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DECISION

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

FILE: B-196442.2 DATE: November 7, 1980
MATTER OF: Lawrence Johnson & Associates, Inc.

DIGEST:

1. Incumbent contractor did not enjoy unfair competitive advantage for Phase II technical proposal though it had performed related Phase I study, since data collected for Phase I and Phase II involve different respondent populations and RFP fully defines objectives of Phase II study, including data to be collected and possible method of sample stratification, so that offeror could develop a sample plan and write competitive Phase II technical proposal without Phase I report.
2. Assuming incumbent contractor enjoyed competitive advantage before it competed for Phase II of two-part study, advantage resulted from status as incumbent contractor rather than preference or unfair action by Government and is not objectionable.
3. Protester's objection to composition of evaluation panel first filed at GAO more than two months after agency denied protest on this basis is untimely. GAO Bid Protest Procedures require protest initially filed with agency to be filed at GAO within 10 working days of initial adverse agency action. 4 C.F.R. § 20(a).

This is Lawrence Johnson & Associates, Inc.'s (LJA) second protest concerning the award or proposed award of a contract by the Department of Education (DE) to Rand Corporation (Rand) under request for proposals (RFP) No. 79-106. The contract is for the evaluation of

[Protest Involving Contract Award]

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DE's foreign language training and area studies program. As originally issued, the RFP required the contract work to be done in two phases over a performance period of 17-1/2 months. We sustained LJA's first protest because DE awarded a contract to Rand for both phases for a 27-month performance period, without affording other offerors an opportunity to submit proposals on that basis. Lawrence Johnson & Associates, Inc., B-196442, March 11, 1980, 80-1 CPD 188. We recommended that the agency reopen negotiations for another round of best and final offers based on a performance period that would meet DE's needs. However, DE reopened negotiations only for Phase II so that Rand could complete Phase I which was substantially underway when we issued our decision. DE did not revise the RFP but simply advised the offerors that it had increased its estimated level of effort for Phase II from four person years to six person years and the performance period from 8.5 months to 18 months.

LJA now contends that Rand enjoyed an unfair competitive advantage when it competed for Phase II because only Rand had access to the Phase I report prior to submitting the technical proposal for the second phase. (LJA did not submit a Phase II technical proposal.) LJA maintains that the information and data garnered from its Phase I study will enable Rand to propose a superior Phase II technical proposal and that without the Phase I report "the sampling plan [for Phase II] cannot be developed." To equalize the competition, the protester argues that DE should have postponed the due date for the Phase II proposals and released the Phase I final report to all offerors.

We deny the protest.

We have recognized that certain firms may enjoy a competitive advantage because of their incumbency or their own particular circumstances and such an advantage is not improper unless it results from preference or unfair action by the Government. ENSEC Service Corporation, 55 Comp. Gen. 656 (1976), 76-1 CPD 34. Thus, we have frequently stated that the Government is not required to equalize competition on a particular procurement by compensating for competitive advantages accruing to firms by reason of their own particular circumstances, including the award of other Government contracts. Piasecki Aircraft Corporation, B-181913, June 27, 1975, 75-1 CPD 391.

To prevail, protesters must show that a competitive advantage existed and that it was obtained unfairly. Presentations South, Inc., B-196099, March 18, 1980, 80-1 CPD 209.

We do not think that Rand enjoyed an unfair competitive advantage in this case. For the following reasons and contrary to LJA's contention, we believe that an offeror could develop a competitive Phase II technical proposal without the Phase I report.

Phase I and Phase II are designed to evaluate two different although related subjects. Phase I requires the contractor to perform an exploratory evaluation of DE's "Language Training and Area Studies Program" and Phase II to develop a design for the evaluation and analysis of the data from the doctoral graduates (both fellowship and non-fellowship holders) or beneficiaries of the program. Thus, the two phases involve data collected from entirely different respondent populations --the institutions themselves in Phase I and the doctoral graduates in Phase II. In this connection, for Phase II, the RFP advises offerors where the list of graduates can be obtained, either from DE for the names of fellowship recipients or the language institutions for the name of non-fellowship recipients. If necessary, a contractor could purify the list of names from the language institutions to obtain the names of the non-fellowship holders. In addition, the RFP suggested possible methods of sample stratification and listed the types of data to be collected from the graduates, for example, employment history, use of language and area expertise on the job, academic discipline or area of training, etc. As a result of the RFP's comprehensive approach to Phase II data collection and analysis, we think that an offeror could develop a sample plan and explain their approach in a Phase II technical proposal.

In addition, the RFP not only advised offerors where to obtain the data and what kind of information offerors would need to conduct the Phase II study, but also clearly defined the scope of each study. The objective of the Phase I study was to evaluate the goals of the foreign language program from the point of view of and data collected from program decisionmakers. In contrast, the objectives of the Phase II evaluation were designed to focus on the graduate's experiences and included tracing the subsequent career trends of doctoral recipients, assessing the relationship of training

received to careers, examining employment/unemployment rates of the doctoral graduates and foreign area studies fellowship recipients, and assessing employment demand trends by foreign language area. We think that this information together with the RFP's delineation of the data required, provided offerors with a clear basis upon which offerors could write a Phase II technical proposal.

As another example of Rand's competitive advantage, LJA argues that only Rand is aware of the problems encountered during the Phase I study and, therefore, only Rand knows the reasons for the Phase II study's increased level of effort to six person years and the performance period to 18 months. However, it appears to us that these changes could be beneficial to an offeror such as LJA, which did not perform the Phase I study, by giving it more time to develop contacts with the foreign language institutions, and to examine the data sources needed for the Phase II study. Finally, LJA emphasizes that Rand was planning for the Phase II shortly after the contract award and geared some of its data collection and analysis during Phase I to the Phase II study. We do not think this shows, as LJA alleges, that Phase I and Phase II were dependent upon each other. Rather, we believe that a plausible explanation was that Rand was preparing to conduct the Phase II study at this time simply because the original RFP required that the Phase I and Phase II studies be conducted concurrently. We do not believe the Government need compensate for this fact simply because it would be less difficult for the incumbent, as a result of this experience, to write a technical proposal. See Field Maintenance Services Corporation, 56 Comp. Gen. 1008 (1977), 77-2 CPD 235.

At most, the situation here resembles that where an incumbent contractor may have developed a large data base and gained experience from its work on a prior Government contract. See Aerospace Engineering Services Corporation, B-184850, March 9, 1976, 76-1 CPD 164. We therefore do not think there is any evidence on the record to show that the competitive advantage Rand may enjoy here resulted from any preference or unfair action by the Government.

Finally, LJA objects to the composition of the technical evaluation panel. The protester first raised this issue with DE in March and May 1980. Although DE denied its protest on

this basis in June, LJA did not protest this issue with our Office until September. Our Bid Protest Procedures require that if a protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 20.2(a) (1980). Inasmuch as LJA's protest concerning the composition of the evaluation panel was filed in September, more than two months after DE denied its protest, its protest on this basis is untimely.

Harry R. Van Cleave

For the Comptroller General
of the United States