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DECISION



Harvey H. Hoff
Per II

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

FILE: E-186984

DATE: March 1, 1977

MATTER OF: Educational Projects, Inc.

DIGEST:

1. Protester who was listed as subcontractor in rejected proposal submitted under agency solicitation is interested party for filing protest. Moreover, subsequent untimely protest by offeror does not require that offeror be excluded from protest action because firm is interested party concerning subcontractor's timely protest.
2. Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent.
3. Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake.
4. Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for GAO.
5. Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection.

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6. Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAC agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship.

Educational Projects, Inc. (EPI), and others, have protested EPI's exclusion from the competitive range and the award to Kirschner Associates, Inc. (Kirschner) of a cost-reimbursement contract under Request for Proposals (RFP) 150-76-R017, issued by the Department of Health, Education, and Welfare (HEW), Office of Child Development, Region V, Chicago, Illinois. The contract provides for training Head Start staff in child development throughout six states in the Midwest.

Five proposals were received. After review by a technical evaluation panel, proposals submitted by EPI, Kirschner, and Success Research Consultants, Inc. (Success), were determined to be technically acceptable. However, EPI was informed by the agency that because of its high estimated costs, and for other reasons, its proposal did not fall within the competitive range. Negotiations were conducted only with Kirschner and Success, and award ultimately was made to Kirschner.

A joint protest was filed timely with this Office by the Child Development Training Program, Bemidji State University, Bemidji, Minnesota, and the Head Start Supplementary Training/Child Development Associate (HSST/CDA) Program, University of Minnesota, Minneapolis, Minnesota (the Bemidji protest). Bemidji sought to protest the exclusion of EPI from the competitive range because EPI had proposed Bemidji, among others, as a subcontractor. Approximately one month after rejection of its offer, EPI protested its rejection to this Office. In addition, EPI timely protested the contract award to Kirschner.

The procuring agency argues that we should consider EPI's exclusion from the competitive range, as raised by Bemidji, only if Bemidji qualifies as an interested party for this procurement under our bid protest procedures, 48 C.F.R. § 20.1(a) (1976). The agency suggests that EPI would not be in the position of a purchasing agent for the Government and that Bemidji is in the same position to protest as an employee of an unsuccessful offeror. The agency notes that individual employees, generally, are not considered by this office to be interested parties for bid protest purposes.

We have stated that generally in determining whether a protester satisfies the interested party requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester. The requirement that a party be interested serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged action may be decided. ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD 245; Coleman Transfer and Storage, Inc., B-182420, October 17, 1975, 75-2 CPD 238. The protester's position as subcontractor should not disqualify it from participating in the protest process. Enterprise Roofing Service, 55 Comp. Gen. 817, 720, 76-1 CPD 5. In our opinion, the agency's analogy is not persuasive because Bemidji, unlike an individual employee, was a proposed subcontractor for a significant aspect of the services required and as such its interests were clearly affected by the agency's nonselection of FPI. In fact, FPI considers itself a contracting agent for its intended subcontractor-institutions.

Also, a question has been raised regarding the timeliness of EPI's protest concerning the rejection of its offer. Our bid protest procedures require the filing of a protest within ten working days after the protester knows the basis of its protest. 4 C.F.R. § 20.2(b)(2) (1976). While EPI's initial protest as to its exclusion from the competitive range is untimely, it is clearly an interested party as to Bemidji's timely protest and we therefore will not exclude the firm from participating fully in this protest action.

The solicitation was issued by HEW's Office of Child Development pursuant to its "Head Start Supplemental Training" (HSST) program. The HSST program goals, as stated in the solicitation, are:

"First, to provide training for Head Start Staff in child development and in early childhood education and related areas with the objective of upgrading their skills and competencies in delivering services to Head Start children; and, second, to provide staff with opportunities for appropriate training and career development to facilitate upward mobility in Head Start programs."

The solicitation points out that emphasis on the program's career development function, which is degree oriented, has conflicted with the need to provide Head Start staff with training for skills directly related to teaching Head Start children. Accordingly, the Office of Child Development has supported development of the

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Child Development Associate (CDA) program. This involves the granting of a CDA credential by the CDA Consortium (a private nonprofit corporation funded by the Office of Child Development) to Head Start trainees who demonstrate competencies as provided in assessment procedures developed by the CDA Consortium. The solicitation points out that the CDA credential program and college degree programs are different in that degree requirements at many institutions often require trainees to take courses which only indirectly affect Head Start classroom performance. Thus, the CDA credential is based on actual performance with children, rather than completion of a prescribed number of credit hours, although college credit also may be given for CDA credential training.

The solicitation's scope of work contemplates that the offeror first will provide CDA credential training, either through its own staff or through cooperating institutions, to Head Start staff trainees. The offeror also is required to provide for degree oriented courses to certain Head Start trainees consistent with the priorities provided in the solicitation's "special instructions."

