

**DECISION**



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

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**FILE:** B-216421

**DATE:** April 16, 1985

**MATTER OF:** Indian and Native American Employment  
and Training Coalition

**DIGEST:**

Protest contending that a contract modification was beyond the scope of the contract and thus improperly suppressed competition is sustained where the modification resulted in the procurement of services materially different from that for which the competition was held.

The Indian and Native American Employment and Training Coalition (Coalition) has protested a task order issued by the Department of Labor, Office of the Inspector General (OIG) under contract No. J-9-M-3-0119 whereby the contractor, Rodriguez, Roach & Assoc., P.C., is to provide specified technical assistance and training to Native American grantees. The Coalition believes that the modification to the contract by the task order is improper since the services to be provided under the task order are outside the scope of the request for proposals on which the contract is based. Furthermore, the Coalition contends that the contractor's additional responsibilities under the contract as modified place the contractor in an organizational conflict of interest with respect to the contractor's duties under the original contract. We sustain the protest on the first basis; the second therefore is academic.

The contract, as originally awarded to Rodriguez, Roach, provided that the contractor would provide professional accounting/audit services on a task order basis, supportive of the OIG. The contract was for a 1-year period with an option for the government to extend the contract for 1 additional year. On July 23, 1984, task order No. 101 was added to the contract, pursuant to which Rodriguez, Roach discussed with representatives of the OIG and the Department of Labor's Employment and Training Administration (ETA) the latter's plans for providing technical assistance and training to Native American and farmworker grantees. On September 28, 1984, the OIG added modification No. 3 to task order No. 101 whereby Rodriguez,

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Roach would provide technical assistance and training to Native American grantees on financial management and management information systems. This technical assistance and training for approximately 194 Native American grantees would be in the form of training workshops and also on-site technical assistance and training to approximately 35 of the grantees. Task order No. 101 added a cost of approximately \$433,000 to the prior total amount of the contract of about \$990,000.

The Coalition objects to the modification of the contract by task order No. 101 to include the technical assistance and training services to grantees on the basis that such services are outside the scope of the request for proposals (RFP) on which the contract is based. The Coalition contends that every aspect of the RFP for the contract created the impression that the OIG was procuring audit services, not technical assistance and training services, and that the procurement of specialized technical assistance and training services through the modification improperly suppressed competition.

We generally do not review protests concerning contract modifications because they involve contract administration which is primarily the responsibility of the contracting agency and beyond the scope of our bid protest function. Sierra Pacific Airlines, B-205439, July 19, 1982, 82-2 C.P.D. ¶ 54. We will consider such a protest, however, where it is alleged that the modification is outside the scope of the original procurement and should have been the subject of a new procurement. Nucletronix, Inc., B-213559, July 23, 1984, 84-2 C.P.D. ¶ 82. In this regard, we have stated that if a contract as modified is materially different from the contract for which competition was held, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. Department of the Interior--Request for an Advance Decision, B-207389, June 15, 1982, 82-1 C.P.D. ¶ 589. Whether a modification is outside the scope of the original procurement is determined on the facts of each case, taking into account the circumstances attending the procurement that was conducted and whether the changes accomplished by the modification are of a nature which would be reasonably anticipated under the changes clause in the original contract. CPT Corp., B-211464, June 7, 1984, 84-1 C.P.D. ¶ 606.

The Department of Labor asserts that the on-site technical assistance and training and the workshops on

financial management and management information systems (financial) are within the scope of the contract as shown by the following language contained in the RFP's Scope of Work provision:

"In addition, the contractor may be required to conduct surveys, provide technical expertise, prepare audit plans and reports, and perform such other work required by the OIG to carry out the Inspector General Act of 1978 including audit coordination, training and orientation." (Emphasis added.)

The quoted sentence is extracted from the following Scope of Work provision:

"The Contractor shall provide professional accounting/audit services, on a Task Order basis, supportive of the U.S. Department of Labor, Office of the Inspector General (OIG). The principal officers of the public accounting firm hereinafter referred to as 'contractor' must be independent Certified Public Accountants. The contractor must also be certified or licensed by a regulatory authority of a State or other political sub-division of the United States and must meet applicable State Board of Accountancy requirements. The contractor may perform financial and compliance audits, economy and efficiency audits, program results audits, full scope audits and other types of audits required by the OIG. The contractor may perform pre-award surveys, pricing reviews, quality control evaluations, analyses, and follow-up required by the OIG. In addition, the contractor may be required to conduct surveys, provide technical expertise, prepare audit plans and reports, and perform such other work required by the OIG to carry out the responsibilities placed on the Inspector General by the Inspector General Act of 1978 including audit coordination, training, and orientation. The contractor may be required to provide services relating to any or all Department of Labor organizations, programs, activities and functions, including, but not limited to the Employment and Training Administration (ETA), Employment Standards

Administration (ESA), Labor-Management Services Administration (LSMA), Mine Safety and Health Administration (MSHA), and Occupational Safety and Health Administration (OSHA). The contractor may also be required to provide services relating to other Federal Agencies especially in those instances in which the Department of Labor has been designated as the cognizant audit agency."

