sending of follow-on letters in response to specific inquiries, and data collection, we see no inherent conflict of interest arising because one contractor performs this work for different military departments.

Worldwide maintains, however, that it was led to believe it could not undertake this contract and other similar fulfillment contracts at the same time. Due to Ayer's statements at the briefing conference Worldwide contends that it refrained from bidding other fulfillment contracts to its detriment. It states that it "and the other bidders properly assumed that the Army was fully aware and approved of all contents of the RFP."

As the record shows, Ayer initially interpreted the effect of the conflict of interest clause differently from the Army. Although the protester believes the Army must have been aware of Ayer's interpretation of the conflict of interest clause before the proposals were submitted, the Army points out that none of its representatives attended the December briefing conference. Thus it appears that Army was not aware of Ayer's interpretation of the conflict of interest clause until it received Ayer's report of February 9, 1976, recommending award to Worldwide. Based on these facts we cannot say that either the Army or Ayer intentionally misled Worldwide. While Worldwide may have refrained from bidding on other contracts because of what Ayer said during the briefing conference, we do not believe that award to LCS is thereby improper.

However, we do think it was unfortunate that Worldwide may have lost business opportunities because of its reliance on Ayer's interpretation of the conflict of interest clause. Therefore, we are recommending to the Secretary of the Army that in future procurements of this type steps should be taken to assure that the Army and its prime contractor coordinate their respective positions on the meaning of a conflict of interest clause so that prospective offerors competing for the work are not misled to their detriment.

Worldwide's next contention concerns the adequacy of the final negotiations. The protester believes that since the discussions preceding the March 2 call for best and final prices had been directed toward the FY 77 period only, offerors should have been allowed more than 2 days (actually only 43 hours) in which to prepare final prices for the option periods as well as the FY 77 period. Moreover, Worldwide states that it complained to Ayer on March 2, that the time provided was insufficient.

Ayer states that Worldwide did say during their first telephone conversation on March 2, that it needed more time to review its price proposal, after Ayer had erroneously advised Worldwide that final proposals were due March 3. However, when Ayer telephoned Worldwide 30 minutes later to advise that final proposals actually were due by March 4, Worldwide did not complain of insufficient time. Moreover, Ayer points out that the other offerors were given the same amount of time to respond and no one "objected to the time span requirement."

On these facts, we cannot say that Ayer should have provided offerors with more time in which to review and submit their final prices. Ayer's RFP stated that the award was expected to be made on February 27, 1976, so that the REACT system would be operational by July 1, 1976. Therefore, on March 2, it was clear that Ayer would need to obtain best and final offers as soon as possible. Ayer insists that once it was explained to Worldwide's representative on March 2 that final prices were due March 4, not March 3, the protester was satisfied. Moreover, none of the other offerors complained of the March 4 deadline. Under the circumstances, we think it was reasonable for Ayer to assume that the time provided was sufficient.

Nevertheless, Worldwide argues that a proposed \$300,000 to \$400,000 reduction in its price should have been considered. We do not agree. Worldwide notified the Army of a possible pricing mistake on March 19, 1976. The same day, however, a delivery order for REACT had been mailed to Ayer. According to the Army, its contracting officials mailed the delivery order before they were aware of the mistake allegation.

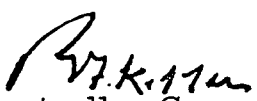
In effect, Worldwide's price reduction offer was received after the award was made. Therefore, it could not be considered.

Worldwide next alleges that the Army usurped Ayer's right as prime contractor to choose its own subcontractor. However, the prime contract provided for contracting officer approval of sub-contract awards in excess of \$100,000. Moreover, Ayer has not complained of the Army's action in the matter. In fact, Ayer has responded to Worldwide's protest by pointing out that it "did not select Worldwide as stated [by] Worldwide. \* \* \* Ayer 'recommended' Worldwide to [Army] as its first choice \* \* \* ." Therefore, we find no merit to Worldwide's charge.

Finally, Worldwide questions whether the contract scope has been considerably relaxed since the award was made to LCS. The protester has furnished a copy of some of the more elaborate requirements under the FY 76 contract and argues that if it had known that these requirements were to be eliminated from the contract Worldwide would have been in a position to have offered an even greater price reduction than that offered to the Army on March 19, 1976. In this connection, Worldwide states that its original proposal listed certain work requirements of the 76 contract which were not cited in the RFP, but that Worldwide was never directed to exclude these areas from its proposal.

We understand that the REACT system for which the protester held the FY 1976 contract has been modified and simplified to present a more streamlined, efficient and cost-effective system. In addition, some of the contract modifications were due to the changes in contractors. Under the circumstances, we have no basis to object to the contract modification. Finally, insofar as the protester's proposal included items not called for the RFP, we believe that it was the protester's responsibility to ascertain whether these items were required prior to submitting its proposal.

Accordingly, the protest is denied.

  
Acting Comptroller General  
of the United States