

DOCUMENT RESUME

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[Protests against Alleged Racial Discrimination, Technical Evaluation, and Rejection of Alternate Proposal]. B-187599. July 20, 1977. 6 pp.

Decision re: Onyx Corp.; by Robert F. Keller, Deputy Comptroller General.

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

Organization Concerned: Department of Health, Education, and Welfare; Humanics Associates.

Authority: 10 U.S.C. 2304(g). 55 Comp. Gen. 244. 55 Comp. Gen. 1111. 55 Comp. Gen. 1119-1121. B-186489 (1976). B-186492 (1976). B-187645 (1977).

A protest was made to the timing of a contract award, and protester contended that there was racial prejudice on the part of agency officials, that their technical proposal was superior to that of awardee, and that their alternate proposal was not considered. No evidence was furnished substantiating allegation of racial prejudice by agency officials. Point spread in technical evaluation was close enough that cost became the determinant in award. Bidder's offer to perform two separate solicitations under single contract did not constitute "alternate proposal" within intent of solicitation. Because of the significance of term "date of award" under Bid Protest Procedures, agency should adopt a standard definition. The protest was denied. (Author/DJM)

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DECISION



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

P.L. II
Ayer

FILE: B-187599

DATE: July 20, 1977

MATTER OF: The Onyx Corporation

DIGEST:

1. Where confusion exists as to the meaning of the term "date of award" it is suggested, due to the significance attached to the term under GAO Bid Protest Procedures, that agency adopt a standard definition.
2. Protester has not furnished any evidence substantiating its allegation that it was the subject of racial prejudice of agency officials.
3. Estimated cost may become determinative factor in award selection where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another.
4. Where offeror submits an "alternate proposal" which offers to perform two separate solicitations under a single contract such a proposal does not constitute an alternate proposal within intent of solicitation and need not be considered by agency.

The Onyx Corporation (Onyx) protests the Department of Health, Education and Welfare's (HEW) award of a contract to Humanics Associates (Humanics) under request for proposals HEW-0013-76 (RFP-13) for validation and technical assistance for validation of HEW Region IV's Headstart Self Assessment program.

RFP-13 was, together with request for proposals HEW-0012-76 (RFP-12) and two other solicitations, the subject matter of our decision in Kirschner Research Institute, Humanics Associates, and Onyx, B-186489, B-186492, September 27, 1976, 76-2 CPD 289. There Humanics asserted that the evaluation of the proposals submitted in response to the solicitations was not conducted in accordance with the procedures set out in a document entitled "OHD Contract Procedures Handbook" (Handbook). Onyx took the position that HEW had complied with all applicable evaluation procedures. We denied the protest on the ground that the Handbook constituted internal guidance and as such did not create or define substantive rights of offerors and that the Handbook requirement that 25 percent of the

members of proposal evaluation panels be from outside the sponsoring program activity was not binding on the agency.

Upon receipt of our decision HEW's Washington Headquarters (Headquarters) phoned HEW's Region IV Atlanta Office (Region IV) and advised them to proceed with award under the until-then protested solicitations. The Region IV contracting officer immediately began processing an award under RFP-13 because of the several solicitations involved in the earlier protest the services provided under RFP-13 were deemed by Region IV to be the most urgently required. Region IV's evaluation of the proposals submitted resulted in the determination that award of RFP-13 to Humanics was in the best interests of the Government. On September 27, 1976 a representative of Humanics signed the face page of the contract. Since its receipt of our September 27 decision, Onyx had attempted to telephonically monitor the progress of the contract awards. On September 28, 1976, Region IV advised Onyx that it could not proceed with an award absent written authority from Headquarters. However, on the same day, Headquarters advised Onyx that oral authorization to proceed with an award had been given Region IV on the preceding day, September 27, 1976. The situation is further confused by the fact that Region IV awarded Onyx a contract under RFP-12 on September 28, 1976 and a representative of Onyx appears to have signed that contract on September 28, 1976. On September 30, 1976, upon learning that RFP-13 had been awarded to Humanics on September 27, 1976, Onyx filed a protest with HEW. At sometime during that day a telephone conversation took place between Onyx and various officials of Region IV. It is not exactly clear what transpired, but the following seems to constitute the high points of the conversation:

1. Onyx informed Region IV that it wanted to be awarded the contracts under both RFP-12 and RFP-13 and that it would protest if it didn't receive them.
2. A non-contracting official of Region IV indicated to Onyx that Humanics was also threatening to protest further and that if the procurement was to be fought over once again it might be best to not award any contracts at all.
3. The same official suggested that Onyx should concentrate on correcting some audit discrepancies which HEW had discovered in the performance of one of the two contracts.

4. A Region IV contracting official advised the non-contracting official that award of one of the contracts had no relationship to award of the other contract.

On October 5, 1976 Onyx filed its protest of HEW's award of RFP-13 to Humanics with this Office. We believe HEW has accurately summarized the grounds of Onyx's protest to GAO as follows:

- "1. The award made to Humanics violated your decision B-186492, and by its timing was designed to frustrate an effective protest action by Onyx.
- "2. Officials of the Regional Office attempted to withhold award under RFP No. HEW-0012-76 in order to induce Onyx to withdraw its protest under the RFP HEW-0013-76.
- "3. Onyx 'has been the victim of persistent abuse, harassment and illegal treatment solely because of racial prejudice of officials of the Atlanta Regional Office.'"