Following the Scope of Work was another provision, the Statement of Work, which began with this paragraph:

"A. Requirements

The Contractor shall provide qualified personnel to perform the audits, surveys, reviews and other tasks needed by the Office of Inspector General, U.S. Department of Labor, to carry out the responsibilities placed on the Inspector General by the Inspector General Act of 1978."

The other paragraphs of the Statement of Work were:

- B. Administrative Reporting Requirements
- C. Reports
- D. Submission of Reports
- E. Workpapers
- F. Entrance and Exit Conference
- G. Auditee Notification
- H. Audit Resolution

As these headings indicate, the Statement of Work focused upon the conduct of audits.

Those who responded to this RFP were to submit technical proposals. The instructions for the preparation of those proposals advised each offeror that by submitting a proposal the offeror was granting the Department of Labor authorization to check references of the offeror's

principal clients for which "financial and/or investigative audit services" had been provided in the last two years. (Emphasis in original.) Each offeror was further advised that its proposal would be evaluated in accordance with the following criteria:

	<u>Maximum Points</u>
Section A - General Qualifications	10
Section B - Client Experience	30
Section C - Personnel Qualifications and Experience	25
Section D - Project Management	20
Section E - Understanding Scope of Work	<u>15</u>
TOTAL POSSIBLE	100

In satisfaction of the single most important criterion, "Client Experience," the offeror was to "provide a list of its principal clients . . . for which financial and/or investigative audit services have been provided in the last two years." (Emphasis in original.) With regard to the second most important criterion, "Personnel Qualifications and Experience," offerors were to submit resumes of senior staff including information concerning "years of auditing experience," "years of supervisory auditing experience if appropriate," "prior experience . . . in performing pre-award surveys, pricing reviews, indirect cost audits, and financial and investigative audits of Federal, State, County or local governments and non-profit organizations . . ." and "prior experience pertaining to commercial enterprises." (Emphasis in original.)

The "Project Management" evaluation criterion was described in the RFP as follows:

"The offeror must describe the management structure and supervision to be exercised over the work to be performed under the contract, including the proposed system for field audit review and office review of reports and workpapers. The offeror must identify the personnel that are to provide the management and supervision. In addition, the offeror must provide an estimate of each individual's time to be spent overall along with an estimate of the percent of time that each individual is to

spend at the audit site managing/supervising the work to be performed under this contract (the individuals who are to conduct the quality control review of the workpapers and audit before submission of the reports to the Government must be specifically identified)."

In addition, the final evaluation criterion, "Understanding Scope of Work," stated in pertinent part:

"The offeror shall provide a narrative to demonstrate the offeror's technical understanding of the work to be performed under this contract by describing the various types of audits that may be performed under this contract. The offeror must also provide an analysis of the distinctions between each of the various types of audits and describe how statistical sampling may be used to accomplish the audits."

Finally, we note that the RFP advised that the successful offeror would be required to attend a postaward conference "held to review the terms of the contract; to discuss the Department's audit requirements, especially those requirements relating to the understanding of the work to be performed and the attainment of quality audits; and to provide an orientation session for the auditors of the successful firm."

As we have indicated above, in three places within the RFP the agency emphasized, through underscoring, the importance of an offeror's experience in financial and investigative audits. In contrast, the word "workshops" does not appear in the RFP's Instructions for Preparing Technical Proposals and Contract Schedule. "Training" appears only in the sixth sentence of the Scope of Work provision, quoted above. "Technical assistance" appears only in the following context in the Statement of Work:

"H. Audit Resolution

"The Contractor is required to provide technical assistance in resolving audit findings to the DOL/OIG and testify [at] ALJ hearings, in accordance with the terms of the task orders issued under this contract."

Offerors were not asked to describe, nor advised that they would be evaluated upon, their experience in on-site technical assistance and training or in conducting workshops.

Rodriguez, Roach's technical proposal, which subsequently was incorporated into the contract, was consistent with the RFP's emphasis upon experience in financial and investigative audits. Although there is mention in the firm's statement of its experience that it has trained accounting personnel and the resumes of several of its members indicate that they have instructed at a seminar, the firm placed no particular emphasis on this aspect of its experience. We note, too, that in responding to the last evaluation criterion--the firm's understanding of the work to be performed--Rodriguez, Roach primarily focused upon the conduct of audits and made no mention of providing on-site training and technical assistance or conducting workshops.

Task order No. 101, the subject of this protest, consists of an initiating memorandum and several subsequent modifications, under which Rodriguez, Roach was paid almost \$29,000:

- to travel to Washington, D.C. to conduct preliminary discussions with the Department of Labor: "the details [of the proposed on-site visits and workshops] will be discussed in this session and a modification to this Task Order developed based on the agreement reached to expand on the Statement of Work, Period of Performance, and Compensation, and to add sections for deliverables and progress reports."

- to attend an additional meeting with the Department of Labor to "review the firm's proposal on how it plans to conduct the training" and to attend two meetings with grantee representatives "to solicit their input and to evaluate the progress made in developing the training program."