HEW reports that in the previous contract year, requirements for Head Start training and technical assistance within Region V were met by awarding 15 separate contracts to the educational institutions or affiliates which were proposed by EPI as subcontractors in this case. In order to simplify contract administration and in anticipation of reducing administrative costs, HEW decided to solicit for a single contract covering this entire region. The incumbent contractors formed a "Region V Consortium" to facilitate submission of a proposal which would be responsive to the single contract requirement.

The record shows that proposals were received from five sources and were submitted to a technical panel for evaluation. On the basis of a 100 point scale, the technically acceptable proposals were rated as follows:

<u>Firm</u>	<u>Rating</u>	<u>Estimated Cost</u>
EPI	73.8	586,649
Kirschner	64.5	422,989
Success	58.5	451,405

Thereafter, EPI was determined to be outside the competitive range and was excluded from negotiations because its proposed approach of subcontracting all training to a large number of institutions was significantly more expensive than that of other

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acceptable offers. The contracting officer believed that even though EPI may have been willing to negotiate, as indicated in its proposal, the firm's proposed method of performance was such that meaningful negotiations were improbable.

The protesters argue that procurement regulations call for acceptance of a proposal even though it may be more costly if it offers the greatest value to the Government in terms of performance and productability. It is alleged that EPI erroneously was rejected on the basis of cost, without sufficient consideration given to overall program proficiency. The protesters point out that only EPI has the general support of the participating institutions which held the prior contracts. In fact, EPI views itself as a contracting agent for these Region V institutions. It is stated that because of the innovative nature of HEW's training program, the granting of "valid credit" for training, a contract objective, is tenuous at many institutions. Because EPI has worked with these institutions since the program's inception, and has gained the general acceptance of participating accredited institutions, it is suggested that forced new arrangements with a different contractor will undermine the offering of valid credit to Head Start trainees. Although EPI believes its cost estimate was realistic, based on its extensive experience and understanding of the program's requirements, it argues that the agency failed to make a reasonable effort to determine whether or not the firm's estimated costs could be considered acceptable.

It is clear from a comparison of Kirschner's and EPI's proposals that they adopted very different methods of satisfying the RFP's requirements. The most significant difference appears to be that EPI intended to subcontract both degree oriented training and CDA training to local universities. Kirschner intended to cooperate with the universities, but to subcontract its CDA training to one firm, which would train those who in turn would provide training and supervise the Head Start trainees.

It is true, as suggested by the protester, that there is no requirement that cost-reimbursement type contracts be awarded on the basis of the lowest proposed cost, fee or combination thereof. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The primary consideration in determining to whom the award shall be made is which firm can perform the contract in a manner most advantageous to the Government. Federal Procurement Regulations § 1-3.805-2. Generally, a proposal must be considered within

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the competitive range for negotiations unless it is so technically inferior or out of line in price that meaningful negotiations are precluded. PRC Computer Center, Inc., 55 Comp. Gen. 60, 68 (1975), 75-2 CPD 35.

In objecting to the agency's failure to negotiate, the protesters state that EPI's proposal indicated a willingness to negotiate its estimated costs and that the firm should have been permitted either to explain the relative value of its proposal or to obtain suggestions from the agency concerning ways of reducing costs without affecting quality. In this regard, EPI's proposal stated:

"The cost information and budget presented below represent EPI's best cost estimates given the information provided in the RFP and EPI's proposed approach to meeting those requirements for the 1976-1977 academic year. Nevertheless, EPI would like to state its willingness to negotiate with the Region V Office of Child Development concerning these estimated cost projections. Wherever OCD can provide information which can demonstrate costs can be reduced without a reduction in the quality of the work to meet the government's expectations of the contractor, EPI is ready to make such adjustments."

In this case the solicitation gave no indication of the Government's intention to accept the acceptable technical proposal with the lowest attendant costs irrespective of its comparative technical excellence. As a general rule an offeror may not be excluded from the competitive range if it submits a proposal which is technically superior to others in the competitive range unless the solicitation makes it clear that the agency intends to accept the least expensive proposal which it finds technically acceptable. 52 Comp. Gen. 161, 164 (1972). Offerors are entitled to know the trade off between technical excellence and costs.