As evidence of the contracting officer's personal animus toward Onyx, the firm points to the fact that Region IV had rejected Onyx's "alternate proposal" of July 1, 1976 to perform both RFP-12 and RFP-13 together at a saving of \$40,000.

Turning to the first part of Onyx's first contention that HEW's award to Humanics was in some way contrary to our September 27 decision, we believe that Onyx has misconceived the import of our decision. As discussed above, the decision was solely concerned with the applicability of the guidance provided in the Handbook to the procedure used in evaluation of proposals. The decision did not reach the issue of which offerors should receive contracts under the protested solicitations.

Regarding the notion that Region IV's timing of the award was in some manner designed to frustrate an effective protest by Onyx, the record discloses that Region IV acted promptly upon notification of our decision to make an award to Humanics and that the face page of the contract shows that it was executed by Humanics on September 27, 1976. We only consider this issue because the contracting officer advised Onyx on September 28, 1976 that no award had been made on RFP-13. HEW has advised that the contracting officer's statement was believed by the contracting officer to be an accurate

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representation of the true status of the procurement. He had in mind two provisions of the solicitation when he answered the question posed by Onyx. The first provided that:

"A written award (or Acceptance of Offer) mailed (or otherwise furnished) to the successful offeror within the time for acceptance specified in the offer shall be deemed to result in a binding contract without further action by either party."

While the second provision read:

"Funds are not presently available for the items covered by this solicitation. The Government's obligation is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless and until funds are made available to the contracting officer for this purpose and notice of such availability, to be confirmed in writing by the contracting officer, is given to the contractor."

HEW, in urging the reasonableness of the contracting officer's answer to the Onyx question, points out that no written award was furnished Humanics until September 30, 1976, and that no funds were made available for the contract until mid-day September 30, 1976. However, HEW recognizes that such a technical definition of "award" could have misled not only Onyx but even Humanics and has taken steps to insure that the contracting officer concerned discontinues this practice. HEW takes the position that the controversy here is attributable not so much to an evil design as it is to ineffective communication among the principals. We tend to concur in this assessment, but, because of the importance assigned under our Bid Protest Procedures to the date of award, we suggest that HEW take steps to assure that all of its contracting officers assign the same meaning to the term "date of award" when they use it in communications with bidders and offerors under HEW solicitations.

Onyx's second contention centers on the statements (described above) of the non-contracting official made during the course of the September 30, 1976 phone conversation between Onyx and Region IV. Once again HEW readily admits that the confusion surrounding the events which transpired is probably attributable to ineffective communication. We agree. However, we think it should be emphasized

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that an official of Region IV with contracting knowledge did toward the end of the conversation clarify the HEW position for both the benefit of Onyx and the non-contracting Region IV official.

Onyx's third contention of racial prejudice on the part of Region IV toward Onyx has been categorically denied by HEW. The protester has, moreover, failed to bring forward any evidence of such an attitude on the part of any of the responsible officials in Region IV. What Onyx has argued is that its proposal under RFP-13 was technically superior to that of Humanics and that its total estimated cost was essentially identical, being within 1/2 of 1 percent of Humanics', and that in such circumstances Onyx should have received the award. The record indicates, however, that the average scores of the two offerors were Onyx 83.75, Humanics 80. Moreover, the contracting officer determined that the two proposals were essentially equal in technical quality. This left estimated cost as the single remaining determinant and the award was made to the offeror proposing the lowest estimated cost. We have recently reiterated our position on this issue in Bunker Ramo Corporation, B-187845, June 15, 1977, 77-1 CPD ___, where we said:

"We believe this review points up the basis for our view that numerical point scores, when used for proposal evaluation, are useful as guides to intelligent decision-making, see 52 Comp. Gen. 688 (1973), but are not themselves controlling in determining award, since it is apparent that averaged scores may reflect the disparate, subjective judgments of the evaluators. Thus, it has consistently been our position that whether a given point spread between competing offerors alone may indicate the significant superiority of one proposal over another depends on the facts and circumstances of each procurement and that while technical point scores and descriptive ratings must of course be considered by source selection officials, such officials are not bound thereby. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Grey Advertising, Inc., 55 Comp. Gen. 111, 119-21, 76-1 CPD 325."

We further observed in Bunker Ramo that:

"[o]nce the proposals could be viewed as essentially equal technically, it was incumbent upon the contracting officer to consider cost. Indeed, in view of the provisions of 10 U. S. C. 2304(g), which require that price be considered in the award of all


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negotiated contracts, he would have been remiss had he not done so. Grey Advertising, supra, at 1124."

We can not, therefore, conclude that HEW's award to Humanics was other than proper.

Turning to the issue of Onyx's July 1, 1978 "alternate proposal," to perform both RFP-12 and RFP-13 together under a single contract, we believe that HEW's position that such an offer does not constitute a true alternate proposal within the meaning which is usually ascribed to the term as it is used in Government solicitations is correct. HEW defines an alternate proposal as "an offer to perform the work specified in an RFP with an alternate approach to the same end result." The record moreover indicates that HEW had itself considered combining the two requirements into one prior to issuance of RFP-12 and RFP-13 and had rejected the idea because of what it conceived to be organizational conflicts of interest. We, therefore, conclude that HEW's treatment of Onyx's "alternate proposal" was appropriate under the circumstances.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States