- to expand the Statement of Work to include the following tasks:

- A. Review ETA monitoring reports relating to program.
- B. Review audit reports relating to program.
- C. Identify grantees and issues related to grantees.
- D. Discuss program weaknesses related to financial management areas with ETA and OIG officials.
- E. Compile profile of grantees.
- F. Compile data for meetings.
- G. Compile data for workshops agenda.
- H. Coordinate efforts with another contractor.

A subsequent modification to task order No. 101 amended the contract's Statement of Work, in detail, to provide for the conduct of up to four regional training workshops, and for on-site training and technical assistance for approximately 35 grantees (as designated by ETA), at a cost of approximately \$405,000.

In contending that the work to be performed under task order No. 101 was within the scope of Rodriguez, Roach's contract and therefore need not have been separately competed, the agency notes that the RFP's Scope of Work provision states that the contractor may be required, among other things, to "provide technical expertise" and to "perform such other work required by the OIG to carry out the responsibilities placed on the Inspector General by [statute] including audit coordination, training, and orientation." These references, the agency argues, evidence its "intent to have the discretion and flexibility to provide training and technical assistance when deemed necessary." The contract modification is consistent with the statutory responsibilities of the OIG, the agency maintains, "to promote economy, efficiency and effectiveness in the administration of . . . programs and operations."

We agree with the protester that there is nothing in the RFP upon which Rodriguez, Roach's contract is based which would have indicated to potential offerors that the contractor could be called upon to provide more than \$400,000 in on-site training and technical assistance to approximately 35 grantees and four regional workshops on financial management matters to Native American grantees receiving funds under the Job Training Partnership Act. This concept does not appear in the RFP even in the briefest outline. Although the agency contends that its intention to procure such services is evidenced by the RFP's statement that the contractor may be required to



provide "technical expertise" and "training," this language appears in the context of a solicitation almost wholly devoted to audit services and, therefore, more reasonably would be read as referring to services to be provided to agency personnel rather than to grantees.

The language which the agency underscored in the RFP, the instructions to offerors for preparing proposals and the content and weighting of the factors used in evaluating proposals, all focused upon experience in conducting financial and investigative audits. Rodriguez, Roach's proposal was consistent with this emphasis and nowhere addressed the possibility of conducting the kind of training later added to the contract by modification. In this regard, we note that the contractor essentially developed its proposal for conducting the on-site training and technical assistance and the workshops through the performance of some \$29,000 in preliminary tasks under task order No. 101. The magnitude of the preliminary work required of the contractor before it was in a position to begin this work, and the fact that the contract's Statement of Work had to be amended by task order No. 101 to include this effort, suggest to us that it was not within the scope of the original contract. We note, too, that the funds for this effort were appropriated under the Job Training Partnership Act--not normally administered by the OIG--and this effort was added to the contract only in conjunction with the transfer of the necessary funds from the Employment and Training Administration. It is not clear to us how at the time of award the contract could have included within its scope an effort in support of a program administered by another entity within the Department of Labor using funds appropriated for that purpose.

Accordingly, we conclude that the modification made by task order No. 101 was outside the scope of the contract. The issue now, therefore becomes whether, in effect, a sole-source award to Rodriguez, Roach for the technical assistance and training services was appropriate.

A sole-source acquisition is authorized when the legitimate needs of the government so require, e.g., when time is of the essence and only one known source can meet the agency's needs within the required timeframe. W.H. Mullins, B-207200, Feb. 16, 1983, 83-1 C.P.D. ¶ 158. It is well-established that administrative expediency or convenience by itself provides no basis for restricting competition. W.H. Mullins, B-207200, supra. The agency

does not attempt to justify a sole-source award here and we see nothing in the record which would justify a sole-source procurement of the technical assistance and training services. We therefore sustain the protest on this issue.

The Coalition also contends that the technical assistance and training responsibilities involved in task order No. 101 place Rodriguez, Roach in an organizational conflict of interest with respect to its audit duties under the same contract. The Coalition asserts that such a conflict exists since the audits to be conducted by the contractor involve expressing opinions on the same financial management practices that the contractor is to assist the grantees/auditees in developing.

The agency has advised us that in order to avoid a conflict of interest situation it has established procedures to assure that the contractor that provides on-site training to a grantee would not in any instance later conduct an audit of that same entity. Since we sustain the Coalition's protest on the basis that task order No. 101 is outside the scope of the contract, we need not decide the conflict of interest issue.

Task order No. 101 was formally effected on September 28, 1984, notwithstanding the Coalition's protest. The Department of Labor has indicated that the workshops have been completed but that the contractor has not yet commenced providing the on-site technical assistance and training to designated grantees. Accordingly, we are recommending to the Secretary of Labor that the contract modification under task order No. 101 be terminated for the convenience of the government and that a new solicitation be issued for the procurement of the on-site technical assistance and training services.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganizational Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

*for* *Harry D. Van Cleave*  
Comptroller General  
of the United States