The circumstances here, however, are unusual in that it appears that EPI's decision to propose a high quality decentralized method of performance would not have been altered even if the agency had advised offerors of its intention to award to the lowest acceptable offeror. EPI essentially does not argue that it in fact was prejudiced by the agency's failure to make clear the importance of cost in its selection criteria. Rather, EPI believes that its high quality and more expensive approach offers the Government a corresponding greater value and it seeks to negotiate for the purpose of explaining the relative value of its approach. It is clear, however, that the agency recognized

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EPI's technical superiority. EPI has not indicated any flexibility in altering its proposed approach to satisfying the Government's specifications other than its willingness to remove itself completely from the procurement to allow the Government to contract separately and directly with the individual institutions indicated in its proposal. This, of course, would not be an acceptable approach as indicated by the solicitation. Moreover, EPI's express offer in its proposal to negotiate costs with the Government was predicated on the assumption that the Government could demonstrate that costs could be reduced without a reduction in the quality of the work. In our opinion, the agency's failure to state its intention to make award on the basis of a technically acceptable proposal offering the lowest attendant costs may have misled EPI into believing it could submit its high quality proposal in the false hope of convincing the agency of its value. Nevertheless, the contracting officer in evaluating proposals reasonably considered EPI to be wedded to its high quality approach and in view of the agency's priorities and the 25 percent higher costs than Kirschner's proposed costs, we cannot conclude that EPI was prejudiced by the agency's failure to negotiate with the firm on the basis of its superior proposal. Finally, we note that the agency has advised this Office of its intention to take appropriate measures to preclude a recurrence of the defect found in the subject solicitation. We support the agency's objective in this regard.

The protesters also object to the selection of Kirschner for several reasons. First, it is argued that a cutback in the prior year's services will occur under Kirschner's contract. The protesters state that the award document deleted material requirements of the solicitation (page 25) and that if EPI had known of this change in requirements its estimated costs would have been reduced significantly. Moreover, it is argued that under Kirschner's centralized approach, trainees will not be issued valid academic credit and counseling at the same level obtained during the previous year. In this connection, EPI states it would be willing to remove itself as the proposed contractor, if the agency was willing to reinstate the separate contracts with the individual educational institutions. The protesters also point out that Kirschner has received a number of contracts in Region V creating a "Kirschner concentration of power and control over the delivering agencies in the Region that almost rivals that of the Regional Office itself." Finally it is argued that the award to Kirschner created a conflict of interest because the firm holds a contract requiring it to evaluate the effectiveness of the CDA program on a national scale.

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As to the deletion of the material requirements on page 25 of the solicitation, we have been advised that this was due to a typographical error and by contract amendment the page has been reinstated with a minor exception and, instead, page 35, dealing with the format of the cost proposal, has been deleted. In addition, the objections concerning the extent of valid academic credit and counseling provided under the Kirschner proposal does not appear to involve a question of the acceptability of the proposal under the specification. We note that Kirschner proposed to provide academic credit for CDA training and has persuaded the agency that it can do so. Even though services to Head Start trainees in fact may have been cut back from previous levels, we are not aware of any material deviation in Kirschner's proposal to the solicitation requirements. Rather, the objection essentially is directed to the agency's specifications which have resulted in a reduction of training provided in the past. In this connection, we note that we have received numerous letters from institutions and Head Start trainees in support of the EPI proposal, which essentially retains past levels and types of training and counseling. While the protesters have requested that we evaluate the effectiveness of the Government's requirements, it would not be appropriate for us to do so pursuant to our bid protest function. We consistently have held that the determination of the Government's minimum needs is primarily the responsibility of the contracting agency which will not be disturbed absent a clear abuse of discretion. Data 100 Corporation, B-182397, February 12, 1975, 75-1 CPD 89. It seems to us that the specifications regarding the quantity and levels of training to be furnished Head Start trainees is a decision for contracting agency rather than this Office. Moreover, this objection to the Government's specifications raised after submission of proposals is untimely. 4 C.F.R. § 20.2(b) (1976).

As to the objections concerning the large number of Office of Child Development contracts held by Kirschner, we are aware of no legal basis for objection in this regard.

As stated by the protesters, and as confirmed by HEW, Kirschner is to perform a 2-year nationwide assessment of the effectiveness of CDA competency training, i.e., the same type of training which Kirschner is to perform in HEW Region V. This would result in Kirschner evaluating its own work, and any conclusions reached by Kirschner in its evaluation should be challenged for lack of objectivity. Notwithstanding the obvious competing relationships of Kirschner and although the

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usefulness of the assessment contract may be impaired, there has been no suggestion that Kirschner's assessment contract will adversely affect its performance under the training contract which is the subject of this protest. In any case, HEW has concluded that this situation does create an apparent conflict of interest, even though it is not directly violative of any Federal or HEW procurement regulation. In order to ensure that HEW gets what it bargained for in the assessment contract, HEW's Deputy Assistant Secretary for Grants and Procurement Management has recommended to the contracting office that Kirschner's national assessment contract be amended to delete the requirement for Region V CDA assessment and that assessment for that Region be performed either in-house or under contract with a firm other than Kirschner. We agree with this remedial action. See generally 701st Personnel Services Company, B-186049, November 11, 1976, 76-2 CPD 430; CI, Armed Services Procurement Regulation, Appendix G, Avoidance of Organizational Conflict of Interest.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States